First, most CMOs administer the right of reproduction but not that of making available, which may give rise to issues of rights clearance.[129] Such issues may have spillover effects in scenarios of collective management of P2P, such as the need for CMOs to secure representation of the making available right to cover uploads in P2P networks.

Second, such overlap causes legal uncertainty in the context of rights clearance, as the line between acts of reproduction that occur during and as a consequence (i.e. the download) of P2P is difficult to draw.[130] The point deserves serious consideration, particularly given CMOs practice of "overrepresentation" of acts involved in online uses of content.[131]

C. Exceptions and limitations

Exceptions and limitations act as internal limits to copyright and can in general terms be qualified as statutory exceptions,[132] compulsory licenses[133] or exceptions for developing countries.[134]

The Berne Convention recognizes uncompensated and compensated exceptions and limitations (or statutory licenses).[135] Mandatory compensation is imposed for three broad cases: broadcasting and communication,[136] authorization to make sound recordings of a musical work[137] and the Berne Convention Appendix. Notwithstanding, many countries implemented compensation requirements also for uncompensated exceptions and limitations, such as private use.[138]

Exceptions and limitations are in general subject to the three-step test, which originally applied to the reproduction right, as stated in art. 9(2) Berne Convention:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

129 *See* Ohly, *supra* note 108, at 217.
130 *Id.* at 225.
131 *See* Eechoud et al., *supra* note 91, at 88-89.
132 *E.g.*, art.10(1) Berne Convention.
133 *E.g.*, arts. 11*bis*(2) and 13 Berne Convention.
134 *E.g.*, arts. II and III of the Berne Convention Appendix.
135 *See* Goldstein & Hugenholtz, *supra* note 113, at 360.
136 Art. 11*bis* Berne Convention.
137 Art. 13 Berne Convention.
138 *See* P.B. Hugenholtz & R.L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright 55 et seq., Institute for Information Law University of Amsterdam/University of Minnesota Law School (2008), http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf (for a detailed list of mandatory exceptions and limitations in existing international intellectual property instruments).

However, this test currently extends to all economic rights, by virtue of arts. 13 TRIPS, 10 WCT (and its Agreed Statements) and 16 WPPT.[139]

The InfoSoc Directive contains a single narrow mandatory exception and limitation for temporary and transient copying–in art. 5(1)–, as well as a catalogue of twenty optional exceptions and limitations spread through arts. 5(2) and 5(3).[140] According to Recital (33), temporary copying includes acts of browsing and caching, provided these "are an integral and essential part of a technological process" and "have no independent economic significance".[141]

It must be borne in mind that the referred mandatory exception does not apply to software or databases[142] meaning, *inter alia*, that software reproduction or making available is not covered by any exception and limitation, as any reproduction of a computer program would be a restricted act under art. 4 Software Directive.

This rigid catalogue does not include any flexible "escape valves" (e.g., fair use[143] or fair dealing[144] provisions) allowing for evolutionary adjustment of exceptions and limitations to cultural, technological and social demands, thus balancing the scope growth of economic rights, *maxime* in the digital environment. [145] Furthermore, the application by Member States of any exception and limitation is subject to the three-step test, under a broad art. 5(5),[146] according to which

> The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

It should be noted that the three-step test also applies to the Software Directive–art. 6(3) –, Database Directive–art. 6(3)–, and Rental Right Directive (by virtue of art. 11(2) InfoSoc Directive).

139 E.g., art. 13 TRIPS reads: "Members shall confine limitations or 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 right holder".

140 *See* Michael Hart, *The Copyright in the Information Society Directive: An Overview*, 24 Euro. Intell. Prop. Rev. 2:58, 59 (2002).

141 On the difficulty of giving operational meaning to these criteria, *see* Hart, *supra* note 140, at 59 (2002).

142 By virtue of art. 1(2).

143 *See* 17 U.S.C. § 107.

144 *See* §§ 29-30 UK Copyright, Designs and Patents Act 1988,.

145 *But see* P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair use in Europe. In Search of Flexibilities* (Nov. 2011), *available at*: http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf (last visited Jan. 31, 2012) (arguing that the prototypical nature of the list of exceptions leaves Member States with "broad margins of implementation" and that the ample unregulated space regarding other rights than reproduction and communication to the public, together with the three-step test, could "effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States").

146 *See* Eechoud et al., *supra* note 91, at 117-118 (pointing out the implementation issues raised by this provision).

In the context of P2P, the private use/copying exception and limitation potentially applies to the initial and subsequent reproduction by users.[147] Such exception and limitation is designed (inconsistently) in art. 5(2)(b) InfoSoc Directive as optional, but with sole application to the reproduction right:[148]

> Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
> (…)
> (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

Given P2P's economic background[149] there seems to be no strong case to argue that its uses support research, teaching or other acts covered by the remaining exceptions and limitations to the reproduction or communication to the public rights under arts. 5(2) and 5(3).[150]

As such, two conclusions must be drawn here:

(i) P2P reproduction acts are admissible absent consent of the right holder only if privileged under private use; and
(ii) No exceptions and limitations cover the acts of making available, meaning that the acts of *upload* to a P2P network are absolutely restricted.

The optional nature of art. 5(2)(b) also raises concerns, as some Member States have not fully implemented this exception and limitation.[151] Hence, any P2P reproduction in such territories would in principle be restricted.

Where art. 5(2)(b) has been implemented, it is subject to payment of "fair compensation". This concept is not defined in the Directive–although limited guidance

147 *See* Lewinsky 2005, *supra* note 8, at 7-8. *See also* Goldstein & Hugenholtz, *supra* note 113, at 370-373 (raising the questions of whether private copying levies should also compensate for unlawful uses, such as P2P, and whether such levies and corresponding exemptions should survive in a DRM controlled digital environment).

148 *See* Eechoud et al., *supra* note 91, at 113-114 (pointing out inconsistencies of this exception and limitation under the Directive and remaining *acquis*). *See also* Stephan Bechtold, *Commentary on the Information Society Dir.* art.5, note 6, in Concise European Copyright Law (Thomas Dreier & P.B. Hugenholtz eds., Kluwer Law International 2006) (comparing the considerable broader scope of the Directive's three-step test provision with that of art. 9(2) Berne Convention).

149 *See supra II.B.*

150 *See* Lewinsky 2005, *supra* note 8, at 6-7 (concluding that the P2P acts of upload will usually not be covered by national exceptions and limitations, while download may be covered by private use exceptions and limitations).

151 *See* Eechoud et al., *supra* note 91, at 118 (exemplifying with the UK and Ireland).

is provided in Recital (35)[152]–and constitutes an attempt to approximate the continental levy-based "equitable remuneration" system and the UK and Ireland non-levy system, against an E.U. backdrop of divergent levy systems.[153] Both the Recital and the provision further demand that such compensation takes into consideration the application of TPMs, but provide no guidance on how to do so. ECJ case law on this matter has also been unhelpful on the articulation of "fair compensation" and TPMs.[154] In our view, this reference can be construed as meaning that, where TPMs substantially hinder a user's possibility of exercising its private copy exception and limitation, no fair compensation is due.[155]

Considering the broad scope of the reproduction right and narrow application of the private copying exception and limitation, it seems that P2P acts of reproduction are seldom privileged. To be sure, where the initial reproduction on a user's computer is made for purposes of subsequent upload to a P2P network, it cannot qualify as private use; similarly for those cases where, due to the P2P software's design, a copy of the file is automatically made available for other users to download in a network, because no reasonable argument can be made as to the private nature of this reproduction.[156] Such interpretation renders infringing most P2P downloads in systems with automated upload design features.

However, if such intent is not established or can reasonably be inferred by the nature of the P2P system, the opposite conclusion must be reached, and the exception and limitation applies. In fact, where national law does not establish otherwise, an initial private use reproduction should not change its privileged character if the user subsequently makes the copy of the work available in a P2P network, if for no other reason than these are *de iure* and *de facto* distinct acts, and legal certainty would not "digest" well a contamination of the reproduction right and *ex tunc* in-

152 The relevant part of this Recital reads: "…When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of [*TPMs*]. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.".

153 *See* Eechoud et al., *supra* note 91, at 118, and Hart, *supra* note 140, at 60.

154 In fact, altough relevant for purposes of defining the concept of "fair compensation" and the powers of Member States in implementing arts. 5(2)(b) and 5(5) InfoSoc Directive, neither *Padawan* (Case C-467/08, Padawan v SGAE, 2010, *available at*: http://curia.europa.eu) nor *Stichting de Thuiskopie v Opus* (Case C-462/09, Stichting de Thuiskopie v Opus Supplies Deutschland GmbH, Mijndert van der Lee and Hananja van der Lee, 2011, *available at*: http://curia.europa.eu) satisfactorily address the interrelation between the use of TPMs and the private copying exception.

155 In a similar sense, although more restrictive, *see* Eechoud et al., *supra* note 91, at 118.

156 *See* Lewinsky 2005, *supra* note 8, at 7. Note however that Member States' laws may value differently the knowledge and intent elements for purposes of infringement, thus reaching different conclusions.

validation of an exception and limitation by an *a posteriori* act of making available.[157]

Similarly, where Member States' laws are silent, the subsequent acts of download by a user in network (without an automated upload process) can be considered as private copying. Nonetheless, some Member States have passed legislations aimed at combating P2P that contradict this interpretation, by making this exception and limitation dependent upon a qualification of the source of the reproduction or making available acts: if the source is obviously illegal (e.g., the current majority of P2P systems) the exception and limitation does not apply.[158]

Finally, a brief reference should be made to the systemic normative tension between exceptions and limitations and DRM, insofar as the latter constitutes a form of content control that can technologically prevent individual users from exercising legitimate private uses, such as those potentially applicable to P2P.[159] A detailed analysis of this complex issue is beyond the scope of this book; suffice it to say, at this stage, that such tension is amplified in the E.U. by the "WCT-plus" implementation carried out in arts. 6 and 7 InfoSoc Directive.[160]

157 *Id.* at 7-8 (raising the issue).

158 *See, e.g.,* § 53(1) German Copyright Act. *See also* Geiger, *supra* note 58, at 461 (referring additionally that the "Spanish and Finnish legislators clearly exclude downloading from an unlawful source from the scope of the private copy exception").

159 *See* Bridy, *supra* note 40, at 578. On the conflict between private copy and DRM in the E.U., *see* Séverine Dusollier & Caroline Ker, *Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics*, *in*, Research Handbook on the Future of EU Copyright 349 (Estelle Derclaye Ed., Edward Elgar 2009).

160 For an overview of these provisions and their implementation by the Member State *see* Eechoud et al., *supra* note 91, at 131-179, and Hart, *supra* note 140, at 61-64.