

Future of creativity in the online environment

– Alternative Compensation for Online Creators –

First COMMUNIA salon

COMMUNIA x Create.Refresh present:
Defending freedom of expression and European digital culture

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On the table

- How to ensure that **creators*** are rewarded for their contributions, while preserving the open nature of the internet?
- What alternative approaches are there to strengthening the position of **creators*** that do not rely on limiting user rights and access to culture?
- ***creators = authors and performers**
 - As opposed to “exploiters”

What is the problem we are trying to solve?

- Piracy?
 - Typical solution: more rights, more enforcement
- Fairness (= fair remuneration) in relation to UUC platforms
 - YouTube should pay more
 - Solution: “Direct” liability of UUC platforms (“value gap”)?
- Fairness re: “exploiters”
 - Spotify should pay more
 - Solution: protective provisions? E.g. termination provisions, unwaivable rights...
- All of the above?



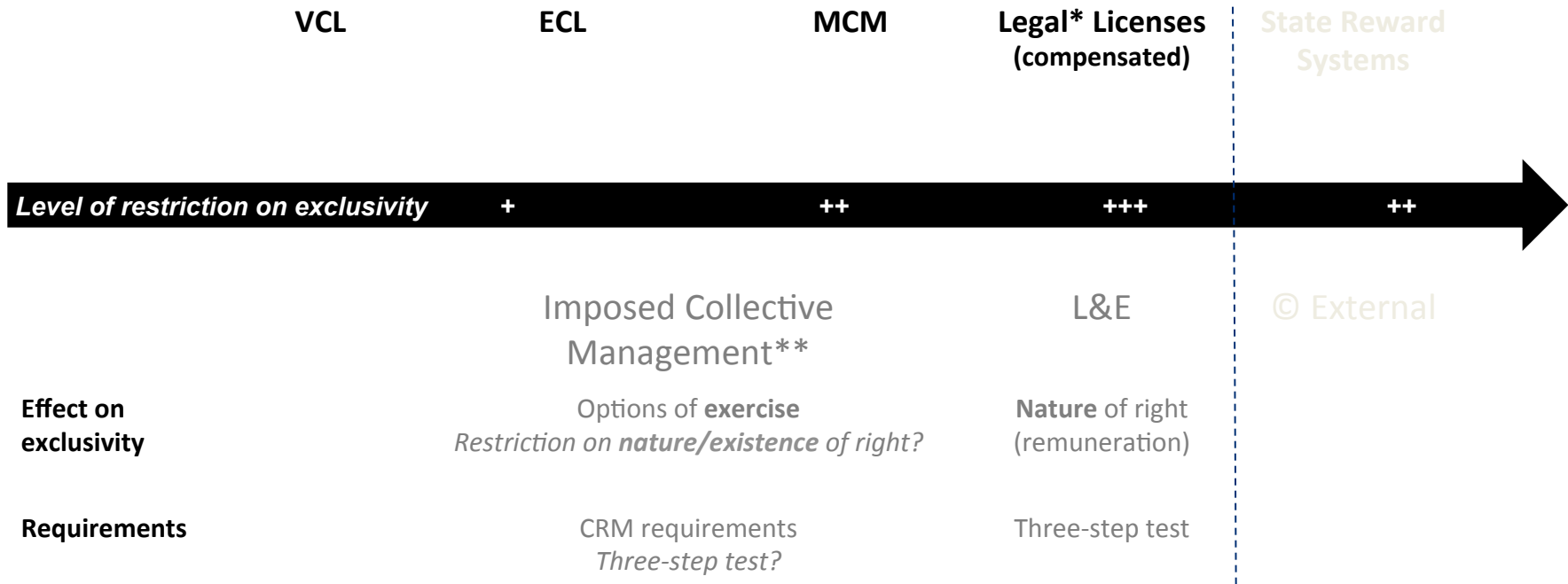
What is the real issue?

- Subject matter and substantive rights expansion of © online
- Territorial and substantive fragmentation of © law
- Inadequacy of a model based on **exclusivity and strict enforcement**
 - Law vs Social Norm
 - Legal uncertainty
 - Licensing transaction costs
 - Strict enforcement
 - Difficult or too costly: market failure
 - Undesirable: conflicts with fundamental rights, user rights / defenses, no monitoring obligations
 - (un)fair remuneration in online platforms

What Alternatives?

- If the goal is rewarding creators for their contributions, while preserving the open nature of the internet,
- then we need to explore **legal models that favor an access and remuneration**, rather than exclusivity and enforcement.
- Solution may differ depending on the problem we are trying to address

What Alternatives?

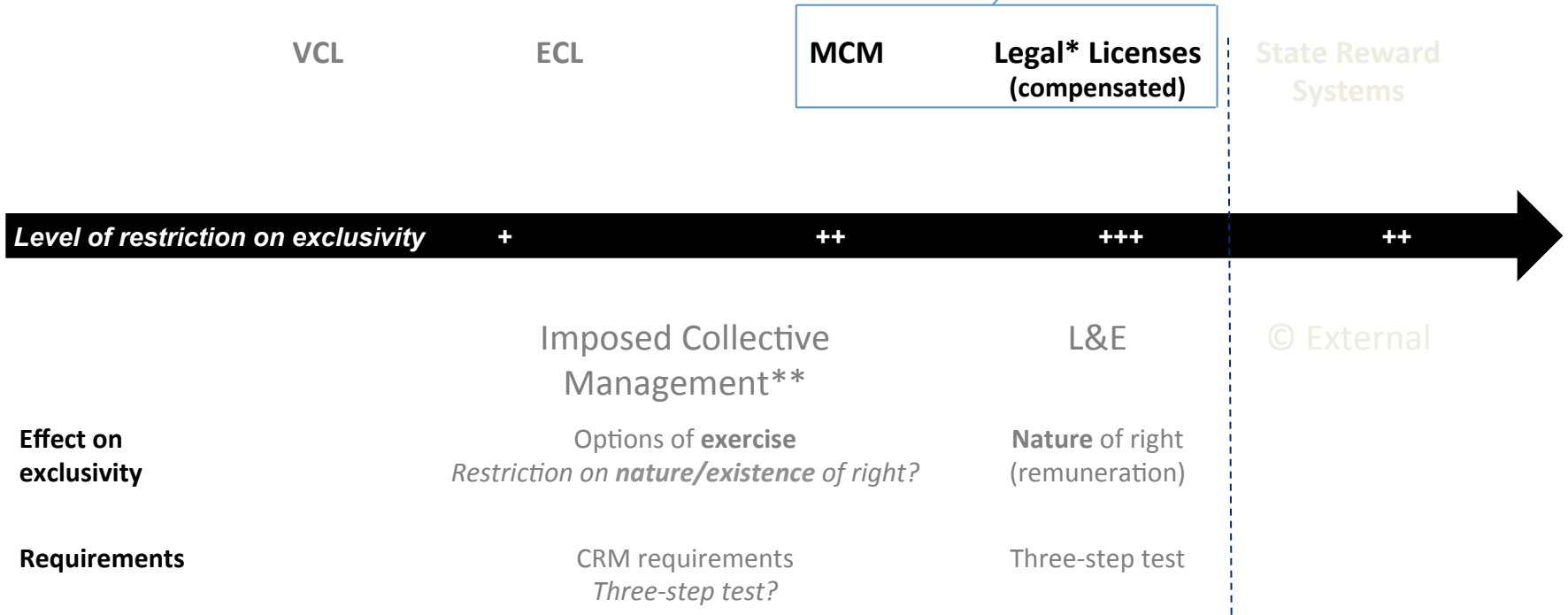


* Includes statutory and compulsory licenses

**regarding compulsory (non opt-out) ECL

What Alternatives?

Best option to deal with issues of © fragmentation, user and rights holder participation, and legal uncertainty



* Includes statutory and compulsory licenses

**regarding compulsory (non opt-out) ECL

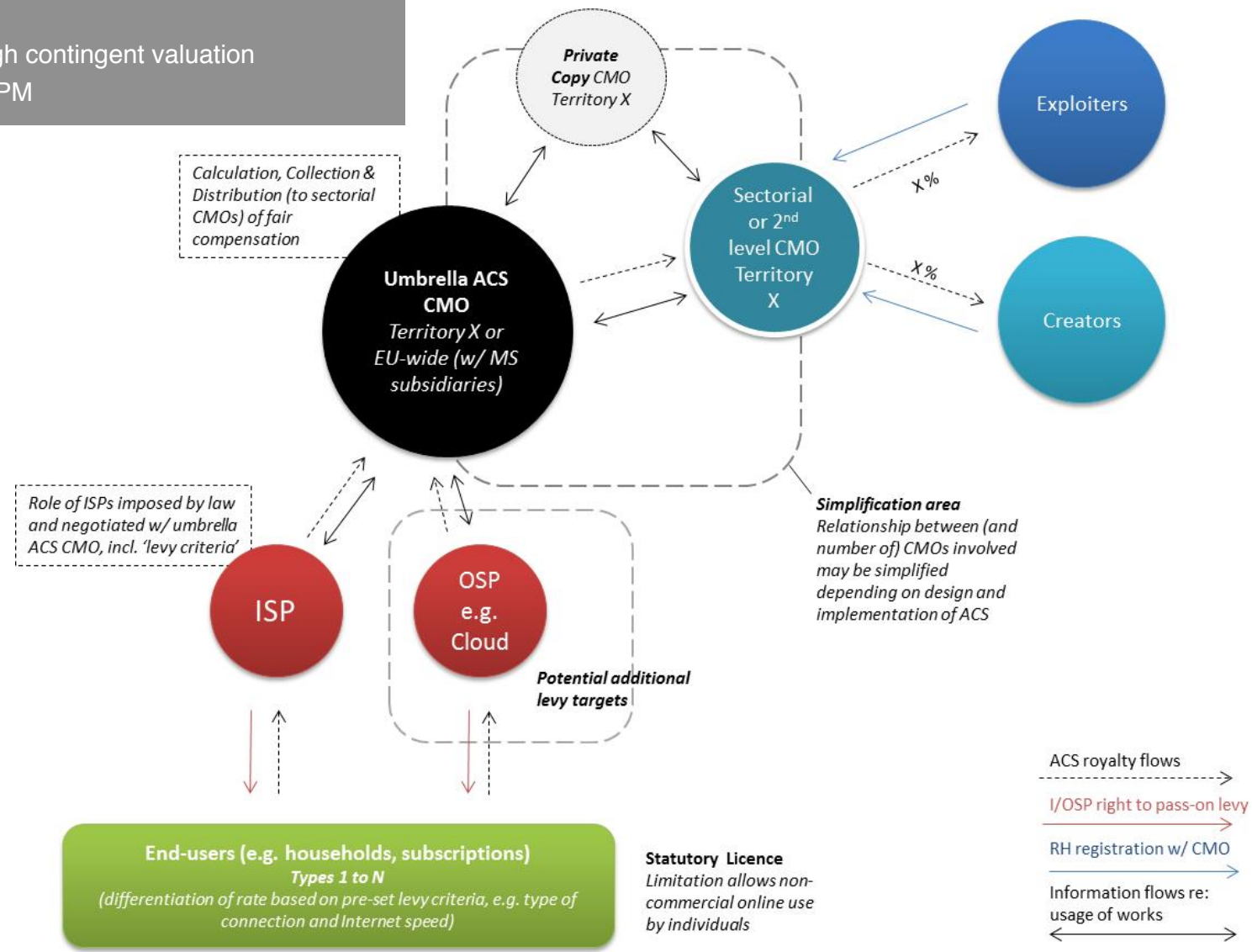
Proposals

- 1) Alternative compensation system for non-commercial online use (Quintais 2017)
- 2) Statutory license for social networks (MPI)

Proposals

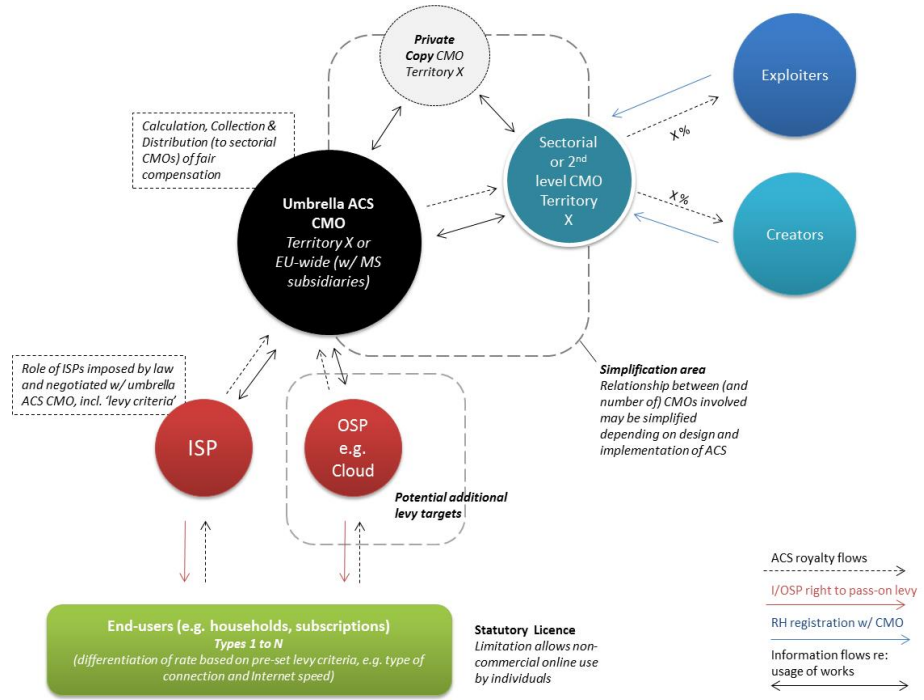
- **1) Alternative compensation system for non-commercial online use** (Quintais 2017)
- 2) Statutory license for social networks (MPI)

- **Mandatory © limitation**
- To the benefit of individual users
- All works except SW, DB, VGs + others discrete categories
- Online rights R + C2P
- NC use: standard (exclusion direct use for profit platforms)
- Fair Compensation Right
- Calculation of harm through contingent valuation
- Prevails over contract + TPM



Scale-down:

- Sectorial ACS
- E/VCL
- COM Rec



Proposals

- 1) Alternative compensation system for non-commercial online use (Quintais 2017)
- **2) Statutory license for social networks (MPI)**
 - Presented as an alternative to the Value Gap Proposal
 - Endorsed in the “The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform”, as a statutory license for UGC
 - Drafted by Senftleben, Angelopoulos, Frosio, Moscon, Peguera & Rognstad
 - Signed by c.a. 50 academics in Europe

Proposals

2) Statutory license for “social networks”

(MPI: Hilty & Bauer, [endorsed by Expert Recommendation](#))

- **Mandatory exception**
 - For private, non-commercial exploitation of works in social networks / [UUC platforms](#)
 - Upload + Uses in preparation of of UGC
 - [Further dissemination of user-generated remixes and mash-ups of protected content](#)
 - Excluded: use in conflict w/ normal exploitation, e.g. at commercial scale, serving commercial objective
 - Positive & negative examples in recitals (e.g. p2p excluded)
 - Work must have been previously uploaded legally
 - lawful source requirement
- **With mandatory remuneration / [fair compensation](#)** for the exploitation of works in social networks
 - Payable by platform providers: “paying agents” in a CRM model
 - Safeguards hosting safe harbor & fundamental rights
 - No new monitoring obligations re: exempted content
 - Providers act only ex post w/ knowledge of work uploaded beyond scope of exception
 - More developed NTD procedure, including counter-notice
 - Possible to shift costs (remuneration) to users ([or use part of advertising income to finance the payment of fair compensation](#))
 - Nature and operation of a platform considered for calculation of remuneration
 - “Time” as factor: longer work is available, lesser the harm
 - [Payable to authors and performers](#)

Thank you for your attention!

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Notes on Senftleben et al. 2017

- New exception for the creation of content remixes and mash-ups by users and the further dissemination of these remixes and mash-ups on online platforms.
- UUC platforms responsible for the payment of fair compensation.
- They could either pass on these additional costs to their users, or use a part of their advertising income to finance the payment of fair compensation.
- Advantages
- To generate an additional revenue stream for authors and performers, this alternative solution is clearly preferable. It does not encroach upon fundamental rights and freedoms, and leaves intact the safe harbour for hosting in Article 14 of the E-Commerce Directive.