

digital performance and not reproduction and making available, as in the E.U.³³⁹ Second, the E.U. CMO market is more evolved, diversified and with a broader scope of activities (e.g., of social and cultural nature) than its U.S. counterpart, a fact which must be taken into account when analyzing this option under a European framework.³⁴⁰

Notwithstanding, the EFF proposal provides an adequate matrix to analyze VCL under E.U. law. It contains the following main features:

- (i) Non-profit CMOs represent rights holders and exploit the relevant exclusive rights;
- (ii) Users are offered a blanket license (multi-repertoire and, *mutatis mutandis* for the E.U., multi-territorial) covering relevant P2P uses against the payment of a flat fee;
- (iii) Payment is possible through an array of mechanisms, either directly via a website or bundled;³⁴¹
- (iv) Royalties are distributed to rights holders on the basis of relative content popularity, to be determined using (privacy respecting) rights management methods and technology.³⁴²

2. Benefits

VCL implementation is beneficial insofar as it requires close to no direct intervention by public authorities, either national or at E.U. level.³⁴³

Furthermore, it presents a significant upgrade for rights holders, as they get additional income (where previously they had none), access to inexpensive promotional channels, and (in some cases) improved bargaining positions.³⁴⁴

What's more, VCL would spur technological development and investment in the field of P2P and content distribution, both in related products/services and at infrastructural level.³⁴⁵

339 See Dougherty, *supra* note 8, at 420-421 & n.114 (explaining the discussion and implications of this qualification of P2P uses as “interactive services”, generally within the exclusive right of 17 U.S.C. § 106(6)).

340 See EP Resolution OMR and EP Resolution CCBM (both illustrating the relevance given in the E.U. to CMOs role on promoting social and cultural interests).

341 E.g., in regular ISPs fees, in University fees as part of network access costs, or subscription fees of P2P software vendors. Note that “bundling” partnerships with ISPs and telecommunications companies is already viewed currently as a “key route to the mass market for digital services” (see IFPI 2012 Report, at 12).

342 See Lohmann 2008, *supra* note 8, at 1-3.

343 *Id.* at 2 (making the same point for the U.S.).

344 *Id.* at 3-4. See also Dougherty, *supra* note 8, at 426.

345 See Lohmann 2008, *supra* note 8, at 3 (exemplifying with the growth of broadband).

For users and society, this means increased availability of works³⁴⁶ 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/elo-jade/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 ECHOUD ET AL., *supra* note 91, at 303).