

## I. Introduction

The coexistence of copyright<sup>1</sup> and technology is uneasy.<sup>2</sup> From the printing press to digital technology, passing through piano rolls, sound recordings, broadcast and photocopiers, copyright's struggle to adapt to disruptive technology has mostly been reactive.<sup>3</sup> P2P is but a recent illustration of such trend, soon to be followed by cloud computing.<sup>4</sup>

The digital age brought about an extension of rights holders' prerogatives through the broadening of the rights of reproduction and communication to the public, and the legal protection of DRM. With it, legislators have created a *de iure* and *de facto* access right, turning the previously "free" acts of (physical) enjoyment into restricted digital acts, unless privileged by an exception and limitation.<sup>5</sup> Adding to the complexity, copyright has kept its territorial blueprint, which is at odds with both its expressional interchangeable nature in the digital world and the transnational character of the Internet.

Such context led to the qualification of most P2P uses as copyright infringement and, consequently, to ever increasing (and largely unsuccessful) deterrence efforts by rights holders. However, such reaction to P2P forgets copyrights' role of market organizer (not preventer), *maxime* in legal systems—like the E.U.—that value strong Competition laws.

Assuming that rights holders should be compensated for uses of their works,<sup>6</sup> this book will focus on the problem of how best to "manage" P2P under E.U.

- 1 Unless otherwise specified, the term "copyright" and variations thereof refer both to copyright and related rights; likewise, the term "works" makes reference to copyrighted works, including performances and sound recordings.
- 2 See Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, at 1255 (2001).
- 3 See John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 INTELL. PROP. L. BULL. 1, at 5-7 (2007) (illustrating this point by describing the relationship between technological innovation and the entertainment industry).
- 4 For some of the legal issues raised by cloud computing see Chris Reed, *Information 'Ownership' in the Cloud*, Queen Mary School of Law Legal Studies Research Paper No. 45/2010 (2010), available at: <http://ssrn.com/abstract=1562461> (last visited Jan. 31, 2012).
- 5 See Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC. U.S.A. 113 (2003) (welcoming such access right has an essential element for the effectiveness of exclusive rights in the digital world). But see Thomas Hoeren, *Access right as a postmodern symbol of copyright deconstruction?*, VI DIREITO SOCIEDADE INFORMAÇÃO 9, 18 (2006) (arguing that, also with reference to E.U. secondary law, "[t]here is no such thing as an access right in copyright law").
- 6 A principle recognized in the E.U., e.g., in Case 62/79, SA Compagnie Générale pour la diffusion d la télévision, Coditel and others v Ciné Vog Films and others, 1980 E.C.R. 881, at para 18.

secondary law. For this purpose, the necessary technical, economic and legal background will be provided so as to correctly analyze the (in)adequacy of the current territorial exclusive rights model to efficiently address P2P. An examination will then be made of alternative models for P2P uses of works (namely online music)<sup>7</sup> based on collective rights management, especially VCL.<sup>8</sup> Also here, the benchmark for assessment will be compatibility with E.U. law.<sup>9</sup>

Chapter II addresses the technical and economic background of P2P, in an attempt to justify its relevance as a subject matter of study and lay the foundations for the discussion of why a territorial exclusive rights model is ill suited for file-sharing. This Chapter explores the interplay between the evolution of P2P technology and relevant judicial decisions in this area, highlighting the flexible and lasting nature of the former. It further analyzes recent industry reports on P2P “piracy” in connection with Internet uses, as well as its effect on legal business models endorsed by rights holders.

Chapter III provides a legal analysis of P2P under current E.U. secondary law, focusing on the exclusive rights involved and the challenges posed by its digital nature on the territoriality principle. It first scrutinizes the *acquis communautaire* and the E.U. policy’s efforts to adjust copyright and its territorial matrix to the digital age. It then proceeds to the identification of the legally relevant P2P uses and their legal qualification under the copyright Directives. Last, it reviews such uses against existing exceptions and limitations in an effort to uncover potentially privileged acts.

- 7 As online music is at the forefront of discussion in these fields; *see, e.g.*, Fred von Lohmann, *Voluntary collective licensing for music file sharing*, 47 COMM. OF THE ACM (No. 10) 21 (2004) [Lohmann 2004], and Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, in, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 135 (Daniel Gervais Ed., Edward Elgar 2<sup>nd</sup> ed. 2010).
- 8 Discussing the application of VCL or other forms of collective management to P2P *see, e.g.*, WILLIAM FISHER III, *Promises to Keep: Technology, Law, and the Future of the Entertainment Industry* 199-258 (Stanford University Press, 2004), Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 2 (2003), Daniel J. Gervais, *The price of social norms: towards a liability regime for file-sharing*, 12 J. INTELL. PROP. L. 39 (2004), Lohmann 2004, *supra* note 7, Silke von Lewinsky, *Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks*, UNESCO E-COPYRIGHT BULL. 1, January-March 2005 issue [Lewinsky 2005], Peter K. Yu, *P2P and the future of private copying*, 76 U. COLO. L. REV. 653 (2005), Meghan Dougherty, *Voluntary collective licensing: the solution to the music industry’s file sharing crisis?*, 13 J. INTELL. PROP. L. 405 (2006), Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, EFF Whitepaper Series (Apr. 30, 2008), <http://www.eff.org/files/eff-a-better-way-forward.pdf> (last visited Jan. 31, 2012) [Lohmann 2008], and Séverine Dusollier & Caroline Colin, *Collective Management of Copyright: Solution or Sacrifice?: Peer-to-Peer File Sharing and Copyright: What Could be the Role of Collective Management*, 34 COLUM. J.L. & ARTS 809.
- 9 To the extent possible, this book will not address issues of private international law, jurisdiction, enforcement or Competition law.

In Chapter IV, collective rights management is analyzed under E.U. law. After clarifying its main operational characteristics, providing a taxonomy of relevant types and framing CMOs' functions, this Chapter focuses on the impact of mass digital uses—such as P2P—on collective management and the role of multi-territorial licensing in providing a solution thereto, briefly mentioning relevant E.U. institutional approaches.

Chapter V further examines the legal compatibility of several collective management proposals of P2P uses with the *acquis*. It tackles first the most restrictive proposals by analyzing the non-voluntary approaches of legal licenses, mandatory collective management and extended collective licensing. This is followed by an in depth look at the voluntary approach of VCL, containing a critical assessment of its main features, benefits and challenges.

We conclude in Chapter VI by suggesting that the problems created by P2P technology to a fragmented and territorially based copyright law in the E.U. can most adequately be solved by implementing a VCL system.