VI. Conclusions

P2P is a phenomenon of great economic significance that is not going away.[398] Our analysis highlights right holders "wealth of lost revenue" derived from inability to monetize P2P uses, but also a "long-running failure of both public and private regulation" in this area.[399]

P2P's *generational* evolution and innovative flexibility in the face of adverse judicial decisions,[400] together with its aptitude to resist and even flourish in an increasingly stringent legal environment[401] and competition from legal online licensing services, leads us to conclude that current approaches to file-sharing are largely ineffective, inclusive in the E.U.

Implementing and enforcing complex legal mechanisms–such as DRM and graduated response systems–translates into economic losses deriving from the implementation itself, damage to the content industry's reputation[402] and consequent alienation of current and prospective consumers from alternative legal markets. Furthermore, severe lost profits result from the complete failure to monetize such massive online uses of works–in the E.U. alone, 30% of all Internet traffic relates to P2P.[403]

Assuming that rights holders should receive reasonable compensation for the online uses made of their works, the current policy and industry approaches fail to understand where the balance between copyright and innovation should be struck in the P2P "arena".[404]

Lessons taught by the ghosts of copyright past, such as *Sony v. Universal* or the more recent DRM debacle,[405] should be remembered: most new technologies are

398 *See* Huygen et al., *supra* note 11, at 121 (noting that "file sharing is here to stay", "people that download are… important customers of the music industry", and "[t]he point of no return has been reached and it is highly unlikely that the industry will be able to turn the tide").

399 *See* Bridy, *supra* note 40, at 566.

400 *E.g.*, *Napster*, *Grokster*, *Pirate Bay*. *See also* Bridy, supra note 40, at 604 ("As an empirical matter, the mass lawsuits appear to have had only a transitory deterrent effect").

401 *E.g.*, the InfoSoc Directives triad of broad exclusive rights, narrow exceptions and limitations and DRM, the Enforcement Directive and, at a national level, legislative efforts to implement graduated response systems, such as Hadopi (in France), the Digital Economy Act (in England) and even the so-called "Sinde" Law (in Spain).

402 *See* Ericsson, *supra* note 10, at 15 (arguing that the recorded music industry as "suffered almost irreparable harm to its image as a result of its crusade against P2P").

403 *See* Envisional Report, *supra* note 25, at 25.

404 *See* Cammaerts & Meng, *supra* note 31, at 2.

405 *See* Huygen et al., *supra* note 11, at 116.

disruptive in nature and development of new business models is a (desired) result of industry's efforts of adaptation, not of repressive legislation.[406]

In a balanced system, copyright should function as an innovation facilitator and market organizer. Promotion of P2P and the establishment of a legislative framework that is both conducive to that goal and user friendly, while safeguarding right holders interests (by securing adequate compensation where they now have none) and users' interests (by ensuring access to works instead of "criminalizing" them),[407] is the most adequate response for the E.U. legislator from the cultural, economic and policy perspectives.[408]

As with any complex problem, a comprehensive answer to the P2P "conundrum" cannot be given solely by the law, but instead relies on its combination with "market forces, technological architectures, and social norms", bearing in mind "Internet's structural resistance to control".[409]

As the recent rise of cloud computing demonstrates, technology moves at lightning speed and has the potential to quickly render entire legal frameworks obsolete. What is needed is a middle ground between "law shaping technology" and "technology shaping law": a law that is flexible enough to encompass technological change.[410]

To be sure, collective rights management is theoretically copyright law's best answer to mass online uses such as P2P, especially if we circumscribe such uses to manageable categories of exclusive rights, such as online reproduction and making available. In the E.U., where a highly developed CMO market exists, which has been subject to numerous decisions and institutional approaches in the field of Competition law, there is solid ground on which to seriously consider a collective management solution to P2P.

In such context, the best available alternative seems to be the implementation of a VCL system to manage P2P uses on a non-exclusive, multi-territorial, multi-repertoire and pan-European level.[411] VCL is compatible with international and

406 *See* Cammaerts & Meng, supra note 31, at 10-11.

407 See Huygen et al., *supra* note 11, at 118 (explaining the European level sensible approach to avoid criminalizing individual users and rather focus on acts–mainly uploading–either of commercial nature or on a large scale). *But see* Cammaerts & Meng, supra note 31, at 8 (explaining the different approach of RIAA in the U.S., where it filed, settled or threatened lawsuits against more than 30,000 users from 2003 to 2008, all without reducing P2P uses).

408 *See, e.g.,* Cammaerts & Meng, supra note 31, at 2, and Huygen et al., *supra* note 11, at 122 (where the government's role in addressing these issues as part of its cultural and innovation polices is emphasized, as well as the importance or nurturing P2P as a driver for innovation and educating users, as opposed to criminalizing them).

409 *See* Yu, *supra* note 8, at 764.

410 *See* Ericsson, *supra* note 10, at 16 & n.68 ("…the jury is still out on P2P technology's ability to shape the law").

411 *Id.* at 5 (arguing for the use of copyright as competition promotion tool "through the encouragement of widespread non-exclusive licensing"). *See also* IPR Strategy, at 10-11.

E.U. law, providing enough flexibility to adapt to innovation in P2P architectures, while maintaining copyright's characteristic of technological neutrality and the Internet's mantra of network neutrality. It has the potential to generate consumer welfare and adequately compensate rights holders through the monetization of a novel revenue stream. Society has a whole would also benefit via the low implementation costs of VCL, the decrease in litigation and additional access to out of print and orphan works that P2P incentivizes. Such benefits make VCL a strategically sound proposition, as its voluntary design and potential to coexist with other online business models will facilitate the momentum gathering required for its acceptance by all stakeholders.

The idea of Europe has been defined best by George Steiner through axioms that underscore values of cultural diversity and intellectual freedom, stemming not in a small way from the sharing of ideas and works.[412] Such fundamental principles are enshrined in the basic freedoms inherent to E.U.'s legislative framework. In the digital age, the cultural value of sharing and freedom is perhaps best epitomized by P2P. An apposite response befitting the E.U.'s underlying values is certainly not its repression but, we believe, its inclusion in a flexible and forward thinking fashion; what better solution than one premised on voluntary collective management?

412 George Steiner, The Idea of Europe (Nexus Institut 2004).