IV. Collective management of copyright

This Chapter examines, first, the general features of the operation of collective rights management and its essential types. This is useful to provide a basic understanding of how collective management functions and how it articulates with the concepts introduced in the previous Chapters. Furthermore, the basic taxonomy provided hereunder will supply the foundations for the analysis, in the following Chapter, of the possible alternatives to apply collective management to P2P uses. Such taxonomy is provided mostly with reference to E.U. legislation so as to afford an adequate overview of the *acquis* in this respect.

Second, the Chapter aims to link the existing collective rights management schemes to the digital age, by making reference to the reality of mass online uses brought about by the Internet (e.g., P2P) and the increasing need felt to address them through multi-territorial licensing-type of systems, illustrating this point with a brief overview of the E.U.'s institutional approaches in this area.

A. Operation and types of collective management

1. General considerations

Collective rights management is a deviation from the general principle of exclusivity under copyright law, according to which any authorization for uses of a work must come from the rights holder; it thus works as an alternative (and limitation) to full individual exercise.[161] It addresses the issue of transaction costs inherent to the copyright paradox and the fragmented, informal, transferable and territorial nature thereof.[162]

E.U. secondary law, more concretely the Satellite and Cable Directive, defines a "collecting society" (or CMO) as "any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes".[163] CMOs are mostly private entities that act as licensing intermediaries,

161 *See* Dusollier & Colin, *supra* note 8, at 817-818 (arguing that "the limitation only extends to the method of exercising one's copyright").

162 *See* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in*, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010) [hereinafter **Gervais 2010**].

163 Art. 1(4) Satellite and Cable Directive.

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royalty collectors, rights enforcers and, more recently, also develop social and cultural functions.[164]

Their establishment sometimes depends on government authorization and requires acquisition of authority to license works, collect royalties, as well as to create a repertoire of works; such authority can have its basis on legal provisions, contracts with rights holders and/or reciprocal repertoire cross-license representation agreements with other countries' CMOs.[165]

Authority to license is typically granted by rights holders (e.g. music composers, publishers or performers) to CMOs by assignment, agency or licensing. The latter can be exclusive or non-exclusive, thus granting (or not) to a CMO a monopoly on the right to license the specific work(s). Users of works are then licensed by CMOs on the basis of agreed tariffs and rights holders are paid by CMOs after usage data is collected and processed.[166] **Annex II** provides a representation of the role of CMOs as intermediaries between rights holders and users in a two sided market.

The applicable licensing terms and tariffs are set in accordance with a combination of state intervention and CMO regulation, the level of which varies greatly depending on the territory.[167]

In the E.U., the majority of CMOs are either *de iure* or *de facto* monopolies.[168] The two main umbrella organizations representing them are CISAC[169] and IFRRO,[170] with most collective management music agreements being based on the CISAC model contract, which follows a complex territorial licensing structure of fragmented rights and types of uses, coupled with reciprocity clauses.[171] **Annex III** depicts the CISAC model for cross-border licensing and highlights the use of reciprocal representation agreements between CMOs in different territories, allowing them to grant multi-repertoire licenses for each of the territories they represent, with respect to works of rights holders of different Member States.

By removing part of the rights holders' freedom to exercise their exclusive rights, collective rights management amounts to a restriction thereof. It is therefore important to categorize its main types, so as to understand which are best suited to cover P2P uses under current E.U. secondary law.

164 *See* Gervais 2010, *supra* note 162, at 3-5.
165 *Id.* at 6-7.
166 *Id.* at 7-9.
167 *Id.* at 7-8.
168 *Id.* at 13.
169 For an overview of CISAC's activities *see* www.cisac.org (last visited Jan. 31, 2012).
170 For an overview of IFRRO's activities *see* http://www.ifrro.org/ (last visited Jan. 31, 2012).
171 *See* Tanya Woods, *Multi-territorial Licensing and the Evolving Role of Collective Management Organizations*, *in*, Collective Management of Copyright and Related Rights 105, 108-109 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

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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).

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