2. Mandatory collective management

Mandatory collective management is a particularly enticing model for P2P as it addresses the problem of rights holders' lack of willingness to rely on CMOs to administer their rights.[289]

It reduces such a risk to zero by making it mandatory for the rights of reproduction and making available in a P2P network to be managed by CMOs, without the possibility of rights holders opposing.

Likewise, users are able to lawfully engage in P2P uses merely by obtaining a license from CMOs and not each rights holder (an impracticable scenario), having additional assurance against infringement liability, as no doubts arise regarding CMOs' entitlement to grant such licenses.

Notwithstanding these benefits, objections can be raised to the adoption of a mandatory collective management model, namely whether it is compatible with international treaty provisions and, consequently, the *acquis*.

Some authors sustain that there is no such incompatibility, as mandatory collective management is compliant with minimum rights and exceptions and limitations at international and E.U. level, as well with the principles of no formalities and national treatment.[290]

On the one hand, it is argued that mandatory collective management is not an exception and limitation–as it only affects the exercise of the exclusive rights–and arts. 11*bis*(2) and 13(1) Berne Convention do not include limitations of the exclusive rights concerned. As such, these provisions do not take away from the authors any possibility of exercising their exclusive rights, such as the making available right. In fact, mandatory collective management would more adequately protect authors' interests against the stronger bargaining position of industry stakeholders, with ultimately more beneficial results.[291] Under this configuration, such manda-

289 *See* Lewinsky 2005, *supra* 8, at 15.

290 *See* Silke von Lewinski, *Mandatory Collective Administration of Economic Rights – A Case Study on its Compatibility with the International and EC Copyright Law*, at 4 et seq. UNESCO e-Copyright Bull. 1, January-March 2004 issue [hereinafter **Lewinsky 2004**] (discussing this issue in relation to several exclusive rights, including the making available right but not the online reproduction right). *See also* Christophe Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO e-Copyright Bull. 1, 9-11, January-March 2007 issue (arguing that mandatory collective management cannot be qualified as a limitation of exclusive rights as no provision in international treaties restricts national legislators in this field).

291 *See* Lewinski 2004, *supra* note 290, at 5-9 (indicating that, by being a CMO member, the author can influence the licensing terms and/or royalty distribution, with the consequence that remuneration rights might be more beneficial to authors than exclusive rights, as recognized in Bundesgerichtshof [BGH] Jul. 11, 2002, ZU M 2002, 7 40 (Ger.)).

tory scheme would be compliant with the minimum rights system of the Berne Convention, TRIPS and WCT.[292]

Even if one were to consider mandatory collective management an exception and limitation, it would be compliant with the three-step test,[293] thus rendering it the best model to cover the P2P acts of reproduction and making available.[294] Its compliance would stem from rights holders keeping their exclusive rights with the added value of legalizing "P2P uses by easy-to-handle blanket licenses" and solving the problem (attributed to VCL) of rights holders distrust of CMOs.[295]

This is not however a unanimous position and arguments have been made to sustain the opposite conclusion.[296] In fact, it is possible to argue that, if mandatory collective management is permitted only in by international provisions as implemented in the *acquis*,[297] and the P2P rights of online reproduction and making available are not included there under, then mandatory collective management cannot cover such uses.[298]

Mandatory collective management differs from other forms of collective rights management insofar the exclusive right is enforced by CMOs.[299] It transforms the relationship between CMOs, authors and users: authors lose the right to decide how their works are used and users deal directly with CMOs; the rights of authors are thus restricted in its essence of "negative rights", which triggers the question as to the admissibility of such restriction under international treaties.[300]

Mandatory collective management is admissible in this sense either by reason of the nature of the rights to which it applies (remuneration rights) or because the Berne Convention allows–in exceptional cases–for determination or imposition of conditions for the exercise of the exclusive rights concerned.

As such, it can be argued that all other mandatory collective management cases outside this narrow scope conflict with international law, meaning that this system cannot apply, *inter alia*, to the rights of (unprivileged) online reproduction and

292 *Id.* at 10.
293 *Id.* at 10-11, 13-14 & n.36 (arguing that mandatory collective management is not an exception and limitation either under the Berne Convention or under art. 5 InfoSoc Directive, reminding that such a qualification was not even discussed–either for mandatory collective management or for non-voluntary licenses–when drafting the Directive, and concluding that "if this argument is true for non-voluntary licenses, where an obligation to conclude a contract with a user exists, it must be all the more true for [*mandatory collective management*]").
294 *Id.* at 10.
295 *Id.* at 15.
296 *See* Ficsor, *supra* note 178, at 48 et seq.
297 *See IV.A.*4. *infra*.
298 *See* Ficsor, *supra* note 178, at 53.
299 *Id.* at 54.
300 *Id*.

making available to the public; for these rights, it is possible to have VCL or extended collective licensing (as long as with an opt-out possibility).[301]

We are satisfied that this last interpretation–that which prevents application of mandatory collective management to the P2P uses of reproduction and especially making available–, although perhaps not definitive, is the most compatible with both international law and the *acquis*.[302] Therefore, on these grounds, mandatory collective management cannot be deemed as the most adequate collective management solution for P2P.[303]

Conversely, it is our view that objections raised to mandatory collective management on the basis of the "national treatment"[304] and "no formalities" principles are not valid.[305]

The principle of "national treatment is set forth in arts. 5(1) Berne Convention, 3 TRIPS and 3 WCT. The first of these provisions states that:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

It is our contention that the application of a mandatory collective management system does not impose membership of a CMO, as its mandatory nature implies an extension of its effects to non-members. Furthermore, this system promotes no discrimination in what regards foreign rights holders or works, which means that there is no violation of the principle of national treatment.[306]

The principle of no formalities is enshrined in art. 5(2) Berne Convention:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

301 *Id.* at 54-59.

302 This position is in line with the argument that, in principle, mandatory collective management should apply merely when it is the only way to exercise the right, being voluntary forms of collective rights management preferable in all other circumstances (*see* Gervais, *supra* note 186, at 38).

303 *But see* Dusollier & Colin, *supra* note 8, at 827 (concluding that "mechanisms authorizing P2P file sharing, although not explicitly provided for by the Berne convention under a compulsory licensing or other scheme, could still be enacted if they pass the three-step test…".).

304 *See* arts. 5(1) Berne Convention, 3 TRIPS and 3 WCT.

305 *See* Lewinsky 2004, *supra* note 290, at 11-12.

306 *Id.* at 12.

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.