Symposium: Collective Management of Copyright: Solution or Sacrifice?

Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?

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Whether originating from copyright scholarship or from legislative discussion, proposals to authorize the transfer of copyrighted works through peer-to-peer ("P2P") networks have been abundant in the last ten years as an alternative to seemingly difficult to enforce and unsuccessful repression-based solutions. As Neil Netanel described it:

> P2P controversy is a story of the copyright industries' increasingly brazen—some say desperate—attempts to shut down P2P file-swapping networks, disable P2P technology and shift the costs of control onto third parties, including telecommunications companies, consumer electronics manufacturers, corporate employers, universities, new media entrepreneurs and the taxpayers.[1]

Although the extent and the forms of these schemes to authorize the transfer of copyrighted works through P2P networks vary greatly, they all share one similarity: the sums collected in counterpart to the authorization will be managed and distributed to the authors by collective management societies. Entrusting collective societies with this new role is logical because they have the institutional competence to issue blanket licensing and collect lump sums generated from the mass use of works, a task for which individual exercise of copyright is ill-suited.[2]

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1. Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 7–8 (2003).

2. *See* Daniel Gervais, *The Changing Role of Copyright Collectives*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 2006) [hereinafter COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006)]. For a revised version, see Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 2d ed. 2010) [hereinafter COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2010)].

Compulsory licensing schemes necessarily involve collective management organizations that are in charge of collecting and distributing the levies imposed by law.

However, such proposals neglect to address the legal and practical difficulties that collective management societies would face should they become in charge of collecting and distributing financial compensation for the use of P2P networks to upload and download creative works. This Paper endeavors to contribute to the debate surrounding the use of collective management societies to manage compulsory licensing schemes by exploring the possibility of establishing efficient collective management of consumer-to-consumer distribution of works of authorship.

First, this Paper will review the legal status of P2P file sharing (Part I). Part II will then analyze some of the major proposals around the world to "license," in one way or another, the P2P transfer of works; it will explore the variations among such proposals and the extent to which they deviate from the principle of the exclusive rights of copyright holders. Next, Part III will review the legal compliance of the various proposed systems from the perspective of the existing international copyright framework. Finally, Part IV will address some practical difficulties that the collective management societies might face when establishing proposed schemes.

I. ENFORCEMENT OF COPYRIGHT IN PEER-TO-PEER NETWORKS

Peer-to-peer sharing of works has been declared an infringement of copyright in many countries.[3] There is no longer any doubt that uploading works on P2P networks is against copyright principles, as, in most cases, it makes available protected works without authorization from copyright owners.[4] The legal status of the mere downloading of works from P2P networks is less clear. Mere downloading is certainly an act of reproduction unauthorized by the authors or neighboring rights holders. Yet, its permissibility as a fair use or private copy has been challenged in some countries.[5] Downloading also raises the question whether

3. *See* PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW (Alain Strowell ed., 2009).

4. In the United States, the leading case is the Supreme Court decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). *Grokster* primarily addresses the liability of the provider of the P2P tool but implies that sharing files infringes copyright. *See id.* at 942 (Ginsburg, J., concurring). French courts have decided many cases on the issue, beginning in 2004. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 13ème ch., Apr. 27, 2007, (Fr.), *available at* http://www.legalis.net/jurisprudence-decision.php3?id_article=1954; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Havre, Sept. 20, 2005, 260/2005 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=748; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Vannes, Apr. 29, 2004, 656/2004 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=503.

5. For French decisions, see Cour d'appel [CA] [regional court of appeal] Montpellier, 3ème ch. crim., Mar. 10, 2005, 04/01534 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=650, *aff'd*, Cour de cassation [Cass.] [supreme court for judicial matters] ch. crim., May 30, 2006, No. 3228 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=830; Tribunal de grande instance [TGI] [ordinary

permissibility of a private copy should depend on whether it was made from a legal source.[6] If the permissibility of a private copy turns on whether it was made from a legal source, then a copyrighted work downloaded from a P2P networks would no longer have private copy status because its source was unauthorized by the copyright owner. Germany has modified its copyright law to permit private copies only when they are made from a source that is not patently illegal.

To limit the development of P2P networks, copyright owners have primarily sued those who make such sharing possible—the developers of P2P software and the hosting providers of BitTorrent indexing (i.e. metadata about files available for downloading using the BitTorrent technology). After some hesitation, courts have generally held developers of P2P software liable for aiding and abetting copyright infringement.[7] Irrespective of the possible lawful uses of the P2P technology, courts have held that transferring copyrighted works without authorization is the primary use of P2P technology, as such use is sometimes even promoted by sellers of the software.[8]

At times, copyright owners have also tried to impose liability on Internet service providers ("ISPs") by exploiting the limited space for ISP liability left by safe harbor regimes. In Belgium, an Internet service provider ("ISP") has been enjoined

court of original jurisdiction] Paris, 31ème ch., Dec. 8, 2005, No. 12 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=785, *aff'd* Cour d'appel [CA] [regional court of appeal] Paris, 13ème ch., Apr. 27, 2007, (Fr.); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction], Bayonne, Nov. 15, 2005, 1613/2005 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=768; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Havre, Sept. 20, 2005, 260/2005 (Fr.), *available at* http://www.juriscom.net/ jpt/visu.php?ID=748; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Meaux, 3ème ch., Apr. 21, 2005, SM/1726 (Fr.), *available at* http://www.juriscom.net/jpt/visu.php?ID=705. A similar Canadian decision is BMG Canada Inc. v. John Doe, [2004] F.C. 488 (Can.), *aff'd* [2005] F.C. 193 (Can.) (refusing to allow record labels to obtain subscriber information of ISP customers alleged to have been infringing copyright and holding that downloading a song was not illegal).

6. *See generally* Christophe Caron & Yves Gaubiac, *L'échange d'Oeuvres sur l'Internet ou le P2P*, *in* MÉLANGES EN L'HONNEUR DE VICTOR NABHAN, CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 23–59 (2004); Séverine Dusollier, *L'utilisation Légitime de L'oeuvre: un Nouveau Sesame pour le Bénéfice des Exceptions en Droit D'auteur*, COMMUNICATION COMMERCE ÉLECTRONIQUE, Nov. 2005, at 18–20.

7. *See* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (providing the first case against a P2P software developer, distinguishable from later cases, as the developer's site operated by hosting the copyrighted files in a central server); Arista Records L.L.C. v. Lime Grp. L.L.C., 532 F. Supp. 2d 556 (S.D.N.Y. 2007); *Universal Music Austl. Pty Ltd. v Sharman License Holdings Ltd.* [2005] 220 ALR 1 (Austl.); Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Jan. 29, 2003, H17.3.31, No. 16 Ne 446 (Japan), *summary available at* http://www.jasrac.or.jp/ejhp/release/2003/0129.htm; HR 19 december 2003, AMI 2004, 1, 9 (Burma/Kazaa) (Neth.) (holding that the P2P service Kazaa was not liable); Rb.-Amsterdam, 21 juni 2007, 369220 / KG ZA 07-840 AB/MV (Stichting BREIN/Leaseweb BV) (Neth.), *available at* http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA7810, *aff'd*, Hof's-Amsterdam, 3 juli 2008, 106.007.074/01KG (Neth.), *available at* http://jure.nl/bd6223; *see also* Allen N. Dixon, *Liability of Users and Third Parties for Copyright Infringements on the Internet: Overview of International Developments*, *in* PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW, *supra* note 3, at 24 (citing case law of other countries).

8. *See Grotsker*, 545 U.S. 913; *see also* Jane C. Ginsburg & Sam Ricketson, *Inducers and Authorisers: A Comparison of the U.S. Supreme Court's Grokster Decision and the Australian Federal Court's KaZaa Ruling*, 11 MEDIA & ARTS L. REV. 1 (2006).

by a court to set up a filtering system to prevent its subscribers from using Internet access to benefit from P2P sharing.[9] Reference for preliminary ruling has been addressed to the Court of Justice of the European Union about the compatibility of this injunction and filtering system with the liability safe harbor regime of the European Union directive 2000/31/EC on electronic commerce—a directive that exempts Internet intermediaries from any liability and from any obligation to monitor Internet uses—and is pending before the European Union Court of Justice.[10]

Direct infringers of copyright—the users of P2P networks who provide and get access to copyrighted works with no authorization from the rights holders—have largely been safe from litigation. This can be explained both by commercial strategies—it makes little sense for a fragile industry to choose to sue and antagonize its own consumers—and by legal constraints—for example, in the European Union, where personal data protection laws sometimes bar identification of the infringers, direct infringers can hide behind IP addresses.[11] The music industry, however, has announced that thousands of users have been sued for file sharing all over the world.[12]

These judicial adventures with regard to P2P users and contributors are not without parallel legislative responses. An increasing number of countries have opted for specific remedies and procedures designed to limit P2P file sharing.[13] France has been a pioneer in this category with its three-strike rule, known as the HADOPI approach, which aims to deter users from engaging in musical or audiovisual file sharing.[14] It has yielded considerable public opposition. The approach's key principle lies in the so-called "graduated response" it offers to copyright owners to stop an Internet user from engaging in P2P file sharing.[15]

9. Tribunal de Première Instance [Civ.] [Tribunal of First Instance] Bruxelles, June 29, 2007, No. 04/8975/A (Belg.), *available at* http://www.juriscom.net/jpt/visu.php?ID=939.

10. Case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers (Sabam) v. Netlog NV, 2010 OJ (C 288) 18.

11. Case C-275/06, Promusicae c. Telefonica de Espana, 19 Feb. 2009; Case C-557-07, LSG-Gesellschaft, (holding that the European Court of Justice does not strictly forbid the identification of data related to IP addresses on privacy grounds but requires that personal data laws explicitly provide an exception to the principles of privacy for copyright enforcement motives and define an adequate balance between those two fundamental protections).

12. *See Press Release: Polish Music Industry Continues Legal Actions Against Illegal File-Sharing*, IFPI (Apr. 20, 2007), http://www.ifpi.org/content/section_news/20070420.html.

13. Graduated responses have been enacted in South Korea, the United Kingdom, Ireland (through legal settlement between copyright holders and the biggest ISP), Thailand and Chile. New Zealand and Malaysia are expected to implement new laws in 2011.

14. Loi 2009-699 du juin 2009 favorisant la diffusion et la protection de la création sur Internet [Law 2009-699 of June 12, 2009 Promoting the Dissemination and Protection of Creation on the Internet], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 2009, p. 9666.

15. Actually, the offence provided by the French law is not copyright infringement, for there is no evidence that the holder of the IP address of the computer used to engage in P2P is the person that has effectively transferred files. The law prohibits the practice of securing one's own Internet access to prevent its use for copyright infringement purposes, which is a nothing but a trick to avoid debate about the guilt of the access subscriber. *See* Décret 2010-695 du 25 juin 2010 instituant une contravention de

Under this approach, an email is first sent to the user whose IP address has been identified as making unauthorized transfers of protected content. In the second stage, the warning is sent in the form a registered letter. Finally, should the user persist in her sharing behavior, the Internet connection can be suspended and severed.[16]

The management of the system is entrusted with an administrative authority called the HADOPI (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet*). Under the law as it was initially adopted, the HADOPI had the power to cut the Internet connection after three warnings to the recidivist user. This legislation was invalidated by the French Constitutional Council, which held that the right to Internet access is a fundamental right whose suspension can only be pronounced by a judge.[17] Now suspension of Internet access takes place during a judicial proceeding, albeit in a rapid and simplified procedure.

Along the same line, the Anti-Counterfeiting Trade Agreement ("ACTA"), negotiated by many Western countries, can be interpreted as encouraging ISPs to police the activities of their subscribers.[18] On that basis, countries could feel enabled to enact HADOPI-like solutions and remedies.[19]

A second approach would be to develop methods of legalizing P2P file sharing which could simultaneously generate financial compensation to copyright holders. This approach aims to transform the formidable machine for distributing works of verified authorship into a mechanism that ensures remuneration for the creators through the establishment of a collective licensing scheme. Proposals in that purpose will now be analyzed.

II. PROPOSED AUTHORIZATION SCHEMES FOR PEER-TO-PEER NETWORKS

A. THE MODELS PROPOSED TO AUTHORIZE PEER-TO-PEER FILE SHARING

Proposals to legitimize P2P file sharing by providing compensation to authors have been advocated by copyright scholars all over the world. In the United States, William Fisher's proposal is very well known.[20] Fisher proposes an administrative compensation system in which the copyright owner of a piece of music or film can

négligence caractérisée protégeant la propriété littéraire et artistique sur internet [Decree 2010-695 of June 25, 2010 Protecting Copyright on the Internet by Establishing a Misdemeanor of Heightened Negligence], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 25, 2010, p. 9666.

16. *Id.*

17. Conseil constiutionnel [CC] [Constitutional Court] decision No. 2009-580DC, June 10, 2009, J.O. 9675 (Fr.), *available at* http://www.conseil-constitutionnel.fr.

18. *See* Anti-Counterfeiting Treaty art. 27(4), Dec. 3, 2010, *available at* http://www.ustr.gov/webfm_send/2417.

19. The graduated response is not explicitly provided for in ACTA, which only requires larger involvement of ISPs in copyright enforcement. It will nonetheless allow countries to implement it.

20. *See generally* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (2004).

register the work with the Copyright Office to obtain a unique registration number that could be used to track the distribution and the use of the file.[21] Under this approach, the government would collect a tax on devices and services used to gain access to digital entertainment content and would then distribute it to copyright owners in proportion to the rates of consumption of their works, based on the tracking enabled by the digital file identification.[22] Noncommercial file sharing would be legalized and would apply to all copyrighted works. Only registered works would benefit from the compensation yielded by the tax system.[23]

Neil Netanel similarly proposed to authorize noncommercial sharing of works of authorship by providing compensation for the authors that would be collected in the form of a levy.[24] Distribution of works in P2P networks would be allowed under a compulsory licensing scheme. Copyright owners would then receive compensation through a levy paid by providers of products or services whose value has been raised by file sharing, such as Internet access, P2P software and consumer electronic devices used to store, copy and listen to files downloaded from P2P networks. The determination of the rate of the levy would be negotiated with the copyright owners, but ultimately decided by a Copyright Office Tribunal should negotiation fail. Netanel's proposal bears much resemblance to the system of compulsory licensing used in Europe for private copy.

Jessica Litman introduced a supplementary feature in the systems elaborated above: an opt out possibility for the rights holders.[25] Her proposal is in line with those of Netanel and Fisher, as it would set up a system where file swapping using the P2P technology would be legalized in connection with compensation to the copyright owners. However, owners would be entitled to regain control of distribution of their works by choosing between letting their creative works be shared in exchange for some financial compensation or exploiting them under a DRM-protected format.[26] The default legal rule would be the compensation-without-control model.[27] Copyright owners would have to take a positive step to opt out of such a default system by making their works available in what Litman calls a "*.drm format," capable of conveying copyright management information.[28] She opposes the two alternatives as "sharing," on one hand, and "hoarding" on the other.[29] Copyright owners' abilities to regain some control over their works and prevent them from being distributed in file sharing networks would be technically formalized.[30] Other American and Canadian scholars have pleaded for similar

21. *See generally id.*

22. *Id.* at 9.

23. *Id.* at 248.

24. *See generally* Netanel, *supra* note 1.

25. *See generally* Jessica D. Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1 (2004).

26. *Id.* at 41.

27. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 254 (2001).

28. Litman, *supra* note 25, at 47.

29. *Id.* at 41.

30. Litman explains how the copyright holders could withdraw copies of their works already

methods of legalizing P2P file swapping and compensating copyright holders.[31]

In Europe, Alexander Peukert, a German legal scholar, has responded to Litman's proposal with a reverse system.[32] Instead of a default rule that legalizes P2P file transfers which gives rights holders the freedom to opt out, he proposes that the default rule should give copyright owners the exclusive right to enforce control over P2P and the option to choose the benefit of a levy-based system put in place by the government. His system would thus use an opt in mechanism.[33] His proposal differs from voluntary management of copyright, as copyright owners would not have to organize themselves into a collective management society or rely on the readiness of users to pay the required fee, because the levy would be imposed upfront on certain products and services.[34] Some authors, perhaps most, would be encouraged to opt for the compulsory licensing system, as it would guarantee some remuneration for the transfer of their works that they were otherwise powerless to control or prevent.

French scholar Phillipe Aigrain has published a book that has garnered much commentary, titled *Internet & Creation*.[35] Aigrain proposes a detailed system, where users would pay a monthly fee to benefit from a blanket licensing for the transfer of works through P2P networks. The collected sums would be used to compensate copyright holders and to feed a fund dedicated to financing creation.

Alongside theoretical development in the field, proposals for authorizing P2P file sharing have surfaced in legislative arenas and with lobbyists. Political representatives have sometimes advocated systems that would grant compensation to copyright owners and allow users to engage in noncommercial online distribution of works of authorship. During the legislative discussion regarding the incorporation into French law of the European Union directive of 2001 on copyright in the information society, an amendment setting up a levy-based compulsory licensing scheme had been enacted by the opposition before being withdrawn by the majority supporting the government, making a great fuss in the

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released in unprotected formats from the levy system by recalling them. *Id.* at 48.

31. *See, e.g.*, LESSIG, *supra* note 27, at 254; Gervais, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2010), *supra* note 2, at 17–18 (providing a more recent proposal); Daniel J. Gervais, *Use of Copyright Content on the Internet: Considerations on Excludability and Collective Licensing*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 517–49 (Michael Geist ed., 2005) [hereinafter Gervais, *Considerations on Excludability*]; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 305 (2002); Glynn S. Lunney, *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 852–69, 886–920 (2001).

32. *See generally* Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, *in* PEER-TO-PEER FILE SHARING AND SECONDARY LIABILITY IN COPYRIGHT LAW, *supra* note 3, at 148–95.

33. *Id.* at 191.

34. *Id.*

35. PHILLIPE AIGRAIN, INTERNET & CRÉATION: COMMENT RECONNAITRE LES ÉCHANGES HORS-MARCHÉ SUR INTERNET EN FINANÇANT ET RÉMUNÉRANT LA CREATION (2008). This title reverses the name of the law enacting the HADOPI remedy to P2P: Creation and Internet.

process.[36] In Belgium, Green MPs have introduced bills that would allow P2P file sharing and collect remuneration from ISPs to compensate copyright owners.[37] Due to their limited representation in the Belgian Parliament and the declared opposition of other political forces to the solution, those bills appear to have no chance of success. Nonetheless, the proposals have succeeded in launching a lively debate in Belgium.

P2P legalization finds support in many organizations. In Brazil, a movement called "Compartilhamento Legal!" has proposed a revision of the copyright law to legalize noncommercial file sharing in exchange for a levy on broadband Internet access.[38] Sometimes, owners of copyright—more often, owners of neighboring rights—also promote the solution of a loss of control over P2P file sharing, compensated by some financial return to authors and artists. This is true in the case of the Alliance Public-Artistes in France, which is comprised of performers' and consumers' associations, and of the Songwriters Association of Canada, which promotes the creation of a new "right of remuneration" for the sharing of music.[39]

Whether originating from academics, elected representatives or artists, these proposals all share the idea, articulated by Litman, that "[f]rom the vantage point of music creators, replacing the theoretical control they enjoy under the copyright law with an enforceable promise of payment makes them no worse off, and makes most of them better off."[40] Proponents of these proposals contemplate legalizing noncommercial file sharing, agreeing that attempts to ban the technology or the

36. Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10–19 (EC).

37. Proposition de loi visant à adapter la perception du droit d'auteur à l'évolution technologique tout en préservant le droit à la vie privée des usagers d'Internet [Bill to Adjust Copyright Law to Technological Developments While Preserving Internet Users' Right to Privacy] (Sen. Benoit Hellings and Freya Piryns), Mar. 2, 2010, S.4-1686, *available at* http://www.senate.be/www/?MIval=/dossier&LEG=4&NR=1686&LANG=fr [hereinafter Hellings & Piryns Bill]. Another almost identical bill has been proposed under the current legislature to replace the former one. *See* Proposition de loi visant à adapter la perception du droit d'auteur à l'évolution technologique tout en préservant le droit à la vie privée des usagers d'Internet [Bill to Adjust Copyright Law to Technological Developments While Preserving Internet Users' Right to Privacy] (Sen. Jacky Morael and Frey Piryns), Dec. 9, 2010, S. 5-590, *available at* http://www.senate.be/www/?MIval=/index_senate&MENUID=22101&Lang=fr (follow "5-501 à 5-600" hyperlink; then follow "5-590" hyperlink). During a previous legislative term, another Senator proposed a bill providing for a HADOPI-like solution based on a three-strikes approach. *See* Proposition de loi favorisant la protection de la création culturelle sur Internet [Bill Promoting the Protection of Cultural Creation on the Internet] (Sen. Philippe Monfils), Apr. 21, 2010, S. 4-1748, *available at* http://www.senate.be/www/?MIval=/index_senate&MENUID=22101&Lang=fr (follow "4-1701 à 4-1800"; then follow "4-1748" hyperlink).

38. *See* COMPARTILHAMENTO LEGAL, http://www.compartilhamentolegal.org (last visited Mar. 8, 2011). For an explanation in English, see Volker Grassmuck, *Compartilhamento legal!—Brazil is Putting an End to the 'War on Copying,' at R$ 3,00 per Month*, VGRASS.DE (Sept. 1, 2010), http://www.vgrass.de/?p=382.

39. L'ALLIANCE PUBLIC.ARTISTES, http://alliance.bugiweb.com/pages/1_1.html (last visited Mar. 8, 2001); *The Songwriters Association of Canada's Proposal to Monetize the Non-Commercial Sharing of Music*, SONGWRITERS ASS'N CAN. (Jan. 2011), http://www.songwriters.ca/proposaldetailed.aspx [hereinafter SAC].

40. Litman, *supra* note 25, at 37.

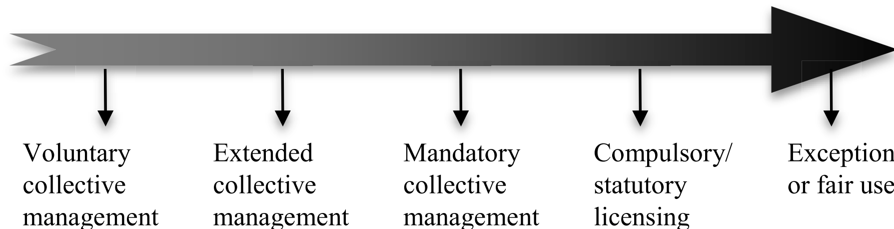
practice, or to discourage users from engaging in such sharing, have proven unsuccessful and unpopular. These endeavors to control file sharing have not generated revenue to copyright owners, whereas a system of levy-based compensation to creators and artists could.[41]

B. POSSIBLE MODELS FOR AUTHORIZING USES OF WORKS OF AUTHORSHIP

The many proposals for authorizing P2P noncommercial file sharing can be distinguished from each other by showing what legal structures each model borrows from current copyright law and practice that authorizes uses of works of authorship.

One key principle of copyright law is that authorization should come from the copyright owner because she enjoys exclusive rights in her work. The principle of exclusivity suggests that the copyright owner should decide whether or not to authorize use of her work and upon what conditions her work may be used. Exclusivity-based copyright in principle requires that authorization is given individually by authors and other rights holders.

Veering away from that key paradigm, however, other methods of authorizing use of copyrighted work exist. These methods can be classified by their various degrees of deviation from the default rule that direct and individual licenses are given by copyright owners. Limitations to exclusive rights and individual management come in different varieties, which can be organized along the following continuum:



Voluntary collective management	Extended collective management	Mandatory collective management	Compulsory/ statutory licensing	Exception or fair use

Moving along the continuum, the next step after full individual exercise of one's exclusive rights under copyright is to entrust those rights to a collective management organization ("CMO"). CMOs can then license authorization to use works on behalf of the copyright owners who they represent. Such management is sometimes more effective than individual management for both copyright owners and users. Copyright owners benefit because CMOs have better bargaining power and can better locate potential users, negotiate with them and enforce rights. For users, CMOs act as one-stop shops for the authorizations they seek. Copyright collectives are traditionally said to reduce transaction costs in enforcing

41. Even the HADOPI graduated approach in France does not compensate authors and producers because the judicial procedure is expedited and does not allow copyright owners to claim damages.

copyright.[42]

Collective management may be considered a limitation on the exclusive rights of owners paradigm, as it departs from the principle of an individual choice and exploitation of copyright. However, the limitation only extends to the method of exercising one's copyright. CMOs defend and exercise rights that can still be considered exclusive. Although they exercise rights collectively and might face antitrust law issues in some circumstances if they refuse to license their repertoire, CMOs do not lose the ability to refuse licensing. Therefore, copyright ownership is not really limited. Instead, its exercise is limited only to the extent that the author loses her *individual* capacity to accept or refuse an exploitation of her work. By entrusting a CMO with management of her copyright, the author accepts the collective decision and its effects. As participation is based on contractual assent and adhesion to the organization, the copyright owner, if not satisfied with the management of her rights, can still terminate her membership and regain her individual exclusive rights.

The described limitation can be more or less significant depending on the type of collective management. In principle, collective management is voluntary: authors decide to adhere to an organization that they entrust with the exercise of their copyright. However, two types of collective management schemes erode the contractual freedom of authors. First, contractual freedom is weakened when collective management is mandatory and imposed by law. A notable example of this scheme can be seen with cable retransmission rights in the European Union, where authors and other owners of rights have no choice but to commit the exercise of their rights to CMOs.[43] If owners do not expressly enlist with any organization, the law presumes that the most representative CMO in the sector represents them. Therefore, the copyright owner has no alternative to collective management and it is unlikely that a CMO could refuse licensing in such a legally imposed scenario.

A second scheme that erodes contractual freedom is extended collective management—most widely known in Nordic European countries—which has been described as "the situation where a license agreement *freely negotiated* between a collective management organization and a user . . . by legal provision is *extended* onto the works of rights holders who are not members of the CMO."[44] Also called "extended collected licensing" ("ECL"), this model effectively mandates collective representation and management for copyright owners who are not members of CMOs by extending clauses of a collective licensing agreement to an entire class of similar works or rights.[45] To mitigate the mandatory imposition of the collective

42. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1295 (1996).

43. *See* Council Directive 93/83, 1993 O.J. (L 248) 15, 20 (EC) (concerning "the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission").

44. CHRISTIAN RYDNING, EXTENDED COLLECTIVE LICENCES—THE COMPATIBILITY OF THE NORDIC SOLUTION WITH THE INTERNATIONAL CONVENTIONS AND EC LAW 11 (2010).

45. On extended collective management, see Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006),

agreement on authors who have chosen to stay outside of the CMO, the extended collective licensing model may give authors the choice to "opt out" and individually manage their rights. However, the ability to opt out is not an essential trait of ECLs, despite what commentators often suggest.[46] In an extended collective management model, copyright owners who are not members of a CMO are legally and automatically integrated into the collective management system. The model therefore abrogates the principle of individual exercise. The extent of such restriction depends on whether the extended collective management allows the author to then remove herself from the system and regain her individual exercise of copyright or not.[47]

Both mandatory and extended forms of voluntary collective management have been devised by law to ease copyright clearance, to reduce transaction costs for users and to limit fragmentation of copyrights.[48] The mandatory regime avoids individual management and the extended regime fills gaps in the repertoire licensed by a CMO. In these regards, they both limit the exercise of copyright, even though the limitation imposed by extended collective management may be less than that imposed by mandatory collective management because the restriction under extended collective management is only suffered by authors who are not members of the CMO. When an opt out mechanism is provided, this restriction is all the more limited.[49]

On the other end of the continuum, compulsory licensing and copyright exceptions are genuine limitations to the principle of exclusive rights, as they legally deprive rights holders of any control over use of their works. Copyright exceptions or fair use deem certain uses to be out of copyright. These uses therefore cannot be prohibited by the copyright owner and do not give rise to any compensation. When a compulsory licensing scheme is provided by the law, the use of copyrighted works cannot be prevented or controlled by copyright owners who are, however, compensated for such use. This is the nature of the private copy regime in Canada and most of Europe. A distinction is sometimes drawn between compulsory licensing and statutory licensing. The former is characterized by the fact that rights owners maintain some power to negotiate the level of compensation, whereas the rate of the levy imposed in the latter is decided upon by a legislator or an administrative body.

Among these possibilities for authorization of uses of copyrighted works, only

supra note 2, at 257–82; Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience: It's a Hybrid but Is it a Volvo or a Lemon?*, 33 COLUM. J.L. & ARTS 471 (2010).

46. Riis & Schovsbo, *supra* note 45, at 476.

47. *Id.* at 482.

48. Rydning, *supra* note 44, at 7.

49. Mihály Ficsor, *Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006), *supra* note 2, at 48 [hereinafter Ficsor, *Collective Management in the Digital, Networked Environment*]. *But see* Riis & Schovsbo, *supra* note 45, at 487 (arguing that unrepresented authors might not know that a license has been granted on their behalf, which lessens the efficiency of the opt out escape).

collective management, compulsory licensing and uncompensated exceptions would allow blanket licensing, whereby the user would obtain a single license or statutory authorization covering an unlimited repertoire of a category of works or of all categories of works.

The variations of licensing schemes for copyrighted works, and the extent they restrict exclusive rights, can now be presented as follows:

<table>
<tr><th></th><th>Scheme for authorizing use</th><th>Level of restriction to exclusivity</th><th>Limitation to copyright</th><th></th></tr>
<tr><td>1.</td><td>Individual management</td><td>None</td><td rowspan="4">Exercise of exclusive copyright</td><td></td></tr>
<tr><td>2.</td><td>Voluntary collective management</td><td>Rights entrusted with a CMO implying an abandon of individual management</td><td rowspan="4">Blanket Licensing (or global license)</td></tr>
<tr><td>3.</td><td>Extended collective management</td><td>Same as voluntary collective management for members of the CMO; statutorily imposed loss of individual management for nonmembers of the CMO</td></tr>
<tr><td>4.</td><td>Mandatory collective management</td><td>Statutorily imposed loss of individual management</td></tr>
<tr><td>5.</td><td>Compulsory or statutory licensing</td><td>Loss of exclusive right of control with compensation</td><td rowspan="2">Limitation to exclusive copyright</td></tr>
<tr><td>6.</td><td>Exception or fair use</td><td>Loss of exclusive right of control without compensation</td><td></td></tr>
</table>

In proposals put forward to authorize P2P file sharing, a system of blanket licensing appears to be favorable to users because it would cover uses of a mass of content. Individual management has neither been seen as an adequate solution for P2P networks, nor envisioned as a possibility to authorize file sharing because it has most often attempted to halt such mass transfer of works.

Exception with no compensation has also not been proposed because its lack of any compensation for copyright owners would seem to be unthinkable.

It leaves us with the following legal models: the compulsory licensing or the collective management, possibly aided by statutory imposition of a mandatory or extended collective management. The latter variations of collective management makes the licensing of mass online uses more efficient.[50]

C. THE LEGAL MODELS AND DETAILS OF THE PROPOSED P2P AUTHORIZATION SCHEMES

Now that the different legal schemes for authorizing use have been sketched out, the proposals for licensing mass uses of works in P2P networks can be further described and categorized into the three main blanket licensing mechanisms identified above. Most of the proposals involve compulsory licensing schemes, where, instead of exclusive rights for copyright owners, users would be authorized by law to share music and other digital files.[51] However, the proposals drafted by the Songwriters Association of Canada and by Gervais are based on voluntary collective management.[52] Aigrain advocates an extended collective licensing system, but his system would turn to compulsory licensing if CMOs do not agree to license the right to engage in P2P file transfer.[53] The model put forward by the French Alliance Public-Artistes is a hybrid one: compulsory licensing (private copy regime) for the downloading of works, but mandatory collective management for the uploading of works.[54]

Pending Belgian bills on the matter would create an extended collective licensing regime. If enacted, this regime would be the first appearance of an extended collective management mechanism in Belgian copyright law. This is surprising, considering that the licensing granted to ISPs by collective management would equally apply to nonmembers of the CMO.[55]

Though the proposed models seem to share much in common, the differences lie in their details (where the devil might be, according to Litman and Netanel).[56]

Some proposals give rights holders the choice to opt out of a default compulsory or voluntary licensing rule (set by either the law or by the CMO). This is the case in the models proposed by Litman, Gervais and Aigrain.[57] The Fisher model is

50. Gervais, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2010), *supra* note 2, at 21.

51. *See* Ku, *supra* note 31, at 311–15; Litman, *supra* note 25, at 41; Netanel, *supra* note 1, at 4; Peukert, *supra* note 32, at 190.

52. *See* SAC, *supra* note 39; *see also* Daniel J. Gervais, *User-Generated Content and Music File-Sharing: A Look at Some of the More Interesting Aspects of Bill C-32*, *in* FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 463 (Michael Geist ed., 2010) [hereinafter Gervais, *User-Generated Content*]. In an earlier article, Gervais added the extended collective licensing option to his collective management model. *See* Gervais, *Considerations on Excludability*, *supra* note 31.

53. AIGRAIN, *supra* note 35, at 35–37.

54. *See Qu'est-ce Que la Licence Globale?*, L'ALLIANCE PUBLIC.ARTISTES, http://alliance.bugiweb.com/pages/2_1.html (last visited Mar. 7, 2011).

55. *See* Hellings & Piryns Bill, *supra* note 37, art. 2.

56. Litman, *supra* note 25, at 34; *see also* Netanel, *supra* note 1, at 7.

57. AIGRAIN, *supra* note 35, at 50 (arguing that it would work better if the copyright owners do

similar to the extent that copyright owners would be entitled to compensation only if they have registered their works.[58] The opt in model sketched by Peukert more closely resembles a voluntary exercise of copyright, as the default rule would be the control of P2P file sharing by exclusive rights.[59] Similarly, Aigrain limits blanket licensing to works that have been made digitally available with the consent of their copyright owners, meaning that users could not exchange bootlegged films or concerts.[60]

Sometimes, it is the users who are given the choice of whether to opt in or out. When a levy is collected on all Internet access fees or consumer electronics devices, some consumers might object to paying for acts of distribution of copyrighted files they do not engage in. This drawback of any levy system is often denounced in the European Union, where all purchasers of blank media or recording devices bear the burden of the levy even if they do not personally engage in private copying with such equipment or media.[61] To counter such criticism, many P2P proposals offer Internet access subscribers the choice of either paying or not paying the monthly fee that would allow them to engage in P2P file sharing. This is the case with the Songwriters Association of Canada model and with the French Alliance Public-Artistes, and such a possibility is also discussed by Litman.[62] However, Aigrain argues that because all Internet users will benefit from the thriving digital culture fostered by a levy system, all users should also be required to bear its costs.[63] In a tax-based or levy-based compulsory licensing system, however, there is no choice for Internet users, as the compensation is a form of levy on all products and services, irrespective of their effective use.[64]

Methods of implementing the levy may also vary. The rate may be fixed by the government or by an administrative body. Alternatively, it may be negotiated by the rights holders with users or ISPs and subject to administrative determination in the absence of an agreement.[65] It may be levied only on broadband Internet access

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not opt out and predicting that the success of the system would gradually deter them from opting out); Gervais, *User-Generated Content*, *supra* note 52, at 463; Litman, *supra* note 25, at 45–46.

58. Fisher, *supra* note 20, at 199–258 (predicting that his proposed system would ultimately replace the current copyright law and that registration would become the default choice.

59. Peukert, *supra* note 32, at 190–92.

60. AIGRAIN, *supra* note 35, at 51–52.

61. Case C-467/08, Padawan v. Sociedad General de Autores y Editores de España (SGAE) (Oct. 21, 2010), http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-467/08 (follow "Case c-467/08 Judgement 2010-10-21" hyperlink). The court stated:

> where the equipment at issue has been made available to natural persons for private purposes it is unnecessary to show that they have in fact made private copies with the help of that equipment and have therefore actually caused harm to the author of the protected work . . . . [T]he fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy . . . .

Id. ¶¶ 54–56.

62. *See* Litman, *supra* note 25, at 44–45; *Qu'est-ce Que la Licence Globale?*, *supra* note 54; SAC, *supra* note 39.

63. AIGRAIN, *supra* note 35, at 54.

64. *See, e.g.*, FISHER, *supra* note 20; Lunney, *supra* note 31; Peukert, *supra* note 32, at 192.

65. *See* FISHER, *supra* note 20; Gervais, *User-Generated Content, supra* note 52, at 463

or it may be levied on a vast array of products and services—from consumer electronics devices (i.e. those used to make or store copies or to download files from the Internet) to blank media.[66] When the models proposed are so structured as to calculate the rate of the levy or fee that would be reasonable both for consumers and for its beneficiaries, its amount is generally in the range of five to ten dollars or euros.[67]

Whatever the details, the general idea behind these blanket licensing proposals remains the same. A fee would be collected either from the cost of Internet access or from the cost of devices used to share and copy works. CMOs would be in charge of collecting and distributing these fees to copyright owners. Users would benefit from such a system that would permit them to share copyrighted works on P2P networks. From this general mold, one can identify three distinct legal models.

The first model would be based on compulsory licensing, like the private copy model that exists in most of the European Union. In such a scheme, the levy would be paid by ISPs (in the case of the levy imposed on Internet broadband access) or by providers of the devices or media upon which the levy is imposed. However, these costs would probably be passed through to all their customers, whether they use P2P or not. Thus, this is a system of rough justice where the contribution to creators is blindly aggregated.

The second model would be a voluntary collective management licensing system in which a contract is formed between the CMO and the ISP. Granting the license to the ISP is somewhat strange from a legal perspective because the ISP itself does not infringe copyright by making works of authorship publicly available. However, one can argue that, economically speaking, the ISPs gain an advantage when their broadband services are mainly used for mass downloading (legal or not). But legally, the ISP is not entering into the contract to get a license from exploitation of copyrighted works, but rather concludes such a contract for the sole benefit of its subscribers, which is known in civil law as a "stipulation for another person." This might have differences in the overall organization of the licensing model, as well as strategic disadvantages as we will see below.

Finally, in the third model (also within a collective management licensing regime), the contract could be formed directly between the CMO and the users, rendering the ISP a mere intermediary that delivers the licensing contract to its

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(providing that if no agreement can be reached, the rate would be fixed by the Canadian Copyright Board); Netanel, *supra* note 1, at 44–45 (suggesting that if no agreement can be reached, then the rate would be fixed by a Copyright Office Tribunal); L'ALLIANCE PUBLIC.ARTISTES, *supra* note 39; SAC, *supra* note 39.

66. *See* AIGRAIN, *supra* note 35; FISHER, *supra* note 20, at 280; Litman, *supra* note 25, at 41; Netanel, *supra* note 1, at 43–44; L'ALLIANCE PUBLIC.ARTISTES, *supra* note 39. *See generally* Lunney, *supra* note 31, at 911–20.

67. This would amount to between five and ten Canadian dollars in the SAC model and between four and seven euros in the Alliance Public-Artistes model. Around ten percent of the retail price of the products or services are taxed in Fisher's approach and this amount is reduced to four percent by Netanel. *See* FISHER, *supra* note 20; Netanel, *supra* note 1, at 4.

subscribers.

Unlike compulsory licensing, in the latter two collective management models, the user is not obliged to obtain and pay for the license. User choice is clearly present in the third model, but it is also present in the second model where the ISP offers its customers such a choice. If users are presented with such a choice, a stronger case can be made for prosecuting those who refuse the license yet continue illegally sharing files under HADOPI-style enforcement or other means. One can further develop the three legal options as follows:

	Compulsory Licensing	**License between CMO and ISP**	**License between CMO and users**
Type of compensation	Levy (rough justice)	Remuneration of the license	Remuneration of the license
Determination of the fee	Government or administrative body	Negotiated between CMO and ISP	CMO (negotiation with users' representatives)
Contractual scheme	No contract, statutorily imposed	Contract between ISP and CMO: ISP stipulates to the benefit of the users	Direct contract between beneficiary of the license (P2P user) and CMO (ISP is an intermediary, third party to the license)
Person liable to pay the compensation	Persons providing the products or services concerned (mainly Internet access providers)	ISPs	Only users entering the licensing agreement
Burden of the compensation	All users (included in the cost of products/services)	Users (included in the cost of Internet access) can be limited only to users willing to benefit from the licensing	Only users entering the licensing agreement

III. LEGAL OBSTACLES

Critics of P2P file sharing proposals argue that most of the proposed

mechanisms would not meet the Berne Convention's requirements.[68] Because a P2P licensing system would cover both domestic and foreign works, any such system would need to be Berne-compliant. Discussion has focused on provisions of the Berne Convention that allow for compulsory licensing in limited circumstances, on the three-step test with which all limitations and exceptions must comply, and for some compulsory licensing mechanisms only, on the rule prohibiting formalities to enjoy and exercise copyright protection.

A. THE ADMISSION OF COMPULSORY LICENSING UNDER THE BERNE CONVENTION

The Berne Convention allows compulsory licensing schemes in limited cases. For example, article 11*bis* (concerning broadcasting and related rights) and article 13 (concerning the right of recording of musical works—but not audiovisual works) clearly allow for compulsory licensing.[69] Other provisions of the Convention allow the countries to set conditions for limiting copyright in the case of speeches (Art. 2*bis*(2)), quotations and illustrations for teaching (Art. 10) and reproductions of articles or broadcasts for news reporting (Art. 10*bis*). As mere exceptions, however, these provisions do not impose compulsory licensing.[70]

Articles 11*bis* and 13 are traditionally construed as permitting compulsory licensing. Article 13 allows for the most flexibility, but only pertains to musical works and not to audiovisual works.[71] As a result, a compulsory licensing system that covers all types of works would not be admissible per se under the Berne Convention. However, it could still be admitted if compliant with the three-step test.

Meanwhile, there has been an extensive discussion among copyright scholars regarding the possibility of attaching extended or mandatory collective

68. *See* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne].

69. Article 11*bis* provides:

> It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Id. art. 11*bis*.
Article 13 states:

> Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

Id. art. 13.

70. Berne, supra note 68, arts. 11*bis*, 13.

71. *Id.* art. 13.

management to the preexisting compulsory licensing provisions in the Berne Convention. Attachment of such mechanisms could allow for P2P transfers without necessitating passing the three-step test. Generally, one must ask whether mandatory or extended collective management qualify as either exceptions to or limitations on relevant exclusivity rights. If they do, then they must either fall within the compulsory licensing provisions of Berne or pass the three-part test to be implementable. If they do not count as exceptions or limitations, then either system could be freely imposed by the lawmaker with no Berne-compliance inquiry. Silke von Lewinski takes the latter view with regards to mandatory collective management, which she argues is not a "limitation" because it merely organizes the ways of exercising copyright without limiting it in any way:

> The mandatory collective administration however does not affect the exclusive right itself; the covered uses are not authorized by law. Rather, the author is only restricted in the options of exercising the right: he is left with the only possibility to exercise the exclusive right through the collecting society, whereas the right itself is not limited as such, in particular not in favor of any such interest of the public at large.[72]

Thus, according to von Lewinski, mandatory collective management is simply a collective management of exclusive rights that can only benefit the authors: their rights stay unlimited, they can fix tariffs and conditions through their CMO and, more generally, CMOs have a record of efficiency in managing the rights of their members.

Ficsor takes the opposite view.[73] For him, even organizing the exercise of copyright in a certain way constitutes a "limitation" based on the notion that granting an exclusive right to authors should entail full-fledged exclusivity.[74] Accordingly, he argues that a mandatory collective management system can only be admitted when the Berne Convention allows compulsory licensing, which is further demonstrated by articles 11*bis* and 13, which apply to "the conditions of exercise" of the exclusive rights. This view is shared by other commentators and sometimes is applied to extended collective management as well.[75]

72. Silke von Lewinski, *Mandatory Collective Administration of Exclusive Rights—A Case Study on Its Compatibility with International and EC Copyright Law*, E-COPYRIGHT BULL., Jan.–Mar. 2004, at 5, http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf; *see also* Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, E-COPYRIGHT BULL., Jan.–Mar. 2007, http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf.

73. *See* Mihály Ficsor, *Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it Remain Voluntary or May it Be "Extended" or Made Mandatory?*, COPYRIGHT BULL., Oct. 2003, http://portal.unesco.org/culture/en/files/14935/10657988721Ficsor_Eng.pdf/Ficsor%2BEng.pdf.

74. *Id.* at 4.

75. DANIEL GERVAIS, APPLICATION OF AN EXTENDED COLLECTIVE LICENSING REGIME IN CANADA: PRINCIPLES AND ISSUES RELATED TO IMPLEMENTATION 40 (2003) (providing study for the Dep't of Canadian Heritage) [hereinafter Gervais, APPLICATION OF AN EXTENDED REGIME IN CANADA]; Riis & Schovsbo, *supra* note 45, at 485; *see also*, CONSEIL SUPÉRIEUR DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE, LA DISTRIBUTION DES CONTENUS NUMÉRIQUES EN LIGNE 67 (2005).

In any case, mechanisms authorizing P2P file sharing, though not explicitly provided for by the Berne Convention under a compulsory licensing or other scheme, could still be enacted if they pass the three-step test discussed below.

B. THE THREE-STEP TEST

1. Scope of Application of the Three-Step Test

A levy-based compulsory licensing system will have to satisfy the three-step test set forth by article 9(2) of the Berne Convention and article 13 of the TRIPS agreement.[76] The TRIPS agreement provides: "[m]embers shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."[77] As the above section began to discuss, there is disagreement as to the compatibility of various blanket licensing schemes with the three-step test; while a compulsory licensing scheme is unquestionably subject to the test, it is less clear whether a mandatory or extended collective management system would be.[78]

The wording of the three-step test in the TRIPS agreement and the WIPO Copyright Treaty of 1996 confines the test to "limitations . . . or exceptions."[79] As for the Berne Convention, article 9(2) simply says that "it shall be a matter *for legislation* in the countries of the Union to *permit* the reproduction in certain special cases . . . ."[80] This language seems to suggest that the test applies to neither mandatory nor extended collective management systems because under collective management systems permission is given by authors through CMOs—not through "legislation."

Hugenholtz and Okediji argue that mandatory collective management is "technically not a limitation, since the exclusive economic right remains intact and can still be enforced on behalf of right holders by designated collecting societies."[81] In other words, copyright owners do not lose their enforcement power solely on the ground that they are legally obliged to collectively manage their right for that use (mandatory collective management) or that they are presumed to be represented by the CMO that has licensed it (extended collective management). The exceptions or limitations to which the three-step test applies should be restricted to cases where

76. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS]; Berne, *supra* note 68, art. 9(2).

77. TRIPS, *supra* note 76, art. 13.

78. RYDNING, *supra* note 44, at 25 (arguing that extended collective management and mandatory collective management require application of the three-step test because they imply an element of coercion); Riis & Schovsbo, *supra* note 45, at 486 (stressing application of the three-step test at least for extended collective licensing with no opt out mechanism).

79. WIPO Copyright Treaty art. 10, Dec. 20, 1996, 36 I.L.M. 65; TRIPS, *supra* note 76, art. 13.

80. Berne, *supra* note 68, art. 9(2) (emphasis added).

81. BERNT HUGENHOLTZ & RUTH OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT 19 (2008); *see also* GERVAIS, APPLICATION OF AN EXTENDED REGIME IN CANADA, *supra* note 75, at 11; von Lewinski, *supra* note 72, at 5.

the copyright owner is genuinely deprived of any possibility to enforce her rights and not where only *some* means of exercising them are restricted, as is the case here.

The purpose of the three-step test is to safeguard a copyright owner's exclusive right to exploit her work. To this end, exceptions to copyright are admissible only if they do not hamper those forms of exploitation of the work that produce substantial revenues for the copyright owners or that are likely to "acquire considerable economic or practical importance" in the future.[82] As a policy matter, it does not make sense to classify mechanisms aimed at achieving effective exploitation of works into the category of "limitations and exceptions." European lawmakers appear to recognize this. Recital 18 of the Information Society Directive of 2001 states, "this Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses," which suggests that models related to the management of rights would escape the regulation imposed on "limitations" on copyright.[83]

Treating collective management as a limitation does not make much sense when an opt out mechanism is provided for copyright owners who wish to avoid the extended collective management effect. In such a case, copyright owners are able to restore the full-fledge exercise of their exclusive rights, including the individual exercise. Therefore, their rights are only limited, to the extent they might not be aware of the collective management extended to them, as nonmembers of the CMO. In the case of extended collective management, the limitation of copyright is only imposed on authors who are not members of the CMO; the represented authors can be said to be regularly exercising their rights.[84]

In conclusion, solutions for P2P based on mandatory or extended collective management theoretically need not be subject to the three-step test. Nevertheless, employing the three-part test might be beneficial, given that these solutions are not otherwise formally recognized by the Berne Convention: compliance with the three-part test could only lend them greater legitimacy.

2. Assessment of the Proposed Schemes Under the Three-Step Test

The scholars who have proposed to authorize P2P file sharing have generally applied the three-step test to their proposed models.[85] The first step of the test does not raise difficulties. The language "certain special cases" has been construed as

82. Panel Report, *United States—Article 110(5) of the U.S. Copyright Act*, ¶ 6.180, WT/DS160/R (June 15, 2000). For similar criteria, see MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 177 (2004) (defining normal exploitation as "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance").

83. Directive 2001/29, *supra* note 36, at 11. This interpretation, however, is not shared by Rydning. *See* RYDNING, *supra* note 44, at 94.

84. RYDNING, *supra* note 44, at 49.

85. *See* Litman, *supra* note 25, at 45–47; Netanel, *supra* note 1, at 60 n.199; Peukert, *supra* note 32, at 160–175.

requiring that the limitation be properly defined and narrow in scope. It can be argued that any form of a global authorization for P2P file sharing is a "certain special case" if its conditions (e.g. its limitations on noncommercial sharing) are specified and can easily be distinguished from impermissible uses.[86]

The second step, which deals with conflicts with normal exploitation, is typically the most complicated prong of the test. Under the "normal exploitation" test, a limitation is impermissible if it covers uses of works that should normally be subject to exploitation by the copyright owners. Such a limitation would obstruct the economic core of exclusive rights, depriving rights holders of substantial revenues from an actual or potential market that they have the right to commercially exploit.

It is unlikely that copyright owners would issue individual licenses to users for P2P file sharing in the absence of a compulsory licensing system. More likely than not, mass uses of works over P2P would simply be outright prohibited by copyright owners. It is thus difficult to measure the normal exploitation of works of uses of works that largely stay out of control by the copyright owners. As aptly stated by Rydning, in the situation involving illegal uses, "it is not the limitation, but rather the failure to ensure user compliance with the initial state of prohibition that causes the conflict with the normal exploitation of the work."[87]

Licensing that originates in collective management helps copyright owners to control uses of their works that would otherwise remain out of their reach and uncompensated. This is particularly true with extended collective management, which kicks in only after negotiations and licensing have occurred between a CMO and users. Lawmakers extend the agreements reached by the CMO to unrepresented copyright owners, thus acknowledging that these licensing agreements represent the normal exploitation scheme for that use.[88] In interpreting the three-step test, the World Trade Organization Panel has held that:

> an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work . . . if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains.[89]

This suggests that another way of interpreting the test could be to measure the effect of the exempted uses on markets controlled and exploited by copyright owners.[90] In other words, if the exempted use under the exception crowds out the normal markets controlled by copyright owners, the exception would be prohibited under the three-step test. Here, the conflict with normal exploitation is between the

86. Peukert, *supra* note 32, at 164.
87. RYDNING, *supra* note 44, at 60.
88. *Id.* at 63.
89. Panel Report, *supra* note 82, ¶ 6.183.
90. *Id.*

exempted use and other markets controlled by rights holders—not between the exempted use and the same use if controlled by the rights holders.[91]

Applying this second interpretation does not yield a definitive answer. Online sales of music or films would undoubtedly be considered a "normal exploitation" of their works. Economic studies are divided between those showing that illegal downloads do not harm legal sales and those showing such downloads to be the main cause of the music industry's decline.[92] Would legalizing file sharing under blanket licensing compete with legal platforms? It might in a compulsory licensing scheme, as it would allow any user to get access to music, films or other digital content through P2P networks for a minimal sum. Supposing that mandatory or extended collective management are considered to be "limitations" requiring compliance with the three-step test, their assessment under the scrutiny of the test would not be very different. Although in theory, the copyright owners in such collective management schemes could set any fee for the license, practically speaking, that sum would not exceed a limited amount per month, so as not to make illegal file sharing attractive. The lower that monthly fee, the more likely it would compete with other Web platforms selling entertainment. However, the thrust of mandatory and extended collective management is that copyright owners would voluntarily choose the license on the basis of their exclusive rights. It therefore seems paradoxical to conclude that this exploitation, consented to by the copyright owners, would contradict the other markets equally controlled by them.

The final prong of the three-step test assesses whether there is unreasonable prejudice to the legitimate interests of the copyright holders. This is a balancing test of sorts: the limitation will only be accepted if, in its form and effect, it does not cause an excessive harm to the authors. Here, the nature of the limitation and its effect on exclusive rights will be key factors. Uncompensated limitations, for instance, would be frowned upon by this prong, but may nevertheless be permissible if the exempted use is in the public's interest (e.g. in the case of parody or quotation). In cases of noncommercial file sharing, however, compensation is certainly required to accommodate the interests of copyright holders. When an option to opt out of compulsory licensing is offered to authors (as Litman proposes), this third step might be less of a challenge because authors are given the option of regaining their exclusive rights.[93]

Collective management would benefit copyright owners more than a compulsory licensing system would. In such a system (whether mandatory or extended), authors may keep their rights, continue to intervene in the imposition of tariffs and conditions on licensed exploitation and generally benefit from a collective process of negotiation in which they are represented by CMOs that aim to protect their interests. Extended collective management with an opt out mechanism certainly does not raise a third-prong issue. When legislators extend

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91. For a useful analogy, see RYDNING, *supra* note 44, at 61.

92. *See* IFPI, IFPI DIGITAL MUSIC REPORT 2011: MUSIC AT THE TOUCH OF A BUTTON 14 (Jan. 2011).

93. Peukert, *supra* note 32, at 174.

existing licensing agreements to nonmembers of the CMO, those licensing terms are ones that have been reached by a substantial number of authors of works of the same category, thereby "lessening the prejudice inflicted on the interests of the authors by the limitation."[94] Thus, those licenses will most likely sufficiently protect the interests of the nonmember copyright owners.

In sum, a compulsory license geared at noncommercial uses in P2P networks probably would not pass the three-step test, as it would deprive the copyright owners of their ability to control file sharing and to directly compete with legal online platforms. On the contrary, any solution based on collective management—particularly imposing the extension of the repertoire licensed by the CMO through the addition of mandatory collective management or extended collective licensing—has a better chance to succeed. First, it may fall outside the "exceptions and limitations" language entirely and therefore may not even trigger the test. Second, even if subject to the test, collective management will likely pass muster because, despite the fact that it deprives copyright owners of the individual exercise of their rights, it is a form of normal exploitation aimed at protecting the interests of the members of the CMO.

C. THE PROHIBITION OF FORMALITIES

A final hurdle created by the international copyright treaties is the prohibition of any formality conditioning its existence or exercise, as laid down in article 5(2) of the Berne Convention.[95] According to some, this prohibition would bar all solutions in which the copyright owner would regain its unabridged exercise of copyright when opting out of the licensing put in place by law or by a CMO.[96] Thus, it would bar both the levy-based compulsory license proposed by Litman with an opt out mechanism and the extended collective management where copyright owners are able to opt out from the collective management imposed on them.

For Peukert, the opt out compulsory licensing regime proposed by Litman constitutes such a prohibited formality because the opt out would take the form of a publication of the work under a *.drm format that could be compared to the former U.S. notice and registration:

> While one might question whether this requirement is a 'formality,' it certainly can be said to impose a 'condition' in a more general sense that has to be complied with in order to ensure that the work does not fall under the limitation/exception for non-commercial file-sharing.[97]

The "formalities" wording that replaced "formality and conditions" in the Berne

94. RYDNING, *supra* note 44, at 73.
95. Berne, *supra* note 68, art. 5(2).
96. *See* Ficsor, *Collective Management in the Digital, Networked Environment*, *supra* note 49, at 48.
97. Peukert, *supra* note 32, at 184.

convention in 1908 is generally construed to encompass "conditions" as well.[98] It does not mean, however, that all methods of exercising exclusive rights would be subject to the no-formalities rule.[99]

It is because of this prohibition of formalities that Peukert has developed an opt in, rather than an opt out, solution. In such a proposal, the default situation would be that of full exercise of exclusive rights; the formality (i.e. the opting into the levy-based compulsory licensing) would thus not condition the enjoyment of copyright but rather would limit it by the sole will of the copyright owner.

Treating an opt out regime (whether opt out compulsory licensing or opt out extended collective licensing) as a prohibited "formality" seems somewhat radical. First, as far as opting out of a compulsory license is concerned, the "formality" would enable copyright owners to recover their full exclusive rights. Limiting copyright is not unlawful under the Berne convention so long as it is compliant with the three-step test. Thus, it seems illogical to interpret the "formalities" rule—whose very objective is to protect the author—as barring an opt out system that would allow authors to regain the exclusivity of their rights. The same argument can be used to dispute any classification of opt out extended collective licensing as a banned formality.[100] Extended collective licensing does not prevent the exercise of an author's copyright, but rather enables it. Therefore, opting out is not so much a restoration of an author's right to exercise her ownership, but rather is a choice to exercise that right in a different way. For these reasons, article 5(2) of the Berne Convention prohibiting formalities should not bar a P2P solution that would allow the copyright owners to opt out of compulsory licensing or extended collective licensing to regain full exclusivity and individual management of their rights.

IV. PRACTICAL DIFFICULTIES

Even if the legal obstacles are overcome, blanket licensing for P2P would still face many practical difficulties. Economic difficulties—for example, determining the adequate level of compensation and finding ways to attract users without competing with other online platforms—will certainly arise. However, those questions are beyond the scope of this Paper. Instead, only practical hurdles with legal implications will be addressed here.

A. INVOLVEMENT OF INTERNET SERVICE PROVIDERS

In most proposed models, the levy or tax will be included, whether exclusively or not, within the price of broadband Internet access. This inclusion requires the participation of ISPs, who will either directly pay the levy or tax imposed upon

98. STEF VAN GOMPEL, FORMALITIES IN COPYRIGHT LAW 161 (forthcoming 2011).

99. Gervais, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006), *supra* note 2, at 33 ("[I]t would be patently incongruous to read Article 5(2) as preventing the mandatory doing of anything . . . .").

100. Gervais, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006), *supra* note 2, at 35.

their service or pass the costs on to customers. Either case will lead to an increasing cost of Internet access, which is neither popular, nor economically viable. Moreover, collecting fees and managing subscribers' willingness to enter into licensing (in voluntary systems) will impose administrative costs on ISPs. Therefore, ISPs might be very reluctant to pay or transfer fees to copyright owners. Furthermore, models based on collective management generally use ISPs as the licensees of the CMOs, which would require their consent to contracts with copyright owners.

ISPs have strong legal grounds for refusing any involvement in such a system (whether contractual or financial). In both Europe and the United States, favorable safe harbor provisions shield ISPs (as "mere conduits") from liability when infringement occurs on their networks. Questions are currently pending in the European Union Court of Justice regarding whether an injunction to filter access to P2P networks imposed on an ISP is permissible under the safe harbor provisions of the E.U. directive on electronic commerce.[101] Should the European judges rule that this filter requirement imposes an excessive burden on the ISPs, it would be even more difficult to involve ISPs in the fight against P2P file sharing. Furthermore, bringing ISPs to the table to negotiate their involvement in any sort of licensing model may prove cumbersome if not mandated by lawmakers through a levy-based compulsory licensing system. Any solution based on voluntary involvement of users, ISPs and CMOs must address this difficulty.

A model in which P2P users contract with and pay fees to the CMOs might prove more successful. In such a scenario, ISPs are mere intermediaries of the license and may be more willing to be involved. Under one proposal, they may collect a service fee out of the sums paid by their customers to cover their own management costs.[102]

B. FRAGMENTED REPERTOIRE

When acquiring a license, users will likely expect the fee they pay to provide unlimited sharing on P2P networks. Although unlimited sharing would be the case with compulsory licenses, which are comprehensive in scope, it is less clear whether a collective management system would be capable of offering such a global license. It is well known that copyright is fragmented in many regards: a single CMO does not hold all the rights to a copyrighted work (e.g. the reproduction and performance rights), does not represent all the rights holders to a work (e.g. authors, producers, performers) and does not cover all types of works that might be transmitted through P2P networks.[103] Regarding the various types of works, strategies might differ for music, audiovisual works, software or other

101. Case C-360/10, Belgische Verenigning van Auteurs, Componisten en Uitgevers (Sabam) v. Netlog NV, 2010 OJ (C 288) 18.

102. *See* AIGRAIN, *supra* note 35.

103. Gervais, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (2006), *supra* note 2, at 10–12.

categories. Because exploitation and markets for these various categories are different, collective licensing for P2P file sharing might not be equally relevant for all of them. For example, Gervais has convincingly argued against including films in a model of global authorization.[104]

In any case, any solution providing for blanket licensing must overcome the fragmentation of copyright management by achieving consensus between all interested parties, authors, film producers, music producers and performers. Consensus will not be easy as each stakeholder might have a different view and priority. For example, producers, who prioritize protecting their markets, may seek to halt unauthorized P2P transfers entirely, while performers may prefer compensation from exploitations bound to happen anyway.

Once a consensus is found, one CMO should be designated as a one-stop-shop for users or ISPs. This CMO should redistribute the collected sums to other CMOs representing different rights holders. This collection model is in place in some European countries for photocopying or private copying. On the territorial level, reciprocal agreements of collective management ensure that CMOs are able to grant licensing for foreign works administered by sister organizations. However, the network of reciprocal agreements between many CMOs might not cover all domestic and foreign works. This is another issue of fragmentation that will not be easy to tackle.

C. MEDIA CHRONOLOGY FOR AUDIOVISUAL WORKS

A final problem specific to the film industry is media chronology.[105] Audiovisual works are traditionally exploited in successive release windows, starting with screening in theaters, followed by DVD rentals and sales and broadcasting, where pay-TV has a priority in time over free-to-air television. Allowing *all* content to be shared in P2P networks might run counter to this chronology: if the licensing includes even recent films, for example, that could harm the copyright owner's ability to exploit the film in a way that would allow him to recoup his investment.

Though some countries still regulate chronology of media release windows, "the European legal framework for media windows has developed in a relatively clear way, characterized by the fact that strict legislative provisions have been abandoned in favor of contractual solutions."[106] A contractual solution could work, but it might also result in film producers removing recent productions from the blanket license for media chronology reasons. This type of content segregation would require the establishment of some form of filtering for file transfers. Filtering would require both technical identification of the works to be excluded and voluntary involvement of ISP in filtering the sharing of these works in their

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104. Gervais, *User-Generated Content*, *supra*, note 52, at 458–59.

105. Martin Kuhr, *Media Windows in Flux: Challenges for Audiovisual Media Chronology*, IRIS PLUS (2008), http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2008.pdf.en.

106. *Id.* at 2.

networks.

V. CONCLUSION

In spite of the best efforts of music and film industries and lawmakers to enforce copyright, P2P file sharing has become a common means of gaining access to cultural and entertainment content for many Internet users. Meanwhile, creators and performers are not getting any remuneration or damages from the millions of uses of their works made each day. This reality arguably gives some weight to any proposal authorizing noncommercial P2P transfers under a global license that provides compensation to rights holders. In most proposed schemes to that effect, CMOs would be in charge of collecting the levy and distributing it amongst copyright owners.

The proposed models differ on many points and certainly raise some legal difficulties. Levy-based compulsory licensing would probably not conform to international copyright treaties, like the Berne Convention. Other schemes based on collective management hence appear as more relevant. Indeed, mandatory collective management and extended collective licensing can help collective management schemes to prevent copyright fragmentation and facilitate copyright clearance. Despite the fact that these two mechanisms restrict the exclusivity and individuality of copyright, they could support a system granting mass authorizations to P2P users.

In granting blanket licenses, CMOs would face practical difficulties. The biggest one might be that all proposed schemes give a prominent role to Internet service providers, either as debtors of the levy, as collectors of the fees or as licensees. Yet, the copyright regime has determined in recent years that Internet service providers should be exempted from liability in many cases and should not be forced to take on an active role.

Do these difficulties mean that blanket licensing for P2P file sharing is an empty promise? Not really. Instead, they highlight the issues that must be addressed in future attempts to offer an alternative to repression-based solutions, like the three-strikes approach, if such solutions prove to be unsuccessful or insufficient.