For users and society, this means increased availability of works[346] and competition in the market place, reduced transaction costs and legal certainty.[347]

3. Compatibility

In principle, VCL is compliant with both international and E.U. law, allowing lawful P2P uses–reproduction and making available–in consideration of an equitable remuneration.[348]

However, specific compatibility issues may arise, in particular under E.U. secondary legislation. These issues are analyzed below.

a) E.U. secondary legislation

In general, VCL presents few compatibility concerns with the copyright Directives.

First, the P2P exclusive rights of reproduction and making available should be licensed together as they mostly correspond to a single economic use.[349] However, this may be problematic when a Member State's law qualifies the download act as private copying, given that monetization thereof may be unjustified.[350] A definitive solution to this problem would require a fact intensive Member State-by-Member State analysis, which is beyond the scope of this writing.

Nevertheless, grounded on the principle of legal certainty, a reasonable approach could be to (by default) license both rights and leave the fixation of royalties to market forces and Competition law supervision. This does not solve the problem of double payment by *certain users* (which are making a private copy) in *certain countries* (where such exception and limitation is implemented and covers the specific P2P act in question). However, absent real E.U.-wide harmonization of the private copy exception and limitation and given the non-mandatory nature of VCL,

346 *See* Netanel *supra* note 8, at 3 (mentioning P2P as a "vehicle for finding works that are otherwise not available"); *See* also Yu, *supra* note 8, at 701 (emphasizing the rights clearance difficulties raised by many "out-of print songs… currently available in P2P networks").

347 *See* Lohmann 2008, *supra* note 8, at 3, and Dougherty, *supra* note 8, at 426-427.

348 *See* Lewinsky 2005, *supra* note 8, at 15.

349 *See MyVideo Case* and Commission Decision of Aug. 12, 2002 regarding Case C2/37.219 Baghalter & Honem Christo v SACEM, available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37219. *See also* **Annex VII**.

350 Underlying this problem is the InfoSoc Directive's overlap of the broad exclusive rights of reproduction and making available, which may give rise to "unjustified claims for 'double payment'" (see Eechoud et al., *supra* note 91, at 303).

it seems a low-impact "collateral damage" if true competition exists in the market.[351]

Second, the complex DRM regulation of arts. 6 and 7 InfoSoc Directive also presents challenges to VCL. It is possible that "DRM-works" are shared in a P2P network, raising the question of whether it is legitimate for rights holders to distribute such works within this system. Concerns arise mainly with TPMs, as reasonable electronic rights management information may be a good complement to a VCL system.

TPMs afford the rights to control access to and uses of a work, the work's integrity and usage level.[352] They thus impact on both "P2P rights" of reproduction and making available.

As previously mentioned,[353] tensions might arise between the application of TPMs and national exceptions and limitations to the reproduction right, namely private copy, mostly due to the wording of art. 6(4) InfoSoc Directive, which on this specific point reads:

> (…) [*second subparagraph*] A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.
> (…) [*fourth subparagraph*] The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

In fact, not only art. 6(4) does not impose on Member States any obligation to enforce the private copy limitation against TPMs, but it also does not apply to works made available online "on agreed contractual terms".[354]

It is not within the scope of this book to analyze the "convoluted and complex… imprecise and ambiguous" text of art. 6 InfoSoc Directive.[355] However, this article

351 At the E.U. level, such solution would probably require an overhaul of the private copy exception, which might occur within the near future, as it is addressed in the context of the Digital Agenda for Europe and expected to be reported in 2012 (*see* IPR Strategy, at 11).
352 *See* Eechoud et al., *supra* note 91, at 132-133.
353 *See III.C. supra.*
354 *See* Eechoud et al., *supra* note 91, at 168-169.
355 *Id.* at 154.

clearly states that protection is granted against circumvention of "effective"[356] TPMs designed to prevent or restrict acts not authorized by the rights holder. To be sure, by joining a P2P VCL system, rights holders would in fact be authorizing the reproduction and making available of their works by users within such system.

This implies that "VCL-works" should not contain TPMs that restrict the afore mentioned P2P uses–including the instrumental *access* to the work–, as in most cases rights holders have entered into a contractual relationship with CMOs–and sometimes with users (depending on how CMOs are set up in the specific Member State)–allowing for such uses.

That being said and absent future amendments, the InfoSoc Directive does not prevent the rights holders from including "TPM-works" in VCL repertoires. What happens then if users circumvent such works? Here too a definite answer would depend on the analysis of national implementations of the Directive, which vary greatly, as well as the specific CMOs' constitution.[357]

From the legal standpoint and in very general terms, the contractual relationship between rights-holders, CMOs and users can be viewed as granting users a contractual right to circumvent TPMs preventing P2P uses, assuming the underlying work had lawfully been "integrated" in the system. For this identification purpose, electronic rights management information could assume a pivotal role. Moreover, it is also arguable that, in some Member States, users may raise defenses based on breach of an objective good faith principle, amounting to a form of *venire contra factum proprium*, as rights holders had at least implicitly authorized such P2P uses and possibly received royalties there from, thus confirming a contractual relationship with users.[358]

Notwithstanding, given the commercial failure of DRM,[359] there are compelling reasons to believe that "regulation by market"[360] would probably prevent inclusion of TPM-works in the system from becoming a standard feature and render this a non-issue in the VCL equation.

Finally, there are issues of "market overlap". Imagine user *A* downloads an mp3 file of Bowie's "A Space Oddity" from Apple's iTunes and then uploads it to Pirate Bay; further imagine that the original file came with TPMs. *Quid iuris?*

356 According to 6(3) *in fine*, "Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.".

357 *Id.* at 175.

358 For a comparative analysis of the *venire* figure, *see* Ernst A. Kramer & Thomas Probst, *Defects in the Contracting Process*, *in* 7 International Encyclopedia of Comparative Law (Ch. 11) 1, 143-146 (Arthur T. von Mehren ed. 2001).

359 *See* Bridy, *supra* note 40, at 610 ("On the music side… songs sold through authorized online distributors are no longer locked by DRM").

360 *See* Lawrence Lessig, Code Version 2.0, 123 et seq. (Basic Books 2006).

Here, an argument could be made that VCL adequately covers all stakeholders' interests:

(i) *A* would be paying for the song twice (to Apple and to CMOs under the VCL scheme);
(ii) Rights holders would further be compensated by additional usage within the P2P networks under the VCL system–therefore balancing any lost profits from their online store licensing model–, losing incentive to enforce their rights against *A* and other users for copyright infringement and circumvention of TPMs; and, consequently
(iii) Users' (*A* and others) exposure to infringement risks would be lower.

b) Participation

VCL of file-sharing is most useful where CMOs can manage significant parts of the available repertoire.[361]

One of the major criticisms to VCL lies in the notion that content industries are unwilling to entrust management of their making available rights to CMOs–even if through an easily revocable mandate–, preferring to enforce them individually.[362] This problem is amplified in P2P by its technical characteristics, which require cooperation amongst users.[363]

Optimists regard this has a changing trend, especially for online music distribution, indicating an increased availability of the industry to consider VCL's blanket licensing options through ISPs.[364]

However, even from a pragmatic perspective, the mere fact that VCL promises revenues from uses that previously generated none should suffice to attract rights holders in sufficient number to make it a viable option,[365] especially in the E.U., where the quasi-universal representativeness of CMOs makes VCL a logistically simpler proposition.

It is arguable whether the majority of Internet and P2P users are willing to pay for VCL. However, convincing arguments can be made that they will:[366]

361 *See* Lewinsky 2005, *supra* note 8, at 15.
362 *Id.* at 15 (arguing this to be true mainly for film and phonogram producers).
363 *See* Dougherty, *supra* note 8, at 428.
364 *See* Lohmann 2008, *supra* note 8, at 4-5.
365 *See* Dougherty, *supra* note 8, at 428-429. *But see* Dusollier & Colin, *supra* note 8, at 833-834 (highlighting the potential problems caused by the "fragmentation of copyright management" on participation in collective rights management of P2P–including VCL–and the need for consensus of all stakeholders involved).
366 *See* Gervais, *supra* note 8, at 73 (arguing that the EFF proposal of a $5 monthly flat rate is optimum and would accelerate VCL user adoption).

(i) being the fee on fair, reasonable and non-discriminatory terms, users would be motivated to seriously consider it;
(ii) in some cases, fees would be paid by intermediaries, rendering the problem of user acceptance inexistent;[367]
(iii) in other cases fees will be made "invisible" by the practice of bundling, which will effectively lead to their acceptance.

Irrespective of whether users perceive their actions as illegal and hence lack incentive to adhere to VCL,[368] there is a growing perception (and evidence) in the online music distribution field that, given the right mix of pricing, user freedom and accessibility, users will "pay a contribution".[369]

A high number of participants will diminish risks posed by free-riders, against whom enforcement remains possible.[370]

c) Free riding

Some authors consider the existence of free-riders the Achilles heel of VCL, ultimately leading to its break down; as this system facilitates free riding (e.g., by multiple users sharing one membership) it reduces royalties collected and removes incentives for membership.[371] It is our view that this argument is flawed.

First, it does not account for those users not engaging in such practices, based on ethical and practical considerations. As competing offers make P2P technology accessible on fair, reasonable and non-discriminatory terms to an increasing user base and educational efforts bring copyright issues to the forefront of consumer concerns, a significant number of users will "internalize" the system and not circumvent it. Additionally, the market will provide for multi-user solutions at differentiated pricing, further avoiding deviant practices.

Second, VCL adoption presupposes some coexistence with DRM, especially privacy compliant electronic rights management systems (the appropriate level of which will be defined by the market), a factor bound to deter some forms of free riding.

367 *See* Lohmann 2008, *supra* note 8, at 5 (indicating ISPs, universities and software vendors as examples of intermediaries). On the practical challenges of involving ISPs in such a system, *see* Dusollier & Colin, *supra* note 8, at 833.
368 *See* Dougherty, *supra* note 8, at 429-430 (pointing out the low risk of an infringement suit and comparing P2P uses to jaywalking).
369 *See* Cammaerts & Meng, *supra* note 31, at 13-14 (arguing that such contribution might come from levies on devices, equipments or bundled in ISP access fees).
370 *See* Lohmann 2008, *supra* note 8, at 5.
371 *See* Yu *supra* note 8, at 715.

Finally, VCL is always a comparatively superior situation to the *status quo*, as it provides added remuneration to rights holders (and savings from enforcement costs), together with inexpensive CMO sponsored liability insurance to previously "uncomfortable" users.[372]

d) Logistics and implementation

Concerns have been voiced that managing a system with so many users will be too costly and not feasible.[373]

However, given E.U. CMOs track record and the technological developments in this field, coupled with the fact that intermediaries will assume a significant part of the task, such concerns seem minor.

Besides, they produce the positive externality of raising consumer welfare by providing additional market differentiators for users to choose from when purchasing their "P2P subscriptions".

e) Royalties

Fixation and collection of royalties under the terms described above seem unproblematic[374] under E.U. law, as long as inter-CMO competition exists, pricing is objectively justifiable and its structure is transparent (e.g., by differentiating management fees from royalty tariffs).[375]

As for methods of calculation and distribution of royalties,[376] the EFF's proposal demands transparency, together with a preference for sampling and anonymous monitoring systems, as these take into consideration users' privacy rights.[377] This would be equally valid in the E.U. framework.[378]

372 *See* Dougherty, *supra* note 8, at 432-433.
373 *Id.* at 429.
374 *See* Lohmann 2008, *supra* note 8, at 6 (arguing that enforcement costs alone would be motivation enough for CMOs to practice reasonable royalties).
375 *See IFPI Simulcasting*, at paras 67 et seq.
376 *See* Dougherty, *supra* note 8, at 431 (identifying this as the main concern under U.S. law).
377 *See* Lohmann 2008, *supra* note 8, at 4. Note also the Commission's decision on the Santiago Agreement, which took into consideration the need to respect privacy laws.
378 See IPR Strategy, at 23-24 (indicating the importance of transparent rules in revenue distribution).

f) Cross-subsidization

There's a potential risk that low-volume users subsidize rights holders and high volume users, motivating the first to opt-out, thus reducing VCL's attractiveness.[379]

The rhetorical power of such argument should not be ignored, as it has been in first instance used by the U.S. music industry to disqualify VCL as a viable option for P2P.[380]

Nevertheless, the system's voluntary nature coupled with the psychological comfort of a blanket license makes this a low level risk.[381]

g) Coexistence

VCL's flexibility is one of its great advantages, allowing for its coexistence with alternative rights management schemes.[382]

Such coexistence is in fact a feature of the current Internet landscape where paid subscription services "live" alongside free of charge sites, e.g. in the news and information[383] and online music distribution markets.[384]

Such coexistence should be unproblematic absent potential strategic market decisions by rights holders (*maxime* content industries), which would however have to seriously consider a model that allows for creation of previously inexistent revenue streams.

379 *See* Yu, *supra* note 8, at 715, and Dougherty, *supra* note 8, at 431-432.
380 *See* Litman, *supra* note 268, at 33-34 & n.136 (citing industry representatives referring to VCL as "either…unfair because the few consumers who participated would subsidize the many who continued to rely on free downloads, or it would be voluntary only in name").
381 *See* Dougherty, *supra* note 8, at 431 (qualifying this risk as "only of marginal concern").
382 *See* Lohmann 2008, *supra* note 8, at 6 (arguing that such services would gain by adopting P2P architectures, as would end users).
383 *See* Litman *supra* note 268, at 43 (concluding that if such "peaceful coexistence" can be duplicated for "digital music, it seems sensible to try to do so").
384 *See supra II.*B. *See also* https://creativecommons.org/legalmusicforvideos (last visited Jan. 31, 2012) (by making digital music freely available for noncommercial purposes under an alternative licensing schemes, Creative Commons provides an adequate illustration of the above-mentioned coexistence).

h) "Remixes"[385]

The making and sharing of adapted versions of works (derivative works, "mash-ups" or "remixes")[386] is part of the practices of P2P users.[387] However, we believe a proposal for a VCL system in the E.U. should not encompass remixes. Irrespective of whether a Member State's copyright law follows the *droit d'auteur* or monistic matrix of copyright, P2P remixes call into question the exclusive economic right of adaptation and, in cases of extensive modifications of a work, the moral right of integrity.

The right of adaptation is mostly unregulated at E.U. level,[388] thus providing no solid basis for an effective collective rights management scheme.[389] Furthermore, the inalienable nature of moral rights in some Member States[390] would raise thorny challenges that might prove insurmountable.

From a different perspective, exceptions and limitations could apply in some Member States to (at least noncommercial) remixes, rendering any authorization to perform such acts unnecessary, thus raising issues of "double payment".[391]

In the U.S., such "remixes" could be qualified as derivative works[392] and warrant the application of the doctrine of (transformative) fair use.[393] In the E.U., art. 5 InfoSoc Directive's exceptions and limitations do not cover such uses. Absent harmonization and subject to the three-step test (when applicable),[394] as well as national provisions on moral rights, Member States are free to institute exceptions and limitations for the right of adaptation covering certain categories of noncommercial remixes. In fact, some authors have noted that the adaptation right constitutes a flexible area (external to the *acquis*) for Member States in what concerns exceptions and limitations, thus allowing for the implementation of permissive

385 This subsection will only briefly touch upon the issue of "remixes" and the right of adaptation, as a detailed analysis of the same is beyond the scope of this book.

386 On the "remix" phenomenon in general and its legal, social and cultural implications, *see* Lawrence Lessig, Remix: Making Art And Commerce Thrive In The Hybrid Economy (Penguin Press 2008).

387 *See* Netanel, *supra* note 8, at 3, and Dougherty, *supra* note 8, at 430-432.

388 *See* Eechoud et al, *supra* note 91, at 84.

389 *See* Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 Vand. J. Ent. & Tech. L. 841, 848-849 (2009) [hereinafter **Gervais 2009**] (noting that CMOs do not typically license the right of adaptation, least of all to individual users).

390 *See* Michel M. Walter & Silke von Lewinsky, European copyright law 1473 (Michel M. Walter and Silke von Lewinski Ed., Oxford University Press 2010).

391 *See supra V.3.a)* & n.350.

392 *See* 17 U.S.C. §§ 101, -106(2).

393 *See* Gervais 2009, *supra* note 389, at 861-870.

394 *See* Hugenholtz & Senftleben, *supra* note 145, at 26 (arguing that the regulation of the right of adaptation, understood as the *"corpus mysticum* of a …work – is left to national law making", being that the InfoSoc Directive only applies to "literal reproduction").

provisions that privilege uses of works, such as several types of transformative uses (e.g. in the area of user generated content).[395]

For the Member States that do so, the question remains of how to consider such remixes in a VCL system when the underlying work is recognizable.[396] Should rights holders be entitled to compensation? What about the author of the remixed work? What if the applicable law only allows non-commercial remixes?[397]

We do not intend to provide answers to these questions here, but merely to illustrate the complex web of issues generated by the introduction of an adaption right in the VCL equation, thus justifying our option (at least at an initial stage) to exclude such a right from a VCL solution to P2P.

395 *Id.* at 26-27 (noting different approaches to user-generated content in Germany and the Netherlands).

396 *See* Fisher III, *supra* note 8, at 234-236 (proposing a method to monetize such uses under his alternative compensation system).

397 *See* Dougherty, *supra* note 8, at 430-431 (concluding that if VCL does not cover such uses "the industry risks perpetuating underground file sharing services on which such remixes can be traded").