

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*<sup>332</sup> 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.,<sup>333</sup> 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.<sup>334</sup>

In the U.S., the precedent for VCL is that of broadcast radio, managed by performance rights organizations—ASCAP,<sup>335</sup> BMI<sup>336</sup> and SESAC—<sup>337</sup> acting pursuant to consent decrees, and which grant broadcasters and other licensees blanket licenses for performance rights in exchange for membership fees.<sup>338</sup> **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.

digital performance and not reproduction and making available, as in the E.U.<sup>339</sup> Second, the E.U. CMO market is more evolved, diversified and with a broader scope of activities (e.g., of social and cultural nature) than its U.S. counterpart, a fact which must be taken into account when analyzing this option under a European framework.<sup>340</sup>

Notwithstanding, the EFF proposal provides an adequate matrix to analyze VCL under E.U. law. It contains the following main features:

- (i) Non-profit CMOs represent rights holders and exploit the relevant exclusive rights;
- (ii) Users are offered a blanket license (multi-repertoire and, *mutatis mutandis* for the E.U., multi-territorial) covering relevant P2P uses against the payment of a flat fee;
- (iii) Payment is possible through an array of mechanisms, either directly via a website or bundled;<sup>341</sup>
- (iv) Royalties are distributed to rights holders on the basis of relative content popularity, to be determined using (privacy respecting) rights management methods and technology.<sup>342</sup>

## 2. Benefits

VCL implementation is beneficial insofar as it requires close to no direct intervention by public authorities, either national or at E.U. level.<sup>343</sup>

Furthermore, it presents a significant upgrade for rights holders, as they get additional income (where previously they had none), access to inexpensive promotional channels, and (in some cases) improved bargaining positions.<sup>344</sup>

What's more, VCL would spur technological development and investment in the field of P2P and content distribution, both in related products/services and at infrastructural level.<sup>345</sup>

339 See Dougherty, *supra* note 8, at 420-421 & n.114 (explaining the discussion and implications of this qualification of P2P uses as “interactive services”, generally within the exclusive right of 17 U.S.C. § 106(6)).

340 See EP Resolution OMR and EP Resolution CCBM (both illustrating the relevance given in the E.U. to CMOs role on promoting social and cultural interests).

341 E.g., in regular ISPs fees, in University fees as part of network access costs, or subscription fees of P2P software vendors. Note that “bundling” partnerships with ISPs and telecommunications companies is already viewed currently as a “key route to the mass market for digital services” (see IFPI 2012 Report, at 12).

342 See Lohmann 2008, *supra* note 8, at 1-3.

343 *Id.* at 2 (making the same point for the U.S.).

344 *Id.* at 3-4. See also Dougherty, *supra* note 8, at 426.

345 See Lohmann 2008, *supra* note 8, at 3 (exemplifying with the growth of broadband).