Where collective rights management is possible, VCL will not apply only if the governing law prescribes a different type of collective management, such as blanket licenses or mandatory collective management.

In this respect and in the E.U., it should be noted that the P2P uses of reproduction (except when qualified as a private copy) and making available are not subject to mandatory or exclusive collective licensing, thus opening room for the application of a VCL system thereto.

3. Blanket licenses

Another type of collective management allows the offering of blanket licenses for quasi universal repertoires, on the basis of two legal techniques.

The first is a *guarantee or presumption based system*, whereby the entitlement of CMOs to license non explicit subject matter derives from statutory or case law, and where users are extended either a guarantee that they will not be sued by rights holders or an indemnification undertaking if they do.[178] In such system, CMOs guarantee fair, reasonable and non-discriminatory treatment of works of rights holders who did not explicitly consent to collective management.[179]

Under the second legal technique–termed *extended collective licensing*–, if a CMO is authorized to manage certain rights by a qualified majority of domestic and foreign right holders, thus meeting a *representativeness criterion*, a statutory presumption operates to extend its representation rights to rights holders not under contract with it.

In the E.U. it is characteristic of the Nordic countries,[180] being also under consideration in Central and Eastern Europe, Africa and Canada.[181]

Mentions to extended collective licensing in the *acquis* are sparse. Art. 3(2) Satellite and Cable Directive contains the outline of such a system between CMOs and broadcasting organizations by using the "may" language,[182] thus indicating a limited possibility for Member States to introduce this system; such interpretation

178 *See* Mihály Ficsor, *Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire, in*, Collective Management of Copyright and Related Rights 29, 61 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

179 *Id.* at 61 (arguing that the absence of an opt-out mechanism makes this system's compatibility with international law questionable).

180 *See* Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *in*, Collective Management of Copyright and Related Rights 283 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

181 *See* Gervais 2010, *supra* note 162, at 21.

182 Art. 3(2) reads: "A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works *may* be extended to rightholders of the same category who are not represented by the collecting society, provided that…" (emphasis added).

is consistent with arts. 3(3) and 3(4) of the same Directive, according to which such system seems to be justified only insofar as it is indispensable or when individual exercise by rights holders is too onerous.[183]

Art. 3(3) confirms this by indicating a category of works (cinematographic works) where extended collective licensing is neither indispensable nor relatively non-onerous in the above sense. Art. 3(4) introduces a specific notification procedure for Member States, whereby the latter must inform the E.U. Commission of the identity of the broadcasting organizations to which extended collective licensing applies, thus underscoring the exceptional character of this licensing scheme.[184]

This interpretation is further strengthened by the fact that Recital (18) of the InfoSoc Directive mentions that it "is without prejudice to the arrangements in Member States concerning the management of rights such as extended collective licensing", i.e. those arrangements made under art. 3 Satellite and Cable Directive.[185]

4. Mandatory collective management

Under our proposed taxonomy in this Chapter, mandatory collective management is the most restrictive type of collective rights management, as it does not allow the rights holder to directly exploit his works, but instead imposes (through legal provisions) that the same be managed by a CMO.

Mandatory collective management is believed to be adequate solely when it is the only possible way to exercise the right, and examples of it can be found in several Member States in the fields of artist's resale right, public lending, private copying, and cable retransmission.[186]

At the international level, arts. 11*bis*(2) and 13(1) Berne Convention[187]–on compulsory licenses–provide that each country's legislation shall decide which *conditions* to determine for the exercise of certain exclusive rights, as long as these are expressly imposed and safeguard authors' rights to equitable remuneration.

In other words, it is admissible for a country to determine it to be mandatory to *exercise the rights in a certain way*, *exploit them in a certain manner* and *only through a certain system*, e.g., by imposing a mandatory collective management system.[188]

183 *See* Ficsor, *supra* note 178, at 62-63.
184 *Id.* at 63.
185 *Id.* at 63-64.
186 *See* Gervais, *supra* note 177, at 37-38.
187 Incorporated by reference in both TRIPS and WCT.
188 *See* Ficsor, *supra* note 178, at 42-44.