

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.<sup>183</sup>

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.<sup>184</sup>

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.<sup>185</sup>

#### 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.<sup>186</sup>

At the international level, arts. 11*bis*(2) and 13(1) Berne Convention<sup>187</sup>—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.<sup>188</sup>

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.

However, the Berne Convention provides for this possibility in an exhaustive way:<sup>189</sup>

- For rights of remuneration *per se*;<sup>190</sup>
- Where the restriction of an exclusive right is allowed;<sup>191</sup> and
- For “residual rights”.<sup>192</sup>

Under the *acquis*, mandatory collective management provisions can be found in the Rental Right Directive, Satellite and Cable Directive and Resale Right Directive.

Under E.U. secondary law, rental is defined as the “making available for use, for a limited period of time and for direct or indirect economic or commercial advantage”.<sup>193</sup> Art. 5 Rental Right Directive provides for an unwaivable right to equitable remuneration, which allows for the possibility—through the use of the word “may” in paragraphs (3) and (4)—of Member States imposing mandatory collective management for the exercise of this residual right. These paragraphs read:

(3) The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

(4) Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Thus, Member States are entitled to impose a system whereby authors and performers cannot directly administer their right to obtain equitable remuneration for rental. This right is instead administered by CMOs, who are to claim or collect such remuneration from parties to be identified by law, typically producers and rental shops. For illustration purposes, a depiction of the mandatory collective management model under this Directive is contained in **Annex IV**.

Art. 9 Satellite and Cable Directive imposes mandatory collective management for cable retransmission, as well as rules for concentration of rights in CMOs’ repertoires.<sup>194</sup> This Directive defines cable retransmission as the “simultaneous, unaltered and unabridged retransmission by a cable or microwave system for re-

189 *Id.* at 44–46 (arguing that, as a result, absent an international provision supporting it, mandatory collective management is only acceptable with E.U. legislative permission).

190 *I.e.*, the resale right under art. 14*ter* Berne Convention and rights of performers and producers of phonograms (*see* art. 12 Rome Convention, which resembles art. 15 WPPT).

191 *See* art. 9(2) Berne Convention for the right of reproduction (e.g., private copy remuneration).

192 *I.e.*, the right to remuneration (usually of authors and performers) that survives transfer of some exclusive rights (and which is only applicable after said transfer).

193 Art. 2(1)(a) Rental Right Directive.

194 In the field of copyright, this provision is allowed by art. 11*bis* Berne Convention. For related rights, neither the Rome Convention nor the any other international treaty grants exclusive rights for cable retransmissions.

ception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public”.<sup>195</sup>

Art. 9 makes it clear that CMOs manage the right to grant or refuse authorization to a cable operator for cable retransmission, even if a rights holder has not transferred the management of his rights to a CMO. In this case, the CMO which manages rights of the same category is deemed mandated to manage his rights; if more than one of such CMOs exists, then the rights holder may freely choose that which is mandated to manage his rights.<sup>196</sup>

Art. 10 contains an exception to this rule for cable retransmission of rights of broadcasting organizations (in respect of their own transmissions) on the grounds that these are less numerous, hence making individual rights management possible.<sup>197</sup>

Finally, because the resale right is a mere right of remuneration,<sup>198</sup> art. 6(2) Resale Right Directive<sup>199</sup> provides for a “residual right” and allows for compulsory or optional collective management of the royalty.<sup>200</sup>

## B. Mass online uses and multi-territorial licensing

The emergence of mass individual uses on the Internet, such as P2P, has brought about a reshaping of the copyright landscape, making it apparent that, short of expelling users from the Internet (e.g., through graduated response systems), there is no effective way to prevent file-sharing.<sup>201</sup>

Moreover, quashing P2P uses will not translate into increased economic welfare to rights holders, quite the opposite, as the “copyright industry does well historically when it focuses on maximizing authorized use”.<sup>202</sup>

Therefore, for mass online uses, E.U. policy should use copyright to fulfill its goal of market facilitator, organizing access to works by bringing P2P uses under the umbrella of a licensing and remuneration system, respecting the interests of

195 Art. 1(3) Satellite and Cable Directive.

196 See art. 9(1) and (2).

197 See Ficsor, *supra* note 178, at 46.

198 See art. 14<sup>ter</sup> Berne Convention.

199 Art. 6(2) reads: “Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.”.

200 See Ficsor, *supra* note 178, at 48 (sustaining that art. 6(2) of this Directive confirms the validity of a restrictive interpretation as to the application of mandatory collective management).

201 See Gervais 2010, *supra* note 162, at 16.

202 *Id.*