Our interpretation of the provision is that: ***(i)*** this principle only applies in the international context;[307] ***(ii)*** author's rights come into existence and are recognized absent any formalities (*enjoyment*); ***(iii)*** authors have the possibility of enforcing their rights under the Berne Convention (*exercise*); ***(iv)*** the term "formalities" is to be understood in a broad sense, but only if related to copyright-specific requirements.[308]

Under this interpretation, examples of prohibited formalities would be: "registration; deposit; filing of copies with a authority; placement of a copyright notice on the work; payment of fees for registration; or the submission of any declarations".[309]

The fact that mandatory collective management applies despite the need for a rights holder to fulfill any formality of this kind and affects solely the way a right is *exercised* (and not its *existence* or *enjoyment*) leads to the conclusion that it is not in violation of the principle of no formalities.[310]

Finally, mandatory collective management presents an additional problem in the current and prospective market place, which is that of effectively preventing the existence and creation of content licensing business models outside the scope of collective management.

The current "legal" online offerings for content, which depend on the rights of reproduction or making available, occupy a relevant market share, with growing tendencies.[311] Mandatory collective management would jeopardize this, with obvious negative consequences, as it lacks the necessary flexibility to adapt to a dynamic market of online content delivery.[312]

3. Extended collective licensing

The basic workings of an extended collective licensing system, as a type of blanket licensing collective rights management, have already been explained above.[313] The possibility of application of this system in the digital environment is admitted in

307 Note that no Member State applies formalities to copyright in its territory.
308 For a brief analysis of the principle of no formalities, touching on the points mentioned, s*ee* Lewinsky 2008, *supra* note 104, at. 117-118.
309 *Id.*
310 *See* Lewinsky 2004, *supra* note 290, at 12. *See also* Dusollier & Colin, *supra* note 8, at 832 (classifying as "somewhat radical" Peukert's position of treating an opt-out regime as a prohibited formality).
311 *See supra II.*B.
312 *See* Lewinsky 2004, *supra* note 290, at 15 (recognizing that "the industry might prefer to… individually manage rights in order to best benefit from the market").
313 *See supra IV.A.*3.

Recital (18) InfoSoc Directive, which applies both to existing and future extended collective licensing provisions.[314]

Extended collective licensing is based on the voluntary licensing or transfer of rights to CMOs coupled with an extension effect to non-members right holders[315] (domestic, foreign and deceased), thus allowing for efficient licensing of mass online uses; differently from a compulsory or legal license, rights holders can opt-out of the system.[316]

In the context of P2P, an extended collective licensing system could efficiently address the problem of acquisition of rights, namely via its extension effect. It is a particularly adequate model for well-organized and informed countries–such as most of the E.U.'s Member States–to manage mass Internet uses, given that it reduces the high transaction costs for obtaining individual licenses, with the added benefit of facilitating royalties' collection.[317]

Moreover, P2P networks are populated by works of unidentified and unidentifiable authors, whose authorization is virtually impossible to obtain. Like mandatory collective management, extended collective licensing would efficiently include such works under a P2P blanket license, thus enhancing public welfare through the dissemination of works.[318]

In the E.U., there have been proposals for application of extended collective licensing to the P2P act of making available, in conjunction with a statutory remuneration right for the download act (deemed as private copy).[319] Under such a configuration, the law would entitle CMOs and consumer organizations to conclude contracts on extended collective licensing, subject to the payment of a statutory remuneration for user downloads, to be incorporated in ISP access fees and fixed by the existing CMO in charge of private copying in the respective country.[320] However, proposals including also the act of download (reproduction) are likewise foreseeable, namely where such act is not privileged under the private copy exception and limitation as per the applicable law.[321]

314 *See* Koskinen-Olsson, *supra* note 180, at 303 (noting that the implementation of the Directive in the Nordic Countries widened the scope of extended collective licensing provisions in the areas of digital copying in education and library uses).

315 *Id.* at 294-295 (explaining that the guarantees extended to non-represented right holders are twofold: an opt out/veto right, with a different design in each country; and a right to claim individual remuneration).

316 *See* Gervais, *supra* note 162, at 26-27.

317 *Id.* at 21-22.

318 *Id.* at 27.

319 *See* Lewinsky 2005, *supra* note 8, at 15 & n.93 (making reference to the proposal by the French performers' organization ADAMI). *See also*, outside the E.U., Daniel Gervais, Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (2003), *available at*: http://works.bepress.com/daniel_gervais/29/ (last visited Jan. 31, 2012).

320 This set-up follows the specifics of the ADAMI proposal.

321 *See* Lewinsky 2005, *supra* note 8, at 15.

A theoretical objection might be raised against the compliance of extended collective licensing with international law, namely with the principle of no formalities.[322] The issue here is whether or not such a system imposes prohibited formalities in the E.U., given that its intra-Community effect necessarily affords it an international context meriting application of the principle.

We are of the opinion it does not. Extended collective licensing provides CMOs with the immediate ability to license all or almost all works that users may require but does not affect the scope of exceptions and limitations (ensuring that uses beyond such scope are remunerated), and could assist in the goal of promoting the public interest side of the copyright paradox equation, by allowing effective Internet dissemination of works via P2P systems.[323]

The formalities prohibited by art. 5(2) Berne Convention relate in essence to "registration with a governmental authority, deposit of a copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings"; they do not relate to the action (mandatory or not) of joining a CMO, as this is a normal act of rights holders towards the exploitation of works.[324]

Similarly, we do not believe that the obligation to opt-out of the system for those rights holders that wish to preserve their exclusive right can be qualified as a formality under art. 5(2) Berne Convention, as it does not pertain to the *enjoyment* (existence) or *exercise* (enforcement) of its rights.[325]

In fact, art. 5(2) Berne Convention does not include "all civic and judicial formalities" connected with the exploitation of works.[326] It should also not include "formalities" that are not government-related, meaning that it should not extend to extended collective licensing's opt-out feature, as most CMOs are private entities.[327]

Properly designed, extended collective licensing guarantees efficient repertoire exploitation against adequate compensation, while offering authors the option of

322 *See V.B.*2 *supra* for a brief analysis of this principle regarding mandatory collective management of P2P. For a discussion of whether extended collective licensing can be qualified as an exception and limitation, *see* Dusollier & Colin, *supra* note 8, at 828 (concluding in the negative, but arguing that "[n]evertheless, employing the three-part test might be beneficial, given that these solutions are not otherwise formally recognized by the Berne Convention: compliance with the three-part test could only lend them greater legitimacy").

323 *See* Gervais 2010, *supra* note 162, at 27.

324 *Id.* at 24-25. Also arguing that extended collective licensing is compliant with international law, *see* Lewinsky 2005, *supra* note 8, at 15-16.

325 *See* Gervais 2010, *supra* note 162, at 22-27 (supporting its arguments on the basis of a thorough analysis of the drafting history of art. 5(2) Berne Convention). *See also* Koskinen-Olsson, *supra* note 180, at 303-304 (discussing the legislation of Denmark and arguing that the opt-out mechanism exists to ensure conformity with international Treaties and E.U. Directives).

326 *See* Gervais 2010, *supra* note 162, at 25-26.

327 *Id.* at 26.

going back to full individual exercise of their rights via simple notice, "perhaps even as simple as an e-mail".[328] This, in our view, cannot be considered a prohibited formality under the Berne Convention.[329]

Attractive as it may be, extended collective licensing presents two potential problems, which theoretically make it less adequate than VCL for covering P2P uses in the E.U.

First, its imposition would require some legal changes to the *acquis*. Specific secondary legislation imposing extended collective licensing for defined P2P uses and categories of works would have to be enacted, so as to lay the foundations for the system and facilitate the necessary amendments to the InfoSoc and (possibly) Software Directives.

In general terms, extended collective licensing would entail the following alterations to the InfoSoc Directive:

– The exclusive rights of reproduction (art. 2) and making available (art. 3), as well as the catalogue of exceptions and limitations (art. 5) would require modifications allowing for the creation of a remuneration right for P2P uses;
– The provisions on DRM (arts. 6 and 7) should be adjusted to allow for an extended collective licensing system for P2P uses, as works shared therein would have to be at least TPM-free (given that users should not be subject to a levy/tax if rights holders are allowed to restrict access to their works and afforded anti-circumvention protection within such system).

In addition, amendments to the Software Directive would be required in the event P2P transfer of computer programs were to be included in the extended collective licensing model.

The need for such amendments–which can prove notoriously difficult to agree upon and implement at E.U. level–makes extended collective licensing a comparatively less appealing proposition than other alternatives (like VCL), which have inferior impact and implementation costs to the *acquis*.[330]

Second, if the idea is to bring P2P uses under the umbrella of collective management, this might be the wrong strategic approach. In fact, given the current existence of a booming licensing market rivaling with the "illegal" one of P2P,[331] the natural tendency of industry scale rights holders will be to immediately opt-out of the extended collective licensing system so as to preserve their business model. This will not only render such system as a failure at an early stage, because

328 *Id.* at 27.
329 For a contrary position, *see* Peukert, *supra* note 247, at 66-68.
330 *See* Peukert, *supra* note 247, at 52-53 (discussing, at the international treaty level, the political and practical challenges of alternative proposals that require changes to existing legislative texts).
331 *See supra II.*B.

users will be deprived of the perceived benefits thereof, but also diminish the relevant repertoire in such a way as to prevent the fulfillment of the *representativeness criterion*[332] and, consequently, the operation of the extension effect that characterizes extended collective licensing, stopping it from gathering any momentum and rendering it *de facto* useless.

As such, from a policy perspective, the legal design of extended collective licensing seems not to be the most adequate for the current market, as it lacks one of two necessary attributes: either the binding nature of mandatory collective management (so as to prevent the escape from the system of major portions of repertoires) or the flexible character of VCL, which allows for adaption to existing and prospective business models.

C. Voluntary collective licensing

1. Basic proposal and features

VCL of P2P uses of music was proposed as far back as 2003 by the EFF in the U.S.,[333] based on the premises that rights holders are entitled to fair compensation, P2P is not going away, "fan-based" online music distribution is more efficient than music industry dissemination and market driven solutions are preferable to government intervention.[334]

In the U.S., the precedent for VCL is that of broadcast radio, managed by performance rights organizations–ASCAP,[335] BMI[336] and SESAC–,[337] acting pursuant to consent decrees, and which grant broadcasters and other licensees blanket licenses for performance rights in exchange for membership fees.[338] **Annex VIII** contains a depiction of ASCAP's VCL model.

The U.S. origin of the EFF proposal is not without relevance, as it translates into at least two significant differences in relation to the eventual application of VCL in the E.U. First, the proposal assumes that the rights involved in P2P are those of

332 *See* Koskinen-Olsson, *supra* note 180, at 293-294 (providing an overview of this criterion).
333 For the original proposal by the EFF *see* Lohmann 2004, *supra* note 7; for a revised "Version 2.1" *see* Lohmann 2008, *supra* note 8.
334 *See* Lohmann 2008, *supra* note 8, at 1.
335 For an overview of ASCAP's activities *see* http://www.ascap.com/ (last visited Jan. 31, 2012).
336 For an overview of BMI's activities *see* http://www.bmi.com/ (last visited Jan. 31, 2012).
337 For an overview of SESAC's activities *see* http://www.sesac.com/ (last visited Jan. 31, 2012).
338 *See* Lohmann 2008, *supra* note 8, at 2, and Dougherty, *supra* note 8, at 410-417.