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A Bipolar Copyright System for the Digital Network Environment

Alexander Peukert

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A Bipolar Copyright System for the Digital Network Environment

by ALEXANDER PEUKERT*

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I. Introduction

Digital technology and global networks have led to the so-called digital dilemma.¹ On the one hand, digital technology and the Internet facilitate the global dissemination of information at very low cost. This feature favors static efficiency in the use of existing works because works as public goods are distributed as widely as is economically feasible. On the other hand, digital technology and global networks diminish the control copyright owners have over

1. See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE, *THE DIGITAL DILEMMA* (2000); CONGRESS OF THE UNITED STATES, CONGRESSIONAL BUDGET OFFICE (CBO), *COPYRIGHT ISSUES IN DIGITAL MEDIA* (Aug. 2004), available at <http://www.cbo.gov/showdoc.cfm?index=5738&sequence=0>; WILLIAM W. FISHER III, *PROMISES TO KEEP* 11-37 (2004); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U CHI. L. REV. 263, 270-276 (2002). The literature on the economics of intellectual property, especially on copyright in the digital age, cannot be accounted for completely. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 313 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 335 (1989); PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 119 *et seq.* (1996); Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1812 (2000); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2013 (2000); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003); Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, U Chicago Law & Economics, Olin Working Paper No. 204, at <http://ssrn.com/abstract=529943> (Apr. 2004); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, UC Berkeley Public Law Research Paper No. 144, at <http://ssrn.com/abstract=494424> (Feb. 2004).

their copyrighted works. If one single digital copy made available on the Internet, especially in a peer-to-peer (p2p) network, theoretically suffices as a master for an indefinite number of identical, unauthorized clones, right holders fear that they will not be able to recoup their investment in producing the work in the first place. Without this promise, it is argued, fewer works will be created. Beneficial dynamic effects of intellectual property protection will be lost. It is thus not surprising that copyright owners try to condition access to information on the basis of digital-rights management (DRM) systems. These measures rely on digitization and therefore on the very same technology that makes widespread dissemination of information possible. From its very beginning, copyright has had to cope with, and has addressed,² the tension between the public interest in increasing the storehouse of knowledge and the author's interest in obtaining compensation to secure his investment. Digitization and the Internet carry this tension to extremes because they optimize both static and dynamic efficiency.

The current paradigm of this dilemma is p2p file sharing.³ Peer-to-peer technology is a broad term used to describe the architecture of computers in a system. A p2p network is characterized by the content being served not by a single central server, but by equal, or "peer," machines linked across the network to communicate with each other. No one computer contains all of the information that is available to all of the users. Rather, each computer makes information available to every other computer in the p2p network, being both a server and a client.⁴ The architecture of those networks changes rapidly. Whereas systems like Napster relied on centralized indexing systems, maintaining a list of available files on one or more central servers,⁵ systems like Gnutella⁶ or KaZaA have become more

2. The search for a balance in copyright is already inherently articulated in U.S. Const. art. I, § 8, cl. 8: "To promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ."

3. See LAWRENCE LESSIG, *FREE CULTURE* 296 (2004); Organisation for Economic Co-operation and Development (OECD), *Information Technology Outlook 2004: Peer to Peer Networks in OECD Countries 2* (2004), <http://www.oecd.org/dataoecd/55/57/32927686.pdf>; Michael A. Einhorn & Bill Rosenblatt, *Peer-to-Peer Networking and Digital Rights Management: How Market Tolls Can Solve Copyright Problems*, 52 J. COPYRIGHT SOC'Y USA 239, 255 (2005) (discussing the benefits and harms of p2p networks).

4. *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2770 (2005); *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004); Aric Jacover, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2213-18 (2002).

5. See *A&M Recording, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011-13 (9th Cir. 2001);

decentralized. Users install software that enables them to “share” content located on their computers directly with other users. The software connects them to the p2p network and makes any shared files available for search and transfer to any other user currently connected to the same p2p network.⁷ Two different methods of indexing the files available for sharing can be distinguished. The Gnutella software system is a completely decentralized indexing system in which each computer maintains a list of files available on that computer only. The software broadcasts a search request to all the computers on the network and a search of the respective index files is conducted. The collective results are routed back to the requesting computer.⁸ Under the “supernode” model, which was developed by KaZaA BV, a Dutch company, and licensed under the name of “FastTrack” technology, a number of select computers on the network are designated as indexing servers which conduct the search and supply the user with the search results. As long as it meets the technical requirements, any computer on the network can function as a supernode.⁹

Peer-to-peer networks provide architecture for stable, cheap, and global sharing of any digitized information, be it music, movies, software, writings or other data. The end-to-end or peer-to-peer architecture makes it possible for thousands of terabytes to rush through p2p networks every month without anybody having to invest in and provide for a centralized server.¹⁰ The technology features characteristics that prompt great hopes for the advent of the global knowledge community. But it also terrifies copyright owners that stand to lose control over their works, which for the users of these

Jacover, *supra* note 4, at 2214.

6. See Jacover, *supra* note 4, at 2216 (providing a description of the Gnutella p2p architecture).

7. See *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2771 (2005); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 259 F. Supp. 2d 1029, 1032-33 (C.D. Cal. 2003); *Recording Industry Association of America, Inc. v. Verizon Internet*, 351 F.3d 1229, 1231-32 (C.A.D.C. 2003); SVEN FREIHALD, DIE PRIVATE VERVIELFÄLTIGUNG IM DIGITALEN KONTEXT AM BEISPIEL DES FILESHARING 126-142 (2004) (discussing German copyright law).

8. *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2771 (2005).

9. *Id.*

10. See *id.* at 2770; Jeff Howe, *Streaming Media*, *Wired Magazine*, June 2004, at 148-149, available at http://a1112.g.akamai.net/7/1112/492/07312000/www.wired.com/wired/archive/12.06/images/atlas_media.pdf (according to this study on the growth of p2p networks over the last two years, music accounted for 80.4%, video for 16.4 %, images for 1.9%, and software for 1.2% in March 2003—in March 2004, these numbers had changed significantly to 57.4% music files, 31.9% video files, 7.3% images and 3.2% software); see also OECD, *supra* note 3, at 3-8.

networks actually seem to be “free as the air to common use.” The conflict that arose out of this technological development has already been called a “war.”¹¹ It is taking place between copyright owners—especially the music industry, the branch of the entertainment industry that has been most severely struck by the rise of p2p networks¹²—and users and their proponents, who want to retain the benefits of this technology for themselves and for society at large.

This dispute is far from being resolved. Aside from court proceedings regarding the liability of users and mere facilitators of file sharing for copyright infringement, different proposals for future amendments of the respective laws have been made. In particular, several commentators and institutions suggest a solution where non-commercial file sharing in p2p networks would be lawful and the copyright owner would be compensated indirectly through a collective licensing scheme, tax or levy.¹³

This article addresses whether these last mentioned proposals are in accordance with obligations under the Berne Convention (BC),¹⁴ the TRIPS Agreement¹⁵ and the WCT.¹⁶ This question is not only of theoretical relevance; the U.S. has ratified all three treaties. Overall, 157 countries are party to the Berne Convention,¹⁷ 148 to the WTO and thus the TRIPS Agreement,¹⁸ and 50 to the WCT.¹⁹ Given that countries adhere to their obligations under this “supranational copyright law,”²⁰ every proposal that has a chance of being enacted

11. See, e.g., Howe, *supra* note 10; Lessig, *supra* note 3, at 10; Fisher, *supra* note 1, at 82; Daniel J. Gervais, *The Price of Social Norms: Towards a Liability Regime for File-Sharing*, 12 J. INTELL. PROP. L. 39, 40 (2004).

12. While the use of p2p networks has grown, revenues of the U.S. music industry fell 4 percent in 2001, 8 percent in 2002, and 6 percent in 2003. See CBO, *supra* note 1, at 17.

13. See *infra* Part III.B.

14. Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, available at <http://www.wipo.int/clea/docs/en/wo/wo001en.htm>.

15. Agreement on Trade-Related Aspects of Intellectual Property Rights of April 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

16. WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty, adopted in Geneva on December 20, 1996, available at <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>.

17. See Bern Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/index.html> (last visited January 12, 2005).

18. See The WTO, http://www.wto.org/english/thewto_e/thewto_e.htm (last visited January 12, 2005).

19. See WIPO Copyright Treaty, <http://www.wipo.int/treaties/en/documents/pdf/s-wct.pdf> (last visited January 12, 2005).

20. See Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 33 (2005); Jane C. Ginsburg,

has to be tested for compliance with these requirements under international law. The German Ministry of Justice already declined to adopt a new limitation on copyright with regard to non-commercial file sharing, explicitly referring to the three-step test under Berne.²¹ Additionally, the dispute settlement system of the GATT/WTO for the first time makes it possible to enforce rules of an international treaty on intellectual property.²² When one country adopts a trade policy measure or takes some action that one or more fellow WTO members considers a violation of the WTO agreements, including TRIPS,²³ a dispute settlement procedure can be instituted. According to the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Dispute Settlement Body may authorize the imposition of trade sanctions if the target of the complaint does not follow the recommendations of the panel report or the appeals report.²⁴ As of October 2005, the WTO homepage lists 24 dispute settlement procedures relating to TRIPS.²⁵ One of the procedures concerned U.S. copyright law. The WTO Panel held that 17 U.S.C. § 110(5) poses a violation of the obligations

Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-step Test" for Copyright Exceptions, 187 *Revue Internationale du Droit d'Auteur (RIDA)* 3 (2001); but see Pierre Sirinelli, *Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT): Exceptions and Limits to Copyright and Neighbouring Rights* 42 (Dec. 3, 1999), http://www.wipo.int/documents/en/meetings/1999/wct_wppt/pdf/imp99_1.pdf (stating that the three-step test "is far from providing harmonization"). According to the case-law of the European Court of Justice, when called upon to apply national rules with a view to ordering measures for the protection of rights in a field to which the TRIPS Agreement applies and in which the Community has already legislated, the national courts are required under Community law to do so, as far as possible, in the light of the wording and purpose of the relevant provisions of the TRIPS Agreement. See *ECJ, Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik*, C-245/02, 04/11/16, at para. 55.

21. See Bill for a "Second Act on Copyright in the Information Society" of September 27, 2004 33-34 (2004), http://www.bmj.bund.de/files/630f712008607f2bf49cde66e5a84046/760/Referentenentwurf_UrheberR.pdf, 33-34 (German).

22. In a WTO Dispute Settlement Proceeding, the one invoking the restriction to minimum rights under TRIPS bears the burden of proof. See Panel Report, *United States-Section 110(5) of US Copyright Act*, WT/DS160 (June 15, 2000), para. 6.9-16; Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, WT/DS114/13 (March 17, 2000), para. 7.16.

23. See Art. 64 TRIPS.

24. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1226 (1994).

25. See Index of Dispute Issues, http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk137 (last visited October 5, 2005).

of the U.S. under the TRIPS Agreement.²⁶ As a result and as a temporary arrangement between the U.S. and the EC, the U.S. agreed to make a lump-sum payment in the amount of \$3.3 million to a fund to be set up by performing rights societies in the European Communities for the provision of general assistance to their members and the promotion of authors' rights for a three-year period commencing on December 21, 2001.²⁷ Thus, an amendment of national copyright law that is in violation of TRIPS may actually have to be abandoned to avoid trade sanctions by other WTO members.

It is therefore true that international copyright law has to be considered in the discussion about the future of copyright in the digital network environment. If a proposal does not comport with treaty obligations, it would be necessary to either amend respective international rules or to terminate membership, which would in the case of the TRIPS Agreement mean leaving the WTO. Obviously, these alternatives are not likely to become reality. The amendment of an international treaty requires international consensus of all contracting parties.²⁸ Terminating membership in the WTO will not be taken as a serious option in a global economy by any country.

Nevertheless, the discussion about the digital dilemma, especially in the U.S., focuses on the—admittedly central—search for an effective, preferably balanced solution. Models are developed for the future. Current law is not the yardstick. Obligations under international copyright law are merely considered in detail.²⁹ Admittedly, proposals that start from scratch are essential to fuel the discussion and to finally come to an acceptable solution for all players involved. The aim of this article, in contrast, is to contribute to this discussion by adopting a strictly positivistic view. This will help to outline a model of future copyright in the digital online environment that has not yet been clearly articulated, *i.e.*, what I call the *bipolar copyright system*. This system acts on the proposals already on the

26. See Panel Report, *United States-Section 110(5) of US Copyright Act*, *supra* note 22.

27. See Notification of a Mutually Satisfaction Temporary Agreement, *United States-Section 110(5) of the US Copyright Act*, WT/DS160/23 (June 26, 2003), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm.

28. On the difficulties to amend the TRIPS Agreement, see Gervais, *supra* note 20, at 28 ("far from simple politically"); Gervais, *supra* note 11, at 71 ("any proposal to license P2P should take account of applicable international treaties"); Peter Eckersley, *Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?*, 18 HARV. J.L. & TECH. 85, 157 (2004).

29. See *infra* Part IV.

table. However, it additionally claims to be in line with international copyright law and thus actually available for national legislatures.

Part II of this article gives a short overview of how copyright has been applied to p2p file sharing and how different stakeholders and academic commentators reacted to this new technology. Part III shows that many national copyright laws, including U.S. law, have for a long time provided statutory or compulsory licenses with regard to certain uses of copyrighted content. Part III also summarizes proposals pleading for the implementation of a levy or tax system for non-commercial file sharing. Discussion of the pros and cons of this approach reveals that economic analysis will not provide us with an answer to where *exactly* the best level of protection of works in the digital online environment lies. It thus seems reasonable to refer to the existing body of international copyright law in order to ask how far a national legislature may go in establishing limitations to or exceptions from the exclusive rights of the copyright owner, and in subjecting the privileged uses to a levy or tax. For these purposes, part IV contains a detailed interpretation of relevant rules of the BC, TRIPS, and the WCT with regard to the concepts mentioned. Specific attention will be given to the three-step test, as it is a part of all of these conventions, and to the provisions of the WIPO copyright treaties on the legal protection of technological protection measures. This analysis will reveal that all international treaties on copyright are based on the notion that copyright is an exclusive right of the author. Limitations and exceptions are admissible only to a very limited extent. Even if a levy or tax system compensates for the privileged uses, it arguably cuts across the boundaries of the three-step test, unless it is the right holder who decides whether her work should be made available for unrestricted non-commercial use in p2p networks under the levy/tax system. This freedom to choose between technology-based exclusivity in cyberspace on the one hand and participation in a levy/tax system that allows non-commercial file sharing in exchange for an indirect compensation of the right holder on the other hand is the core feature of the *bipolar copyright system*. Part V will discuss this system in further detail. Part VI concludes with an emphasis on what this study tells us about the flexibility of international copyright law in general.

II. Copyright and Peer-to-Peer Networks

The advent of p2p network technology and the ability of users all over the world to exchange digital files intensified the conflict between right holders and users about the future of copyright in

cyberspace. Much is at stake for both sides. Copyright owners fear not being able to establish a market for digital products. Users want to benefit from cheap, worldwide, and unrestricted access to information contained in published works. In this dispute, not even the facts are uncontroversial.³⁰

A. Applying Today's Copyright Law to P2P File Sharing

The legal questions surrounding file sharing are only slowly being cleared up by court decisions in various jurisdictions. Right holders have applied several strategies to pursue their goal of minimizing unauthorized sharing of copyrighted content. Since the abandonment of p2p technology would be the most effective way to fight unauthorized file sharing, copyright owners have often sued providers of p2p file sharing services or suppliers of p2p file sharing software for indirect copyright infringement.

This approach proved successful with regard to centralized networks like Napster.³¹ It initially failed concerning software providers for decentralized systems.³² In *Metro-Goldwyn-Mayer v. Grokster*, however, the Supreme Court held that,

30. It is not undisputed, on an empirical level, whether if at all, and if so, to what extent, file sharing causes declines in sales of music and other copyrighted products. See *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2794 (2005) (Breyer, J., concurring); OECD, *supra* note 3, at 4; Felix Oberholzer & Koleman Strumpf, *The Effect of File Sharing on Record Sales. An Empirical Analysis* 24-25 (March 2004), http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (concluding that file sharing has no statistically significant effect on purchases of the average music album and that file sharing probably increases aggregate welfare due to increased dissemination of music); Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on CD Sales: Cross-Section Evidence*, CESifo Working Paper Series No. 1122 (Jan. 2004), available at <http://ssrn.com/abstract=511763>; Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-Sharing*, 51 CESifo Economic Studies 435, 471-472 (2005), available at <http://ssrn.com/abstract=583484> (surveying the literature on the impact of file sharing and concluding that the evidence to date strongly suggests that file sharing harms the sound recording industry). Moreover, a study on the effects of downloading on welfare as well as expenditure in a subsample of Penn undergraduates argues that downloading reduces the per capita expenditure of the undergraduates (on hit albums released 1999-2003) from \$126 to \$100 but raises per capita consumer welfare by \$70. See Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, NBER Working Paper Series, Working Paper 10874 (Oct. 2004), available at <http://papers.nber.org/papers/W10874>.

31. See *A&M Recording, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

32. See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004); *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003); Jacover, *supra* note 4, at 2227-45; Judica Krikke, *Comment: Dutch Supreme Court, Collecting Society Buma/Stemra v. KazaA B.V.*, 2004 COMPUTER L. REV. INT'L (CRI) 90-91; Freiwald, *supra* note 7, at 157-165; Michael Naphthali, *Unauthorised: Some Thoughts Upon the Doctrine of*

[o]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device³³

Considering the context of the entire record, the Supreme Court found that the required “unlawful objective” of defendants Grokster and StreamCast—providers of software for decentralized p2p networks—was “unmistakable.”³⁴ Therefore, the Court held the defendants liable for the “gigantic” direct infringement of the recipients of the software.³⁵ In reaching this result, the Supreme Court declared that the Ninth Circuit’s judgment in favor of the defendants rested on an erroneous reading of *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Instead of interpreting this case as one involving liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement, the Ninth Circuit interpreted this case as one involving liability on any theory. Where evidence—as in this case—would go beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony’s* staple-article rule would not preclude liability.³⁶ The Court distinguished *Sony*, which dealt with a claim of liability based *solely* on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course, from this case and did not revisit *Sony* further to add a more quantified description of the point of balance between copyright protection and free commerce when liability rests solely on the distribution with knowledge that unlawful use of the product will occur.³⁷ Therefore, the court did *not* decide about whether the mere distribution of software designed for decentralized p2p networks as such is enough to establish indirect copyright infringement. Obviously, the court was divided on that

Authorisation of Copyright Infringement in the Peer-to-Peer Age, 16 Australian Intellectual Property Journal (AIPJ) 5 (2005).

33. MGM Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764, 2767 (2005).

34. *Id.* at 2782.

35. *Id.*

36. *Id.* at 2776-2780.

37. *Id.* at 2778.

matter. Two concurring opinions take up the Sony question: whether Grokster's product is "capable of substantial or commercially significant noninfringing uses." Three judges answered this question in the affirmative, but three other judges disagreed.³⁸ Ultimately, the *Grokster* decision does not clearly define the relationship between copyright and decentralized p2p networks. In any event, it could have done so only as regards U.S. copyright law. Apparently, no jurisdiction has yet taken a final position on this matter. Thinking about alternatives to the current legal situation in light of the boundaries of international copyright thus remains a current and important topic—more than ever after *Grokster*.

The limited success that litigants have had suing distributors of p2p file sharing software has shifted the focus of the debate to finding ways for copyright owners to receive compensation from those who actually use p2p networks.³⁹ Only six days after the decision of the Court of Appeals for the Ninth Circuit in *Metro-Goldwyn-Mayer v. Grokster*, the Department of Justice announced the first criminal enforcement action against "an extensive peer-to-peer network suspected of enabling users to traffic illegally in music, films, software and published works."⁴⁰ The ones who actually use works are the uploaders and downloaders of copyrighted content. It seems to be settled that according to Art. 8 WIPO Copyright Treaty (WCT), making works available on the Internet ("uploading") infringes copyright if not permitted by the respective right holder.⁴¹ It is less

38. Three judges found that "fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time" and that "the District Court should not have ruled dispositively on the contributory infringement charge by granting summary judgment to Grokster and StreamCast." *Id.* at 2786 (Ginsburg, J., concurring). Three other judges were instead of the opinion that Grokster and StreamCast pass the Sony test because their products were capable of substantial or commercially significant noninfringing uses. *Id.* at 2788-89 (Breyer, J., concurring). See also Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1379 *et seq.* (2004) (discussing the general drawbacks of suing facilitators of copyright infringement and thereby banning certain technologies).

39. Lemley & Reese, *supra* note 38, at 1365; see also *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2794-95 (2005) (Breyer, J., concurring); Justin Hughes, *On the Logic of Suing One's Customers and the Dilemma of Infringement-Based Business Models*, 22 CARDOZO ARTS & ENT. L.J. 725 (2005).

40. See *Department of Justice Brings First Criminal Enforcement Action Against Peer-to-Peer Copyright Piracy*, 21 THE COMPUTER AND INTERNET LAWYER 33 (2004).

41. On U.S. law in that respect see *A&M Recording, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.COM, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

obvious whether the same is true with respect to downloading works as an act of reproduction.⁴² A Canadian court held that downloading copyrighted content for private use does not amount to infringement under Canadian law. Moreover, because at the time of the decision Canada had not implemented the WCT, the making available right did not form part of the Canadian copyright law.⁴³ Under current German copyright law, it has not yet been established whether each and every download of a work from a p2p network is unlawful. Section 53(1) of the German Copyright Act limits the exclusive right of reproduction with regard to digital private copies. However, such a private copy must not be made from an “obviously illegally made” original copy. The problem with this additional requirement for a privileged private copy is that works available for download in p2p networks may well be “made” legally (because they are an admissible private copy made by the uploader). In order to clear up this uncertainty, the German Ministry of Justice proposed amending Sec. 53(1) of the German Copyright Act to read that a digital private copy is illegal if made from an original that has been “obviously illegally made *or publicly made available*.”⁴⁴ Under this provision, downloading works from p2p networks would always amount to copyright infringement because every upload is obviously illegal.

In order to pursue up- and downloaders, right holders need to know the identity of the alleged infringer in order to enforce their exclusive rights. The obligation of Internet Service Providers (ISP) to

42. See *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2782 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); *Sony Music Entm't Inc. v. Does 1-40*, 71 USPQ 2d 1661, 1668 (S.D. N.Y. 2004) (holding that downloading and distribution of copyrighted music via p2p networks constitutes copyright infringement). On the nature of the infringement involved in transferring files over p2p networks under U.S. law, see R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 258-59 (2001). See also Lemley & Reese, *supra* note 38, at 1413 (“Making a copyrighted work available for any other person to copy is much more likely to constitute copyright infringement than is any individual instance of downloading, where the downloader’s act of reproduction might well be excused as fair use or by some other defense.”); Ulrich Bäumer et al., *Napster, Gnutella, Kazaa and Beyond: Can the Music Industry Win the Battle against File-Sharing Networks?*, 2004 COMPUTER L. REV. INT’L (CRI) 129; CBO, *supra* note 1, at 15.

43. *BMG Canada Inc. v. John Doe*, 2004 FC 488, at 14-16 (Federal Court 2004). No such findings were made by the Court of Appeal. See *BMG Canada Inc. v. John Doe*, 2005 FCA 193, at para. 46-54 (Federal Court of Appeal 2005). A bill of the Minister of Canadian Heritage, No. C-60 for an “Act to amend the Copyright Act” of June 20, 2005, would implement the obligations under the WCT and the WPPT in Canadian copyright law, including the right of making available, http://www.parl.gc.ca/PDF/38/1/parlbus/chambus/house/bills/government/C-60_1.pdf.

44. See Bill for a “Second Act on Copyright in the Information Society”, *supra* note 21.

reveal the identity of users of the network as alleged copyright infringers is the subject of intensive litigation in several jurisdictions.⁴⁵ After failing to persuade courts that the DMCA established a respective obligation of ISPs,⁴⁶ the RIAA filed John Doe lawsuits and after that sought subpoenas against the ISPs controlling those IP addresses.⁴⁷

B. Patterns of Reaction to P2P File Sharing

In light of these developments, one commentator rightly describes the current situation as a “kind of logjam.”⁴⁸ On the one hand, p2p networks are still intensely used and technologically improved for the sharing of digitized content, which is partially copyrighted. On the other hand, right holders are trying everything to bring an end to this allegedly harmful institution. This is not to say that no proposals have been made regarding how to resolve this conflict. On the contrary, postulations cover the whole spectrum, from “abolish copyright” to “abolish p2p networks.”

Two approaches would not require legislative actions. First, a “wait-and-see approach” argues that the market will bring an efficient

45. For cases arising in the U.S., see *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet*, 351 F.3d 1229, 1231-32 (C.A.D.C. 2003), *cert. denied*, 125 S. Ct. 309 (2004), and *cert. denied sub nom. Verizon Internet Services, Inc. v. Recording Indus. Ass’n of Am., Inc.*, 125 S. Ct. 347 (2004) (holding that there is no obligation of ISPs to identify alleged infringers under the DMCA); *Recording Indus. Ass’n of Am. v. Univ. of N. C. at Chapel Hill*, 74 USPQ 2d 1661 (M.N.C. 2005). For Canadian precedent, see *BMG Canada Inc. v. John Doe*, 2005 FCA 193 (Federal Court of Appeal 2005). In Great Britain, the High Court in London has granted a court order forcing ISPs to reveal the names of illegal music swappers. See Arthur Rogers, *British Court Orders ISPs to Reveal Identities of Several Dozen Alleged Copyright Infringers*, 9 ELECTRONIC COM. & L. REP. (BNA) 856 (2004). For cases arising in Germany, see *Hamburg District Court, Computer und Recht* (CR) 136 (2005); *Cologne District Court, Zeitschrift für Urheber- und Medienrecht* (ZUM) 236 (2005) (holding that there is an obligation of ISPs under German copyright law to identify alleged large scale users of p2p networks); *contra Frankfurt/Main Court of Appeals, Kommunikation und Recht* (K&R) 138 (2005) (denying an obligation of ISPs to disclose the identity of users of p2p networks).

46. *Verizon*, 351 F.3d at 1231-32, *cert. denied*, S. Ct. Cases 03-1579/03-1722; *Recording Industry Association of America v. Charter Communications Inc.*, 73 USPQ 2d 1339 (8th Cir. 2005).

47. See *Sony*, 71 USPQ at 1666-1670 (holding that identities of alleged infringers of copyright in p2p networks are subject to disclosure through subpoena served on nonparty Internet service provider by plaintiff record companies); *Twentieth Century Fox Film Corp. v. Does 1-12*, No. C 04-04862 WHA, 2004 WL 3241669 (N.D. Cal. Nov. 1, 2004) (holding that plaintiffs must sue each alleged file sharer separately absent a showing of relationship); Lemley & Reese, *supra* note 38, at 1414 n.279.

48. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-peer File Sharing*, 17 HARV. J.L. & TECH. 1, 19-22 (2003), available at <http://www.utexas.edu/law/faculty/nnetanel>.

result, especially in the form of differential pricing, even if the legislature refrains from stepping in.⁴⁹ Second, several commentators and the Electronic Frontier Foundation (EFF) plead for *voluntary* collective licensing of exclusive rights. According to the EFF's proposal, the music industry would form a collecting society, which would then offer file-sharing users the opportunity to "get legit" by making a reasonable regular payment (the EFF specifies \$5 per month). So long as they pay, users would be free to download whatever they like, using whatever software works best for them.⁵⁰

The problem with both approaches is that they have not yet become reality. Copyright owners have established more and more commercial online ventures that allow users to legally stream and download works after paying for these uses individually. But neither these lawful alternatives to file sharing nor civil and criminal actions have lead to a decrease of traffic in p2p networks.⁵¹ Thus, uncontrolled use of copyrighted works takes place without generating revenues for artists and right holders in general. The market has not solved the problem. Whether it ever will is uncertain. Interestingly enough, the failure to stop unauthorized file sharing has not put enough pressure on copyright owners to agree on a voluntary collecting and licensing scheme as proposed by the EFF and others. Still, right holders bet on exclusivity in cyberspace.⁵²

Not surprisingly, therefore, both parties have turned their attention to the legislature.⁵³ Several proposals have been put forward, differing substantially with respect to the aim and the practical solution suggested. At the extremes, "anti-copyright"

49. See CBO, *supra* note 1, at 28-33.

50. See Electronic Frontier Foundation (EFF), *A Better Way Forward: Voluntary Collective Licensing of Music*, http://www.eff.org/share/collective_lic_wp.pdf (2004); Daniel J. Gervais, *Copyright, Money & the Internet*, paper presented at the "Copyright Office Comes to California" Conference San Francisco, March 3, 2004, 22-23 (2004) <http://www.commonlaw.uottawa.ca/faculty/prof/dgervais/CopyrightMoneyAndTheInternet.pdf> (proposing a voluntary licensing system for file sharing, especially in light of international copyright treaties); Gervais, *supra* note 11, at 71; Fisher, *supra* note 1, at 252-258 (describing a voluntary licensing regime to be implemented if the government were not willing to step in to impose the tax-based system that Fisher prefers).

51. See Howe, *supra* note 10.

52. This reluctance of copyright owners is telling with regard to the acceptance of proposals to establish a non-voluntary licensing regime.

53. See also *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1166-67 (9th Cir. 2004) (holding that to fix the flow of Internet innovation is a question to be resolved by Congress and not by the courts); *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 1999) (pointing to Congress as the right addressee for a re-examination of copyright principles in cyberspace).

models plead for a complete or nearly complete abandonment of copyright as an exclusive right in the digital network environment because exclusive rights in cyberspace would do more harm than good.⁵⁴ The “beyond copyright model” instead proposes a “digital lock up” to stop infringing uses on the net.⁵⁵ Looking for a middle ground that acknowledges the need of right holders to enforce their exclusive rights effectively against illegal uses in p2p networks without banning these technologies altogether, Mark A. Lemley and R. Anthony Reese have outlined a streamlined, and largely online administrative proceeding with the Copyright Office that gives copyright owners a quick, low-cost alternative to enforcing their rights against individual large-scale uploaders on p2p networks.⁵⁶

Also somewhere in the middle of this spectrum of control are proposals for future copyright models regarding p2p networks that would replace exclusive rights in the copyrightable subject matter with mandatory remuneration rights. The fundamental notion of these concepts is that efficient control of the use of p2p network technology is not possible without banning the technology altogether or without severe drawbacks with regard to monitoring and privacy. To avoid these disadvantages, non-commercial file sharing would be legalized under a limitation of or exception from copyright. Right holders would be compensated by a levy or tax on products and services used for file sharing. The congeniality of this solution rests upon the fact that it preserves the benefits of p2p network technologies while at the same time guaranteeing an author's compensation. In Lawrence Lessig's words, it is “compensation without control.”⁵⁷

54. See, e.g., Shih Ray Ku, *supra* note 1; Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785 (2004).

55. For an overview on different approaches, see Lionel S. Sobel, *Symposium: The Law and Economics of Digital Rights Management: DRM as an Enabler of Business Models: ISPs as Digital Retailers*, 18 BERKELEY TECH. L.J. 667, 670 *et seq.* (2003); Netanel, *supra* note 48, at 7-22, 74-83; Jacover, *supra* note 4, at 2209-11; Eckersley, *supra* note 28, at 86 (“information anarchism and information feudalism”). On filters that stop infringing uses in p2p networks see Lemley & Reese, *supra* note 38, at 1385.

56. Lemley & Reese, *supra* note 38, at 1354 *et seq.* For a dispute resolution mechanism through a form of non-binding arbitration which could rapidly resolve copyright infringement cases on the Internet at low litigation expense, see also Alan R. Kabat, *Proposal for a Worldwide Internet Collecting Society: Mark Twain and Samuel Johnson Licenses*, 45 J. COPYRIGHT SOC'Y USA 329, 341 (1998).

57. LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 201 (Random House 2001); Shih Ray Ku, *supra* note 1, at 263.

III. Non-Voluntary Licenses Today and Tomorrow

A. Non-Voluntary Licenses in Current Copyright Law

From the outset, national and international copyright laws have always acknowledged the need to balance the exclusive rights of authors in their works with the public interest in the dissemination of knowledge.⁵⁸ One way international copyright law has accomplished this goal has been to recognize the freedom of contracting parties to provide for limitations from, or exceptions to,⁵⁹ copyright. As regards quotations, Art. 10(1) BC even imposes a mandatory requirement to which each union member must give effect.⁶⁰

Many limitations/exceptions in national copyright laws, like the right to make quotations, are remuneration-free. This is especially true under U.S. copyright law, where fair use and the limitations regulated in more detail in the following sections are not subject to a levy.⁶¹ The EC Copyright Directive 2001/29/EC (hereinafter Copyright Directive) refers to a right to remuneration only with regard to private copying.⁶² In some European jurisdictions, notably Germany, other limitations addressing the public interest in free speech and the dissemination of knowledge are combined with a right to remuneration.⁶³ Of particular interest regarding the proposals on

58. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986* 477 (Kluwer Law International 1987).

59. Art. 13 TRIPS, Art. 10 WCT, and Art. 5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, OJ L 167/10 of June 22, 2001 [hereinafter Copyright Directive] name both alternatives.

60. Ricketson, *supra* note 58, at 489.

61. See also 17 U.S.C. §§ 107, 108, 110, 117, 120, 121 (2000 & Supp. II 2002).

62. The Copyright Directive specifically provides the following:

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, *provided that the rightholders receive fair compensation*;

(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.

Copyright Directive Art. 5(2)(a), (b), *supra* note 59.

63. LUCIE M.C.R. GUIBAULT, *COPYRIGHT LIMITATIONS AND CONTRACTS: AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT* 28 *et seq.*, 69 *et seq.* (Kluwer Law International 2002); MARTIN SENFTLEBEN,

non-commercial file sharing are limitations/exceptions which permit private copying, but combine this restriction with a right to remuneration, *i.e.*, a levy on devices used for copying. This approach goes back to the development and widespread use of technologies for reproductions in the private sphere (VCRs, cassette recorders, etc.). Right holders were not able to enforce their exclusive rights against private copying. In order to compensate for the resulting losses, they were granted a right to remuneration under a levy system administered by collecting societies. Such a right to remuneration was first established in the German Copyright Act of 1965 and was later adopted in other European countries, as well as, for example, in Canada.⁶⁴ It is—to a much more limited extent—also provided under U.S. copyright law in the form of the Audio Home Recording Act (AHRA) of 1992.⁶⁵

COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 22-34 (Kluwer Law International 2004); CHRISTOPHE GEIGER, DROIT D'AUTEUR ET DROIT DU PUBLIC À L'INFORMATION. APPROCHE DE DROIT COMPARÉ para. 213-305 (R.D.T.I. 2004) (France). For example, the limitation for disabled people according to Sec. 45a German CA is combined with an obligation to pay an equitable remuneration that is obligatorily administered by a collecting society, whereas the quotation right (Sec. 51 German CA) is not subject to a remuneration right.

64. See Copyright Directive, *supra* note 59, at Art. 5(2)(a), (b); Sec. 53-54h German CA. For an overview, see Adolf Dietz in: Paul Edward Geller ed., *International Copyright Law & Practice*, Germany, § 8(2) (2003). On the historical development, see Jürgen Weimann, *Private Home Taping under Sec. 53(5) of the German Copyright Act of 1965*, 30 J. COPYRIGHT SOC'Y USA 153 (1982); Reinhold Kreile, *Collection and Distribution of the Statutory Remuneration for Private Copying with Respect to Recorders and Blank Cassettes in Germany*, 23 INT'L REV. OF INDUS. PROP. AND COPYRIGHT L. (IIC) 449 (1992); Adolf Dietz, *Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe*, 49 J. COPYRIGHT SOC'Y USA 897 (2002); Katerina Gaita & Andrew F. Christie, *Principle or Compromise? Understanding the Original Thinking behind Statutory License and Levy Schemes for Private Copying*, 8 INTELL. PROP. Q. 422 (2004). See also P. Bernt Hugenholtz, Lucie M.C.R. Guibault & Sjoerd van Geffen, *The Future of Levies in a Digital Environment* 13-31 (2003), <http://www.ivir.nl/publications/other/DRM%20Levies%20Final%20Report.pdf> (regarding the adoption of this approach in other European countries); Canadian Private Copying Collective v. Canadian Storage Media Alliance, 2004 FCA 424 (Federal Court of Appeal, 2004); Gervais, *supra* note 20; Gervais, *supra* note 50 (regarding Canadian copyright law).

65. Pub. L. No. 102-563, 106 Stat. 4237; MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW § 8.30 (1999); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8B.01[C] (2002); Fisher, *supra* note 1, at 83-87. The AHRA covers only digital audio recording devices (DCC, DAT). It is not applicable to computers that facilitate private copying in the digital network environment. Therefore, the AHRA is irrelevant regarding p2p file sharing. See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th. Cir. 1999); A&M Records vs. Napster, Inc., 239 F.3d 1004, 1024-25 (9th. Cir. 2001) (holding that the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives); Nimmer at § 8B.02[A][1][a][ii]; Netanel, *supra* note 48, at 33 (provisions of the AHRA have remained a

These limitations/exceptions can be distinguished from provisions establishing a right to remuneration instead of an exclusive right in order not to subject secondary uses of copyrighted material by certain industries (especially in the case of retransmissions) to an exclusive right which could possibly be exercised in an abusive manner by the right holder.⁶⁶ On a more general level, these provisions are also meant to avoid negative consequences of exclusive rights in works like the aforementioned limitations/exceptions in favor of the general public interest. However, they tend to be more focused on intra-industry related issues.

The terminology and classification of those limitations/exceptions and the accompanying rights to remuneration differ substantially in national copyright laws.⁶⁷ German copyright law speaks of statutory remuneration rights (*gesetzliche Vergütungsansprüche*) or statutory licenses with regard to private copying as opposed to compulsory licenses, *i.e.*, where the right holder is obliged to grant a license according to a specific procedure.⁶⁸ In contrast, U.S. copyright law and literature use the terms compulsory license and statutory license synonymously.⁶⁹ Since all alternatives reduce the right holder's proprietary control to a right to remuneration,⁷⁰ this article introduces *non-voluntary licenses* as a generic term for both statutory licenses and compulsory licenses.⁷¹

dead letter).

66. See Art. 8-12 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15 of October 6, 1993. U.S. copyright law also provides a number of non-voluntary licenses of this kind. See 17 U.S.C. §§ 111(d), 112, 114(d), (f), 115, 118, 119, 122 (2000 & Supp. II 2002). For an overview, see Leaffer, *supra* note 65, at § 8.2, 8.3; Nimmer, *supra* note 65, at § 8.18; Ricketson, *supra* note 58, at 513.

67. Sirinelli, *supra* note 20, at 2.

68. See the terminology used in Art. 15 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; Guibault, *supra* note 63, at 20-27; but see Sam Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights, Ninth Session, Geneva, June 23 to 27, 2003, WIPO Document SCCR/9/7 of April 5, 2003 4 (2003), http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf, 4 (2003).

69. See *e.g.* PAUL GOLDSTEIN, COPYRIGHT § 5.8.6.2 (2d ed. 2002).

70. JÖRG REINBOTHE & SILKE VON LEWINSKI, THE WIPO-TREATIES Art. 10 WCT no. 25 (2002).

71. See MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET. THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 5.04, 5.123 (Oxford University Press 2002); Sirinelli, *supra* note 20, at 3.

The remuneration to be paid will be called a levy or tax, respectively. All in all, the approach is referred to as the *levy/tax system*.

Independent of these rather sophisticated differentiations, one can certainly conclude that the idea not to grant exclusive rights but to limit these rights to a mere right to indirect remuneration is nothing new to many national copyright laws. The factual situations to which these concepts apply vary widely. However, the fundamental rationale is always the same. Either exclusive rights are practically not enforceable or their exercise would have too many negative side effects. To extend these approaches to cyberspace would thus not be anything completely new.

B. Proposals Regarding P2P File Sharing

Whereas non-voluntary licenses have thus for a long time been one important instrument to balance the private interest of the right holder with the public interest in the dissemination of knowledge, a non-voluntary license covering p2p file sharing does not yet exist in any national copyright law.⁷² However, several commentators advocate models that permit non-commercial file sharing in exchange for a levy or tax that is meant to compensate the losses incurred by the right holder.

Without going into details, German and Swiss commentators state that copyright in the digital network environment will at least partially have to be replaced or supplemented by levies because exclusive rights would either not be enforceable or their exercise would constrain the free flow of information on the Internet.⁷³ In his French dissertation, Christophe Geiger discusses several solutions addressing the fact that copyright as it is today does not meet the needs of a functioning information society. Among those, the author lists compulsory licenses, especially for *sui generis* rights in databases,⁷⁴ and mandatory collective administration of exclusive

72. Netanel, *supra* note 48, at 32.

73. See PHILIPP WITTGENSTEIN, DIE DIGITALE AGENDA DER WIPO-VERTRÄGE 162 (2000) (stating that copyright on the Internet should be transformed from an exclusive right to a mere remuneration right); Artur-Axel Wandtke, *Copyright und virtueller Markt in der Informationsgesellschaft*, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1, 7 (2002) (arguing that the future protection of authors will probably amount to mere remuneration rights); Freiwald, *supra* note 7, at 187-189.

74. Geiger, *supra* note 63, at para. 371-80. See also Christophe Geiger, *Right to Copy v. Three-Step Test: The Future of the Private Copy Exception in the Digital Environment*, 2005 COMPUTER L. REV. INT'L (CRi) 7, 10 (stating that it would be preferable to admit private copying as an enforceable right against technical devices and to solve the problem by a working system of equitable remuneration).

rights, where collecting societies have to license certain uses on a non-discriminating, fair basis,⁷⁵ a model that ultimately is very similar to a statutory, non-voluntary license.⁷⁶

Interestingly, a richer set of proposals for non-voluntary licenses applied to p2p file sharing can be found in recent U.S. literature.⁷⁷ Glynn S. Lunney argues that a levy or limited tax on copying technology and storage media for private copying is “inescapable,” taking into account the dangers of an “encryption-based approach.”⁷⁸ Raymond Shih Ray Ku is very much in line with this reasoning in proposing a “Digital Recording Act” as a second-best solution if the abolishment of copyright would hamper the incentive to be creative. This Act would allow file sharing, but would introduce statutory levies on subscriptions for Internet services and on the sales of computer, audio, and video equipment. In order to

75. Geiger, *supra* note 63, at para. 381-84; Guibault, *supra* note 63, at 26-27. Since these solutions and new statutory limitations/exceptions do not exist, Geiger proposes limiting exclusive rights having recourse to fundamental rights (external limitations). See Geiger, *supra* note 63, at para. 441-89.

76. See Guibault, *supra* note 63, at 26-27. On mandatory collective administration of exclusive rights without the obligation of the collecting society to license certain uses, see Silke von Lewinski, *Mandatory Collective Administration of Exclusive Rights—A Case Study on Its Compatibility with International and EC Copyright Law*, UNESCO e.Copyright Bulletin, No. 1 2004, available at http://portal.unesco.org/culture/en/ev.php-URL_ID=19552&URL_DO=DO_TOPIC&URL_SECTION=201.html.

77. See also Jim Griffin, *At Impasse: Technology, Popular Demand, and Today's Copyright Regime* (Apr. 2001), http://www.62chevy.com/at_impasse.htm; Bennett Lincoff, *A Full, Fair and Feasible Solution to the Dilemma of Online Music Licensing* (Nov. 2002), <http://www.quicktopic.com/boing/D/uhAMNwVb8yfk.html>; Philip S. Corwin & Lawrence M. Hadley, *P2P: The Path to Prosperity*, 24 LOY. L.A. ENT. L. REV. 649, 669 (2004); Eckersley, *supra* note 28, at 92 (“virtual market reward/remuneration system”). Lionel Sobel’s “Digital Retailers” model (Sobel, *supra* note 55, at 667, 673 *et seq.*) should not be listed among the proponents of a non-voluntary license for non-commercial file sharing. See Lemley & Reese, *supra* note 38, at 1410 (2004) (stating that Sobel’s model is not a levy at all, because it depends on identifying and collecting from infringers). Its main characteristics are that users are—under a statutory license—free to download and stream copyrighted content. However, copyright holders have a right to digitally identify each work, its owner, and the wholesale royalty price to be paid by ISPs for its transmission to users. As content identified in that fashion (by way of fingerprinting or watermarking) passes through ISPs’ routers to their users, ISPs log those transmissions and bill users’ accounts monthly for the content they receive. Sobel’s proposition differs from the two aforementioned models in that it does not deprive copyright owners of the ability to determine the royalty value of their works independently from an agency. Moreover, users have to pay individually according to the number of downloads or streams. No tax or levy is imposed on services or products related to file sharing. Basically, the idea is that ISPs act as a paying agent for the right holders. Instead of conditioning uses with DRMs, any and every use is monitored and billed.

78. Glynn S. Lunney, *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 910-918 (2001).

measure the extent of downloads and other uses of digital works on the Internet, these activities would be technologically tracked and monitored.⁷⁹ Speaking in favor of exclusive rights in works as a means to ensure adequate compensation for artists and right holders, Aric Jacover pleads for a similar levy or tax system as a second-best solution if the strategy of “aggressively employing traditional copyright policies in the Internet distribution market” would not ensure compensation for the use of works.⁸⁰ Even these few examples show that a levy/tax solution forms a compromise between ever-expanding exclusivity and abandonment of copyright. Advocates of both extreme approaches refer to levies as the second-best solution.

Others plead for a levy/tax system as regards p2p file sharing not only as the second-best, but as the primary solution. Among these ranks Neil Netanel with his proposal for a “Noncommercial Use Levy.”⁸¹ His model permits—as a right protected by law that cannot be waived contractually—noncommercial copying, online distribution in p2p networks (download), streaming, and adaptation of published copyrighted works (except software), provided that the derivative creator clearly identifies the underlying work and indicates that it has been modified, in return for a levy which is—provided that negotiations have failed—set by a Copyright Office Tribunal at a “fair return/fair income” rate (some four percent of the retail price of the goods/services). The levy has to be paid by providers of products and services whose value is enhanced by file swapping (Internet access, p2p software and services, computer hardware, consumer electronic devices such as CD writers, MP3 players, digital video recorders and storage media such as blank CDs). The allocation of the collected money is made in accordance with the actual use of the content as measured by technology that tracks and monitors the use. Apparently, Netanel does not concede to copyright holders the right to withdraw their works from the levy system and to opt for exclusive exploitation on the basis of digital rights management instead.⁸²

79. Shih Ray Ku, *supra* note 1, at 311-15; Raymond Shih Ray Ku, *Symposium: The Law and Economics of Digital Rights Management: Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539, 566 n.160 (2003).

80. Jacover, *supra* note 4, at 2250-54 (referencing Kabat, *supra* note 56, at 336-37, who proposed a Worldwide Internet Collecting Society (WICS) which—contrary to the proposals discussed in this article—was meant to administer the exclusive rights of authors in cyberspace).

81. Netanel, *supra* note 48, at 4, 35-59.

82. See *infra* Part IV.B.2 (discussing the negative consequences regarding the compliance of the proposal with international copyright law).

In a proposal that bears much resemblance to Netanel's "Noncommercial Use Levy," William Fisher outlines an administrative compensation system,⁸³ even providing detailed figures on the amount of taxes that would be needed to compensate the losses expected to result from the reduction of exclusive rights.⁸⁴ Fisher sketches his model as follows:

The owner of the copyright in an audio or video recording who wished to be compensated when it was used by others would register it with the Copyright Office and would receive, in return, a unique file name, which then would be used to track its distribution, consumption, and modification. The government would raise the money necessary to compensate copyright owners through a tax—most likely, a tax on devices and services that consumers use to gain access to digital entertainment. Using techniques pioneered by television rating services and performing rights organizations, a government agency would estimate the frequency with which each song and film was listened to or watched. The tax revenues would then be distributed to copyright owners in proportion to the rates with which their registered works were being consumed. Once this alternative regime were in place, copyright law would be reformed to eliminate most of the current prohibitions on unauthorized reproduction and use of published recorded music and films.⁸⁵

Fisher allows right holders a hybrid marketing strategy, *i.e.*, to sell copy-protected CDs while simultaneously distributing unencrypted versions of the song, receiving shares of the tax for these uses.⁸⁶ Copyright owners would also be free to implement DRM without registering their work for the tax system.⁸⁷ The statutory default, however, would be a limitation for non-commercial file sharing. It would also apply to works not registered.⁸⁸

83. Fisher, *supra* note 1, at 199-251.

84. Fisher, *supra* note 1, at 214 (\$2.389 billion would have to be raised for copyright owners in movies, musical works and sound recordings).

85. *Id.* at 9.

86. *Id.* at 248.

87. *Id.* See also *infra* Part IV.B.2, V.B.3 (discussing the potential of this solution to comply with international copyright law treaties).

88. See Fisher, *supra* note 1, at 204 (stating that if a work was not registered, the use would be lawful, but uncompensated); *id.* at 247 ("[I]f a copyright owner opted out of the system entirely, releasing only an encrypted version of his or her recording . . ."). The relationship between Fisher's alternative compensation system and exclusive exploitation

In “The Future of Ideas,” Lawrence Lessig argued that file sharing should be empowered by recognizing a similar system of compulsory licenses as in the case of cable retransmission, the fee being set by a policy maker striking the right balance.⁸⁹ In his 2004 book “Free Culture,” he still agrees with Fisher’s proposal, but he also stresses that the current p2p network technology might become irrelevant when faster and easier Internet access will empower users to switch from downloading to streaming content from a commercial service to which they subscribe. Due to this possible technological development, Fisher’s system would only serve for the interim to the extent that actual harm is demonstrated.⁹⁰

Jessica Litman differentiates between “sharing” and “hoarding” as the two possible ways to exploit works on the Internet.⁹¹ By that, she means that right holders can choose between letting their works be shared in p2p networks in exchange for a blanket fee or levy/tax disbursed primarily to the musicians and composers, and hoarding their works in exclusively exploited online ventures, protected by DRM. Sharing would be the legal default rule.⁹² However, right holders would be able to opt out of the levy system. To this end, they would have to make their work available in a certain DRM format capable of conveying copyright management information, as defined in 17 U.S.C. § 1202, that incorporates and facilitates digital rights management.⁹³ If they had already released their works in other formats, they still could—after a 24-month grace period before any withdrawal would take effect—withdraw it from the levy/tax system. In order to do so, however, they would have to recall copies of the work released in other formats, and offer any consumers who own

is not entirely clear. Apparently, to use DRM instead of registering the work is to be an option only for new releases and only at the time of first publication. Moreover, it is doubtful whether the right holder who implemented technological measures would be entitled to enforce her exclusive rights against the sharing of copies made by circumventing the technological protection measure. Fisher sketches an opt-out mechanism only as regards the proposed limitation of the exclusive right to prepare derivative works. *See id.* at 240-42, 246.

89. Lessig, *supra* note 57, at 254-55.

90. Lessig, *supra* note 3, at 298, 301. *See also* PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY. FROM GUTENBERG TO THE CELESTIAL JUKEBOX 202-03 (2d ed. 2003).

91. Jessica D. Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 39-50 (2004).

92. *Id.* at 41. *See also infra* Part V.B.2.b (discussing the consequences of this solution for the compliance with international copyright law).

93. Litman, *supra* note 91, at 46-48.

authorized, commercial copies in a non-DRM format the opportunity to exchange those copies for DRM copies at no charge.⁹⁴

Summing up, these concepts take the same starting point: “compensation without control” is considered to be the best way to reap the fruits of the digital network technologies for authors and the general public alike. Nevertheless, important differences can be observed. For example, not all models afford the copyright owner the right to withhold her work from the levy/tax system and opt for exclusivity in cyberspace instead. Even those that do so, including Jessica Litman and William Fisher, advocate “sharing” as the legal default. As will be shown in the following sections of this article, these differences are important when addressing the question of compliance with international copyright law. It should finally be noted that the mentioned proposals are already influencing current political debates about copyright and file sharing. Whereas content holders propose the application of software filters that check files on the fly and order the user’s computer to terminate a download if the file’s “fingerprint” matches that of a restricted song contained in an online database, providers of p2p network software and services advocate a collective licensing regime similar to that currently applied to broadcast radio and webcasting under U.S. copyright law.⁹⁵

C. Pros and Cons of Non-Voluntary Licenses and Levies

It is beyond the scope of this article to discuss the economic and social assets and drawbacks of non-voluntary licenses in the field of copyright law.⁹⁶ Whether and to what extent—speaking in economic terms—liability rules should replace property rules with regard to intangible goods such as copyrightable works has been discussed for some time and is to a large extent dependent on the aim that the respective commentator wants to achieve with copyright protection in general.⁹⁷

94. *Id.* at 48.

95. See Michael Warnecke, *P2P United Pushes Collective Licenses While RIAA Sees Filters as Better Solution*, 9 ELECTRONIC COM. & L. REP. (BNA) 204, 204-05 (2004); Netanel, *supra* note 48, at 35-36. In the current discussion about the next amendment of the German Copyright Act, a proposal by two private organizations entitled *Kompensation ohne Kontrolle* (on file with the author) draws explicitly on Lessig’s “compensation without control.”

96. See Sobel, *supra* note 55, at 667, 687-88; Eckersley, *supra* note 28, at 116-52.

97. See Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NATIONAL BUREAU FOR ECONOMIC RESEARCH AND THE COMMITTEE ON ECONOMIC GROWTH OF THE SOCIAL SCIENCE RESEARCH COUNCIL, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY, ECONOMIC AND SOCIAL FACTORS, 602, 623

The advantages of non-voluntary licenses are often summarized as acknowledging the public-good character of a work that should be disseminated to the greatest extent possible,⁹⁸ but at the same time providing revenue for authors, which might be even higher for single creators than under a system where an intermediary governs the exploitation of the work on the basis of exclusive rights. Transaction and enforcement costs are reduced. Moreover, the structure of p2p networks makes it very difficult for copyright owners to exercise meaningful control over their works once a single copy is available on the network. Therefore, alternative, indirect compensation methods are particularly reasonable.⁹⁹ Compared to Lemley and Reese's proposal for easier enforcement mechanisms to efficiently deter keystone uploaders, a non-voluntary license system would not diminish the available content on the network.¹⁰⁰

Several objections have been made to liability rules in the context of intellectual property.¹⁰¹ The primary argument is that liability rules are generally only the second-best solution compared to individual licensing. This "crude and rough justice measure" suffers from severe practical problems, especially in determining a "fair" compensation. The administration of the system incurs high costs. Under a broad levy regime, large numbers of consumers cross-subsidise a relatively limited group of private copiers, whereas right holders become totally dependent on remuneration administered by collecting societies. In addition, it negatively affects the (increasingly 'digital') economy by distorting emerging markets that provide for price differentiation and thus for an efficient property regime.¹⁰² Finally, reducing exclusive rights to remuneration rights compromises

(1962); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

98. See Lemley & Reese, *supra* note 38, at 1381 (discussing the efficiency of p2p networks in disseminating content).

99. Lunney, *supra* note 78, at 910-18; Lessig, *supra* note 57, at 204-05; Sobel, *supra* note 55, at 687; Shih Ray Ku, *supra* note 1, at 314; Netanel, *supra* note 48, at 6, 67; Fisher, *supra* note 1, 236-38; Litman, *supra* note 91, at 30-50.

100. Lemley & Reese, *supra* note 38, at 1408 n.254.

101. See e.g. Hugenholtz et al., *supra* note 64, at 41; Goldstein, *supra* note 90, at 187-216; CBO, *supra* note 1, at 34; Michael A. Einhorn, *Digitization and Its Discontents: Digital Rights Management, Access Protection, and Free Markets*, 51 J. COPYRIGHT SOC'Y USA 279, 292 (2004); Lemley & Reese, *supra* note 38, at 1408-10; Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property, Contract Rights and Markets*, CATO Institute Policy Analysis No. 508 (2004), <http://www.cato.org/pubs/pas/pa508.pdf>.

102. CBO, *supra* note 1, at 23-26; Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001).

the credibility of the copyright system as such, because users will believe that there is a “license to copy.”

Both lines of argumentation are comprehensible. The Congressional Budget Office Paper on Copyright Issues in Digital Media of August 2004 ends with the recommendation: “Any revisions that are undertaken, therefore, require careful deliberation.”¹⁰³ It is, however, very hard—if not impossible—to tell which solution is actually more efficient in a given case, for example with respect to file sharing.¹⁰⁴

If we accept the notion that we do not know *exactly* where the optimal trade-off between access and incentive lies, a normative, even positivistic point of view becomes more attractive.¹⁰⁵ This approach has to take its start from international copyright law, which is binding upon most countries in the world, including the U.S., the EC, and its member states. This body of law sets the stage for national copyright amendments, since the alternatives are either practically out of reach

103. CBO, *supra* note 1, at 37.

104. MGM Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764, 2793-96 (2005) (Breyer, J., concurring); CBO, *supra* note 1, at vii-ix; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004) (“It is easy to say that the right to exclude is needed to provide incentives for authors. It is hard to show that any particular rules provide optimal incentives. It is easy to point to deviations from the model of perfect competition. It is hard to show why these deviations imply particular rules.”); Lemley & Reese, *supra* note 38, at 1391 (2004) (on the difficulties of quantifying harms and benefits of decisions regarding innovation, but rejecting McGowan’s abandonment of utilitarian analysis); Epstein, *supra* note 1, at 38-39 (“Quite simply, any system of private property imposes heavy costs of exclusion. However, these costs can only be eliminated by adopting some system of collective ownership that for its part imposes heavy costs of governance. The only choice that we have is to pick the lesser of two evils.”); Nadel, *supra* note 54, at 855-56 (arguing that current copyright law “probably” reduces the overall number of new creations, while an abridgment of 17 U.S.C. § 106 would “likely” increase social welfare); Kamiel J. Koelman, *Copyright Law and Economics in the EU Copyright Directive: Is the Droit d’Auteur Passé?*, 35 IIC 603, 619 (2004) (“[I]t is impossible to know the optimal trade-off between incentive and non-rivalry.”); Eckersley, *supra* note 28, at 150 (“[S]ociety could, on the balance of probabilities, expect better outcomes under a well-implemented alternative compensation system than under a well-implemented system of technologically-enforced exclusive rights . . .”).

105. This is, however, not to say that economics should not play a role in copyright law and policy. Economic analysis can improve our understanding of an optimal copyright protection. See Alexander Peukert, *Der Schutzbereich des Urheberrechts und das Werk als öffentliches Gut. Insbesondere: Die urheberrechtliche Relevanz des privaten Werkgenusses*, in RETO M. HILTY & ALEXANDER PEUKERT (ED.), INTERESSENAUSGLEICH IM URHEBERRECHT 11, 12-25 (2004); Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. (UOLTJ) 1-21 (2003-2004); *contra* McGowan, *supra* note 104, at 72 (2004) (“The debate would be clearer if we spent less time swapping utilitarian narratives that cannot be falsified and more time acknowledging the first principles that drive the narratives, and debating those principles on their own terms.”).

within a reasonable time—*i.e.*, amendment of the treaties or termination of membership—or they are untenable from a lawyer's point of view—*i.e.*, they disregard international law.

IV. International Copyright Law

In the following section this article adopts a positivistic view in analyzing the above-mentioned proposals. In particular, it will discuss whether the three-step test conflicts with the implementation of the suggested regimes in national copyright law. Basically, the three-step test establishes general limits for national legislatures to impose limitations on and exceptions to exclusive rights. In other words, it marks the borderline between exclusivity and non-voluntary licenses.¹⁰⁶ Additionally, this section will consider the obligation of contracting parties of the WIPO Copyright Treaties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.¹⁰⁷

The proposals for levy/tax systems to cover non-commercial file sharing deal with these issues marginally at best. Some articles do not address this question at all.¹⁰⁸ Lawrence Lessig acknowledges that “some of the changes” he proposes would require amendments to “or the abrogation of some treaties,” listing the BC, the WIPO Treaties

106. See Senftleben, *supra* note 63, at 118-124 (discussing the functions of the three step test). The following discussion will not deal with specific restrictions on the exercise of exclusive rights as laid down in Art. 10, 11bis(2, 3), 13 BC (Fisher, *supra* note 1, at 248-49, refers to Art. 13 BC and states that the Berne Convention had to be modified to adopt his system. The reference to Art. 13 BC as a possible basis for a non-voluntary license is mistaken because Art. 13 BC seeks to benefit record manufacturing companies; see Ricketson, *supra* note 58, at 513-22.). Nor will international conventions on the protection of performing artists, broadcasters, and producers of phonograms be considered. Finally, the so-called minor exceptions or reservations doctrine will not be separately addressed, which is derived from statements made during the 1967 Stockholm conference according to which certain minor limitations/exceptions are acceptable. The reason is that it is generally acknowledged that this doctrine does not give contracting parties discretion beyond the limits set by the three-step test. See Panel Report, *United States-Section 110(5) of US Copyright Act*, *supra* note 22, at para. 6.42-70, 6.81; Ricketson, *supra* note 58, at 533-42; Ricketson, *supra* note 68, at 53; Mihály Ficsor, *How Much of What? The Three-Step Test and Its Application in Two Recent WTO Dispute Settlement Cases*, 192 *Revue Internationale du Droit d'Auteur (RIDA)* 111, 209-15 (2002); Ficsor, *supra* note 71, at 5.59-66; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 2, 31.

107. See Art. 11 WCT, 18 WPPT.

108. See Lunney, *supra* note 78, at 910-18; Sobel, *supra* note 55, at 673; Shih Ray Ku, *supra* note 1, at 311-15; Shih Ray Ku, *supra* note 79, at 566 n.160; Lemley & Reese, *supra* note 38, at 1414-31 (hinting only at the widespread adoption of TRIPS and the Berne Convention). Eckersley, *supra* note 28, at 152-58, is the only proponent of a tax/levy system for file sharing who offers a more detailed discussion of Art. 13 TRIPS.

and TRIPS.¹⁰⁹ William Fisher briefly explicates that his proposed limitation to exclusive rights¹¹⁰ would necessitate amendment of the BC and the TRIPS Agreement. Only Art. 13 BC would allow some flexibility with regard to music.¹¹¹ According to Jessica Litman, a model in which the right holder can withdraw her work from the levy system would “at least arguably” be “compliant” with treaty obligations under Berne and the WIPO treaties.¹¹² She apparently, however, doubts whether her proposal for a levy/tax system as the statutory default rule with an opt-out-procedure for right holders to be eligible for exclusive exploitation comports with the prohibition of formalities for copyright protection under the BC.¹¹³ Finally, Neil Netanel states that the levy he proposes would comport with Art. 13 TRIPS because it would be limited to non-commercial uses and would provide a solution to the practical implausibility of enforcing proprietary copyrights in the global p2p arena.¹¹⁴ The following section will analyze which of these clearly differing assessments at least arguably proves correct.

A. Overview

All aforementioned proposals draw upon a limitation of or exception to exclusive rights. With some differences in detail, the concepts permit non-commercial reproduction, distribution and public performance (streaming) of a musical composition, sound recording, or motion picture via the Internet.¹¹⁵ Thus, they restrict the

109. Lessig, *supra* note 57, at 251 n.14.

110. Fisher, *supra* note 1, at 247 (proposes a new section 107A that would permit:

- Reproduction of a musical composition, sound recording, or motion picture for noncommercial purposes (i.e., consumption, not resale);
- Preparation of a derivative work of a sound recording or motion picture registered pursuant to the new scheme, provided that the derivative work is also so registered before it is made available to the public;
- Distribution of a sound recording (including a musical composition embodied therein) or motion picture via the Internet;
- Public performance of a sound recording (including a musical composition embodied therein) via a digital audio transmission;
- Public performance of a motion picture via a digital video transmission.).

111. Fisher, *supra* note 1, at 248-49.

112. Litman, *supra* note 91, at 45-46.

113. Litman, *supra* note 91, at 46 n.166.

114. Netanel, *supra* note 48, at 60 n.199.

115. Fisher, *supra* note 1, at 247; Netanel, *supra* note 48, at 37-38 (non-commercial copying, distribution, and streaming over digital networks); Sobel, *supra* note 55, at 683 (copying and redistribution online). Fisher's and Netanel's concepts additionally permit derivative creations. See Fisher, *supra* note 1, at 234-36, 247; Netanel, *supra* note 48, at 38-40. Since this form of use is not necessarily involved in file sharing, this article does not

reproduction right and the right of communication to the public, which includes the right to make protected content available to the public. Both rights are regulated as mandatory minimum rights in international copyright law.¹¹⁶

These exclusive rights are subject to the three-step test, which was adopted 1967 in Art. 9(2) BC¹¹⁷ and later in Art. 13 TRIPS,¹¹⁸ Art. 10 WCT¹¹⁹ and Art. 16(2) WIPO Performances and Phonograms Treaty (WPPT).¹²⁰ It proclaims that contracting parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors:

1. in certain special cases;
 2. that do not conflict with a normal exploitation of the work;
- and
3. do not unreasonably prejudice the legitimate interests of the author.

The named provisions are regulated in different international conventions and treaties which have—especially regarding the purpose of the TRIPS Agreement to reduce distortions of and impediments to international trade—partially different goals.¹²¹

dwell on this proposal.

116. See Art. 9 BC; art. 9(1) TRIPS; agreed statement concerning art. 1(4) WCT (reproduction right); art. 11, 11bis(1), 11ter(1), 14(1), 14bis(1) BC; art. 8 WCT; art. 10, 14 WPPT (right of communication to the public).

117. Report on the Work of Main Committee I of the Conference in Stockholm 1967, *reprinted in*: WIPO, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS FROM 1886 TO 1986 (CENTENARY) 196-97 (1986) [hereinafter Report Stockholm 1967]. Art. 9(2) BC applies only to the reproduction right as regulated in paragraph one of that article.

118. Art. 13 TRIPS is not confined to the rights newly introduced by the TRIPS Agreement, but also applies to the rights provided for under the BC. See Panel Report, *United States-Section 110(5) of US Copyright Act*, *supra* note 22, at para. 6.80; Ficsor, *supra* note 106, at 153, 163; Ricketson, *supra* note 68, at 47.

119. Art. 10(1) WCT covers the rights added by the WCT. See Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 26. Paragraph 2 relates to the rights provided for in the BC. See agreed statement to art. 10(2) WCT (“It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”); Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 6.

120. For the purpose of this study, I assume that the country that considers implementing one of the proposals is a member of or contracting party to the BC, the TRIPS Agreement and the WIPO Copyright Treaties. The three-step test is also regulated in Copyright Directive, *supra* note 59, Art. 5(5). In this regard, see German Federal Supreme Court, *Juristenzeitung* (JZ) 1000, 1004 (1999); Stuttgart Court of Appeals, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 614, 618 (2001); Senftleben, *supra* note 63, at 245-81.

121. According to the preamble of the TRIPS Agreement, it is also “taking into

Nevertheless, this article will not analyze the provisions individually because each wording is practically identical and all provisions derive from Art. 9(2) BC.¹²² Moreover, this article does not attempt a comprehensive interpretation of the three-step test according to the Vienna Convention on the Law of Treaties.¹²³ Rather, it summarizes how national courts, the WTO Panel, and legal literature construe the elements of the test. It then applies these definitions to concepts for a levy/tax system for p2p file sharing.

B. Interpretation of the Three-Step Test

As regards the interpretation of the three-step test, it is undisputed that the three steps have to be applied cumulatively¹²⁴ and successively.¹²⁵ In addition, it is generally acknowledged that in construing the provisions of the three-step test, one has to keep in mind the overall aim of the conventions: to provide for adequate, balanced copyright protection.¹²⁶

1. Certain Special Cases

The first condition established by the three-step test is that limitations of or exceptions to exclusive rights may be introduced only in *certain special cases*. As with all other elements of the test, divergent opinions exist as to what this requirement means in detail. Some argue that a restriction in national law must be clearly defined

account the need to promote effective and adequate protection of intellectual property rights." In this respect, it parallels the WCT ("to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible") and the BC ("to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works").

122. With regard to Art. 13 TRIPS see Art. 2(2), 9(1) TRIPS; DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 2.124 (2d ed. 2003); Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.66; Ginsburg, *supra* note 20, at 35; Senftleben, *supra* note 63, at 99 *et seq.* But see Gervais, *THE TRIPS AGREEMENT*, at 2.11.

123. See Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.43-46; Ricketson, *supra* note 58, at 134-42; Ricketson, *supra* note 68, at 5-9; Senftleben, *supra* note 63, at 99-114.

124. Failure to comply with any one of the three conditions results in the limitation/exception being disallowed. See Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.74, 6.97; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 14.

125. See the Records of the WCT negotiations, reproduced in Ficsor, *supra* note 71, 5.134; Ficsor, *supra* note 106, at 120-21; Ginsburg, *supra* note 20, at 40-41.

126. With regard to the BC see Ricketson, *supra* note 68, at 47-48 (a pure "maximalist" view is mistaken); Ficsor, *supra* note 71, 5.06-8. Regarding Art. 7 and 8 TRIPS, see Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, *supra* note 22, at para. 7.26. Regarding the WCT, see Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 7.

and should be narrow in its scope.¹²⁷ The scope of the exception has to be known and particularized so that it becomes foreseeable whether a given use will be subject to the limitation/exception.¹²⁸ Although it seems clear that this condition does not rule out concepts like fair dealing or fair use, “an incalculable, shapeless provision exempting a wide variety of different uses” is deemed to be impermissible.¹²⁹ Moreover, the WTO Panel held that the business exemption of 17 U.S.C. § 110(5)(B) is not a “certain special case” because a “substantial majority of eating and drinking establishments and close to half of retail establishments” are covered by the exemption.¹³⁰ Thus, the Panel adopted a quantitative view regarding the first step.¹³¹

Regarding the “specialness” of the limitation or exception, some commentators ask whether some clear reason of public policy or rational basis for justification exists for the restriction;¹³² whether there is an understandable need for the reconciliation of the user’s interests with the author’s interests.¹³³ However, the WTO Panel views the legitimacy of public policy as only of subsidiary relevance in applying the first element of the test.¹³⁴

127. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.112; Ricketson, *supra* note 58, at 482; Ficsor, *supra* note 106, at 129, 227; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 15. With regard to Art. 30 TRIPS (“limited exceptions”), see Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, *supra* note 22, at para. 7.30; Gervais, *supra* note 122, at 2.125; Ficsor, *supra* note 106, at 151 (extensive use of compulsory licensing not in line with Art. 13 TRIPS).

128. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.108; Senftleben, *supra* note 63, at 137.

129. Senftleben, *supra* note 63, at 133-137. Due to the fact that few countries would act in a purely arbitrary way and any exception short of a complete repeal of the Copyright Act would arguably be a certain special case, Gervais, *supra* note 20, at 17, argues that only the second and third step really embody a restriction to future limitations and exceptions.

130. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.133. *Contra* Senftleben, *supra* note 63, at 140-44 (disapproving the quantitative approach of the WTO Panel because the outcome of the second criterion is predetermined).

131. *But see* Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, *supra* note 22, at para. 7.49 (holding that the first step does not directly address the issue of economic impact); Ficsor, *supra* note 106, at 229 (critical of this purely statistical approach).

132. Ricketson, *supra* note 58, at 482; Ficsor, *supra* note 106, at 129-32, 227; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 15; *but see* Ricketson, *supra* note 68, at 22.

133. Senftleben, *supra* note 63, at 144-152.

134. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.102-13; Ginsburg, *supra* note 20, at 39-43 (no normative inquiry at this point); Ricketson, *supra* note 68, at 22.

In my view, a non-voluntary license in national copyright law privileging non-commercial file sharing on the Internet could quite possibly establish a certain special case under the three-step test. First, a limitation or exception that is geared towards non-commercial reproduction and communication to the public with regard to p2p networks is clearly defined and can easily be distinguished from impermissible uses. For example, posting a work on a website or running a “p2p dark net” where users have access only on a subscription basis would not be privileged because these uses have nothing to do with p2p technology (posting a work on a website) or are made for commercial purposes (running a “dark net”). Second, advocates of non-voluntary license regimes indicate several justifications: namely, their concepts would preserve the promising advantages of global digital networks for instant and global dissemination of knowledge, especially regarding works that are no longer exploited and offered by the right holder.¹³⁵ Third, the “quantitative” approach taken by the WTO Panel misconceives that the scope of the limitation/exception and its consequences on the proprietary exploitation of the work in general must be analyzed under the second step, not the first.¹³⁶

2. *Conflict with a Normal Exploitation*

Proceeding to step two, the proposals must not conflict with a *normal exploitation* of the work. This element of the three-step test probably raises the most doubts regarding its scope of application and its effect on national copyright legislation.

a. What Constitutes Normal Exploitation Under the Three-Step Test?

First of all, it is of utmost importance to note that, according to a nearly uniformly accepted understanding based on the wording and structure of the test, a non-voluntary license may only be introduced in national law if it clears this hurdle. In particular, the implementation of a levy cannot cure a conflict of the underlying limitation/exception with the second step, even if it compensates for the losses of the copyright owner. This aspect is relevant only with regard to step three.¹³⁷

135. On the assets of the proposals, see *supra* Part III.C; Lessig, *supra* note 3, at 296-97. But see Ricketson, *supra* note 68, at 75 (unqualified assertion of “public interest” is not enough); Senftleben, *supra* note 63, at 162 (with regard to digital private copying).

136. Senftleben, *supra* note 63, at 140-144.

137. Report Stockholm 1967, *supra* note 117, at 197 (the sequence would afford a more logical order for the interpretation of the rule); Panel Report, *United States-Section*

In defining “normal” exploitation, it is accepted that something less than full use of an exclusive right has to be meant in order not to render every restriction impermissible and thus the provision itself superfluous.¹³⁸ Moreover, “normal” implies an empirical and a normative element.¹³⁹

Regarding the empirical side (the degree of market displacement following from the restriction), different standards have been articulated. It has been maintained that a limitation/exception conflicts with normal exploitation if:

It causes a serious loss of profit;¹⁴⁰

It covers uses for which the author would ordinarily expect to receive a fee; or¹⁴¹

It applies to those forms of exploitation that currently generate significant or tangible revenue or which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance as opposed to uses that do not compete with non-exempted uses (actual and potential effects).¹⁴²

The prevailing opinion judges the existence of a conflict with normal exploitation for each exclusive right separately.¹⁴³ Contrary to this view, Senftleben refers to a deprivation of an actual or potential market, which typically constitutes a major source of income, which

110(5) of the US Copyright Act, *supra* note 22, at para. 6.73-4; Ginsburg, *supra* note 20, at 45-53; CLAUDE MASOUYÉ, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 55-56 (1978); Ricketson, *supra* note 58, at 483-485; Ricketson, *supra* note 68, at 27; HENRI DESBOIS ET AL., LES CONVENTIONS INTERNATIONALES DU DROIT D'AUTEUR ET DES DROIT VOISINS para. 173 (1976); Ficsor, *supra* note 71, at 5.58; Senftleben, *supra* note 63, at 130-1. *Contra* Geiger, *supra* note 63, at para. 418-420; Christophe Geiger, *Comment*, 36 INT'L REV. INTELL. PROP. & COMPETITION L. (IIC) 151, 157 (2005) (proposing to read the three-step test backwards and to start with the third step in order to accomplish a flexible, balanced system).

138. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.167.

139. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.166-78; Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, *supra* note 22, at para. 7.54; Ficsor, *supra* note 106, at 139.

140. Masouyé, *supra* note 137, at 56.

141. Ricketson, *supra* note 58, at 482-3; Ricketson, *supra* note 68, at 23; *contra* Kamiel J. Koelman, *De nationale driestappentoets*, 17 Tijdschrift voor Auteurs-, Media- & Informatierecht (AMI) 6, 7 (2003) (critical to this “subjective” approach by noting that this argument tends to be circular).

142. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.181-87; Ricketson, *supra* note 68, at 24; Gervais, *supra* note 20, at 18; Ficsor, *supra* note 106, at 137.

143. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.173; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 18.

carries weight within the *overall commercialization* of works of the relevant category and, consequently, belongs to the core of copyright.¹⁴⁴

Whether additional aspects can be derived from the often referred-to normative element of “normal exploitation” is still largely unclear.¹⁴⁵ In light of the fact that DRM systems enable the right holder to exploit a work even on a pay-per-use basis, it is argued that market failure considerations and decreasing transaction costs cannot be the sole line of argument. Otherwise, generally accepted restrictions, such as criticism, parody, or scholarship, could be argued to contravene step two.¹⁴⁶

Applying these definitions to the proposals raises severe doubts regarding their compatibility with the three-step test. The reason is that the uses covered by the proposed non-voluntary license, *i.e.*, copying and distributing content online by way of up- and downloads or streaming, are a source of income today and will probably become even more important in the future. Right holders increasingly establish commercial platforms offering their content for download or streaming.¹⁴⁷ Assuming that a complete shift to commercial online distribution by way of streaming is plausible at least for music and perhaps motion pictures,¹⁴⁸ even Senftleben’s restrictive interpretation, according to which a significant effect on the overall commercialization of the work is necessary, would arguably conflict with the second step. It thus appears as if non-voluntary licenses covering noncommercial file sharing can hardly be considered to be in line with the second criterion of the three-step test.¹⁴⁹

144. Senftleben, *supra* note 63, at 177-94.

145. See Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.178 (holding that the normative approach to defining normal exploitation includes “*inter alia* a dynamical element capable of taking into account technological and market developments”).

146. Ginsburg, *supra* note 20, at 50-51; Ricketson, *supra* note 68, at 25.

147. See *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2795-96 (2005) (Breyer, J., concurring); Jeevan Jaisingh, *Piracy on File Sharing Networks: Strategies for Recording Companies* (2004), <http://ssrn.com/abstract=567681>.

148. For already existing commercial online ventures for music and motion pictures see, *e.g.*, <http://www.apple.com/itunes/> (U.S.); <http://www.movielink.com> (U.S.); <https://www.eventim-music.de/wlbs/> (Germany); <http://www.popfile.de/> (Germany).

149. This is also true in respect of Sobel’s Digital Retailer Model, which aims at preserving for the right holder the ability to set the rates for a download because setting the price is only one feature of exclusivity apart from when, to what extent, and how (*e.g.* via streaming or via download) an asset may be used by others. See Sobel, *supra* note 55.

b. Normal Exploitation and Protection of Technological Measures

This conclusion, however, does not exhaust the problem. The reason is that the aforementioned application of the three-step test relies upon a new “type” of protection and factual exclusivity that Stefan Bechtold called “copyright cast in silicon”¹⁵⁰—i.e., DRM systems. This technology enables right holders to launch commercial services in the digital network environment. With the advent of technological protection measures, the copyright owner not only enjoys exclusivity based on the rights granted to her in national and international copyright law, but DRM systems make it possible to establish an additional, factual exclusivity supplemented with legal protection against the circumvention of those measures.¹⁵¹

As already indicated, contracting parties of the WIPO Copyright Treaties are committed to providing legal protection of technological measures and rights management information systems.¹⁵² Are the proposals in accordance with these international requirements? Additionally, how does this legal protection relate to the specifications of the three-step test?

(1) Rights Management Information

Regarding rights management information, most of the proposals actually draw upon “fingerprinting” and “watermarking” technologies. They do so in order to monitor the ongoing uses in p2p networks for determining the shares of each right holder.¹⁵³ The establishment of a levy/tax system thus benefits from, and relies upon, the mandatory protection of rights management information systems according to Art. 12 WCT. A violation of this treaty obligation is not apparent.

(2) Technological Measures

Much more problematic in this context is the mandatory protection of technological measures (Art. 11 WCT). A complete prohibition of technological measures in national law would obviously be in conflict with this requirement. Indeed, none of the proposals discussed in this article suggests that.

150. STEFAN BECHTOLD, VOM URHEBER- ZUM INFORMATIONSRECHT 279 (2002).

151. See Art. 11, 12 WCT, 18, 19 WPPT; 17 U.S.C. Chapter 12; Copyright Directive, *supra* note 59, at Art. 6, 7.

152. See Art. 11 WCT, 18 WPPT.

153. *Supra* Part III.B.

Neil Netanel's "Noncommercial Use Levy," however, rests upon the idea that all works are covered by the limitation/exception to copyright and are thus lawfully available in p2p networks. This promise can only be fulfilled if right holders do not have the opportunity to withhold their works from this system. Consequently, Netanel suggests that right holders would not be entitled to employ technological DRM controls to block the privileged uses, or at the very least, it would be legal for users to circumvent DRM controls and for suppliers to distribute circumvention tools needed to engage in privileged uses.¹⁵⁴ Would such a limitation of the legal protection of technological protection measures be in accordance with the WIPO copyright treaties? This raises the very fundamental question of how this additional protection layer to copyright,¹⁵⁵ as regulated in Art. 11, WCT relates to the three-step test (Art. 10 WCT), which historically corresponded solely to exclusive *rights* granted by law.

Since both provisions are regulated in the same treaty, they must not be construed separately. Adopting this view, it is certainly in accordance with this treaty to provide for narrow limitations/exceptions in line with Art. 10 WCT and to restrict the legal protection of technological measures to the remaining (broad) scope of exclusive rights.¹⁵⁶ For example, it would not be a violation of the WCT to limit copyright regarding quotations and to allow a person to circumvent a technological measure for the sole purpose of copying a part of the work in order to make a quotation. Think about incorporating sequences of movie A—which is available only on

154. Netanel, *supra* note 48, at 40. Sobel does not address this question expressly, but it seems that his model is meant to comprise all copyrighted works and that it implies that works can be downloaded, which would also require a prohibition of certain restrictive technologies, e.g. those that facilitate pay-per-use models. See Sobel, *supra* note 55, at 683-93. A different question is whether it would be in accordance with Art. 11 WCT for national provisions to outlaw technological measures restricting even narrow limitations which are not in conflict with the three-step test, for example the quotation right.

155. See *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 1192, 1202 (Fed. Cir. 2004) (holding that 17 U.S.C. §§ 1201 *et seq.* do not establish a new, highly protective alternative regime for copyrighted works and a new property right, but instead prohibit forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords as an additional protection layer).

156. Ficsor, *supra* note 71, at C11.10. This is the approach of the DMCA that gives users a right to hack, but only under very restricted circumstances. See 17 U.S.C. § 1201(d)-(j) (2000). A draft bill of Sept. 2004 for an amendment of the Swiss Copyright Act—Switzerland is not a member of the EU—would not prohibit acts of circumvention done for the sole purpose of benefiting from a limitation to copyright. The draft is available in German, French and Italian at <http://www.ige.ch/E/jurinfo/j103.shtm#1>.

copy-protected DVDs—into movie B to comment on movie A's statements.¹⁵⁷

But what about also applying a limitation/exception for non-commercial file sharing to the anti-circumvention provisions as Netanel suggests? Art. 11 WCT proclaims that contracting parties shall provide adequate legal protection of effective technological measures that restrict acts with respect to works not authorized by the authors concerned *or permitted by law*. At first glance, it seems that this wording would not require contracting parties to provide legal protection for technological measures that restrict uses covered by such a limitation/exception. The obligation under Art. 11 WCT does not extend to acts *permitted by law*. Thus, if a national legislature implemented a broad limitation/exception, e.g., for file sharing, that country would consequently be free to confine the anti-circumvention provisions accordingly. Obviously, this reasoning would open the door for contracting parties to chip away at both legal *and* factual exclusivity in the digital online environment, particularly regarding file sharing.

This solution, however, would amount to a violation of obligations under the WCT. As outlined above, a limitation/exception for non-commercial file sharing would run afoul of the three-step test, since the privileged p2p networks would compete with commercial online ventures licensed by the right holders.¹⁵⁸ This latter kind of “hoarding” in cyberspace rests upon DRM. There is no indication that this mode of exploitation may not be regarded as “normal” under the three-step test. On the contrary, the WCT acknowledges that the adoption of DRM is crucial for an exclusive exploitation in cyberspace. This can be shown by the fact that it prohibits circumvention of technological measures. Considering the possibility of DRM-based pay-per-use business models, one could even argue that any restriction to copyright contravenes the three-step test because *any* use of the work forms part of this “normal” exploitation.¹⁵⁹ Even if one does not want to go that far, a *combination* of a broad limitation/exception with limited legal protection of DRM systems (*i.e.*, circumvention is legal if done to engage in privileged uses, e.g., noncommercial file sharing) or even a prohibition of technological measures that restrict these permitted uses is not in line

157. For example, critics of Michael Moore considered making a point-by-point rebuttal of his movie “Fahrenheit 9/11.”

158. *Supra* Part IV.B.2.a.

159. See Koelman, *supra* note 141, at 7.

with the three-step test and the mandatory protection of technological measures.

This result, however, does not render all ideas for a levy/tax system covering non-commercial file sharing unlawful. Accounting for DRM systems when applying the three-step test might result in an even greater freedom for contracting parties to structure their national copyright law. The idea behind this consideration is that the right holder obtains a new kind of exclusivity if she implements DRM systems which eventually prevent the work from being used without permission, for example “shared” online. There are now two protection layers for a copyrightable work. The first one is exclusive rights under copyright. The second one is the application of technological measures and the legal rules against circumventing this factual exclusivity. The legislature can limit both layers in parallel. For example, national copyright law can limit exclusive rights and the legal protection of technological measures with regard to quotations.

Both protection layers can, however, also be treated differently. By “differently,” I mean that national copyright law would, on the one hand, grant nearly limitless anti-circumvention protection to DRM systems in order to enable proprietary business models in cyberspace (exclusivity/“hoarding”). On the other hand, a limitation/exception would allow non-commercial file sharing under a levy/tax system, *provided that the right owner does not implement DRM*. The copyright owner would thus be free to choose which kind of protection to adopt. With that freedom to choose, exclusivity as the fundamental feature of current international copyright law is not restricted by a statutory limitation/exception imposed by national law, but voluntarily by the right holder herself. This is the basic notion of the *bipolar copyright system* and the reason why this approach, if implemented in national copyright law, would not be a violation of the three-step test and the obligation to protect technological measures.

One nevertheless has to consider some possible counter-arguments in view of international copyright law. Art. 31(3)(b) of the Vienna Convention on the Law of Treaties proclaims that “there shall be taken into account, together with the context ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” An agreement of the contracting parties regarding the permissibility of a “bipolar system” cannot yet be observed. Broad non-voluntary licenses have, until recently, only been accepted to the extent that the exercise of exclusive rights is practically impossible (like in the case of private

copying in the analog world). They have not been adopted in a situation where the copyright owner simply refuses to implement readily available enforcement mechanisms.¹⁶⁰ In addition, legal protection of technological measures is dealt with only in the WIPO Copyright Treaties, and not in the TRIPS Agreement. This may be one reason why the WTO Panel has generally refused to consider the failure of right holders to exercise their rights—due to a lack of effective or affordable means of enforcement—when deciding what constitutes normal exploitation.¹⁶¹

These arguments are, however, not persuasive. Many copyright owners—e.g., small, startup record labels and single creators—do not currently and most likely will not in the future adopt DRM to exploit a work in cyberspace simply because it is too difficult or too expensive. At the same time, modern technologies and p2p networks enable these right holders to cheaply produce and publish their works for a worldwide audience.¹⁶² Copyright law as the conventional protection layer, however, cannot be enforced effectively to generate sufficient income. Commercialization of works in cyberspace therefore can be said to be impossible or extremely impractical for these right holders. In acknowledging this problem, some authors state that the three-step test actually obliges contracting parties to impose a levy in order to compensate for the losses incurred by the right holder if exercising the right is impossible.¹⁶³

Moreover, if the right owner—for whatever reasons—does not implement restrictive DRM systems, but instead prefers to benefit from a levy or tax for statutorily privileged uses in cyberspace, there cannot be a conflict with the “normal,” *i.e.*, DRM-based exploitation. P2P networks simply will not compete with proprietary business models, because if applied, technology prevents the respective work from being available at all in unrestricted p2p networks.¹⁶⁴ This assumption, admittedly, will work only if technological measures

160. See *supra* Part III.A.

161. Panel Report, *United States-Section 110(5) of the US Copyright Act*, *supra* note 22, at para. 6.188.

162. This notion can be traced back to the digital dilemma stemming from digitization and the Internet. See *supra* Part I.

163. See Ficsor, *supra* note 71, at C10.34; Sirinelli, *supra* note 20, at 28; Ricketson, *supra* note 68, at 75; Netanel, *supra* note 48, at 60 n.199. With regard to the limitation for private use under German law, see Martin Senftleben, *Privates digitales Kopieren im Spiegel des Dreistufentests*, Computer und Recht (CR) 914, 919 (2003).

164. See, e.g., Senftleben, *supra* note 163, at 918 (arguing that the limitation for digital private copying under German copyright law does not conflict with normal exploitation because the right holder is free to implement DRM systems that restrict private copying).

prevail over existing restrictions to exclusive rights. In other words, any circumvention of technological measures must be prohibited, even if the intended use is permitted by law. If the right holder chooses exclusivity, this exclusivity has to be far-reaching, similar to the provisions of current U.S. and European copyright law.¹⁶⁵ Only in this case can the copyright owner effectively build a pay-per-use business model on DRM systems.¹⁶⁶ Additionally, only this approach lets one expect that a work is technologically shielded from file sharing. This approach is also fruitful with regard to the interpretation of the WCT. A contracting party providing for protection beyond the obligations established by Art. 11 WCT regarding technological measures—because circumvention is also prohibited if the intended uses fall under a limitation/exception to copyright—may draw upon a more flexible interpretation of Art. 10 WCT regarding the three-step test compared to a contracting party that goes for narrow limitations to/exceptions from both the legal and the technological protection layer.

Finally, the three-step test is not geared towards single copyright owners, but instead addresses national legislatures. The right holder herself has always been free to decide to what extent she wants to benefit from the exclusivity granted by law. This freedom is exactly what the bipolar copyright system is founded on. The right holder may opt for exclusivity and individual licensing (“hoarding”), but under the bipolar copyright system, she has an additional option. Under that system, she would also be able to earn a levy/tax share by accepting certain privileges of users, in particular the non-commercial use of her work in p2p file sharing systems.¹⁶⁷ Seen from this perspective, the bipolar copyright system is nothing more than an additional compensation mechanism to what is available today. At present, the right holder may try to recoup her investment by individually licensing the use of her work. File sharing is copyright infringement. It is not compensated if the right holder does not

165. This far-reaching—“WCT-plus”—protection of technological measures was adopted by the European Union and the United States. See Copyright Directive, *supra* note 59, at Art. 6(4)(4). On the relationship between fair use and the anti-circumvention provisions under U.S. law see *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp. 2d 211, 219 (S.D.N.Y. 2000); *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp. 2d 294, 322 (S.D.N.Y. 2000).

166. With regard to European copyright law, see Peukert, *supra* note 105, at 25 *et seq.* (explaining how the copyright directive expanded exclusivity to listening, reading, and watching a work even if the consumer does not acquire a copy of the work).

167. On the lawfulness of the opt-in and opt-out alternatives, see *infra* Part V.B.2.b.(3).

enforce exclusive rights in difficult and expensive litigation in every single case. Under the bipolar copyright system, these uncompensated uses would potentially fall under the levy/tax system and would generate income. It would be up to the right holder to decide which compensation mechanism promises more revenues. Therefore, the levy/tax system essentially is not a non-voluntary license, but instead, it is a voluntary option.¹⁶⁸

However, it must be stressed that this discussion relates to the second step of the three-step test: the bipolar copyright system does not conflict with normal exploitation of the work. Still, the limitation/exception to exclusive rights under the levy/tax system has to meet the requirements of the first¹⁶⁹ and third¹⁷⁰ steps. This way, the protection layer “copyright” may not be gouged completely. A bipolar copyright system would have to be limited to certain special cases (first step) and would have to be modeled in a way not to prejudice the legitimate interests of the author (third step).

In summary, the bipolar system rests upon two pillars which represent the layers of today’s copyright protection. One pillar is the law that prohibits the circumvention of technological protection measures in order to establish exclusivity in the digital realm. The other pillar is a limitation/exception that permits digital uses (e.g., non-commercial file sharing) in the case of the right holder not opting for the “silicon copyright.”¹⁷¹ The model in accordance with the three-step test is thus a levy/tax for non-commercial file sharing as an *alternative* to exclusivity based on law and technology. As indicated, this is the approach of William Fisher and Jessica Litman. According to their concepts, the copyright owner is free to go for “hoarding” instead of “sharing.”¹⁷²

Fischer and Litman suggest the levy/tax system as the statutory default rule, thereby requiring the right holder to *opt out* of the levy/tax system if she prefers a proprietary exploitation. The pros and cons of this alternative and its compliance with international copyright law treaties will be discussed in part V.¹⁷³

168. On the differences to voluntary collective licensing as proposed by the EFF, Daniel Gervais, and others, see EFF, *supra* note 50; Gervais, *supra* note 50; *infra* Part V.B.3.b.

169. See *supra* Part IV.B.1.

170. See *infra* Part IV.B.3.

171. See Bechtold, *supra* note 150.

172. Litman, *supra* note 91, at 39-50 (“sharing” or “hoarding”); Fisher, *supra* note 1, at 248. For a more detailed discussion of the bipolar system, see *infra* Part V.

173. See *infra* Part V.

3. *Unreasonable Prejudice to the Legitimate Interests of the Right Holder*

Before these details of the bipolar copyright system can be addressed, one must still consider the third element of the three-step test. This element requires that the limitation/exception must *not unreasonably prejudice the legitimate interests of the right holder*.

Only if a non-voluntary license overcomes the first two hurdles must this last condition be assessed. It establishes a flexible standard of reasonableness to balance the interests of right holders and the beneficiaries of the restriction to exclusive rights.¹⁷⁴ It calls for protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms.¹⁷⁵ The crucial questions are whether the interests at stake are legitimate, and at which point the degree or level of prejudice to the interests of the right holder may be considered “unreasonable.”¹⁷⁶ The payment of remuneration under a non-voluntary license may prevent the prejudice from reaching an “unreasonable” level.¹⁷⁷

Deciding whether a levy/tax system covering p2p networks on a non-commercial scale presents an unreasonable prejudice to the right holder’s interest depends, to a large extent, upon the architecture of the system. It would obviously mean a prejudice to the right holder if she were not allowed to technologically prevent file sharing or if circumvention for the purpose of file sharing were not prohibited.¹⁷⁸ Relying on technological measures to exploit works online is a legitimate interest of the right holder,¹⁷⁹ as that is just what Arts. 8, 10 and 11 WCT are meant to facilitate. Whether such an encroachment upon the author’s rights is seen as unreasonable depends on whether national legislatures find that the public interests benefited by this regime¹⁸⁰ are equal to the interests of authors,¹⁸¹ and whether the

174. Ficsor, *supra* note 106, at 145; Ricketson, *supra* note 68, at 27; Ginsburg, *supra* note 20, at 57; Senftleben, *supra* note 63, at 210-44; Gervais, *supra* note 20, at 19-20.

175. Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, *supra* note 22, at para. 7.69; Gervais, *supra* note 20, at 19-20.

176. Senftleben, *supra* note 63, at 226-41.

177. German Federal Supreme Court, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 963, 967 (2002); Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 23; Ginsburg, *supra* note 20, at 53; Senftleben, *supra* note 63, at 237-41.

178. This reflects Neil Netanel’s proposal. *See supra* Part III.B.

179. In this regard, it is important whether only the interests of the author count or also the interests of intermediaries as derivative right holders; *see* Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 8 (safeguarding of investments of intermediaries is an aspect to be considered in applying Art. 10 WCT); Senftleben, *supra* note 63, at 216-21.

180. *See supra* Part III.C.

tax/levy actually compensates for the losses. In that regard, it must be observed that the third requirement remains open-ended, leaving it for the national legislature to strike the balance in particular cases that passed the first and second step.¹⁸² Considering the positive effects of a levy/tax system for the dissemination of knowledge and even for the compensation of the accruing uses, it could certainly be argued that it would be a justified, and not unreasonable prejudice to the interests of the right holder. The problem with a proposal that restricts both protection layers—*i.e.*, copyright and DRM plus anti-circumvention provisions—with regard to file sharing is, however, that it does not fulfill the requirements of the second step.¹⁸³ Neil Netanel's concept, therefore, would not even make it to the third step.

As explained above, a tax or levy system as an optional alternative to exclusive exploitation in cyberspace does not run afoul of the first two steps of the three-step test (bipolar system). Regarding the third step, the beneficial effects of not outlawing p2p technology, improving the dissemination of knowledge and guaranteeing compensation for authors, justifies the adoption of this system. The bipolar system does not limit exclusivity as such; it just offers the right holder an additional business model to generate income from the uses of her work in cyberspace. The mere necessity to make a choice between the two alternatives cannot be said to be a "prejudice" to the legitimate interests of the right holder because it is nothing other than an everyday business decision. This fact again illuminates the fact that limiting only one protection layer to a mere remuneration right (*i.e.*, copyright) and leaving the other layer untouched (*i.e.*, DRM plus anti-circumvention rules) is consistent with international copyright law. In any event, the levy/tax revenue has to be so high as to at least arguably substitute for a potential exclusive exploitation on the basis of DRM in cyberspace.¹⁸⁴

181. The dominant opinion prioritizes author's *rights* vs. user's *interests*. *see e.g.* Guibault, *supra* note 63, at 90-110; Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 8 (referring to the preamble of the WCT that speaks of "rights of authors" but only of the public "interest"); *contra* Geiger, *supra* note 63, para. 225-26 (regarding limitations justified by fundamental rights); *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (Supreme Court of Canada 2004), para. 12, 48 (finding that fair dealing is a right of users).

182. Ricketson, *supra* note 68, at 26.

183. *See supra* Part IV.B.2.

184. For a discussion of the amount of tax/levy due, *see* Fisher, *supra* note 1, at 205-15; Netanel, *supra* note 48, at 44-52.

C. Agreed Statement to Art. 10 WCT

The previous analysis reveals that it is more than doubtful whether, for example, Neil Netanel's "noncommercial use levy" for p2p file sharing complies with the requirements of international copyright law, as it also denies the right holder the option of individual licensing using DRM. A different view could be derived from the agreed statement regarding Art. 10 WCT,¹⁸⁵ which reads:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.¹⁸⁶

The delegations that proposed this statement wanted to express concerns that the three-step test might become a straightjacket for adopting limitations and exceptions in the digital environment.¹⁸⁷ It is worth noting the differences between the two sentences: whereas the first sentence corresponds to already existing restrictions and the digital environment in general, the second sentence, dealing with *new* exceptions/limitations, relates to the digital *network* environment and thus to the context addressed by this article. Does the statement thus constitute a charter for contracting parties to devise new exceptions and limitations in the digital network environment (*i.e.*, the Internet) without taking account of the three-step test?

For a number of reasons, the answer must be in the negative. It was one of the main goals of the WCT to establish a new, exclusive "Internet" right as a minimum right in international law. It would be inconsistent with this purpose to read the statement as giving contracting parties discretion to restrict exclusivity in the digital network environment as they see fit. Had the contracting parties wanted to exclude online uses from the three-step test, they would have had to do so in the treaty. Finally, since the reproduction right is also subject to Art. 13 TRIPS, which does not contain a similar

185. Since it applies to both paragraphs of Article 10 WCT, it not only relates to the rights provided for in the WCT (especially the right of communication to the public, Art. 8 WCT), but also to the rights granted under the BC (the reproduction right).

186. For a discussion on the relevance of the agreed statements with regard to the application of the three-step test in general, see Ricketson, *supra* note 68, at 62.

187. For the remarks of the delegations of the USA, Denmark, India, and the United Kingdom, see Ficsor, *supra* note 71, at 5.137.

statement, this interpretation would produce a severe discrepancy in international copyright law in general. Thus, the statement has to be understood not as a broad enabling clause but as a clarification that exceptions and limitations may indeed be adopted in the digital network environment,¹⁸⁸ and that they still are subject to the three-step test.¹⁸⁹

D. Comparison with European Copyright Regarding Digital Private Copies

Finally, in evaluating the bipolar copyright system and its compliance with international copyright law requirements, it is interesting that its fundamental idea—to distinguish between the two layers of protection of copyrightable works in the digital realm—has already been taken up in European, especially German, copyright law with regard to the limitation/exception for digital private copies.¹⁹⁰ In order to understand why, one has to read various provisions in context.

1. The Two Protection Layers

Articles 2 and 3 of the Copyright Directive grant authors and other right holders the exclusive rights of reproduction, of communication to the public, and of making the protected subject matter available to the public.¹⁹¹ With those rights, every currently known use of copyrightable subject matter on the Internet is covered.¹⁹²

Article 5 of the Copyright Directive contains a long list of detailed limitations to or exceptions from those rights. In particular, Art. 5(2)(b) Copyright Directive authorizes member states to provide for a limitation/exception “in respect of reproductions on any

188. Ficsor, *supra* note 71, at C10.10 (correlating the statement to limitations and exceptions justified specifically in view of the digital network environment, e.g. temporary reproductions).

189. See Reinbothe & von Lewinski, *supra* note 70, at Art. WCT no. 33; Ficsor, *supra* note 71, at C10.09; Sirinelli, *supra* note 20, at 42; Ricketson, *supra* note 68, at 63 (“If a distinct regime for new limitations and exceptions is envisaged under the WCT, this would need to be the subject of an express provision of that treaty”).

190. See Alexander Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, Zeitschrift für Urheber- und Medienrecht (ZUM) 1050, 1051-53 (2003) (discussing German copyright law in that respect); Alexander Peukert, *DRM: Ende der kollektiven Vergütung?*, sic! 749 (2004) (discussing Swiss copyright law).

191. See Sec. 16, 19a and 20 German CA.

192. See Art. 9, 11, 11bis(1), 11ter(1) 14(1), 14bis(1) BC; art. 9(1) TRIPS; art. 8 WCT, agreed statement concerning art. 1(4) WCT; art. 10, 14 WPPT.

medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation . . .” The wording “any medium” covers digital copies.¹⁹³ The compensation is raised by a levy on products that facilitate digital copying.¹⁹⁴ This system relates to copyright as the traditional protection layer.

Art. 6 Copyright Directive regulates technological measures as the new and second protection layer.¹⁹⁵ Paragraph 1 of this provision prohibits circumvention of technological measures. The interface of DRM to the limitations/exceptions of copyright is laid down in Art. 6(4) Copyright Directive. It basically says that the anti-circumvention protection trumps most limitations of copyright, including the one for digital private copying. Thus, the right holder may impose technical measures to prevent copying upfront.¹⁹⁶ Besides, she is not obliged to

193. See Copyright Directive, *supra* note 59, at recital 38 (“Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.”). Germany has chosen to permit digital private copies. See Sec. 53(1) German CA. After thorough consideration, the German government wants to stick with this originally only temporary decision from 2003. See Bill for a “Second Act on Copyright in the Information Society”, *supra* note 21.

194. See Hugenholtz et al., *supra* note 64. For German copyright law, see Secs. 54-54h German CA.

195. For a discussion of the legal protection of technological measures under the Copyright Directive (*supra* note 59), see Severine Dusollier, *Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright*, 21 EUR. INTEL. PROP. REV. (EIPR) 285 (1999); Terese Foged, *U.S. v. E.U. Anti-Circumvention Legislation: Preserving the Public's Privileges in the Digital Age?*, 24 EUR. INTEL. PROP. REV. (EIPR) 525 (2002); Thomas Heide, *Access Control and Innovation under the Emerging EU Electronic Commerce Framework*, 15 BERKELEY TECH. L.J. 992 (2000); Marie-Thérèse Huppertz, *The Pivotal Role of Digital Rights Management Systems in the Digital World*, 2002 COMPUTER L. REV. INT'L (CRi) 105; Kamiel Koelman, *A HardNnut to crack: The Protection of Technological Measures*, 22 EUR. INTEL. PROP. REV. (EIPR) 272 (2000); Kamiel Koelman, *The Protection of Technological Measures vs. Copyright Limitations*, ALAI Congress Book 2001, 448; Kamiel Koelman & Natalie Helberger, *Protection of Technological Measures*, in: P. BERNT HUGENHOLTZ (ED.), COPYRIGHT AND ELECTRONIC COMMERCE 165 (2000); Annemique de Kroon, *Protection of Copyright Management Information*, in: P. BERNT HUGENHOLTZ (ED.), COPYRIGHT AND ELECTRONIC COMMERCE 229 (2000); Jacqueline Lipton, *Copyright in the Digital Age: A Comparative Survey*, 27 RUTGERS COMPUTER & TECH. L.J. 333 (2001); Maria Martin-Prat, *The Relationship Between Protection and Exceptions in the EU “Information Society” Directive*, ALAI Congress Book 466 (2001); Karin Retzer, *On the Technical Protection of Copyright*, 2002 COMPUTER L. REV. INT'L (CRi) 134; Jacques de Werra, *The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws (Japan, Australia)*, ALAI Conference Book 198 (2001). For further references on German literature see Alexander Peukert, *Technische Schutzmaßnahmen*, in: ULRICH LOEWENHEIM (ED.), HANDBUCH DES URHEBERRECHTS § 33 (2003).

196. See Tribunal de première instance de Bruxelles, L'ASBL Association Belge des

make the necessary means available to enable the beneficiary of Art. 5(2)(b) to produce a digital private copy if the application of DRM blocks this usage.¹⁹⁷

Taken together, the “copyright” protection layer is limited with regard to digital private copies to a mere right to remuneration under a non-voluntary license. The “DRM plus anti-circumvention rules” protection layer, however, stays intact. The right holder can achieve nearly unlimited exclusivity on the condition that she applies technological measures. This way, European copyright law on digital private copying entails many features of the bipolar copyright system for the digital network environment as proposed in this article. What seems to be missing, however, is the freedom of the right holder to choose between the two alternatives of exploitation, *i.e.*, proprietary exploitation based on DRM (blocking digital private copies) on the one hand, and participation in the levy system (accepting digital private copies) on the other.

2. *The Freedom to Choose*

In order to recognize that this option exists under European copyright law on digital private copying, one has to take a closer look at how the existing levy system is affected by the application of DRM. If the right holder were to deploy technological measures and thereby exploit her work under a private, proprietary system but nevertheless benefit from the levy system, she would receive an

Consommateurs TestAchats v. EMI Belgium et al., Auteurs & Media 338 (2004) (holding that there is no subjective right to private copying under Belgian copyright law). *But see* Paris Court of Appeal, *Recueil Dalloz*, 1573 (2005) (stating that a technological measure that prevents copying of a DVD violates the limitation for private copying under the French Intellectual Property Code and that this violation is actionable by a consumer). This decision overturned the decision of the Paris District Court, *Perquin et al. v. SA Films Alain Sarde et al.*, 36 INT'L REV. INTELL. PROP. & COMPETITION L. (IIC) 148, 152-53 (2005) with comment by Christophe Geiger (holding that there is no subjective right to produce a private copy and that therefore the implementation of copy protection mechanisms on DVDs does not constitute a breach of the provisions on private copying, L.122-5 and L.211-3 of the French Intellectual Property Code).

197. See Copyright Directive, *supra* note 59, at Art. 6(4)(2). The Copyright Directive leaves open whether member states enforce the limitation for digital private copies against the application of DRM. It follows from Art. 6(4)(4) that this freedom does not relate to interactive uses on the Internet and thus not to file sharing. With regard to these uses, the limitation for digital private copies may not be enforced in national law. For German law, see Sec. 95b(1) no. 6a German CA. The decision of the Paris Court of Appeal, *Recueil Dalloz*, 1573 (2005) dealt with a DVD and therefore with the limitation for private copying in the *offline* realm. It expressly refers to the freedom of the EC member states to enforce the limitation for digital private copying against technological measures under Art. 6(4)(2).

unjustified double compensation, because technology prevents the permitted uses that justify the levy. By the same token, if many works are commercialized exclusively by the right holder implementing DRM, the amount of royalties raised under the levy has to be lessened, since the extent of uses under this regime decreases.¹⁹⁸ Otherwise, consumers would face increased prices for certain products (e.g., CD writers, blank CDs) without being able to employ these goods for private copying, which is perfectly legal under German and European copyright law.

To avoid this problem of double compensation with regard to digital private copying, two different approaches have been submitted. Hugenholtz et al. suggest adjusting the levy system according to the *availability* of respective technological measures. After a finding that for a given media type or platform the application of TPM's is, or soon is to become, economically viable, the corresponding levy might be phased out, either gradually or at once. Factors ('trigger points') to be considered in such a phase-out procedure might include: upfront costs to producers and intermediaries (i.e., DRM technology should be cheaply available to SMEs); incremental costs or savings for consumers; consumer-friendliness and acceptance, as reflected in, for example, the market share; incorporation of PETs (Privacy Enhancement Technologies) in DRM systems; accessibility of DRM protected content by disabled users and users with special needs.¹⁹⁹ Apparently, this proposal prefers private exploitation. It is not meant to accomplish a permanent coexistence of the private and the levy system, but to completely phase out levies in the digital environment.

The other proposal—which is reflected in Art. 5(2)(b) Copyright Directive and current German copyright law with regard to levies for digital private copying²⁰⁰—modulates the imposition and distribution

198. See Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, *supra* note 190, at 1053-54; Till Kreutzer, *Herausforderungen an das System der Pauschalvergütungen nach den §§ 54, 54a UrhG durch die Umsetzung der Richtlinie 2001/29/EG*, *Zeitschrift für Urheber- und Medienrecht* (ZUM) 1041, 1043 (2003).

199. Hugenholtz et al., *supra* note 64, at 44.

200. Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, *supra* note 190, at 1054-55; *contra* Hugenholtz et al., *supra* note 64, at 42-44. Section 13(4) of the *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten* (German Law on the Administration of Copyright and Neighboring Rights) (as amended on September 10, 2003) declares that collecting societies, in drawing up tariffs for the levy, have to take into account to what extent technological measures are being applied. For other European jurisdictions, see Hugenholtz et al., *supra* note 64, at 45.

of levies according to the extent of *actual application* of DRM systems in the respective digital field.²⁰¹ The fundamental features of this concept can be summarized as follows.²⁰² Most important, one has to distinguish the imposition of the levy from the distribution among right holders. Starting with the distribution, right holders are obliged to inform the competent authority (in Germany the competent collecting society) when registering the work or when afterwards applying DRM systems in the course of exploiting the work. When such a notification is filed, the respective right holder is suspended from the distribution process.²⁰³ This system produces data that describes the actual application of DRM in the market. These datasets can be employed to determine how far the levy imposed on products or services has to be adjusted. If the number of proprietarily exploited works increases, the royalties imposed on specific devices or mediums to which DRMs are regularly applied have to be reduced. The reason is that the respective device can less often be utilized for private copying of copyrighted works.²⁰⁴

Obviously, this solution resembles core features of the bipolar copyright system. In both cases, copyright law at the same time provides for legal protection of technological measures and for limitations to copyright accompanied by a levy. Technological measures must not be circumvented, even if done for the sole purpose of carrying out privileged uses under a limitation to copyright. Thus, the copyright owner is enabled to establish proprietary and technologically supported business models in the digital realm. *If she chooses to do so*, however, she will not participate in the distribution of the levy and may try to recoup her investment by individual licensing. If not, digital private copies are not technologically prevented up front. Copying in this case is lawful and indirectly compensated via a levy.

201. Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, *supra* note 190, at 1055-58; Kreutzer, *supra* note 198, at 1044-45. The draft bill of the German Ministry of Justice on a "Second Act on Copyright in the Information Society", *supra* note 21, at 20 *et seq.*, expressly adopts this view.

202. For a detailed analysis of the system applied to existing levies for digital private copies under German law, see Peukert, *Neue Techniken und ihre Auswirkung auf die Erhebung und Verteilung gesetzlicher Vergütungsansprüche*, *supra* note 190, at 1055-58. For an analysis of the existing levies for digital private copies under Swiss law, see Peukert, *DRM: Ende der kollektiven Vergütung?*, *supra* note 190.

203. This is expressly laid down in the draft bill of the German Ministry of Justice on a "Second Act on Copyright in the Information Society", *supra* note 21, at Sec. 54g (2)(2).

204. For example, CD writers could not successfully be used for reproducing copyrighted content if most compact disks are copy protected.

The major difference between the bipolar copyright system and this already existing body of European copyright law is the type of use to which these concepts apply. In Europe, especially Germany, copyright issues revolve around digital private copies. This article and the proposals discussed herein are devoted to non-commercial file sharing. Nevertheless, it can certainly be argued that if current European copyright law is considered to be in line with the WIPO Treaties—which is generally acknowledged²⁰⁵—the bipolar copyright system applied to p2p file sharing must be too.

E. Summary

This section discussed whether proposals for a levy/tax system covering non-commercial file sharing are consistent with international copyright law. The following conclusions can be drawn.

It is not even necessary to adopt a narrow interpretation of the three-step test as applied by the WTO Panel decisions to discover that those aforementioned proposals are not in accordance with the three-step test, which do not give the right holder the option to choose exclusivity on the basis of DRM.²⁰⁶ The reason for this negative assessment is that all international conventions rest upon the

205. See Copyright Directive, *supra* note 59, at recital 15 The Community and a majority of Member States have already signed the Treaties, and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations. The Copyright Directive is meant to implement the WIPO treaties in EC law. See *id.* See also Paris Court of Appeal, *Recueil Dalloz*, 1573 (2005) (holding that the limitation for digital private copies does not violate the three-step test under the Berne Convention). But see Cyrill P. Rigamonti, *Schutz gegen Umgehung technischer Maßnahmen im Urheberrecht aus internationaler und rechtsvergleichender Perspektive*, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (GRUR Int.) 1, 5 et seq. (2005) (arguing that the Copyright Directive violates the WCT because it extends the protection of technological measures beyond the limitations of copyright).

206. See Ginsburg, *supra* note 20, at 55-56 (“Indeed, an exception for large-scale ‘private’ copying of the ‘sharing’ type might well conflict with a normal exploitation (assuming the copyright could be enforced in this kind of situation)”); Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 20 (applying strict scrutiny when it comes to uses in the digital network environment), no. 22 (“[P]lacing of an entire protected work on the digital networks for free access may unreasonably prejudice the author’s interests to a considerable degree.”); Ricketson, *supra* note 68, at 80 (“[I]t is difficult to see any justification that can be made for these uses under the three-step test”); but see Ficsor, *supra* note 71, at C10.34, C10.37; Eckersley, *supra* note 28, at 158 (concluding that the three-step test “might just prove itself flexible enough to allow some limited experimentation with virtual markets,” although he acknowledges that the three-step test “was devised as a mechanism to reinforce a model of copyright based in exclusive rights.”). Accordingly, Neil Netanel’s “Noncommercial Use Levy” would actually require the amendment of international copyright law. Netanel, *supra* note 48.

perception that copyright is a private, exclusive right. Accordingly, non-voluntary licenses are the exception to this rule, and they have to be of a limited nature.²⁰⁷ A broad levy system has never been accepted as a true alternative to exclusive rights in the history of international copyright law.²⁰⁸ This holds true also for the WIPO "Internet" Treaties of 1996.²⁰⁹

This conclusion, however, does not apply to a "bipolar copyright system" regarding noncommercial file sharing, where the right holder chooses between exclusivity based on technology and a right to remuneration under a tax/levy regime.²¹⁰ This kind of optional levy/tax system corresponds to William Fisher's and Jessica Litman's models.²¹¹

However, even this result leaves many questions open. As Jessica Litman correctly points out, "the devil will be in the details, and focusing on the details allows us to figure out which ones are most important."²¹² Whereas it is beyond the scope of this article to address all relevant aspects of a bipolar copyright system, the following part V will bring up questions which will most likely bring on major criticism. In particular, part V will explain in more detail how the two poles of the system—proprietary exploitation and participation in the levy/tax

207. See ECJ, *Anheuser-Busch Inc. v. Budějovický Budvar, národní podnik*, C-245-02, 04/11/16, at para. 65 ("With respect to the TRIPS Agreement, it should be observed that the primary objective of that agreement is to strengthen and harmonise the protection of intellectual property on a worldwide scale."); WILHELM NORDEMANN, KAI VINCK & PAUL W. HERTIN, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW* Art. 9 BC no. 4 (1990); Panel Report, *United States Section 110(5) of the U.S. Copyright Act*, *supra* note 22, at para. 6.97; Eckersley, *supra* note 28, at 158 ("The Berne three-step test was devised as a mechanism to reinforce a model of copyright based in exclusive rights."). For an application of the three-step test to Australian copyright law, see SAM RICKETSON, *THE THREE-STEP TEST, DEEMED QUANTITIES, LIBRARIES AND CLOSED EXCEPTIONS*, ADVICE PREPARED FOR THE CENTER FOR COPYRIGHT STUDIES LTD. (2002).

208. During the Stockholm Conference in 1967, a general compulsory license in favor of the dissemination of knowledge was rejected. The latter had been proposed by India and Romania to counterbalance for providing a general right of reproduction. See Report Stockholm 1967, *supra* note 117, at 197; Ricketson, *supra* note 58, at 481. The Federal Republic of Germany proposed an *additional* condition for exceptions, namely, that the reproduction should not conflict with the author's right to obtain equitable remuneration. See Report Stockholm 1967, *supra* note 117, at 196. See Ficsor, *supra* note 71, at 5.125-7 (remuneration schemes for private copying had also been discussed prior to the WIPO conference in 1996, but did not make it onto the agenda of the conference).

209. See Ficsor, *supra* note 71, at 5.113-20, C10.33 (summarizing various statements made at WIPO Symposiums in 1993, 1994, and 1995 that unanimously stress the notion of copyright as an exclusive right in cyberspace).

210. See *supra* Part IV.B 2.b.

211. See *supra* Part III.B.

212. Litman, *supra* note 91, at 40.

system—relate to each other and which alternative should be, or, again in light of international copyright law, must be the statutory default.

V. How a Bipolar Copyright System Would Function

A. Complexity of the System

A fundamental reservation against a bipolar copyright system for the digital network environment will be its complexity.²¹³ Even without going into the details of how the freedom of the right holder to choose between those two alternatives may be accomplished in practice, it is obvious that it will involve considerable effort to establish and organize the system. It is certainly true that there are less complex answers to the digital dilemma.²¹⁴ For example, a shorter term than life plus 50, or even 70, years would flush many works into the public domain without significantly diminishing the incentive of authors to create new works. A similar result could perhaps be achieved by requiring registration for the renewal of the copyright term.²¹⁵

The problem with these proposals—which brings us back to the aim of this article—is that they require the amendment or abrogation of international copyright treaties.²¹⁶ It has been pointed out that these steps are extremely difficult to achieve or simply unrealistic on a political level.²¹⁷ It is therefore reasonable to modulate a solution which is superior to the logjam currently in place without conflicting with Berne, TRIPS or the WIPO Treaties. One proposal that fulfills

213. For a discussion on a necessary “new simplicity” in dealing with copyright, see Stefan Bechtold, *Das Urheberrecht und die Informationsgesellschaft*, in RETO M. HILTY & ALEXANDER PEUKERT (ED.), INTERESSENAUSGLEICH IM URHEBERRECHT 67, 84-86 (2004).

214. For the definition of the term “digital dilemma,” see *supra* Part I.

215. See Breyer, *supra* note 1, at 323 *et seq.*; Lessig, *supra* note 57, at 251-52; William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 476 (2003); Epstein, *supra* note 1, at 33-37; Public Domain Enhancement Act, H.R. 2601 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.2601>.

216. For the duration of copyright, see Art. 7 BC, 12 TRIPS. For the formalities of copyright see Art. 5(2) BC.

217. See *supra* Part I. In the end, national lawmakers have to make a choice between negotiations on a political level to amend international copyright law and systems like the bipolar copyright system that do not require changes of international law. Complexity is involved in either strategy. It only relates to different aspects, *i.e.*, politics on the one hand and the legal and technological architecture of the approach in line with current international copyright law on the other (be it a bipolar copyright system or a streamlined enforcement mechanism).

this fundamental requirement and looks for middle ground in the battle over copyright in the digital network environment is a streamlined enforcement mechanism as outlined by Lemley and Reese.²¹⁸ Another option would be a voluntary collective management system as suggested by the EFF and others.²¹⁹ However, as long as these solutions are not adopted and have proven that they actually solve some of the problems they address, it is worth asking what a bipolar copyright system would look like, despite its complexity.

B. Switching between Individual Licensing and the Levy System

1. Does the Choice Make Sense?

The most important feature of the bipolar system is that the right holder may freely choose between exclusive, proprietary exploitation on the basis of DRM (“hoarding”) and participating in the levy/tax system (“sharing”) as regards non-commercial file sharing. One of the advantages of this system is that the decision can and should be made for *every single subject matter* by the copyright owner according to the particular circumstances of each case. No governmental agency is involved. It is thus a market-based, decentralized concept. To leave the choice to the right holder recognizes self-determination as a core value of copyright in general.

The following examples are meant to show that it makes sense to provide for both alternatives in the digital online environment. In doing so, one has to distinguish between two scenarios. Either the choice will be made at the time of first publication of the work or the copyright owner withdraws the work from one system and releases it into the other after the time of first publication.

a. Decision at the Time of First Publication

A recognized artist who has already had some commercial success may decide in favor of the proprietary system just as it is today. Unauthorized use of her works in p2p networks infringes the copyright in the works. To increase the risk that possible infringers will actually face consequences, a streamlined enforcement procedure as proposed by Lemley and Reese²²⁰ might be advisable.

218. Lemley & Reese, *supra* note 38. The authors also think it possible that their proposed system could be part of a levy system, be it on an opt-in or opt-out basis. *Id.* at 1424.

219. See *supra* Part III.B.

220. Lemley & Reese, *supra* note 38.

The situation is completely different if a newly created work does not promise commercial success.²²¹ This might be the case if the author is not yet known in public²²² or the work is geared at a very small market for which there is not yet an intermediary offering commercial distribution. Obviously, the author does not and cannot expect significant revenue from choosing the proprietary system. She will often not even find an intermediary who will agree to handle commercial exploitation. In this situation, the levy/tax system will be much more appealing. The work—once produced and ready for distribution as a digital file in p2p networks—can be registered to be eligible for distribution of the tax/levy.²²³ It is then up to the author or a commercial supplier of this service to promote the work among potential consumers. To this end, the Internet and modern technologies—especially preference-matching engines²²⁴—provide promising tools for a cost-effective promotion, lowering the barriers to entering the market. The interested user may download and redistribute the work without being obliged to pay for every use directly.²²⁵ Instead, the creator receives a share of the levy/tax according to the use of his work as monitored by technology. Thus, failing to get a contract in the entertainment industry does not

221. The distinction between popular works and less popular works also plays a role in the discussion about the optimal level of DRM protection. See Jaisingh, *supra* note 147, at 19 (stating that “protecting the latest album by Michael Jackson or the latest Lord of the Rings (movies and artists which already do, or are more likely to create a ‘buzz’) makes more sense than protecting an album, which is less likely to be popular.”).

222. See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004) (“Indeed, the record indicates that thousands of other musical groups have authorized free distribution of their music through the internet.”); *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2772 (2005) (“Some musical performers . . . have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks . . .”).

223. For a discussion on the opt-in and opt-out alternatives, see *infra* Parts V.2, V.3.

224. See Lessig, *supra* note 57, at 132-34.

225. This is the approach of the so-called PotatoSystem, which was developed by the German Company “4FO AG” together with the Fraunhofer-Institute for Digital Media Technology IDMT in Ilmenau, Germany. Its concept is sketched on the website, Potato System Frequently Asked Questions, <http://www.potatosystem.com/info/eng/index.html>, as follows:

Authors of music aim at selling music. Therefore they have a substantial interest in a wide distribution of their works (e.g. as MP3-files). However, they care about making money as well. The PotatoSystem comes up with an innovative solution to this problem. It was particularly developed for unknown authors and independent music labels and operators of music download portals. It is based on a commission model: the consumer receives a commission for redistributing a music file. That means, within the PotatoSystem, the user does not just pay for the right to hold a music file but also for the right of redistribution.

automatically mean that you have to offer your work “for free.” Instead, you simply opt for the other business model and still have the possibility to earn money with your creations. It should be added that the levy/tax system could be attractive not only for newcomers or artists who create works for markets too small to be served by intermediaries of today. For example, a newly released album may be promoted with a pre-released single which is registered for the levy/tax system and then lawfully and unrestrictedly “shared” in p2p networks. If the song proves successful, it can thereafter—together with the rest of the album and additional material such as video sequences—be exploited in the proprietary system.

b. Switch-Over from One System to the Other

The last example gives rise to the second scenario, which is much more difficult to handle. Up to this point, this article has only dealt with works which, at the time of first publication, are deliberately channeled into the proprietary or the levy/tax system. Are there cases imaginable where the copyright owner decides to switch from one system to the other?

The first variant under that scenario is that the author initially went for proprietary exploitation on the basis of DRM. If it has become clear that there will not be additional, significant revenue from exclusive exploitation—be it because consumers did not like the work or because the commercial life cycle of the work has already faded—the copyright owner can at least try to make some more money by registering the work and making it freely available in p2p networks.²²⁶ She is thereby able to reach consumers who are not willing to pay for the song or other work on an individual basis. The levy/tax system can thus form part of a strategy that relies on price discrimination.²²⁷ To offer the work for non-commercial file sharing, not require direct payment for such uses, and still to make some money is an alternative business model not available today.

226. The copyright owner may still try to sell copies of the work. While commercial online ventures will face significant competitive pressure from the freely available versions in p2p networks, CDs and other offline mediums may still be successfully offered. *See infra* Part V.B.3.c.

227. There is no considerable risk that consumers will willfully abstain from purchasing or licensing copies of newly released songs or movies because they hope that these works will soon be available in p2p networks. The reason is that cultural works exert considerable attraction on consumers if they are—admittedly, for a limited period of time—a “must-have.” Think, for example, of number one hits or movies that consumers simply have to know in order to be able to take part in everyday conversation. This notion relates particularly to younger consumers.

Moreover, the fact that this switch to the levy/tax system will often take place after a certain period of proprietary exploitation reflects current criticism regarding the copyright term. In many jurisdictions, copyright currently lasts 70 years *post mortem auctoris*.²²⁸ It is rightly argued that such a long copyright term—compared to a copyright term of 50 years p.m.a. or an even shorter term—does not generate relevant economic incentives to become creative in the first place.²²⁹ As justice Breyer stated in his dissenting opinion in *Eldred v. Ashcroft*, “no potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2 percent of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller.”²³⁰ The bipolar copyright system can be understood as a flexible answer to that problem. Releasing works into p2p networks after an initial exploitation in proprietary systems gives users nearly as much freedom as with works in the public domain. Besides, to provide for a significantly shorter copyright term would again require the amendment of international copyright law.²³¹ Finally, no statutory modification of the copyright term would ever make it possible to consider each commercial life cycle of a given work individually. This, however, is just what the bipolar copyright system does.

At first glance, it seems that the second variant—that is, to switch from the levy/tax system to the proprietary system—will not likely be of practical relevance. After all, there are digital files of the work not protected by DRM available in p2p networks. Taking the current state of the art, it will hardly be possible to technologically prevent further use of these files. The Ninth Circuit’s decision in *Grokster*, however, offers a telling example which teaches the opposite. Explaining why the p2p software at issue was “capable of substantial” or “commercially significant noninfringing uses,” the court proceeds:²³²

228. See 17 U.S.C. § 302(a) (2000); Art. 1(1) Council Directive 93/98, 1993 OJ (L290) 9-13 (EC).

229. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 792-93 (2003) (Stevens, J., *dissenting*); *id.* at 808 (Breyer, J., *dissenting*).

230. *Eldred*, 123 S. Ct. at 808 (Breyer, J., *dissenting*); Lessig, *supra* note 57, at 292-94. See Reto M. Hilty, *Eldred v. Ashcroft: Die Schutzfrist im Urheberrecht—eine Diskussion, die auch Europäer interessieren sollte*, Gewerblicher Rechtsschutz und Urheberrecht International (GRUR Int.) 201 (2003) (providing a European perspective on *Eldred*).

231. See Art. 7 BC; art. 12 TRIPS.

232. *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004). The

One striking example provided by the Software Distributors is the popular band Wilco, whose record company had declined to release one of its albums on the basis that it had no commercial potential. Wilco repurchased the work from the record company and made the album available for free downloading, both from its own website and through the software user networks. The result sparked widespread interest and, as a result, Wilco received another recording contract.

Thus, experience shows that proprietary exploitation is not at all eliminated if the respective work had already been available in p2p networks in an unprotected digital format. The strategy to exclusively commercialize such works may become even more promising under the bipolar copyright system. First, the proprietary system could be strengthened by an improved enforcement system on the Internet in order to deter users from further “sharing.”²³³ Second, the monitoring technology which helps to count lawful uses in p2p networks²³⁴ may also be employed to curtail file sharing. For example, one could imagine an automatic indication that the work is no longer available for “free” if a user wants to stream or download the work after the withdrawal. It should be added in this context that one important consequence of the differentiated approach of the bipolar copyright system may well be that consumers will be more likely to respect copyright enforcement if it applies only to commercially valuable works, and not to possibly any content available.²³⁵ In any event, it is up to the copyright owner to take the risk. Again, new business models and improved offers (for example additional versions of a song, etc.) may help to make this strategy valuable.²³⁶

Supreme Court did not refer to this example expressly but stated that “some musical performers . . . have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks” *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2772 (2005). Justice Ginsburg declared “there has been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses.” *Id.* at 2785 (Ginsburg J., concurring).

233. See Lemley & Reese, *supra* note 38.

234. See *supra* Part I.

235. Litman, *supra* note 91, at 49.

236. One could even consider allocating, for a certain period of time, a fraction of the money due under the levy/tax system to the copyright owner after the work has been withdrawn to account for the ongoing uses. This option, however, has severe legal pitfalls. In the end, the uses are unlawful. After the work has been withdrawn, uploads and downloads infringe the copyright in the work. They can be prevented by exercising exclusive rights. If the copyright owner fails to do so, it does not seem justified to nevertheless assign her shares of the levy/tax revenue.

These examples show that both systems will be used for different classes of works. While some works will be exploited—often for a limited time only—in commercial online ventures, others will from their publication on be available for non-commercial file sharing in p2p networks. The question still open is, however, which system should or must form the legal default. Two alternatives are imaginable. Either the levy/tax system is the legal default and the copyright owner has to opt out of it (this is the variant proposed by Jessica Litman and William Fisher), or exclusivity is the rule and the right holder may deliberately opt into the levy/tax system. The following section addresses both alternatives, again emphasizing the question of whether both approaches are in line with international copyright law.

2. *Opting Out of the Levy/Tax System*

a. Features and Benefits

The first alternative to be considered here is the opt-out model. According to Jessica Litman's and William Fisher's suggestions, the levy/tax system should be the legal default.²³⁷ Thus, any work still under copyright and every newly published work would fall under the new limitation from or exception to exclusive rights and would at the same time be eligible for shares of the levy/tax, unless the right holder opts for exclusivity on the basis of DRM. With regard to new works, Litman proposes a notice-based opt out mechanism. In order to inform consumers that a particular work does not fall under the levy/tax system, the copyright owner would have to release the work in a certain DRM format.²³⁸ She would lose any claims under the levy system. Additionally, she would have to take affirmative steps to exclude her work from the network and "enable consumers to quickly and painlessly ascertain that those works may not lawfully be shared."²³⁹ As concerns works that have already been released in another, free format, Litman would make it even more burdensome to withdraw a work from "sharing."²⁴⁰ Without explaining how the

237. See Litman, *supra* note 91, at 45 *et seq*; Fisher, *supra* note 1.

238. Litman, *supra* note 91, at 46-47.

239. *Id.* at 45.

240. See *id.* at 48:

All owners of the copyright in the work, as well as the work's creators, would be required to join in the decision to withdraw. First, the copyright owners would need to recall copies of the work released in formats other than *.drm, and offer any consumers who own authorized, commercial copies in a non-*.drm format the opportunity to swap those copies for

implementation of technological measures and privileged uses under the alternative compensation system relate to each other, Fisher would accept it if a copyright owner “opted out of the tax system entirely, releasing only an encrypted version of his or her recording.”²⁴¹

Obviously, this concept aims at encouraging “sharing” instead of “hoarding.”²⁴² It thus relies on the positive effects of the levy/tax system as summarized above.²⁴³ Moreover, it accepts the fact that virtually every work published today can be accessed in p2p networks and that many works are not commercialized and released for free on the Internet.²⁴⁴ If “sharing” is the default today, Litman concludes that it should be the default of tomorrow. It would simply be transformed from illegal to lawful and compensated use. One final aspect should not be underestimated: a tax or levy system would be imposed on services and devices in use for file sharing upfront. It would not be collected on an individual basis, as under a collective license where the user or the facilitator has to pay according to the number of works actually being used or at least available for use in the network.²⁴⁵ The imposition of a levy/tax high enough to generate funding that encourages authors to go for the levy/tax system can hardly be justified if there are only very few works registered for lawful use in p2p networks. The opt-out model would make sure that presumptively all copyrighted works are legally available for up- and download. It would thus provide the prospect of something of value for the society at large. Without this prospect, there will be strong

*.drm copies at no charge. Second, the law should incorporate a 24-month grace period before any withdrawal of a work could take effect. (In the meantime, withdrawn works could collect payments from the common fund.) Finally, in order to recover in an infringement suit for consumer-to-consumer dissemination of a withdrawn work, the copyright owner would need to show knowledge that the work had been withdrawn.

241. Fisher, *supra* note 1, at 247-48.

242. Litman, *supra* note 91, at 41; Fisher, *supra* note 1, at 237.

243. See *supra* Part III.C.

244. See *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1161 (9th Cir. 2004) (“Indeed, the record indicates that that thousands of other musical groups have authorized free distribution of their music through the internet.”); *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2772 (2005) (“Some musical performers . . . have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks . . .”). See also *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2789 (2005) (Breyer J., concurring) (explaining the significant future market for noninfringing uses of Grokster-type peer-to-peer software).

245. Fisher, *supra* note 1, at 252. For the differences in financing between voluntary collective licensing and a levy/tax, see *infra* Part. V.3.b.

resistance against the adoption of a levy/tax system as a mere alternative to exclusive exploitation.

b. Compliance with International Copyright Law

Again however, there are severe doubts whether this concept is in accordance with international copyright law, basically for two reasons.

(1) Overview

First, one could ask whether exclusivity as only the secondary option is still in line with the three-step test. As already outlined, the bipolar copyright system *as such* arguably complies with this treaty obligation because it simply offers the right holder an additional business model. Exclusivity in cyberspace is limited only with regard to copyright as one of the two layers of exclusivity. The other one, *i.e.*, exclusive exploitation based on DRM systems, remains unaffected.²⁴⁶ What remains uncertain, however, is whether exclusivity has to be the legal default under the three-step test.

Second, if the right holder has to opt out of the levy/tax system in order to enjoy full exclusivity, it could be said that this model establishes a formality requirement.²⁴⁷ Article 5(2) BC reads “The enjoyment and exercise of these rights shall not be subject to any formality” The formulation “these rights” refers to paragraph 1 of Article 5 BC, which proclaims that “authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”²⁴⁸

246. See *supra* Part IV.B.2.b.

247. See Litman, *supra* note 91, at 46 n.166.

248. Historically, the acts of the Berne Convention moved away from formality requirements for copyright protection. Article 2(2) of the 1886 act provided that “the enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work” It was only at the 1908 Berlin Conference that this requirement was abolished. Article 4(2) BC 1908 already had the same wording as Art. 5(2) of the current version. The 1967 Stockholm Conference simply rearranged the legal material in Arts. 4 to 6. It did not alter Art. 4(2) but simply gave it a new number, Art. 5. See Ricketson, *supra* note 58, at 5.82; Fritz Schönherr, *On the Interpretation of Article 5(2) of the Berne Convention, Taking as an Example the Greek Antipiracy Law of July 15, 1980*, Copyright 295-97 (1981); Alfred Baum, *Berner Konvention, Landesgesetze und internationales Privatrecht*, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 923-27 (1932).

Since both the TRIPS Agreement and the WCT stipulate that contracting parties have to comply with Articles 1 to 21 of the Berne Convention, the prohibition of formalities has to be observed by parties to these treaties too.²⁴⁹ An alleged violation of this obligation is consequently enforceable in a WTO dispute settlement proceeding.²⁵⁰ Moreover, these references entail that not only the right of reproduction according to Art. 9 BC must not be subject to formality requirements, but also the right of communication to the public, including the right of making works available to the public under article 8 WCT.²⁵¹ These rights are minimum rights granted by the Berne Convention and the WCT. They are thus “rights specially granted” under these treaties, so their enjoyment or exercise must not be subject to formalities.²⁵² In order to establish a levy/tax system where “sharing” is the legal default rule, however, the right of reproduction and the right of communication to the public would be limited with regard to non-commercial file sharing unless the right holder accomplishes certain requirements.²⁵³

The three-step test and the prohibition of formalities are closely related to each other. If exclusivity has to be the default under the three-step test, the opt-out mechanism can well be said to be a formality requirement. If not, the right holder would in principle²⁵⁴ enjoy automatic protection under the levy/tax system without further conditions or formalities. In this latter case, Art. 5(2) BC would not be opposed to this solution. To explain this distinction, one has to rely on the general goals of the convention and the provisions relevant here because there is no precedent for an opt-out mechanism under a bipolar copyright system. The idea of two layers of exclusivity which are treated differently was not known in 1971, the year of the last amendment of the Berne Convention.

(2) Formalities

To begin with, it can certainly be argued that the necessary acts for opting out of the levy/tax system are *formalities* under 5(2) BC.

249. See Art. 9 (1) TRIPS (excluding Art. 6bis BC), Art. 1(4) WCT.

250. See *supra* Part I.

251. These are the exclusive rights that would have to be limited in order to establish a levy/tax system. See *supra* note 116.

252. Nordemann et al., *supra* note 207, at Art. 5 BC no. 6.

253. See *supra* Part III.B.

254. It has to be noted that naturally only those right holders can receive a share of the incurred levy/tax who register their work with the competent authority that distributes the money. See *infra* Part V.B.2.b.(3).

Jessica Litman suggests that the work would have to be published in a certain DRM format and that the right holder would have to take care that consumers are informed about this choice.²⁵⁵ One could alternatively imagine a notice with the competent authority that the work shall not be lawfully available for file sharing.²⁵⁶ Both requirements are state-required, formal preconditions, just as the notice and registration system under former U.S. copyright law, which was one of the major obstacles for the U.S. joining the Berne Convention.²⁵⁷ This is obvious in the case that a declaration or registration is necessary.²⁵⁸ It also holds true for the need to use a DRM format. While one might question whether this requirement is a “formality,” it certainly can be said to impose a “condition” in a more general sense that has to be complied with in order to ensure that the work does not fall under the limitation/exception for non-commercial file sharing. Originally, article 2(2) of the 1886 Berne act referred to formalities *and* conditions.²⁵⁹ “Conditions” meant material requirements such as providing a translation of the work in the language of the country where protection was sought.²⁶⁰ When the need to comply with conditions and formalities was abolished at the 1908 Berlin Conference, the term “conditions” in the new provision 4(2) was also deleted. The documents of the conference, however, show that the delegations understood the new wording “formalities” as covering both the “conditions and formalities” referred to in the 1886 act.²⁶¹ Thus, the requirement to use a certain format for publication in order to enjoy exclusivity in cyberspace is also a “formality” under Article 5(2) BC.²⁶²

255. See *supra* Part III.B.

256. See Fisher, *supra* note 1, at 242 (discussing an opt-out mechanism as regards the preparation of derivative works).

257. See 17 U.S.C. § 401(a) (2000); Nordemann et al., *supra* note 207, at Art. 5 BC no. 7; Leaffer, *supra* note 65, at § 12.5[B][1].

258. Other formalities are the obligation to affix a copyright symbol and to make a legal deposit of money or a copy of the work under penalty of losing rights. See Daniel Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation*, Study prepared for the Department of Canadian Heritage 19 (2003), http://www.canadianheritage.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/regime/regime_e.pdf; Ricketson, *supra* note 58, at 5.83; Nordemann et al., *supra* note 207, at Art. 5 BC no. 7.

259. For the development of the wording of this article, see *supra* note 248.

260. ERNST RÖTHLISBERGER, *DIE BERNER ÜBEREINKUNFT ZUM SCHUTZE VON WERKEN DER LITERATUR UND KUNST UND DIE ZUSATZABKOMMEN* 101 (1906).

261. Ricketson, *supra* note 58, at 5.83.

262. The same holds true for other requirements Litman proposes. See Litman, *supra* note 91, at 48.

(3) Effect on the Enjoyment or Exercise of Rights

With this insight, however, the interpretation of Art. 5(2) BC is not complete. The second element of this provision is that the *enjoyment or exercise* of the right of reproduction and the right of communication to the public as minimum rights under the named conventions are subject to the formality. The necessity to address this element separately becomes obvious in light of a statement at the Diplomatic Conference of 1884 which explains the meaning and reach of the provision. During the discussion, one of the German delegates put forward an interpretation which was approved by the Conference and was reproduced verbatim in the Conference records. According to this statement of Dr. Meyer, “the words ‘formalities and conditions’ comprise everything which must be complied with in order to ensure that the rights of the author with regard to his work may come into existence [in German: “*Voraussetzungen*”], while the effects and consequences of protection [in German: “*Wirkungen*”], in particular the extent of that protection, should remain subordinated to the principle of treatment equal with nationals.”²⁶³ As was already shown, the current version of Art. 5(2) BC can be traced back to Art. 2(2) of the 1886 act.²⁶⁴ Hence, the distinction between prohibited formalities relating to the *genesis* of the right and formalities that concern only the *scope* of copyright is still valid for the interpretation of the provision.²⁶⁵

Adopting this reading of Art. 5(2) BC, it could be argued that the opt-out mechanism establishes only a formality requirement as regards the *scope* of copyright, in Dr. Meyer’s words the *consequences of protection*, but not its genesis. As a result, these formalities would not fall under Art. 5(2) BC and would therefore not conflict with this international obligation. It is, for example, held that Art. 5(2) BC does not apply²⁶⁶ to provisions in national copyright law that grant a longer copyright term for pseudonym works if the author registers her true name in a register for authors²⁶⁷ or if the law provides for a

263. Ricketson, *supra* note 58, at 5.82.

264. See *supra* Part V.B.2.b.(2).

265. See Ricketson, *supra* note 58, at 5.83; Masouyé, *supra* note 137, at 35; Nordemann et al., *supra* note 207, at Art. 5 BC no. 7; see also Baum, *supra* note 248, at 927 (providing further references).

266. See Ricketson, *supra* note 58, at 5.82; Röthlisberger, *supra* note 260, at 108; Baum, *supra* note 248, at 928; WILLY HOFFMANN, DIE BERNER ÜBEREINKUNFT ZUM SCHUTZE VON WERKEN DER LITERATUR UND KUNST 92 (1935); Schönherr, *supra* note 248, at 297.

267. See, e.g., Sec. 66(2) German CA.

presumption in favor of the person who is designated as author on a copy of the work.²⁶⁸ Similarly, the opt-out mechanism does not deprive the author of copyright protection completely. Copyright still comes into existence without any formalities. Only with regard to non-commercial file sharing is the legal default not exclusivity, but a levy/tax system that, after all, generates income for the author. True, the copyright owner still has to register her work with the competent authority in order to actually have the prospect of receiving a share of the accrued money. But this could be said to be a mere factual necessity;²⁶⁹ it is not required by law. Basically, the protection under the levy/tax system is afforded without any formalities. Moreover, it has to be kept in mind that the bipolar copyright system is generally admissible under the three-step test.²⁷⁰ A national copyright law establishing this model could thus be said to grant authors the minimum rights under Berne. If this is true, both pillars of the bipolar system are valid default rules. Art. 5(2) BC would only prohibit *both* layers of protection being subjected to formalities. Therefore, if the right holder opts for exclusivity, she would, according to this view, only extend the scope of copyright protection, just like the author of a pseudonym work who registers her true name to enjoy the full copyright term.

Finally, the formalities proposed for opting out of the levy/tax system do not relate to the *exercise* of the exclusive rights. With exercise, Art. 5(2) BC refers to the enforcement of copyrights, *i.e.*, to the remedies available in the case of an infringement. For example, the bringing of proceedings or the award of damages must not be

268. See, e.g., Sec. 10(1) German CA:

In the absence of proof to the contrary, the person designated in the customary manner as the author on copies of a work which has been published or on the original of a work of fine art shall be deemed the author of the work; the same shall apply to a designation which is known as the author's pseudonym or the artist's mark.

269. For a discussion of the contrary view and the duty of the competent authority to search for authors who did not register, although their works are being shared, see *infra* note 282. It is furthermore interesting in this context that the "extended collective management" of exclusive rights by collecting societies is said to be in line with Art. 5(2) BC. Extended collective management of rights means that national copyright law entails a presumption in favor of collecting societies. According to this presumption, all authors grant rights, even if this is true only for a substantial number of authors, but not for all authors whose works are actually used under the collective licensing scheme. The background is that without this presumption, smaller collecting societies would not be able to offer a comprehensive repertoire for users. Authors are therefore obliged to expressly object to this administration of their rights in order to regain control over the exercise of their exclusive rights. See Gervais, *supra* note 258, at 19; Gervais, *supra* note 11, at 72.

270. See *supra* Part IV.E.

dependent on formalities or conditions.²⁷¹ The formalities at stake here do not center on infringement and remedies, but primarily on the enjoyment of rights. Additionally, the whole idea of a bipolar copyright system stringently implies a choice to be made by the right holder. This choice has to be expressed and registered in some form to give the public or at least the competent authority notice about the status of the work. If “exercise” of rights were to cover this notification, even a system that starts from exclusivity and provides for a voluntary opt-in mechanism as regards the levy/tax system would not comply with Art. 5(2) BC. Respectively, the requirement to file written documents in order to institute an infringement proceeding would run afoul of the Berne Convention. Obviously, this cannot be true. A formality requirement as to the exercise of rights has to impose additional obstacles not necessarily inherent in the copyright system.

For the following reasons, these arguments in favor of an opt-out mechanism are unconvincing. First and most important, it must be reiterated that the bipolar copyright system is also subject to the three-step test. It only helps to avoid a conflict with the second step, *i.e.*, the normal exploitation of the work in the digital network environment. The first and third steps still have to be observed.²⁷² From this it follows that a bipolar copyright system has to be confined to certain special cases (non-commercial file sharing) and that the levy or tax has to compensate the privileged uses in order not to cause an unreasonable prejudice to the legitimate interests of the right holder. If it is true that the three-step test applies, its primary purpose has to be observed. And this fundamental goal is to guarantee certain minimum *exclusive* rights in works and to confine the scope of limitations to or exceptions from exclusive rights in national copyright law.²⁷³ The bipolar copyright system already downgrades exclusivity to an alternative, on a par with a mere right to remuneration under a levy/tax system. This right to remuneration relies on limitations/exceptions to copyright which would conflict with the normal exploitation of the work if the copyright owner did not have the option to choose exclusivity.²⁷⁴ A paradigm shift like this only conforms with the purpose of the three-step test if exclusivity at least forms the statutory default rule.

271. Ricketson, *supra* note 58, at 5.84.

272. *See supra* Part IV.B, IV.E.

273. *See supra* Part IV.E.

274. *See supra* Part IV.B.2.b.

Second, this consideration can be rested upon the evaluation of other cases where the copyright owner is obliged to fulfil formalities in order to enjoy exclusivity. One example can be found in the BC itself. Art. 10bis (1)(1) reads:

It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, *in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved* [emphasis added].

The emphasized qualification enables the right holder to avoid the limitation. In order to enjoy exclusivity, she has to expressly reserve her rights. Under German copyright law, the statement “all rights reserved” has to be expressed in connection with every single published article.²⁷⁵ Obviously, this solution greatly resembles the bipolar copyright system, and particularly with the opt-out model as proposed by Jessica Litman. Ricketson and other commentators, however, reason that Art. 10bis (1) BC contains a formality requirement in that the genesis of the exclusive right at stake depends upon making an express reservation.²⁷⁶ It is thought to be justified only because it is acknowledged in the convention itself as a *lex specialis* to Art. 5(2) BC.²⁷⁷ Another situation similar to the opt-out model is mandatory or extended collective licensing, where the author has to withdraw her rights from the collecting society in order to handle her rights individually. Again, the author has to make a declaration or has to fulfill other conditions to enjoy exclusivity. However, mandatory collective licensing is found to be in conflict with the three-step test already if it pertains to exclusive rights²⁷⁸ or at any rate if the collecting society is required by law to grant exploitation rights or authorizations to any person so requesting.²⁷⁹

275. See Ferdinand Melichar in GERHARD SCHRICKER (ED.), URHEBERRECHT, Sec. 49 German CA no. 10.

276. Hoffmann, *supra* note 266, at 91.

277. Ricketson, *supra* note 58, at 5.85.

278. See Schönherr, *supra* note 248, at 295 with further references; Nordemann et al., *supra* note 207, at Art. 5 BC no. 77.

279. This is the case according to the German “Law on the Administration of Copyright and Neighboring Rights (Copyright Administration Law).” According to Sec. 11 of the Copyright Administration Law, “[C]ollecting societies shall be required to grant

For in the latter case the exclusive rights are in fact reduced to a mere right to remuneration administered by a collecting society.²⁸⁰ This, however, is exactly the case under the opt-out model where participation in the levy/tax system is the statutory default. Taken together, these examples illuminate the fact that the Berne Convention has been interpreted as requiring national copyright laws to vest the author with exclusive rights as the statutory default rule. A diverging subsequent practice in the application of the treaty cannot be ascertained.²⁸¹

Finally, it should be added that the right holder has to register her work with the competent authority in order to actually participate in the levy/tax system. Thus, even the statutory default under the opt-out model requires compliance with formalities.²⁸²

c. Summary

In Summary, the opt-out model as suggested by Jessica Litman and William Fisher is a state-required formality for the enjoyment of minimum exclusive rights. It is thus not in line with Art. 5(2) BC. The reason is that international copyright law persists in the notion of exclusive rights, even in the digital network environment. These exclusive rights have to come into existence without further formalities as the statutory default. To provide for exclusivity only under the condition that the right holder opts out of a levy/tax system does not meet this requirement.

The only way to go forward would be to confine the opt-out approach to works for which the respective country (for example the

exploitation rights or authorizations to any person so requesting on equitable terms in respect of the rights they administer.”

280. See von Lewinski, *supra* note 76, at 5:

The mandatory collective administration however does not affect the exclusive right itself; the covered uses are not authorized by law. Rather, the author is only restricted in the options of exercising the right: he is left with the only possibility to exercise the exclusive right through the collecting society, whereas the right itself is not limited as such, in particular not in favor of any such interest of the public at large.

Contra Gervais, *supra* note 11, at 72.

281. See Vienna Convention on the Law of Treaties, Art. 31(3)(b) May 23, 1969 n.55 U.N.T.S.331.

282. In order to address this problem, the authority distributing the money would have to check whether all works that are being used are registered and would have to contact the respective right holders if this were not the case. This solution obviously entails significant administration costs that diminish the prospects of the whole system.

U.S.) is the country of origin as defined in Art. 5(4) BC,²⁸³ because the obligation to provide for certain minimum rights and the formality requirement of Art. 5(2) BC do not apply in this situation.²⁸⁴ Such a limited adoption of the opt-out model, however, would not seem to be reasonable from a practical point of view. First publication determines the country of origin of a work. Right holders could easily evade the system if they published the work in another country than, for example, the U.S., for the first time. Users of p2p networks could not be sure whether the work they were using was lawfully available in the network even if it was not in a DRM format because it could still be a foreign work, which does not fall under the system anyway. The opt-out model as such would lose its most important prospect, *i.e.*, that the levy/tax system covers presumptively all works available in the network. Finally, it would be even more difficult to persuade the legislature to implement a general levy/tax up front if the amendment discriminates against national authors as compared to foreigners.²⁸⁵

283. Litman, *supra* note 91, at 46 n.166. Articles 5(3) and 5(4) of the Berne Convention read:

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

284. See Art. 5(1) BC (“[I]n countries of the Union other than the country of origin”); Ricketson, *supra* note 58, at 5.81; Masouyé, *supra* note 137, at 5.6; von Lewinski, *supra* note 76, at 5 n.13. This is the reason why 17 U.S.C. § 411(a) limits registration as a condition to instituting an infringement action to “United States works.” See Goldstein, *supra* note 69, at § 3.15.

285. See Ricketson, *supra* note 58, at 5.81 (explaining that the convention invariably has a decisive effect on the content of the domestic laws of its members).

If the opt-out model is not in line with international copyright law and admissible modifications of this concept do not seem reasonable as to their consequences, consideration should be given to the legal and practical aspects of an opt-in model.

3. *Opting In to the Levy/Tax System*

a. Features and Benefits

To get paid a share of the levy/tax based on the monitored use of the work in p2p file-sharing systems according to the opt-out model, the right holder has to register her work with the competent authority. As long as the work has not been registered and technologically tagged, the use will be unauthorized and thus will infringe the author's rights.²⁸⁶ This means that exclusivity is the legal default—just as it is today. The levy/tax system would provide an additional business model, available for those right holders who think that this mode of exploitation is more attractive than individual licensing on the basis of DRM.

Obviously, this solution does not raise doubts as to whether it is in accordance with treaty obligations under Berne, TRIPS or the WCT. It does not limit the enjoyment or exercise of exclusive rights by law. Moreover, these rights come into existence without formalities or other conditions. Accordingly, neither the guarantee of normal exploitation under the three-step test²⁸⁷ nor the prohibition of formalities is affected. This concept only gives the copyright owner an incentive to accept lawful non-commercial file sharing by providing a distribution channel where “compensation without control” can become reality.

The questions relating to this approach are—contrary to the opt-out model—not of a positivistic and legal, but of a practical nature: is it persuasive to implement a levy or tax on devices and services up front if it is still up to the right holder to reserve “all” rights or only “some”? Additionally, how is this different from a voluntary

286. For a different proposed solution, see Fisher, *supra* note 1, at 204 (If the work is not registered, it would be deemed to be dedicated to the public domain: “[w]ould each creator be obliged to register his or her creations? No. Unlike cars, songs and films could be unlicensed. Creators who wished for whatever reason to dedicate their products to the public domain could do so.”).

287. Still, however, the first and third requirements of the three-step test have to be observed. See *supra* Part IV.B.

collective licensing scheme as proposed *inter alia* by the EFF if the right holder is free to choose exclusivity?²⁸⁸

b. The Opt-In Model Compared to Collective Licensing

The difference and at the same time the advantage that makes the opt-in model more attractive than voluntary collective licensing relates to the funding of the system and the way lawful uses are compensated. Collective licensing relies on a voluntary agreement of right holders to form a collecting society, which then offers consumers the opportunity to use works online in exchange for a regular payment. This system will function successfully only under the condition that most if not all works are covered. Otherwise, consumers have no incentive to pay a subscription fee if they are not offered a variety of content. If it is not certain that enough users will subscribe, right holders have no incentive to agree on collective licensing instead of exploiting their works individually in different commercial online ventures while trying to stop unauthorized file sharing in p2p networks. This may be the reason voluntary collective licensing has not been adopted in the digital network environment.²⁸⁹

A levy/tax system provides funds to be distributed among right holders without requiring them to establish a collective society and without relying on the readiness of consumers to pay a subscription fee. Instead, the levy/tax is imposed upfront on services and products whose value is increased by file sharing.²⁹⁰ Thereby, a significant amount of money will be collected. All right holders who register their works are entitled to a share of this revenue. The primary difference between a levy/tax system and collective licensing is that a levy/tax system generates funding as an incentive for choosing “sharing” instead of “hoarding.”²⁹¹ With registration, the work

288. See *supra* Part III.B; EFF, *supra* note 50 (for the EFF proposal).

289. See *supra* Part V.A; Fisher, *supra* note 1, at 257-58.

290. See Netanel, *supra* note 48, at 35-59. The levy/tax would have to be imposed on all services and products offered in the respective country. It therefore would not severely affect competition in the relevant markets because any manufacturer or supplier of services would have to pay the levy/tax. It must be admitted, though, that newly developed substitutes would have to be covered quickly.

291. The PotatoSystem relies on a different incentive. It is based on a commission model that gives users who pay for the download of a music file the right to redistribute this work. The consumer can thus make money if other users acquire the music file from her. With the prospect of making money by redistributing works on the net, more and more users have an incentive to enter the system and to pay for the music and the right of redistribution in the first place. In the end, every user would act as a commercial distributor. Downloads from websites and file sharing would be transformed from uncompensated uses to “regular” market transactions. See PotatoSystem, *supra* note 225.

becomes available for lawful non-commercial file sharing. This, in turn, increases the readiness of consumers to pay more for Internet access or devices used for file sharing. In other words, the government would step in to offer an incentive for copyright owners to accept “compensation without control.” This is necessary because “contracting into liability rules”²⁹² obviously does not take place automatically. The government, however, does not force right holders into liability rules, since that would be incompatible with international copyright law. Instead, it establishes a system for indirect compensation of non-commercial file sharing. Whereas in the short run, not all works will be available for lawful file sharing, the fact that at least some will be available will probably change consumers’ attitudes towards the way works on the Internet can be legally accessed. This “soft” pressure and change of consumer behavior is likely to make the levy/tax system ever more appealing for copyright owners.

The fact that the levy/tax system may grow due to network effects, however, also reveals important drawbacks of the opt-in model. The levy or tax has to be imposed without the prospect that all works will be lawfully available in p2p networks. Especially works that promise commercial success will, at least in the beginning, not likely be registered. Thus, the ones who have to pay the levy/tax, *i.e.*, consumers and manufacturers of devices and suppliers of services used for file sharing, will claim that they are burdened whereas it is uncertain how much the public will gain from the system. In fact, this value judgment will be at the core of the political discussion surrounding an opt-in model: is it justified to raise prices for devices and services at the heart of the information and knowledge society in order to establish an additional business model for the distribution of copyrighted content online?

Since right holders retain their freedom to decide about the use of their work, it will instead be manufacturers of devices and suppliers of services who will primarily defy the implementation of this proposal.²⁹³ The opt-in model shifts the pressure away from copyright

292. See Robert P. Merges, *Contracting Into Liability Rules*, 84 CAL. L. REV. 1293 (1996) (explaining why right holders will automatically establish systems like collective licensing if individual licensing does not work).

293. Fisher, *supra* note 1, at 242. This repudiation can also be observed in the course of the discussion about the future of the limitation and the levy for private copying in Germany. See, e.g., Bernd Rohleder, *Für eine zukunftsfähige Urhebervergütung*, Zeitschrift für Urheber- und Medienrecht (ZUM) 1061 (2004) (proposing to abolish the levy for digital private copies).

owners towards a party that neither creates nor consumes content. This view, however, neglects the fact that manufacturers and suppliers of services profit from unauthorized use of copyrighted works in p2p networks because they commercialize the very services and devices necessary for file sharing. Thus, they cannot claim that they're not involved.

In summary, there are many good reasons for a bipolar opt-in model, even if it is uncertain how many works will in the end be lawfully available for non-commercial file sharing. Most important, it is the only model that brings a levy/tax system in the digital network environment in line with international copyright law.

c. Further Questions

The primary aim of this article is to test the flexibility of international copyright law in light of proposals for a levy/tax system covering non-commercial file sharing. It is not meant to address the manifold questions related to the implementation of such a system. It will not discuss, for example, which classes of works shall be covered,²⁹⁴ who is the responsible right holder to make the choice between "sharing" or "hoarding,"²⁹⁵ how much funding is needed to compensate the copyright owners, or which services and devices are

294. Not surprisingly, many proposals that gave rise to this study focus on music on the Internet because it still is mostly music that is shared. *See, e.g.,* Litman, *supra* note 91, at 2; Gervais, *supra* note 50; Shih Ray Ku, *supra* note 79, at 567; Sobel, *supra* note 55, at 694. However, according to a recent study, the sharing of video, images, and software are surging. *See* Howe, *supra* note 10. Neil Netanel would apply his Non-Commercial Use Levy to movies, music, text, and graphics, but not to computer programs. Netanel, *supra* note 48, at 41. William Fisher limits his proposal to audio and video recordings. Fisher, *supra* note 1, at 10. Peter Eckersley claims that his "virtual market system" might be a normatively superior means for providing incentives to produce digital writing (e-books, websites), music, and film. Eckersley, *supra* note 28, at 112. Daniel Gervais proposes a default license for sharing music, but not for text and images. Gervais, *supra* note 11, at 70.

295. This question was raised by P. Bernt Hugenholtz during the ATRIP 2004 conference in Utrecht. It relates to the fact that a music or video recording comprises several different copyrightable subject matters or—in European legal terminology—copyrights and neighbouring rights. Under U.S. copyright law, a music file, for example, can be subject to a copyright in the musical composition, in the words of the song, and in the sound recording. Not all copyrights have to be owned by the same person or entity. *See* Leaffer, *supra* note 65, at § 3.19; Fisher, *supra* note 1, at 204. The question then arises: who is entitled to decide how the music file may be used in cyberspace? The answer is that it is the person who holds the right to make the music file available and to reproduce it in the respective country. As regards music, as a rule, a record company—if not the author of a work made for hire—acquires all rights necessary from the original authors. Thus, one should ask: Who is the person holding *all* rights necessary to authorize non-commercial file sharing in the U.S. or the EC? This is also the way to identify the "right holder" under Art. 6 EC Copyright Directive. *See* Copyright Directive, *supra* note 59; Peukert, *supra* note 195, at § 34 no. 13-14.

subject to the levy/tax etc.²⁹⁶ These issues largely are beyond the positivistic approach of this article. However, some additional remarks on how the bipolar opt-in model would work are worth considering.

First, would a copyright owner be barred from employing DRM after registering the work with the competent authority to become eligible for the levy/tax system? Although it might seem odd at first glance, the answer should be in the negative.²⁹⁷ In this context, international copyright law is not the reason. Clearly, if the right holder voluntarily chooses to accept non-commercial file sharing, it is up to the national legislature to regulate the consequences of this decision. International copyright law contains no specifications as to a levy/tax system as a secondary alternative to exclusive exploitation in cyberspace. The reason the copyright owner should still be free to grant individual licenses for commercial online ventures like iTunes, etc., is that the levy/tax system only privileges and covers *non-commercial* uses. As regards commercial online exploitation of the work, the right holder retains her exclusive rights. Additionally, some right holders may be less reluctant to register their work if they are still free to offer their works in commercial online ventures. Those services may still attract consumers if they are easier to use and offer additional features (merchandising products, etc.) not available in p2p networks. At the same time, the work is lawfully available in p2p networks so that the public can take advantage of the levy/tax system. Consumers should, however, be enabled to easily inform themselves about the availability of a certain work in the levy/tax system. In this respect, one can think of a searchable database or even some kind of automatically displayed tag which signals that the respective work may be shared lawfully. Moreover, there is no risk of double compensation in the sense that the author receives shares of the levy/tax and additionally generates income from licensing the work to commercial online ventures.²⁹⁸ The reason is that the author's share of the levy/tax depends on the actual uses of the work in p2p networks as automatically monitored.²⁹⁹ If commercial offers are so attractive that users refrain from file sharing, the author's interest in the levy/tax will decrease accordingly. Note that this competition between

296. For a discussion on the last two points, see Netanel, *supra* note 48, at 43 *et seq.*; Fisher, *supra* note 1, at 205-223; Eckersley, *supra* note 28, at 106.

297. See also Fisher, *supra* note 1, at 248.

298. For a discussion of double compensation with regard to the levy for digital private copying under European copyright law, see *supra* Part IV.D.

299. See *supra* Part III.B.

p2p networks and commercial online ventures is made possible because the copyright owner accepts that her work be “shared.” If the law established this competition under a *non-voluntary* license, this would amount to a violation of the three-step test (conflict with normal exploitation).³⁰⁰ Again, copyright law should not limit the variety of ways works can be distributed and exploited, but should offer as many business models as possible. The choice is then up to the rightholder in each individual case.

Second, copyright owners may hesitate to register their works for the levy/tax system because control over the work is deemed to be “lost” forever if it is ever available for lawful, technologically unprotected file sharing. In this respect, it has already been shown that a withdrawal of a registered work from the levy/tax system can be of interest to right holders.³⁰¹ To make this a viable option, the legal and technological architecture of the bipolar copyright system would have to address two main concerns. First, a withdrawal of the work has to be visible to the consumer. This may be accomplished by an online database or—even better—by an automatic indexing system indicating the status of a work (a green or red flag). Thus, consumers do not risk sharing works which initially were available, but were later retracted. Additionally, one might contemplate a grace period of perhaps six months until the withdrawal becomes effective. Second, the copyright owner must be in a position to enforce her regained exclusive rights against non-commercial file sharing. Since the files are not incorporated into an overall DRM system, their use cannot be stopped technologically. One therefore has to rely on legal enforcement. In that regard, a streamlined enforcement mechanism like the one proposed by Lemley and Reese³⁰² would be a reasonable approach. It could be part of the necessary amendments of current law to establish the bipolar opt-in copyright system.

Finally, the foregoing assessments rest upon the assumption that every copyright owner will actually make a decision about whether to go for the levy/tax share or for proprietary exploitation. This, however, is not a very realistic view. Many right holders will not even take notice of this option because they do not attend to the work or are not even aware of the fact that they own copyrights, for example in the case of heirs. As a result, only a fraction of even those works the system specifically aims at, *i.e.*, works not (any more)

300. See *supra* Part IV.B.2.

301. See *supra* Part V.B.2.b.

302. Lemley & Reese, *supra* note 38, at 1424.

commercialized, will be registered. Two consequences arise out of this circumstance. One is that only those right holders who register their work will be entitled to a share of the levy/tax. This, however, is only a necessary side effect of the autonomy of the right holder. Those who do not concern themselves with their works simply cannot expect the copyright system to automatically step in.

The second effect of a right holder's ignorance towards the bipolar opt-in system is more problematic. It particularly concerns old works still under copyright. Under the opt-out model, these works could be lawfully shared in p2p networks because the levy/tax system would be the statutory default rule. According to the opt-in model, these works remain under exclusive control of the copyright owner because here exclusivity is the default. Thus, even if the right holder never objects to these uses, they are clearly copyright infringements because they are not approved through registration. As the discussion of the opt-out model already revealed, national copyright law that declares those uses lawful unless the copyright owner expressly objects is not in line with international copyright law.³⁰³ Accordingly, with regard to a work about which no choice is made, the situation would stay the way it is today. File sharing would be infringement, but copyright would not be enforced in practice. Clearly, this is a serious drawback of the opt-in model dictated by international copyright law. In order to give right holders an incentive not only to register but first of all to make their decision, copyright law should not award statutory damages and attorney's fees for any infringement of copyright unless the right holder notifies the competent authority that she does not want her work to be shared in p2p networks.³⁰⁴ One could additionally think about limiting the streamlined enforcement system as proposed by Lemley and Reese³⁰⁵ to this category of works.

303. See *supra* Part V.B.2.b.

304. This proposal is modeled on 17 U.S.C. § 412(2) (2000), which reads:
In any action under this title, other than an action brought for a violation of the rights of the author under section 106A (a) or an action instituted under section 411 (b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for ... (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

For the background of this provision and its relationship to obligations under the Berne Convention, see Goldstein, *supra* note 69, at § 3.15. To deny the copyright owner an award of attorney's fees is not an option for jurisdictions where the party defeated in the action is generally required to pay the costs of the proceedings. This is the case, for example, under German law. See Sec. 91 German Code of Civil Procedure.

305. Lemley & Reese, *supra* note 38.

C. International Dimension

One additional aspect of the bipolar copyright system that has not been studied intensively is the international dimension of such a system. The bipolar copyright system is geared towards the digital online environment. The Internet and p2p networks reach all over the world, and are not confined to a specific country. It is therefore essential to consider the international context in which p2p file sharing takes place. A proposal addressing the Internet that assumes that all parties and actions involved are located in one single country falls far short of the reality it applies to. For a long time, this friction between global networks and national legislation in over 180 countries has been identified as one of the core problems of the regulation of "cyberspace."³⁰⁶ It also would affect the bipolar copyright system.

If this system were established in only one country, for example the U.S., only consumers in that country would have to pay higher prices for services and devices used for file sharing.³⁰⁷ At the same time, only up- and downloads occurring in the U.S. would be privileged under the levy/tax system because national copyright law applies only to those uses taking place in the respective country.³⁰⁸ Consequently, if a p2p network user downloads a work in a country outside the U.S., she may well infringe the copyright existing in the work under the law of that country even though the work is registered and lawfully available for noncommercial file sharing in the U.S. Theoretically, the copyright owner would be able to enforce her exclusive rights abroad and to opt for the levy/tax system in the U.S.³⁰⁹ Practically, however, this distinction will hardly ever be important. If a right holder accepts file sharing in exchange for participating in the levy/tax distribution in one country, she will not likely try to prohibit

306. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365 (2002); Joel R. Reidenberg, *States and Internet Enforcement*, 1 UNIVERSITY OF OTTAWA LAW & TECHNOLOGY JOURNAL (UOLTJ) 213 (2003-2004).

307. Fisher, *supra* note 1, at 245 (acknowledging the leakage of a national tax-funded system across national borders).

308. This *lex loci protectionis* as to the rights and their limitations seems to be accepted in nearly all jurisdictions. For U.S. law, see *Lauritzen v. Larsen*, 73 S. Ct. 921 (1953); *Itar-Tass v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998). For German law, see the decisions (English translations) of the Federal Supreme Court, 24 IIC 539, 540 (1993); 30 IIC 227, 230 (1999). See generally William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383 (2000).

309. It is beyond the scope of this article to discuss possible solutions under choice of law provisions.

the very same behavior in other countries. Registration in one country will likely mean that users in other countries enjoy virtually the same privileges as consumers in the country where the bipolar system is in place. The only—though major—difference is that consumers abroad would not have to pay for non-commercial file sharing. It should therefore be acknowledged that cross-subsidization would occur not only in the U.S. (between high-level users of p2p file-sharing networks and those who pay the levy/tax but do not up- or download copy-protected content),³¹⁰ but also between jurisdictions that implement the bipolar copyright system and those that do not.

Nevertheless, these negative effects should not lead to a complete rejection of the bipolar copyright system. Seen from the perspective of the copyright owners, they are still free to choose between exclusivity and the levy/tax system. They simply have to decide which system is more promising. In doing so, they have to take into account the international dimension of their choice. Obviously, the more countries participating and the higher the prospective revenue for each individual author is, the more works are likely to be released into the levy/tax system. The phenomenon of international cross-subsidization again brings up the core question of the bipolar copyright system, *i.e.*, whether a society wants to spend more on devices and services related to the Internet in order to provide for an indirect funding for authors and the content they create. Still, one country could make the first step without needing the approval of all other contracting parties of Berne, TRIPS and the WCT.

Alternatively, the bipolar copyright system could be established in those countries where most of the p2p file-sharing activity takes place. According to a recent study,³¹¹ the EC (45 percent³¹²) and the U.S. (36 percent) alone make up 81 percent of the file trading. If one embraces three more countries,³¹³ even 92 percent of the traffic would be covered. Therefore, agreement between these contracting parties to international copyright treaties³¹⁴ would minimize the effects of international cross-subsidization. If p2p use becomes more widespread in other countries due to increased proliferation of

310. See Netanel, *supra* note 48, at 67.

311. See Howe, *supra* note 10; OECD, *supra* note 3, at 5-7.

312. See Howe, *supra* note 10 (stating the percentage of file-sharing activity as follows: Germany 14%, Italy 10%, Poland 7%, France 7%, Spain 3%, UK 4%).

313. See *id.* (stating the percentage of file-sharing activity as follows: Canada 6%, Japan 3%, Australia 2%).

314. The EC is contracting party to TRIPS and the WCT, but not to the Berne Convention.

Internet access, these countries could implement systems similar to the ones already in place. This bottom-up approach differs from the recent history of copyright law where new technologies were regulated on an international level first without being known in any national jurisdiction.³¹⁵ This new approach helps to avoid erroneous solutions due to a lack of experience. Moreover, every country retains the freedom to amend its national law if some decision proves wrong, without having to persuade all other contracting parties to an international treaty to do the same. Thus, a bottom-up approach fosters flexibility in copyright legislation. Even taking into account that the copyright owner is obliged to register her work with several competent authorities who each handle the bipolar opt-in model in one country only, this viewpoint has one pivotal advantage over the alternative to establish an international consensus or to set up a global agency for the realization of the system: it can be adopted immediately if only one country decides to do so.

VI. Conclusion

As long as p2p file-sharing technology is not declared illegal³¹⁶ and is not substituted by other technologies, it will likely be here to stay. If copyright owners fail to integrate this technology into business models to generate revenue from the consumer's use of copyrighted works (as in the case of the VCR³¹⁷), the discussion about alternatives to exclusive exploitation in cyberspace will become ever more important. Proposals for tax or levy systems covering non-commercial file sharing are among the most promising approaches to take advantage of this technology for authors and society at large because this model secures compensation for authors without hindering p2p networks and the innovation that this technology brings about: *compensation without control*.³¹⁸

This article has shown, however, that none of the currently discussed models is in accordance with obligations contained in international copyright law. The BC, TRIPS and WCT rest upon the notion of legal and technological exclusivity enjoyed by the copyright owner. They are opposed to the implementation of statutory, non-

315. This is the case for the legal protection of technological measures against circumvention according to Art. 11, 12, 18, 19 WCT.

316. For the limited holding of MGM Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764 (2005), see *supra* Part II.A.

317. See Lessig, *supra* note 57, at 195; Shih Ray Ku, *supra* note 79, at 553-57.

318. Lessig, *supra* note 57, at 201.

voluntary licenses covering noncommercial file sharing. Only if the right holder is free to decide whether she wants her work to be subject to a levy/tax system is exclusivity as the fundamental requirement of international copyright law accomplished. Moreover, exclusive rights and individual licensing have to be the legal default. Therefore, only an opt-in model, in which the right holder has to register the work for the levy/tax system, can be implemented in national law without the need to amend international copyright treaties or terminate membership.

Although this approach has some significant drawbacks, especially with regard to the number of works available for lawful sharing, it nevertheless provides a business model not available today, *i.e.*, to accept file sharing in exchange for an indirect compensation. It is also superior to voluntary collective licensing in that it generates funding up front and thereby gives copyright owners an incentive to opt for “sharing.” In sum, the bipolar opt-in copyright system caters to a permanent coexistence of—speaking in economic terms—property and liability rules in cyberspace. Whereas the architecture of proprietary exploitation is constructed by the copyright owner, the levy/tax system has to be established by the government. Neither form of exploitation is outlawed.³¹⁹ Instead, the choice between the two is up to the copyright owner. Thereby, this approach enhances freedom and triggers competition between the two alternatives for the exploitation of works in the digital network environment. All in all, it supports creative pursuits through exclusive rights *and* innovation in and development of new communication technologies.³²⁰

This article ultimately demonstrates that, in thinking about new approaches, existing copyright law has to be considered because it is to a large extent rooted in international law, which in turn is binding upon national and even supranational legislatures (like the EC). It further shows that it is necessary to carefully examine the drawbacks of international harmonization as regards the flexibility of copyright

319. See also Einhorn & Rosenblatt, 52 J. COPYRIGHT SOC'Y USA 239, 271 (2005) (“In other words, P2P and DRM technologies should be left to evolve together . . .”).

320. These were the two seemingly opposing policy considerations at the heart of the *Grokster* decision. See *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, 2775 (2005) (“The more artistic protection is favored, the more technological innovation may be discouraged . . .”); *id.* at 2776 n.8 (“The mutual exclusivity of these values should not be overstated, however.”); see also *id.* at 2791 (Breyer, J., *concurring*) (referring to the need for the law to “strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.”).

legislation.³²¹ This is true for both developing³²² and industrialized countries. The reason is that copyright in general is directly linked to and has always reacted to technological changes. Accepting this insight, modern national copyright laws provide for expiration dates of certain provisions,³²³ for specific measures to quickly amend the law,³²⁴ or at least for obligatory, regular reports on the effects of the law.³²⁵ Even if one does not call into question the international harmonization of copyright law in general,³²⁶ it is necessary to discuss whether and how we can achieve a balance between the need for adequate minimum protection on a global scale and flexibility to react to perhaps fundamental changes in the way works are exploited and used.³²⁷ This call for flexibility in international copyright law not only relates to technology-specific rules—like those on technological protection measures—but also to the three-step test as an open, technology-neutral and central aspect of international intellectual property law.³²⁸ A narrow construction of the three-step test may prevent the implementation of a concept like the levy/tax system that addresses new problems (file sharing) in a way that favors most if not all parties involved. If reality proves even the initial point of a given concept wrong, it has to be possible to modify this concept as a whole.³²⁹

321. See generally Annette Kur, *A New Framework for Intellectual Property Rights—Horizontal Issues*, 35 IIC 1, 20 (2004); *contra* Sirinelli, *supra* note 20, at 26-27 (pleading for additional harmonization); Reinbothe & von Lewinski, *supra* note 70, at Art. 10 WCT no. 11 (recognizing the need to flexibly interpret the three-step test in light of changing market conditions, focusing, however, solely on strengthening the position of authors); Goldstein, *supra* note 90, at 209-11.

322. See the preamble of TRIPS: "Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base."

323. See 17 U.S.C. § 119(a)(1), (e) (2000 & Supp. II 2002); Sec. 52a, 137k German CA (proclaiming that one limitation to copyright—Sec. 52a German CA—expires on Jan. 1, 2007).

324. See 17 U.S.C. § 1201(a)(B)-(D) (2000) (rulemaking of U.S. Copyright Office regarding certain classes of works are exempted from the legal protection of technological measures).

325. See 17 U.S.C. § 1201(g)(5) (2000); Copyright Directive, *supra* note 59, at Art. 12 (both concerning the legal protection of technological measures).

326. See Kur, *supra* note 321, at 20 (naming soft law and recommendations as an alternative).

327. This applies even to the proposals discussed herein. These may become obsolete, just like today's file sharing, because of easier Internet access which enables information of commercial databases to be streamed. See Lessig, *supra* note 3, at 300-04.

328. Ficsor, *supra* note 71, at 5.50; Senftleben, *supra* note 63, at 304-11.

329. *But see* Senftleben, *supra* note 63, at 304 (arguing the three-step test lends sufficient weight to the interests of authors and users alike and it was wise to embrace the three-step test to circumscribe the ambit of operation of permissible limitations in the digital environment).