Based on the type of restriction imposed to the rights holder, we can consider three main types of collective rights management, from the least restrictive to the most restrictive:[172]

– VCL;
– Blanket licenses; and
– Mandatory collective management.

2. Voluntary collective licensing

In voluntary collective management licensing systems a contract is formed between the CMO (representing rights holders) and users or, depending on how the system might be set up, with intermediaries–such as ISPs–which obtain licenses for the benefit of its subscribers, i.e. the actual users of the works.[173] VCL is thus one of the least restrictive forms of collective rights management.[174] It's voluntary for rights holders and users.[175] The former are free to join a CMO and to decide which of their works are to be managed by the organization. Moreover, nothing prevents them from directly concluding licensing contracts with users, despite having joined a CMO. On the other hand, users can decide whether to obtain a license from a CMO or directly from the rights holder.

VCL is a typical rights management model in the E.U., albeit not for P2P.[176] It is the standard form of collective management allowing rights holders an efficient way to make available their works and users an easy way to obtain rights on such works, thus optimizing licensing activities.[177]

172 *See* Gervais 2010, *supra* note 162, at 26-27 (defining with more detail six levels of restriction, where the lowest level 0 corresponds to *full individual exercise* and the highest level 5 to *exceptions and limitations* or *compulsory license with no tariff*).

173 *See* Dusollier & Colin, *supra* note 8, at 823-824 (arguing that the latter contactual stipulation is known in civil law jurisdictions as a "stipulation for another person"). It is arguable however that, where the ISP itself is deemed to be using said works, this contractual relationship can be qualified as a license with the right to sublicense, a qualification that will vary however on the specifics of the agreement and the applicable law. The authors seem to place this latter model as well as models where ISPs act as mere "contractual inermediaries" between CMOs and users as a type of blanket license outside the category of VCL.

174 *See* Gervais 2010, *supra* note 162, at 26.

175 *See* Lohmann 2008, *supra* note 8, at 2.

176 *See* Lewinsky 2005, *supra* note 8, at 15 (indicating that "[t]his model is already practiced to some extent, in particular European countries", implying that such application covers P2P, without however naming specific countries).

177 *See* Daniel Gervais, Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective 83 (2001), http://works.bepress.com/cgi/viewcontent.cgi?article=1028&context=daniel_gervais (last visited Jan. 31, 2012).

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).