Copyright in the age of online access

Alternative compensation systems in EU copyright law

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3 Alternative Compensation Systems: Taxonomy of Legalisation
Proposals

3.1 Introduction

The study of the admissibility and consistency of ACS with EU copyright law requires a clear understanding of their legal characteristics. To do so, it is necessary to define their nature, scope, and effects. This can be achieved through the identification, systematisation, and conceptualisation of proposals for legalisation of large-scale individual online use. This chapter sets about that task by developing a taxonomy of ACS from the perspective of EU copyright law, which can subsequently be tested against the relevant provisions of the acquis.

The chapter asks the following research questions:

What legal models are most commonly used for legalisation proposals?

How can these models be qualified in light of EU copyright law?

What is the nature and effect of these models on the exclusive right?

What are the main attributes of these models?

The departure point for analysis is the preliminary definition of ACS in Chapter 1. As noted, ACS is a shorthand for legal schemes, often combined with elements of collective rights management, that allow individuals to make online use of works without the direct authorisation of rights holders, subject to the payment of remuneration.470

The kinds of use in question are technology neutral. They can be of different types and carried out in different contexts over the Internet, such as through P2P networks, user groups, social media, streaming sites, or other web 2.0 platforms. (Chapter 4 develops a typology of online uses which it then links to exclusive rights and limitations in the acquis.)

The “alternative” refers to a deviation from the application of an exclusive right and individual management to large-scale online use for personal enjoyment and expression. The former restricted use becomes permitted-but-paid through a system of “compensation without control”.471 Hence, an ACS implies a shift from exclusivity to remunerated access and use.

It was also noted in Chapter 1 that legalisation proposals bear different labels, beyond the overarching term “alternative compensation systems”. These include, to name a few representative examples, Fisher’s “tax-and-royalty system”, Netanel’s “non-commercial use levy”, the French L’ALLIANCE Public Artistes’ “license globale”, the German Green Party’s proposals for a “content” or “culture flat-rate”, Aigrain’s “creative contribution” model,

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470 There is a vast literature in this field, covering contributions beyond legal scholarship. Among the most influential sources see: Bernault & Lebois, 2005; Séverine Dusollier & Colin, 2011; Grassmuck, 2009; Litman, 2004; Lohmann, 2004, 2008; Lunney, 2001; Netanel, 2003; Peukert, 2005. N.B. probably the first high level ACS proposal is Stallman, 1993, proposing a system for taxing digital copying through a levy on devices and media.

471 See supra 1.1. See Ginsburg, 2014b (on the notion of “permitted-but-paid”) and Wizards of OS, 2004 (with the “Berlin Declaration on Collectively Managed Online Rights: Compensation without Control”, a jointly issued declaration urging the European Commission to consider content flat-rate proposals).
Blázquez’s “file sharing levy”, Grassmuck’s “sharing license”, and COMMUNIA’s “alternative reward systems”. 472

Most proposals share the core characteristics of the precedents identified in Chapter 2. They are copyright rules that regulate mass use of works through non-voluntary licences, subject to compensation. 473 However, in order to offer a complete systematisation, this chapter also examines proposals external to copyright or that rely on voluntary licensing through collective rights management.

The analysis focuses on a list of texts, along with commentary and critique that can be understood as a “canon” of the theory of ACS. 474 These materials include a selection of legalisation proposals ranging from the purely theoretical to concrete implementation legislation. From the perspective of comparative legal analysis, the selection of sources is a combination of “typical”, “most similar”, and “influential”. 475 The selected literature is authored by academics, stakeholders, and political parties. With few exceptions (mainly in Brazil and Canada 476), most proposals originate from the US and EU, 477 and are post-2000. 478 Due to the high level of international harmonisation in copyright and the fact that many proposals are anchored in models of collective rights management (on which the EU has a longstanding tradition in law and practice), even ACS designed for non-EU jurisdictions are considered here. 479 To provide an overview of the field, Annex 1 contains a list and brief description of selected ACS proposals.

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473 See supra 2.2.

474 To this effect, see Duncan Kennedy’s parallel comments when describing the several facets of critical legal studies. See D. Kennedy, 1997, p. 10.

475 Seawright & Gerring, 2008, discussing several cross-case selection methods in scholarly research.

476 For Brazil, see: Grassmuck, 2010a; Machado & Ortellado, 2013; Souza, Machado, Mendonça, Ortellado, & Schmidt, 2013. For Canada, see Songwriters Association of Canada, 2011.

477 In Europe, several minority political parties in different countries (Italy, Belgium, and Portugal) have advanced legislative proposals for ACS. See: Beltrandi et al., 2008; Beltrandi, D’Elia, Turco, Mellano, & Poretti, 2007 (Italy); Hellings & Piryns, 2010; Moraal & Piryns, 2010 (Belgium); and Partido Comunista Português (Grupo Parlamentar), 2012 (Portugal). In France, during the adoption process of Law No. 2006-961 of 1 August 2006 concerning Copyright and Neighbouring Rights in the Information Society (Loi relative aux droit d’auteur et aux droits voisins dans la société de l’information, also known as “DADVSI”), the Parliament adopted an amendment on 21 December 2005 that regulated the act of downloading a file. This amendment was said by some to legalise P2P file sharing. This decision was subsequently reversed. See Geiger, 2008b, pp. 1–2.

478 N.B. some authors advance general recommendations in the sense of adopting ACS but offer little detail, preventing their qualification as fully-fledged ACS proposals. See, e.g., Patry, 2011, pp. 177–189, advocating the need to implement “a right to be paid through statutory licensing, collective management of rights, and levies”. For criticism, see Samuelson, 2012. See also Slater, Smith, Bambauer, Gasser, & Palfrey, 2005, with a comparative analysis of different proposals.

479 Momirov & Naude Fourie, 2009, discussing the application of comparative law methods and advancing a typology of modes of vertical and horizontal legal comparison.
The ACS definition requires access to works through blanket licensing subject to payment of compensation. These features exclude as viable legalisation options pure private ordering schemes, like those based solely on open access. Also excluded are systems built on uncompensated limitations for online use, sometimes labelled as “digital abandon” or “information anarchy”. Proposals of this type are therefore not examined here.

The design of the taxonomy is predicated on existing law. Despite their different origins, the selected proposals are qualified and systematised with reference to the copyright acquis. This predominantly conceptual analysis provides a building block for the subsequent study of the admissibility of an ACS in EU copyright law. However, the definition of the scope and effects of legalisation models in light of this legal framework necessarily entails some compliance analysis. For example, the examination of schemes based on collective rights management models (voluntary, extended, mandatory) requires an assessment of their scope in the acquis, together with consideration of the legal hurdles they may face. Nevertheless, beyond what is necessary to develop this taxonomy, the analysis of whether an ACS is admissible in EU copyright law takes place in the following chapters.

The inquiry proceeds as follows. Section 3.2 sets out a conceptual design for ACS. It identifies classification criteria for legalisation models and proposes a method to understand them through a gradual approach to exclusivity. Section 3.3 then defines the scope of ACS. The analysis delves into the legal schemes fitting the ACS definition and examines them as “vertical” regimes susceptible of application to large-scale online use. It relates the schemes to the acquis and takes a position on their legal nature. Section 3.4 furthers the taxonomy of legalisation proposals by looking at the characteristics of ACS, conceptualised as “horizontal” attributes. Section 3.5 concludes.

### 3.2 Conceptual Design

Legalisation proposals vary widely and tend to be depicted as radical departures from current law. However, a systematic and careful study of the literature tells a different story. It reveals a body of work that explores copyright law’s flexibility. This section develops a conceptual design for the selection and characterisation of ACS. If first advances classification criteria to distinguish a set of legalisation models that impose restrictions to exclusivity. It then explores these models by explaining their relationship to exclusivity, leading to the selection of five types of ACS theoretically applicable to all types of works.

To design a conceptual framework, we need to identify an organising principle reflecting the aim of the subject of systematisation. The aim of ACS is the establishment of a model of remunerated access for the copyright regulation of online use of works, as an alternative to the status quo of exclusivity, individual management, and the possibility of strict enforcement against individuals.

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480 Netanel, 2003, pp. 74–77, labelling the positions of Ku, Litman, Lunney and Nadel as “digital abandon”. However, the label may not adequately reflect all cited authors’ proposals, namely in the cases of Lunney, Ku and Litman, which all advance alternatives in the form of atypical legal licences. See also Ekersley, 2012, p. 85, defining “information anarchy” as a regulatory regime where non-commercial copying is freely permitted or copyright is abolished altogether.

481 A similar approach in the literature in this field is used in Slater et al., 2005, p. 5.
In economic terms, ACS aim to substitute a “property rule”—imposing a default prohibition on use—with a “liability rule” for online use by individuals.\textsuperscript{482}

Therefore, we should classify legalisation schemes according to their effects on the application of the exclusive right to online use. This requires us to take the perspective of the rights holder, as the party affected in her pre-existing juridical entitlement. In this light, a sound organising criterion is that of the \textit{restrictions operated by an ACS on the exclusive right}.\textsuperscript{483}

ACS can then be classified according to the gradual level of the restrictions to the exclusive right resulting from different statutory or contractual mechanisms. The approach reflects different ways in which rights can be acquired (in a broad sense) so as to enable use absent direct authorisation from rights holders. This allows the division of ACS into voluntary and mandatory legal mechanisms imposing gradually higher restrictions on the nature and exercise of exclusive rights. Table 1 provides a representation of the classification.\textsuperscript{484}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Level / Impact} & \textbf{Nature of right} & \textbf{Rights Acquisition Scheme or Type of Restriction} \\
\hline
0 / - & Exclusive & Status quo: full individual exercise of right (Private Ordering) \\
\hline
1 / + & Exclusive & Voluntary Collective Licensing \\
\hline
2 / ++ & Exclusive & Extended Collective Licensing (ECL) \\
\hline
3/ +++ & Exclusive \textit{(debated)} & Mandatory Collective Management \\
\hline
4/++++ & Remuneration or compensation & Compulsory or statutory licences with compensated or remunerated copyright limitations (“Legal licences”), typically exercised through collective rights management \\
\hline
5/+++++ & No economic substantive rights & Uncompensated limitation \\
\hline
6/++++++ & Remuneration claim \textit{(external to copyright)} & State remuneration, compensation or reward systems; Cultural subsidies (“State Systems”) \\
\hline
\end{tabular}
\caption{Restrictions to Exclusivity}
\end{table}

\textsuperscript{482} See Kur & Schovsbo, 2011, on the reception of these terms in the field of intellectual property rights, while discussing the gradual loss of relevance of the exclusivity paradigm. See also: Merges, 1996, 2004a (arguing for the superiority of property rules due to the fact that parties contract around the same to avoid holdup problems); Oliar, 2012 (discussing property and liability rules in the context of the conflict on the legal protection of new technological uses of content between copyright owners and technological innovators); and Lemley, 2012 (arguing that parties not only contract around property rules, as suggested by Merges, but also around inefficient liability rules). For the original use of the term in law and economics scholarship, see Calabresi & Melamed, 1972.

\textsuperscript{483} Implicitly or explicitly, most scholarship adopts this basic criterion. For explicit adoption, see Séverine Dusollier & Colin, 2011; Gervais, 2010; von Lewinski, 2005. See also Kur & Schovsbo, 2011, using the “exclusivity” characteristic of intellectual property rights as the pivotal point of the analysis of liability rules.

\textsuperscript{484} Table 1 is inspired by Gervais, 2010, p. 26.
The departure point is full individual exercise of an exclusive right, absent restrictions (Level 0). This represents the status quo for most online use of works and includes *inter alia* private ordering models, such as creative commons. It can be understood as one end of the spectrum. At the other end are uncompensated limitations (Level 5), which fail to qualify as ACS due to their lack of a remuneration element. Between these extremes are the five legal schemes that satisfy a broad ACS definition. These are, from least to most restrictive:

- Voluntary collective licensing,
- Extended collective licensing (ECL),
- Mandatory collective management,
- Compulsory or statutory licences (jointly referred to as “legal licences”), and
- State remuneration, compensation or reward systems, and cultural subsidies (hereinafter jointly referred to as “State Systems”).

These models constitute stand-alone legal schemes to cover all relevant mass use. Levels 1 through 4 correspond to legal and legally enabled contractual mechanisms, namely regulated forms of collective rights management. They range from the most restrictive legal licences (Level 4), a term discussed in the previous chapter, to the least restrictive voluntary collective licensing (Level 1).⁴⁸⁵ All these schemes are internal to copyright and identified as preferred regulation models by ACS proponents.

State Systems (Level 6) differ from the previous schemes insofar as they are external to copyright. This label applies to proposals that eliminate copyright protection for (mostly non-commercial) online forms of use of works, placing the same (for the types of use in question) in the public domain. In these systems, creators are compensated not through a right of remuneration but rather through an array of tax or financing schemes to subsidise or reward creators. State Systems therefore shift the burden of incentivising the creation and dissemination of works from the copyright system to the State. As argued below, these characteristics make State Systems arguably more restrictive than uncompensated limitations (Level 5).

This classificatory method also reinforces one of the conclusions of Chapter 2, to the effect that copyright law’s approach to exclusivity is not absolute but nuanced.⁴⁸⁶ It is possible to represent the gradual approach in an axis or continuum (Figure 2).⁴⁸⁷

⁴⁸⁶  Kur & Schovsbo, 2011, noting that although copyright is the richest example of this gradual approach in the field of intellectual property rights, the same point holds true at differing degrees to other such rights, with the notable exception of trademarks.
⁴⁸⁷  Figure 2 draws inspiration from Séverine Dusollier & Colin, 2011, pp. 817–820.
When gliding through the axis from least through increasingly more restrictive rights acquisition schemes, both the nature of substantive rights and the type of licence are affected. For instance, voluntary and extended collective licensing are typical models within which exclusive rights are managed. Their designation as “alternatives”, especially for voluntary collective licensing, should be broadly construed as relating to their opposition to full individual management in lieu of regulated forms of collective rights management.

Conversely, mandatory collective management, due to the restrictions imposed on the options of exercise of the right, has been subject to much scholarly debate regarding its impact on the exclusive nature of the right.\(^{488}\) This issue, anticipated in Chapter 2, is examined infra in 3.3.4.2.

At this stage, it is sufficient to state that mandatory forms of collective rights management can apply both to exclusive and remuneration rights. As noted in the previous chapter, these two cases are distinguished by using the term “mandatory” to refer to the application of the scheme to exclusive rights, and “obligatory” to refer to its application to remuneration or compensation rights, typically as an adjunct to a statutory licence.\(^{489}\) An example of mandatory collective management, provided in Chapter 2, is the special regime applicable to the exclusive right of cable retransmission in Articles 9–12 SatCab Directive.\(^{490}\) It is submitted that the legal imposition of collective management of an exclusive right does not per se affect its nature and transform it into a remuneration right. Instead, each collective rights management model—voluntary, extended, mandatory—imposes increasing restrictions on the options of exercise of the right.

Why does this distinction matter?


\(^{489}\) See Lucie Guibault, 2002, pp. 26–27, with a similar distinction. See also supra 2.2.3.

\(^{490}\) See supra 2.4.4.
First, it matters because the legal qualification affects the scope of the right. An exclusive right allows the application of injunctions, making effective the prohibition of use through judicially backed enforcement mechanisms. Contrariwise, remuneration or compensation rights reduce the entitlement to remuneration claims (and enforcement of the same). Thus, the loss of ability to restrict access to the right and to ex post enforcement implies the shift from a property rule to a liability rule-based copyright regulation.

Second, the distinction matters because the effect of a model on the exercise and nature of the right has consequences for its compliance with international law and the acquis, its legal feasibility and even normative adequacy. Furthermore, the distinction helps to clarify legal concepts that are often used with overlapping meanings in legislative texts and academic writings.

A good example, with relevance here, is that of “non-voluntary” licences. As noted in the previous chapter, the term applies to two different models: compulsory licences and mandatory collective management. The first model is a legal licence and clearly implies that the underlying right is not exclusive, but subject to remuneration or compensation. Thus, if an ACS is adopted on the basis of such a licence and there is no legal rule in the acquis that provides for its application to non-commercial online acts of reproduction and communication to the public, the validity of the licence depends on meeting the conditions of the three-step test in Article 5(5) InfoSoc Directive. However, if it is accepted that mandatory collective management does not constitute a copyright limitation, it will not have to meet the conditions of the test.

Of importance in drawing these distinctions is the term “exercise”. The term has multiple possible meanings, so it is important to be clear on its connotation here. A crucial use of the term is found in Article 5(2) BC, which bans formalities for the “enjoyment” and “exercise” of copyright. In that context, “enjoyment” refers to author’s rights coming into existence and being recognised absent any formality, whereas “exercise” relates to formal requirements on the initiation of enforcement of copyright.

Together with other copyright scholars, “exercise” of copyright is understood here to cover a range of acts that do not touch upon the enjoyment or existence of the right. That meaning is broader but consistent with the use of the term in Article 5(2) BC. Exercise thus includes “performing, authorising or prohibiting rights under copyright and related rights and/or claiming remuneration for acts, or taking the necessary steps to have moral rights respected”; the main

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491 Kur & Schovsbo, 2011, pp. 1–16, discussing the implications of the different legal qualification of exclusive and remuneration rights.

492 Kur & Schovsbo, 2011, pp. 1–16.

493 Kur & Schovsbo, 2011, p. 21, concluding this in connection with limits to exclusivity in patent rights, but using identical reasoning for copyright. See also Oliar, 2012, on the conflict between property and liability rules and the trade-offs between authorship and innovation as the “copyright-innovation conflict”.

494 For example, the expression “conditions on the exercise” in Art. 11bis(2) BC is a euphemism for compulsory licensing. See supra 2.4.2.

modalities of exercise are individual exercise—including direct licensing, agency or representation—and collective rights management.\(^{496}\)

Restrictions on the exercise of copyright are conditions imposed by law or contract that affect its transfer, management and enforcement, but not its nature or existence. Only where a legally imposed restriction affects that nature or existence does it cause a transformation from an exclusive to a remuneration or compensation right, and therefore qualifies as a copyright limitation. This understanding of exercise leads to the observation that the exclusive right has significant *elasticity*. It can stretch from individual management to the gradually more limiting collective rights management schemes, without losing its exclusive nature.

Hence, there is no complete overlap between the effect on the exclusive right of a legal model and the voluntary or non-voluntary type of licensing that underlies each scheme (see Figure 2). On the one hand, voluntary and extended collective licensing are models to which rights holders choose to adhere or can generally opt out of, retaining the possibility of unencumbered exercise of their copyright. (Where ECL does not allow opt-out, section 3.3.3 below contends that the model is equivalent to mandatory collective management, and therefore a non-voluntary licence.)

On the other hand, although the term non-voluntary licence appears to originate in the ambiguous terminology of international treaties on compulsory licences, the label also fits well for mandatory collective management and legal licences: for neither scheme does the rights holder have the initial choice to participate or the subsequent possibility of opting out. What differs here is that mandatory collective management technically translates into a statutory restriction on the options for exercise of a right, but not on its existence as an exclusive right, as is the case with legal licences.\(^{497}\)

Finally, “State Systems” (Level 6) place the regulation of online use outside the realm of copyright protection. This makes their impact on the exercise and nature of exclusive rights the highest among all the rights acquisition schemes considered. From a conceptual standpoint, it is arguable that these systems are more restrictive than uncompensated exceptions (Level 5), commonly qualified as user *privileges* or *defences*—not rights—subject to the fulfilment of certain conditions.\(^{498}\) If such conditions are not met, the use in question triggers the exclusive copyright.

The same does not hold true for State Systems. Here, because no copyright protection is afforded to the use in the first place, failure to comply with a condition of use does not imply the default application of copyright. As noted in Chapter 1, this dissertation takes a pragmatic approach to legal reform and examines models to adapt and improve EU copyright law, rather than abolish copyright protection.\(^{499}\) Adoption of State Systems would require abrogation or profound change

\(^{496}\) Ficsor, 2003b, p. 288.

\(^{497}\) In this sense, see Colin, 2011a; Sèverine Dusollier & Colin, 2011; von Lewinski, 2004, 2005. See infra 3.3.4.2.

\(^{498}\) On the discussion of exceptions or limitations as restrictions to exclusive rights (perceived as user defences) versus their consideration as affirmative user rights see e.g. Geiger, 2010; Lucie Guibault, 2002; Karapapa, 2012, pp. 79–98.

\(^{499}\) Cf. supra 1.2.
in international treaties, which makes them legally and politically unrealistic.\textsuperscript{500} Thus, they are only analysed in this chapter due to their influential nature in the ACS debate and the fact many of their attributes are susceptible of application to schemes internal to copyright, namely legal licences.\textsuperscript{501}

### 3.3 Types of Alternative Compensation System

This section builds on the previous conceptual design by delimiting the scope of ACS in light of the \textit{acquis}. The rights acquisition schemes identified above reflect the legal and contractual mechanisms under which ACS proposals authorise large-scale online use.

Authorisation can be direct or indirect. Authorisation is \textit{direct} if the end-user enjoys a legal or contractual entitlement to engage in the online use without intermediation. Authorisation is \textit{indirect} when granted to commercial users or intermediaries, even if for the ultimate benefit of end-users.\textsuperscript{502} An intermediate case is that of authorisation with “minimal” intermediation. This refers to contractual mechanisms between users and rights holders’ representatives (such as CMOs) authorising individual online use via intermediaries (commonly ISPs) that are instrumental to the contractual relationship, but not parties thereto.\textsuperscript{503}

This section analyses each rights acquisition scheme against the legal framework of the \textit{acquis}, and describes how different legalisation proposals apply to large-scale online use. The examination begins with a background summary of collective rights management, as most legalisation models are of this type (3.3.1). This section then examines in turn each type of ACS, from least to most restrictive: voluntary collective licensing (3.3.2), ECL (3.3.3), mandatory collective management (3.3.4), legal licences (3.3.5), and State Systems (3.3.6).

#### 3.3.1 Some Basics on Collective Rights Management

Collective rights management is both a deviation from and an alternative to the general principle of exclusivity and individual exercise of copyright. The objective of collective management is to achieve an efficient exploitation of works.\textsuperscript{504} The price of a CMO’s efficiency is “the limitation of the freedom of contract of right holders and users”.\textsuperscript{505}

Collective management addresses the problem of transaction costs associated with establishing, managing and enforcing copyright, inherent to its informal, fragmented, transferable and territorial nature.\textsuperscript{506} In offering a solution to this problem, collective management emerges as an answer to the so-called “copyright paradox”, as it reconciles the exclusive nature of the right—

\textsuperscript{500} Noting the political challenge of such changes, see Gervais, 2005, p. 30; Griffiths, 2009, p. 11; Koelman, 2006, p. 411; Peukert, 2005, p. 52.

\textsuperscript{501} Cf. \textit{supra} 1.2.

\textsuperscript{502} See Gervais, 2001, using a comparable terminology when discussing models for the acquisition of rights.

\textsuperscript{503} Colin, 2011a.

\textsuperscript{504} Séverine Dusollier & Colin, 2011, p. 827.

\textsuperscript{505} R. Hilty & Nérisson, 2013, p. 4.

\textsuperscript{506} See Eckersley, 2012, pp. 230–231, for a discussion of the concept of transaction costs in ACS. The author focuses on the reduction of transaction costs in connection with collective rights management. See also Allen, 2000, for a broader law and economics discussion.
and its default prohibition on use—with the goals of access and dissemination of works.\(^{507}\) It is therefore unsurprising that legalisation proposals often rely on collective licensing.

CMOs are mostly private entities providing services that include licensing users, auditing and monitoring rights, enforcing copyright, and collecting and distributing royalties to rights holders.\(^{508}\) They also develop social and cultural functions, a role recognised in the CRM Directive.\(^{509}\)

Although the directive does not require CMOs established in the EU to adopt a specific legal form, it subjects them to a variety of rules on representation, membership, organisation, management of rights revenue, management of rights on behalf of other CMOs, relationships with users, transparency, reporting, and enforcement measures.\(^{510}\) In addition, the directive contains a special regime for CMOs established in the EU that manage authors’ rights in musical works for online use on a multi-territorial basis (more on that later).\(^{511}\)

In the EU, an organisation qualifies as a CMO only if its *sole or main purpose* is to act for the collective benefit of its members. Furthermore, it must fulfil at least one of the following requirements: be owned or controlled by its members; or be organised on a not-for-profit basis.\(^{512}\) These organisations must act in the best interests of their members and may not impose on them obligations that are “not objectively necessary for the protection of their rights and interests or for the effective management of their rights.”\(^{513}\)

The CRM Directive distinguishes CMOs from “independent management entities”, to which it applies a more limited set of rules.\(^{514}\) This new concept in the *acquis* refers to organisations authorised to manage rights on behalf of *several* rights holders for their collective benefit, as their sole or main purpose. In contrast to CMOs, these entities are *commercial* and *not owned* by right holders.\(^{515}\)

Recital 16 clarifies that independent management entities do not include audio-visual producers, record producers, broadcasters, and publishers (of books, music or newspapers), who license rights in their own interest. Managers and agents of creators do not qualify either because “they do not manage rights in the sense of setting tariffs, granting licences or collecting money from users”.


\(^{510}\) Art. 2(1) CRM Directive.

\(^{511}\) Art. 2(2) CRM Directive, referring to Title III. It is noteworthy that the relevant provisions of the directive apply to entities directly or indirectly owned or controlled (wholly or in part) by a CMO, if such entities carry out an activity which, if carried out by the CMO, would be subject to the provisions of the directive. Cf. Art. 2(3) CRM Directive. On the issue of legal form, see recital 14.

\(^{512}\) Art. 3(a) CRM Directive. A “member” is a rights holder or an entity representing rights holders, including other CMOs and associations of rights holders, fulfilling the membership requirements of the CMO and admitted by it. Cf. Art. 3(d) CRM Directive.

\(^{513}\) Art. 4 CRM Directive.


\(^{515}\) Art. 3(b) CRM Directive.
In some countries, establishment of CMOs may depend on government authorisation. In all cases, the organisation requires acquisition of authority to license works, collect royalties, and create a repertoire of works. Such authority stems from legal provisions, contracts with rights holders, or representation agreements between CMOs, whereby one organisation mandates another to manage the rights it represents.\textsuperscript{516} The organisation is then authorised to grant licences on the works in respect of which it manages rights for a given territory, i.e. its “repertoire”.\textsuperscript{517}

The authority to license on behalf of rights holders can be granted to CMOs on an exclusive or non-exclusive basis. If granted on an exclusive basis, it will result on the organisations having a monopoly for their field and territory of operation. Indeed, most CMOs are \textit{de facto}, and sometimes \textit{de iure}, monopolies.\textsuperscript{518} In the EU and for the online exploitation of musical works, the CRM Directive attempts to counteract this by fostering a competitive regime of multi-territorial licensing.\textsuperscript{519}

A CMO grants licenses to users based on agreed prices or fees, also called “tariffs”, and rights holders are paid by the organisation after usage data is collected and processed.\textsuperscript{520} In the CRM Directive, a “user” means any person or entity carrying out acts subject to authorisation by right holders, or the requirement to pay remuneration or compensation to right holders, which is not acting in the capacity of a consumer.\textsuperscript{521} A consumer, in turn, is a natural person acting for purposes outside his trade, business, craft or profession.\textsuperscript{522} In essence, CMOs operate as intermediaries in a two-sided market between rights holders and users (Figure 3).

\textsuperscript{516} Gervais, 2010, pp. 6–7, 2016, pp. 8–9. For a definition of representation agreement see Art. 3(j) CRM Directive.
\textsuperscript{517} See Art. 3(l) CRM Directive. See also Gervais, 2016, p. 9.
\textsuperscript{518} Gervais, 2010, pp. 6–9, 2016, p. 9.
\textsuperscript{519} See \textit{infra} 3.3.2.
\textsuperscript{520} Gervais, 2010, pp. 7–9.
\textsuperscript{521} Art. 3(k) CRM Directive.
\textsuperscript{522} Art. 2(1) Consumer Rights Directive. See also recital 33 CRM Directive, and Lucie Guibault & Gompel, 2016, p. 144.
The licensing terms and tariffs are set in accordance with a combination of state intervention and CMO regulation, the level of which varies per territory. 523 The CRM Directive mandates that negotiations with users for the purposes of licensing are carried out in good faith, in a timely manner, with disclosure of the necessary information, and that licensing terms are subject to objective and non-discriminatory criteria. Furthermore, refusals to license a particular service must be presented to users in a reasoned statement. 524

The directive further requires that rights holders receive “appropriate remuneration” for the use of their rights. This means that tariffs for exclusive or remuneration rights must be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. 525

The notion of “economic value in trade” as an objective criterion to set tariffs is used by the CJEU in Kanal 5 and TV4. The case involved determining whether tariffs applied by the Swedish CMO STIM for use of its music repertoire by a broadcasting organisation in television broadcasts were reasonable. The Court stated that “in so far as such royalties are calculated on

524 Art. 16(1)–(3) and Recital 32 CRM Directive.
525 Art. 16(3) CRM Directive.
On this point, it is worth noting the challenges of reconciling this view of “appropriate remuneration”, linked to the standard of “economic value in trade”, with the concept of fair compensation in the InfoSoc and Orphan Works Directive, based on the notion of harm. As such, appropriate remuneration should be viewed flexibly so as to accommodate the conceptual nuances of the different remuneration entitlements inherent in voluntary royalties, remuneration rights, and fair compensation rights.\textsuperscript{528}

The income collected by a CMO on behalf of rights holders, whether deriving from an exclusive right, a right to remuneration, or a right to compensation is called “rights revenue”.\textsuperscript{529} The amounts charged, deducted, or offset by a CMO from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management services are the “management fees” (see Figure 3).\textsuperscript{530}

Finally, Article 5(3) CRM Directive provides rights holders a right to grant licences for “non-commercial uses of any rights, categories of rights or types of works and other subject-matter that they may choose”. CMOs must ensure that rights holders can exercise the right, \textit{inter alia} by deciding on the “conditions attached to the exercise of that right” and informing their members of those conditions.\textsuperscript{531} Importantly, there is no right to non-commercially license individual works.\textsuperscript{532}

\subsection*{3.3.2 Voluntary Collective Licensing}

\subsubsection*{3.3.2.1 Characterisation and Legal Framework}

Voluntary collective licensing is the least restrictive form of collective rights management.\textsuperscript{533} In this system, a CMO enters into a contract with users for the rights it represents. The licensees are typically users not acting in the capacity of consumers, as envisaged in the CRM Directive, but certain ACS proposals refer to the possibility of a CMO directly licensing end-users.\textsuperscript{534}

\begin{thebibliography}{99}
\bibitem{526} CJEU, \textit{Kanal 5 and TV4}, \textsuperscript{¶}37. On this case, see Lucie Guibault & Gompel, 2016, pp. 154–155.
\bibitem{527} CJEU, \textit{Kanal 5 and TV4}, \textsuperscript{¶}41.
\bibitem{528} Cf. Lucie Guibault, 2014, p. 750; Quintais, 2013, p. 69. On the concepts of equitable remuneration and fair compensation, see supra 2.2.4, 2.3.3, and \textit{infra} 4.4.3.3.
\bibitem{529} Art. 3(h) CRM Directive. See also Arts 11–13 CRM Directive with rules on the management of rights revenue.
\bibitem{530} Art. 3(i) CRM Directive.
\bibitem{531} Recital 19 CRM Directive.
\bibitem{532} Lucie Guibault & Gompel, 2016, p. 151.
\bibitem{534} Art. 3(k) CRM Directive. See also SWD CRM Directive 2012, p. 195, defining “commercial user” as “any person or entity involved in the provision of goods or services who for its activities needs a licence from rightholders of copyrights and/or related rights”.
\end{thebibliography}
Depending on how the system is set up, a commercial user (e.g. an ISP) may contract directly with a CMO and obtain the right to sublicense its customers, or act as a mere intermediary obtaining licences for the benefit of clients or subscribers, i.e. the actual users of works.\footnote{Colin, 2011a, pp. 64–77. See also Séverine Dusollier & Colin, 2011, pp. 823–824, arguing that the later use is known in civil law jurisdictions as a “stipulation for another person”. It is also conceivable that certain licence agreements qualify ISP’s as sub-licensors with the authority to licence end-users.}

The system is voluntary for rights holders and users.\footnote{Lohmann, 2008, p. 2.} The former are free to join a CMO and decide which works the organisation will manage. CMOs may partially curtail that freedom through contractual terms in membership requirements. Before the CRM Directive, requirements of this type might go so far as to make membership dependent on rights holders entrusting all rights to the organisation on an exclusive basis or preventing them from individual management. Since the directive, this possibility is now limited.\footnote{Arts 5–6 and Recital 9 CRM Directive. See also Lucie Guibault & Gompel, 2016, pp. 151–152.} Where membership agreements are non-exclusive, rights holders retain the possibility of licensing users directly or through representatives.\footnote{Art. 3(b) and recital 15 CRM Directive.}

Voluntary licensing is a typical rights management model in the EU, increasingly used for optimising licensing activities, especially for particular rights in online music.\footnote{von Lewinski, 2005, p. 15, indicating that “[t]his model is already practiced to some extent, in particular European countries”. See also SWD CRM Directive 2012, pp. 5-7.} The CRM Directive prescribes a special regime for multi-territorial licensing of author’s online rights in musical works, which can be viewed as a model of reinforced voluntary collective licensing.\footnote{Arts 23–32 CRM Directive.} This regime is the most innovative part of the directive and constitutes a regulatory novelty in European copyright law. For this reason, and because it illustrates the complexity of copyright fragmentation in EU law, it is important to provide an overview of its mechanics.

The multi-territorial licensing system is a development of the regulatory framework advanced in the unsuccessful 2005 Online Music Recommendation, and aims at replacing the current predominantly territorial model of online music licensing by CMOs.\footnote{Recitals 6, 39, and 40 CRM Directive.} The system aims to facilitate repertoire aggregation for online use of musical works at EU level, to develop common standards on multi-territorial licensing, and to foster efficient licensing practices.\footnote{Proposal CRM Directive, pp. 6-7. See also Memo CRM Directive FAQ 2014, ¶15.} Through it, the Commission hopes to reduce the complexity caused by the fragmentation of the EU digital market for online music services, approximating it to consumer expectations.\footnote{Recital 38 CRM Directive.}

In the EU, online service providers interested in music licensing need to license three sets of rights involved in the online exploitation of musical works: author's rights (from composers and lyricists), phonogram or record producer's rights, and performer's rights.\footnote{Memo CRM Directive FAQ 2014, ¶14; Recitals 37 and 38 CRM Directive.} For online providers to offer consumers download or streaming music services, or access to films and videogames
where “music is an important element”, they are required to obtain a licence for each of these rights.\textsuperscript{545}

The record producer usually aggregates the related rights of producers and performers; conversely, rights of authors are managed by CMOs. The CRM Directive's special regime only regulates the online rights of authors. The regime does not apply to related rights of performers or producers, or to \textit{non-online rights} in musical works, like those in relation to cable retransmission or communication to the public by satellite (see Figure 4).\textsuperscript{546}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure4.png}
\caption{Figure 4. Scope of Multi-Territorial Licensing Regime in the CRM Directive}
\end{figure}

Multi-territorial licensing refers to any licence granted by a CMO covering the territory of more than one Member State, and relates to author’s “online rights in musical works” required for the provision of an online service: the rights of reproduction and communication to the public in Articles 2 and 3 InfoSoc Directive.\textsuperscript{547} Musical works include both stand-alone works and those incorporated in audio-visual works.\textsuperscript{548}

These exclusive rights can be managed individually by the rights holder (author or assignee, e.g. music publisher) or by CMOs. Different CMOs may manage each of the rights for the same author and further complications might arise from joint ownership of rights.\textsuperscript{549} Therefore, in order to provide online music services, online providers must aggregate all the necessary rights.

\textsuperscript{545} Recital 37 CRM Directive.
\textsuperscript{546} This is consistent with the understanding that the acts of cable retransmission do not include online use. \textit{Cf. supra} 2.4.4. Figure 4 is inspired in the “example of licensing for music rights in online uses” in Memo CRM Directive FAQ 2014, ¶14.
\textsuperscript{547} Art. 3(m) and (n) CRM Directive. See also recital 37.
\textsuperscript{548} Recital 40 CRM Directive. Musical works include lyrics but exclude sheet music.
\textsuperscript{549} Recital 37 CRM Directive.
from different rights holders and CMOs, and clear all of the applicable related rights (see Figure 4).550

CMOs established in the EU that wish to provide multi-territorial licensing for online rights in musical works must comply with a number of requirements and obligations set out in the CRM Directive.551 These include having the capacity to process these licences electronically in an efficient and transparent manner, the provision of information on the repertoire they represent, invoicing, and payment. Only CMOs meeting these requirements are authorised to offer multi-territorial licences.552

The CRM Directive’s special regime does not mandate multi-territorial licensing. Instead, it aims to foster and enable it by facilitating repertoire aggregation for the benefit of online service providers wishing to offer cross-border pan-EU services, while safeguarding cultural diversity and the position of consumers.553

In other words, the regime does not prevent CMOs from concluding reciprocal representation agreements to grant mono- or multi-territorial licences covering both their and foreign CMOs’ repertoires to online service providers. Hence, two regimes that enable multi-territorial licensing of works co-exist in the framework of the CRM Directive: that of reciprocal representation agreements and the special regime described.554

Multi-territorial licensing is allowed in different scenarios.555 In the first and simplest scenario, the authorised CMO can license its own repertoire to online service providers for two or more Member States.556 In a variation of this option, a CMO that does not meet the requirements to offer multi-territorial licences may outsource the functions that it is lacking to a third party.557

A more complex scenario incorporates the so-called “passport” system.558 A CMO failing the directive’s requirements can enter into a non-exclusive representation agreement with another CMO that meets them, who then grants multi-territorial licences for the repertoire of the first.559 In the terminology of the travaux préparatoires, the authorised CMO is the “passport entity”, to which the mandating CMOs would have a “right to tag on repertoire”.560

Under certain circumstances, the agreement is mandatory. If the CMO is already granting or offering multi-territorial licences for the “same category of online rights in musical works” in the

550 Recital 37 CRM Directive.
551 Art. 23 CRM Directive.
554 Lucie Guibault & Gompel, 2016, pp. 158–164, explaining the system of reciprocal representation agreements in the EU, which coexists with the special regime of multi-territorial licensing. See also Recitals 11 and 30 CRM Directive.
555 These scenarios mirror those presented as examples in Memo CRM Directive FAQ 2014, ¶15.
557 Memo CRM Directive FAQ 2014, ¶¶15, 23 (mentioning “quality standards”). Outsourcing of this type seems to be within the spirit of Recital 43 CRM Directive.
558 On the proposal, see Quintais, 2013.
559 Art. 29(1) and 30 CRM Directive. See also: recital 44 CRM Directive: “all multi-territorial licensing should be concluded on a non-exclusive basis”; Memo CRM Directive FAQ 2014, ¶15.
repertoire of at least one other CMO, it will have an obligation to conclude the representation agreement if so requested. The expression “categories of rights” refers to forms of exploitation of the rights of reproduction and communication to the public; examples are “broadcasting, theatrical exhibition or reproduction for online distribution”.

The final scenario is that in which one or several CMOs create a subsidiary CMO to aggregate repertoire and provide multi-territorial licences. This subsidiary is also subject to the obligation to conclude representation agreements as a “passport entity”.

Importantly, whenever an authorised CMO represents another organisation for multi-territorial licensing, it has the obligation to manage the latter’s repertoire on a non-discriminatory basis and subject to the same conditions applied to its own repertoire. The main derogation from the special regime of the directive applies to multi-territorial licences granted by CMOs for the online right of communication to the public of musical works required by a broadcaster for use in its radio and television programmes. The exemption covers the broadcaster’s use of musical works with or after the initial broadcast of programmes, including simulcasting and catch-up TV, and ancillary online materials.

3.3.2.2 Legalisation Proposals

Legalisation proponents sometimes rely on voluntary collective licensing schemes, based on agreements between CMOs and commercial users, ISPs or both. In an influential example, the Electronic Frontier Foundation proposes that industry-created performance rights organisations (the US equivalent to a CMO for the right of public performance) offer non-exclusive blanket licences to end-users against payment of a flat fee. The fee would be paid through dedicated websites or intermediary “resellers”, such as ISPs, Universities, P2P software vendors, and employers. The direct or indirect licence granted to individuals using P2P subscriptions is designed not as a grant of rights but as a “covenant not to sue” by the representatives of rights holders. The covenant would immunise file-sharers from future civil (but not criminal) infringement suits.

Other proposals exist. Earp and McDiarmid, for example, suggest a limited model adapted to University campus settings. Fisher, in a variation from his “tax-and-royalty” system, envisons

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561 Art. 30(1) and Recital 46 CRM Directive.
562 Recital 19 CRM Directive.
563 See Art. 2(3), Recital 17 and the relevant provisions in Title III CRM Directive, which apply to entities directly or indirectly owned or controlled, wholly or in part” by one or more CMOs.
564 Arts 29(1), 30(4)–(6) CRM Directive.
565 Art. 32 and Recital 48 CRM Directive. The exemption is subject to the external control of EU competition law. Simulcasting is the “simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their single channel and free-to-air broadcasts of radio and/or TV signals, in compliance with the respective regulations on provision of broadcasting services”. Cf. Commission Decision, IFPI Simulcasting, p. 2 & n. 6. On the rationales and implications of the provision, see Lucie Guibault & Gompel, 2016, pp. 172–173.
566 See, e.g., Lohmann, 2008; Merges, 1996, 2004b, Fisher, 2004 (discussing his voluntary option), and Lincoff, 2008, reviewing and extending his 2002 proposal, making it voluntary. See also Lincoff, 2002.
567 Lohmann, 2008, emphasising that intermediaries are allowed to advertise such services.
568 Lohmann, 2008.
569 Earp & McDiarmid, 2008.
an atypical non-profit corporation that celebrates partnership agreements with ISPs that offer end-users regular and premium subscriptions.  

A more ambitious proposal belongs to Sterling, who suggests a system for the worldwide licensing of a new exclusive “internet right” through a “Global Internet Licensing Agency”. This would be an umbrella organisation mandated by local CMOs to whom rights fragments have been granted, assigned or transferred. In a similar vein, Lincoff devises a complex collective rights management system for a new “digital transmission right” for online music, which coexists with direct licensing practices and individual management. Lincoff’s system features one CMO per territory with quasi-universal repertoires and worldwide licensing mandates for transmissions originating in its territory. End-users, especially those using P2P platforms, would require licences only when playing an active role in the dissemination of works, i.e. in their communication to the public.

While this is certainly the most legally feasible type of ACS, voluntary collective licensing is not without its challenges. One risk is that of free riding by certain users. This may occur where multiple users share one P2P licence, thereby reducing royalties and removing incentives to membership. Another problem relates to cross-subsidisation, meaning low-volume users subsidising high volume users, motivating the first to opt out, thereby reducing the attractiveness of the licence. Yet another concern is voiced in relation to the prohibitive costs associated with the logistics and implementation of the system.

While these are valid concerns, perhaps the main issue with voluntary collective licences relates to the risk of insufficient participation and the model’s lack of suitability to provide an overarching blanket licence for mass non-commercial online use by individuals. Quite simply, the level of territorial and substantive fragmentation of copyright at EU level may prove an insurmountable obstacle to the voluntary aggregation of sufficient different rights in different territories to provide users with an all-encompassing repertoire. The current state of the online management of music rights in the EU, described above, is a good example, showing that for certain rights, rights holders (in this case phonogram producers) are unwilling to entrust CMOs with their rights, preferring to manage them directly or through other vehicles, including independent management entities.

The participation problem is compounded for sectors of the content industry where—unlike the music, visual arts and photography sectors—collective management of online rights is not common practice. Examples include “film producers, book publishers, journal and magazine

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571 See Sterling, 2008, 2009. N.B. Sterling’s system seems to have provided the blueprint for Dimita’s global dissemination right.
573 Lincoff, 2008, p. 34.
577 See, e.g., von Lewinski, 2005, p. 15, noting that voluntary collective licensing is most useful if CMOs manage significant parts of the available repertoire.
publishers or games publishers”, who typically handle mono and multi-territorial licensing of online rights in Europe without the intervention of CMOs.\(^{579}\) In the audio-visual sector, for instance, collective management is typical only for cable retransmission of audio-visual works.\(^{580}\) It is therefore unlikely that a sufficiently high number of copyright owners entrusts the management of their online rights in audio-visual works to CMOs. As a result, the repertoire available for licensing in an ACS would be unattractive to users.

In sum, a voluntary collective management ACS requires a high level of consensus from all categories of rights holders across the EU landscape in order to achieve a workable system and licence.\(^{581}\) In light of the above, that consensus appears unlikely.

### 3.3.3 Extended Collective Licensing

#### 3.3.3.1 Characterisation and Legal Framework

ECL is a type of collective management that allows the offering of blanket licences for the entire repertoire represented by a CMO.\(^{582}\) In this system, a CMO first enters into voluntary agreements with rights holders. When the organisation meets a representativeness criterion—meaning that it is authorised to manage a category of rights by a substantial number of domestic and foreign right holders—a statutory presumption extends its representation powers to non-member rights holders. This extension effect by operation of law increases the organisation’s repertoire and simplifies acquisition of rights.\(^{583}\) In this way, ECL aims to solve the problem of providing “fully covering licenses in cases of mass uses”.\(^{584}\)

In general, a CMO meets the representativeness criterion if it represents a statutorily defined “substantial amount of rights holders”,\(^{585}\) which can be of national or foreign nationality.\(^{586}\) In simple terms, the organisation must be mandated, directly by rights holders and indirectly through representation agreements, to represent a relevant share of substantive rights in works used in the national market.\(^{587}\)

This principle of “indirect representation” allows for the fulfilment of the legal requirement by allowing rights aggregation in primary and secondary CMOs. The former are umbrella

\(^{579}\) Ibid., p. 12 (& n.50).

\(^{580}\) See AGICOA: ASSOCIATION OF INTERNATIONAL COLLECTIVE MANAGEMENT OF AUDIOVISUAL WORKS, Frequently asked questions, [http://www.agicoa.org/english/toolsandhelp/faq.html#1c](http://www.agicoa.org/english/toolsandhelp/faq.html#1c) (accessed 30.04.2016). See also SWD CRM Directive 2012, p. 57 (“Collective licensing of film is essentially limited to cable retransmissions. These are licensed for each territory in which a cable network operates.”)


\(^{582}\) SWD CRM Directive 2012, p. 197, defining “blanket licence”. See also Riis & Jens Schovsbo, 2010, p. 473 & n.4, noting that the first proposal for an ECL model is attributed to the Swedish law professor Svante Bergström.


\(^{584}\) Koskinen-Olsson & Sigurdardottir, 2016, p. 250.

\(^{585}\) See Riis & Jens Schovsbo, 2010, p. 472 & n.1, citing section 50(1) of the Danish Copyright Act.

\(^{586}\) Riis & Jens Schovsbo, 2010, pp. 490–491. See also Art. 18 TFEU.

organisations. The latter are small and medium-sized CMOs covering specific categories of rights holders, members of a larger primary organisation qualifying to manage an ECL.\textsuperscript{588}

Importantly, a “substantial amount” does not necessarily mean a majority of rights holders, as such requirement might prove impractical.\textsuperscript{589} As Gervais notes, “substantiality is contextual”: a new CMO organising rights holders in a certain area for the first time “should have a much lower substantiality threshold to pass than a well-established collective trying to obtain an extension of the repertoire for a new licensing scheme.”\textsuperscript{590}

ECL is a “mixture of autonomy with state intervention”: a combination of legal rules enabling and giving effect to it with agreements based on those rules, together forming a “unique kind of collective rights administration that operates as a hybrid between compulsory licenses and traditional collective agreements”.\textsuperscript{591}

ECL has been characteristic of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) since the 1960s.\textsuperscript{592} It has also been deemed worthy of consideration in Central and Eastern Europe, Africa, Canada, and the US (for the licensing of orphan works), and is growing in popularity in other countries.\textsuperscript{593} In 1984, the application of ECL provisions to cable distribution was acknowledged by WIPO. The organisation defined “ECL-rule” as a form of collective rights management subject to the fulfilment of the following conditions: an express legal basis for representation of non-members, an indemnification covenant from CMOs to cable distributors for claims by rights holders, and equal treatment of represented and unrepresented rights holders.\textsuperscript{594}

In the Nordic countries, ECL presents similarities and idiosyncrasies for each country. Common features are that all systems are based on the existence of functioning and transparent representative CMOs, the extension effect applies to unrepresented rights holders for the same category of works, agreements between CMOs and users are based on free negotiations, and unrepresented rights holders are guaranteed equal treatment and a right to claim individual remuneration.\textsuperscript{595}

Another important feature of some ECL systems is the possibility afforded to rights holders to opt out of collective management and restore full individual exercise of their exclusive right, also called a “veto right”.\textsuperscript{596} The opt-out consists of a declaration from rights holders to the CMO

\textsuperscript{588} Riis & Schovsbo, 2012, p. 939.
\textsuperscript{589} Riis & Schovsbo, 2012, p. 937.
\textsuperscript{590} Gervais, 2016, p. 24 & n.64.
\textsuperscript{591} Riis & Jens Schovsbo, 2010, p. 472.
\textsuperscript{592} Riis & Jens Schovsbo, 2010, pp. 472–474, noting that ECL was initially developed to respond to administration of broadcasting rights in 1961 and in 1974 begun to be used in a coordinated way for the management of copyright.
\textsuperscript{594} See Riis & Jens Schovsbo, 2010, p. 476.
\textsuperscript{595} Axhamn & Guibault, 2012, pp. 41–42.
\textsuperscript{596} Koskinen-Olsson & Sigurdardottir, 2016, p. 251; Riis & Jens Schovsbo, 2010, p. 476.
managing the ECL to the effect that they do not wish the organisation to represent them. The declaration will come into effect after a reasonable deadline, following which the CMO will exclude the represented works or subject matter from its repertoire. As a whole, the procedure should be simple and not burdensome.\textsuperscript{597}

The opt-out mechanism is often described as an essential requirement of ECL models, which seems inaccurate. If we take the Danish Copyright Act as a blueprint, the right to opt out does not assist rights holders in most types of ECL after operation of the extension effect.\textsuperscript{598} In fact, once there is a legal extension of the repertoire of the CMO, unsatisfied rights holders can only challenge the calculated and distributed fees with the appropriate appellate body.\textsuperscript{599} This non-opt-out variant of the model has been termed as “compulsory ECL”.\textsuperscript{600} It is not a Danish idiosyncrasy. In fact, it is characteristic of the many approved ECLs in Denmark and Norway, as well as specific categories of licence in Finland and Sweden.\textsuperscript{601}

Whether the opt-out is a “feature” or mere “add-on” to the ECL model in international law or the \textit{acquis} is uncertain as a matter of law and in academic writings.\textsuperscript{602} Ficsor, for example, considers the presence of this option an “indispensable condition” for the compatibility of ECL with international norms.\textsuperscript{603} Of course, that would mean that at least some of the aforementioned compulsory ECLs in the Nordic countries would be in violation of international treaties. However, it is difficult to so conclude, not only in light of their longstanding existence, but also by reference to the model in the SatCab, InfoSoc and CRM Directives.

The SatCab Directive contains the outline of an ECL between CMOs and broadcasting organisations for the exclusive right of communication to the public by satellite concerning a given category of works. The regime is subject to two conditions, and one derogation. The first condition is that the act of communication simulcasts a terrestrial broadcast by the same broadcaster. The second condition is that the unrepresented rights holder may opt out of the system. The derogation is that the ECL does not cover cinematographic works. Furthermore, where an ECL is applied, Member States must inform the Commission of the identity of the beneficiary broadcasters, which will be publicised at EU level.\textsuperscript{604}

Some construe this provision as implying a restricted possibility for Member States to introduce ECL, limited to situations where the model “is indispensable or at least highly desirable for effective exercise of the given rights”.\textsuperscript{605} Still, even if the opt-out right is an indispensable requirement for ECL under the SatCab Directive, it is difficult to generalise this rule for all other hypothetical ECL systems outside communication to the public by satellite.

\textsuperscript{597} Ficsor, 2016, p. 68.
\textsuperscript{598} Riis & Jens Schovsbo, 2010, p. 476.
\textsuperscript{599} Riis & Jens Schovsbo, 2010, p. 476.
\textsuperscript{600} Gervais, 2003, p. 40.
\textsuperscript{601} Axhamn & Guibault, 2012, pp. 30–44.
\textsuperscript{603} Ficsor, 2016, p. 68.
\textsuperscript{604} Art. 3(2)-(4) SatCab Directive.
\textsuperscript{605} Ficsor, 2016, p. 69.
Indeed, such generalisation may be inconsistent with Recitals 18 InfoSoc Directive, 24 Orphan Works Directive, and 12 CRM Directive, which offer grounds to argue for the admissibility of ECL for other uses. The recitals clarify that the respective directives are without prejudice to the arrangements in Member States concerning the management of rights such as ECL. At the very least, this wording puts to rest the argument that compulsory ECLs at national level are incompatible with the *acquis*.\(^{606}\) It also opens the door for application of the system to the digital networked environment.\(^{607}\)

Regardless, the recognition of an opt-out right may influence the legal qualification of ECL. If the right of opt-out is retained, ECL remains voluntary and should be qualified as a restriction on the exercise of the right, but not its existence or nature. Consequently, it is not a copyright limitation.\(^{608}\)

This conclusion is less clear for compulsory ECLs. In these systems, rights holders may no longer opt out and there is a statutorily imposed loss of individual exercise rights.\(^{609}\) In other words, after operation of the extension effect, the model is akin to mandatory collective management, and may therefore qualify as a non-voluntary licence. This has led some authors to consider that the model “affects the exclusive character of copyright” and constitutes a copyright limitation.\(^{610}\) Due to the near identity between both collective rights management models, this possibility is analysed below in 3.3.4.2, together with the legal nature of mandatory collective management.

Finally, there is no specific *acquis* rule applying ECL to online use, although the possibility was discussed for projects involving mass use (such as EUROPEANA) and in the preparatory works of the Orphan Works Directive.\(^{611}\) ECL was also viewed as a potential solution for the multi-territorial licensing of musical works in the preparatory works of the CRM Directive. The rejected proposal combined an ECL legal presumption for the aggregation of rights within each representative CMO, a right to opt out, and a country of origin rule for the substantive rights covered by the online use of musical works. The resulting system would allow licensing of the

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\(^{609}\) See Colin, 2011a, p. 41; Riis & Jens Schovsbo, 2010, p. 482, reaching a similar conclusion.

\(^{610}\) Cf. Riis & Jens Schovsbo, 2010, pp. 482–490, 497–498; Riis & Schovsbo, 2012, p. 933. See also Riis & Jens Schovsbo, 2010, p. 476, referring to the fact that the normal “effect of ECL rules in the DCA [Danish Copyright Act] has been to turn copyright’s exclusivity-based regime into a remuneration-based regime”. See also Gervais, 2003, p. 40: “A compulsory extended collective licence can exist only in situations in which a non-voluntary licence can be used (for example, cable retransmission).”

works through the clearing of a single pan-European licence by online music providers in their country of origin.\textsuperscript{612} Rejection of this option was justified primarily by fears of large-scale opt-outs leading to the need for commercial users to obtain a number of licences from rights holders and CMOs, in addition to the ECL in their country of origin. Other justifications advanced were the cumbersome requirement for rights holders to opt out in (then) twenty-seven Member States, the compliance costs associated with the legislative amendments and supervision of the system, as well as doubts as to its effectiveness.\textsuperscript{613}

\textbf{3.3.3.2 Legalisation Proposals}

In light of the above, ECL appears to be an efficient licensing system for mass use online. Through the extension mechanism, it addresses two significant problems of standard voluntary collective licensing as an ACS proposition. First, the potential unwillingness of some rights holders to join the system and the resulting unrepresentative repertoire of works available for licensing to end-users. Second, it brings into the license the works of unknow rights holders.

Several ACS proposals rely on this model, but most bypass the legal risks inherent in compulsory ECLs by introducing an opt-out right.\textsuperscript{614} The notable exceptions, which do not allow opt-out by rights holders (or only do so in a very limited fashion), are the legislative proposals advanced in Italy by Beltrandi and others (in 2007 and 2008), and in Belgium by Green Party Members of Parliament Benoit Hellings, Freya Piryns, and Jacky Morael (at different times in 2010).\textsuperscript{615}

All ECL legalisation proposals require an \textit{ex lege} extension of the system to unrepresented national and foreign rights holders. Aigrain goes further by proposing that, where the representativeness requirement is not met, a back-up legal licence ACS would kick in to regulate mass-scale non-commercial use by individuals.\textsuperscript{616}

Other models apply solely to the right of making available, and operate in combination with a statutory remuneration right for the act of reproduction (e.g. the download), which is qualified as a private copy. The law would entitle CMOs and consumer organisations to conclude contracts on ECL, subject to the payment of a statutory remuneration for user downloads. That

\textsuperscript{612} SWD CRM Directive 2012, pp. 45-46, identifying this as “Option B4 – Extended collective licensing combined with a country of origin principle”. On the use of the localisation criterion for acts of satellite transmission in the SatCab Directive, see \textit{supra} 2.4.4.

\textsuperscript{613} SWD CRM Directive 2012, pp. 172–175.

\textsuperscript{614} See, e.g., Aigrain, 2008; Ciurcina, Martin, Margoni, Morando, & Ricolfi, 2009; Gervais, 2004. When discussing the application of ECL to mass online use, Gervais mentions the possibility of the opt-out constituting a simple email notice. Cf. Gervais, 2016, p. 29.

\textsuperscript{615} See Beltrandi et al., 2008, 2007 (Italy), Hellings & Piryns, 2010; Morael & Piryns, 2010 (Belgium), not including an opt-out feature for rights holders. However, at least the Italian proposals seem to allow a limited opt-out for copyright owners of works that have not exhausted their “commercial cycle” (“ciclo commerciale”).

\textsuperscript{616} Aigrain, 2008, discussing possible regulations for non-commercial online use and manifesting a preference for ECL with specific provisions securing net neutrality. In a later work, the author favours a legal licensing approach as a default. See Aigrain, 2012.
remuneration would be incorporated in the ISP subscription fee and fixed by the existing CMO for private copying in the respective country.  

All proposals prescribe that CMOs authorise ISPs to allow their clients to exchange files containing licensed works. In the study by Modot and others for the European Parliament, the contractual role of ISPs was designed to be that of mere intermediaries offering a voluntary, value-added, private use standardised licence and collecting flat-rate amounts on behalf of CMOs. This design is aimed at creating a content flat-rate “ring-fenced from any commercial networks”, but which allows all-inclusive ISP offers beneficial to consumers. In this way, the system attempts to preserve the commercial exploitation of works outside the sphere of ACS, aimed at non-commercial use by private subscribers.

Assuming an ECL model contains an opt-out rule, there are two main objections to its adoption as an ACS. The first objection relates to the need to effect legal changes to the acquis. Indeed, it would probably be necessary to adopt secondary EU law imposing an ECL framework for non-commercial acts of reproduction and communication to the public online (perhaps including a country of origin rule to enable cross-border effect to the national licences), and to create interfaces with the legal protection of TPMs. In the particular case of ECL, the costs of supervising and managing the system, especially its opt-out mechanism in the digital environment, should also be carefully considered.

The second objection is perhaps the most relevant. For the system to work, rights holders would have to, in the first place, adhere to collective management in large enough numbers to meet a representativeness threshold sufficient to trigger the extension effect. As noted above for voluntary collective licensing, the challenge is particularly great in sectors (such as the audio-visual) that do not have an established practice in collective rights management of online rights. Even if the challenge is met, the possibility of opting out is a constant threat to the viability of the system. This is especially true as the value of the licence to end-users is linked to the breadth of the repertoire and consequent licence, especially regarding the most popular works. If major rights holders decide to withhold or hoard these works systematically, the ACS is of little value to end-users.

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618 See, e.g., Hellings & Piryns, 2010, proposed Art. 78 quarter(1).
621 Quintais, 2012, p. 65. See also Lucie Guibault, 2015, proposing “establishment of ECL systems as a solution for the clearance of rights for the digitisation and making available of works contained in the collection of a cultural heritage institution”. In this context, Guibault argues “that the only workable solution to the problem of extra-territorial application of ECL schemes would be to formally establish a “country of origin” principle.” But see infra 6.2.7, where it is argued that it may be possible to adopt an ECL without legislative changes beyond a Commission recommendation.
622 See supra 3.3.2.2 and references cited.

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3.3.4 Mandatory Collective Management

3.3.4.1 Characterisation and Legal Framework

Mandatory collective management is the most restrictive model of collective licensing. It prevents rights holders from directly exploiting their works, imposing by law the transfer or assignment of the exercise of rights to a CMO, which will act on their behalf.\footnote{Lucie Guibault, 2002, p. 26.}

Mandatory collective management aims “to ease copyright clearance, to reduce transaction costs for users and to limit fragmentation of copyrights”.\footnote{Séverine Dusollier & Colin, 2011, p. 819.} Due to the restrictions it imposes, application of mandatory collective management to exclusive rights is subject to strict requirements and should be considered only when voluntary models prove unsuitable to exercise the right.\footnote{See Gervais, 2001, pp. 37–38; Sinacore-Guinn, 1993, p. 379.}

For example, the model requires specific regulation, together with a system for authorisation, accreditation or registration of the relevant CMOs at national level.\footnote{See Ficsor, 2016, p. 49, applying the same requirements to ECL.} Also, it should be justified by market failure and high transaction costs thwarting the efficiency of individual licensing, taking into account the social or philosophical underpinnings of a particular copyright system.\footnote{Lucie Guibault, 2002, pp. 26 –27. See also Geiger & Schönherr, 2014a, p. 139, citing the CRM Directive proposal and stating that collective rights management is the preferred model of regulation for EU institutions where it “is justified by the practical impossibility of individual management of rights”.}

As noted above, collective management can be imposed in order to regulate exclusive rights or rights of remuneration/fair compensation. In the most common scenario, which is labelled here as “obligatory” collective management, the regulation of a right of remuneration or compensation through a legal licence will imply that rights holders have a \textit{de facto} or \textit{de iure} obligation to administer the right through CMOs. More rarely, in what is called in this dissertation “mandatory” collective management proper, the law will require the collective administration of exclusive rights; it is this possibility in particular that makes it attractive to ACS proponents, and controversial among legal scholars.\footnote{See \textit{supra} 3.2. See also Lucie Guibault, 2002, pp. 26–27.}

It is sometimes argued that mandatory collective management can be more beneficial to creators than an unrestricted exclusive right.\footnote{Geiger & Schönerr, 2014a, p. 141; Kur, 2008, p. 12.} The model would afford them protection against the traditionally stronger bargaining position of industry stakeholders—due to the prominent role of CMOs in negotiating licensing terms with users—and avoid alienation of their exclusive rights to exploiters on imbalanced contractual terms and without appropriate remuneration.\footnote{Colin, 2011a, pp. 39–40; Geiger & Schönerr, 2012, pp. 182–183; Gervais, 2011, p. 430; von Lewinski, 2004, pp. 8–9. See also Geiger, 2007b, p. 11, 2014a, p. 21, 2014b, p. 183, exemplifying with the French reprography system.}

From the perspective of rights holders, mandatory collective management is functionally similar to a legal licence: both constitute externally mandated restrictions on their ability to exercise rights without the possibility of opting out. (The same is true for compulsory ECL in relation to
non-members.) The similarities extend to procedural aspects, such as the determination of remuneration.632

In this sense, and from the viewpoint of rights holders, mandatory collective management is a non-voluntary licence. However, this similar classification as a type of licence (explained in Chapter 2 and adopted in Figure 2 above) does not necessarily result in a similar legal qualification or identical effects on the exclusive right. The question that then arises is whether mandatory collective management or compulsory ECL of exclusive rights affect the nature of exclusive rights.

If the answer is affirmative, mandatory collective management qualifies as a copyright limitation, whose admissibility—and that of any ACS relying on it—hinges on meeting the requirements of international law, in particular the three-step test. Should the answer be negative, the right remains exclusive and the model can form the backbone of a policy option for mass online use, subject to specific requirements applicable to collective management of rights, but not to international rules on the admissibility of compulsory licences or copyright limitations.

Academic discussion on this topic with reference to international law revolves around the wording of Article 11bis(2) BC, on broadcasting and communication to the public, and Article 13 BC, on mechanical recording of musical works. These articles allow countries to decide which “conditions” to “determine” or “impose” for the exercise of certain exclusive rights, subject to a set of requirements: respect of moral rights, express imposition, and equitable remuneration.633 In both cases, the provisions’ headings and preparatory works clarify that these terms refer to compulsory licensing (see Chapter 2).

A maiore ad minus, if these rules allow compulsory licensing, they should also permit less restrictive models, such as mandatory, extended or voluntary collective management. However, part of the academic literature takes the interpretation further and considers that, because mandatory collective management determines or imposes conditions on the exercise of copyright, it is subject to the same constraints as compulsory licences.634 The implication is that admissibility of mandatory collective management is restricted to the scope of Articles 11bis(2) and 13(1) BC. These provisions, it is noted, only partially cover mass online use. For use outside that scope, an ACS based on mandatory collective management would constitute a copyright limitation.635

Before addressing this legal quandary, it is useful to have a complete picture of the legal framework. Mandatory collective management is common in Europe, largely for the management of certain categories of rights, such as the artist’s resale right, public lending, and cable retransmission.636 The model is used in some cases to regulate exclusive rights, such as in

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632 Lucie Guibault, 2002, p. 26. Noting that the process is analogous in mandatory collective management and compulsory licences, insofar as it relies on negotiation between all stakeholders involved and, failing an agreement, is subject to fixation by an administrative or judicial body.
633 These provisions are incorporated by reference in the TRIPS and WCT. See Arts 9(1) TRIPS and 1(4) WCT.
634 See, for all, Ficsor, 2016, p. 51. See also Mazziotti, 2008, p. 267 calling this “prevailing doctrine of international copyright law regarding the mandatory collective management of copyrights”.
635 Ficsor, 2016, pp. 51–52.
France and Austria, in the fields of reprography (outside a statutory licence) and communication of broadcasts to the public.\textsuperscript{637}

In the \textit{acquis}, regimes of mandatory collective management exist in relation to the exclusive right of cable retransmission, the equitable remuneration right for rental of a work or related subject matter, and the artist’s resale right.\textsuperscript{638}

The special regime for cable retransmission in Articles 9–12 SatCab Directive is explained in Chapter 2. As noted, the regime is unique in EU law, insofar as it is the only case of mandatory collective management of an \textit{exclusive right}. Article 9 elucidates that CMOs manage the right to refuse or grant authorisation to a cable operator for cable retransmission, even if rights holders have not transferred the management of their rights to a CMO. In this case, the CMO managing rights in the same category is deemed mandated to manage the rights of non-members. If more than one such CMO exists, rights holders may freely choose between the authorised CMOs.\textsuperscript{639}

The remaining regimes in the \textit{acquis} apply to remuneration rights and could therefore be qualified as instances of \textit{obligatory} collective management. Article 5 Rental Right Directive provides for an unwaivable right to equitable remuneration, and allows for the possibility—through the use of the word “may” in paragraphs (3) and (4)—of Member States imposing mandatory collective management of the exercise of this residual right. The 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.

Member States are therefore entitled to impose collective rights management, preventing authors and performers from individual management of the right. Instead, the same is administered by a CMO, who will claim and collect the remuneration from parties to be identified by law, typically producers and rental shops (see Figure 5).

\textsuperscript{637} Dreier, 2010, p. 451 & n.149, citing Arts L122-10 through L122-12 French Intellectual Property Code, and the “similar provision… already contained in Art. 59 of the Austrian Copyright Act of 1936…”. See also Lucie Guibault, 2002, pp. 26–27, noting that France chose to regulate reprography through this model instead of a statutory licence, unlike other EU Member States; and Geiger, 2014a, p. 21, 2014b, p. 182, 2014c, p. 140. Colin, 2011a, p. 25, calls the French reprography system a type of \textit{cessio legis} with similar effects to mandatory collective management.

\textsuperscript{638} See, respectively, Art. 5 Rental Right Directive, Art. 9 SatCab Directive, and Art. 6(2) Resale Right Directive.

\textsuperscript{639} Art. 9(1)–(2) SatCab Directive. Art. 10 SatCab Directive exempts broadcasting organisations from this regime. For further detail, see \textit{supra} 2.4.4.
Finally, the Resale Right Directive establishes a residual right of remuneration. Article 6(2) thereof allows Member States to provide for “compulsory or optional” collective management of the resulting royalty.

There are no specific rules in the *acquis* applying this model to online use of works. In fact, even in the context of the special regime of the SatCab Directive, there is little room to argue that the right of cable retransmission applies to Internet retransmissions. 640 However, as explored below, it is common for ACS proponents to advance models based on collective rights management, either as a stand-alone solution or in combination with voluntary or legal licences. 641 From the viewpoint of consistency with international and EU law, the question that lingers is how to qualify the effect of this model when applied to the exclusive right.

### 3.3.4.2 Theories on Mandatory Collective Management

In essence, the controversial question in copyright scholarship relates to the legal nature of mandatory collective management, and its effect on exclusive rights. This subsection explores the different theories on the limited or broader application of mandatory collective management to exclusive rights. It is submitted that, for the reasons above, the same theories are valid *mutatis mutandis* for compulsory ECL.

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640 Cf. *supra* 2.4.4.
641 See *infra* 3.4.1.
3.3.4.2.1 Limited Applicability to Exclusive Rights

One school of thought limits the admissibility of mandatory collective management to remuneration or compensation rights, or when exceptionally allowed in international and EU law. International law contains such a permission in Articles 11bis(2) and 13(1) BC. In the *acquis*, mandatory collective management is allowed when the law expressly prescribes it “because the right in question is too specific to be found in these international rules” (e.g. the rental right).

The position has undeniable pedigree. It is reflected in the WIPO Guide and Glossary and in a 2006 ALAI resolution, adopted in response to a legislative proposal for a “licence globale” in France. In both cases, it seems to mirror the view of its main proponent, Mihály Ficsor, who authored the WIPO publication and was a member of the Executive Committee of the ALAI at the time of the resolution.

The ALAI Resolution states that the ordinary meaning, object and purpose of the BC provisions is clear in that “determination or imposition of conditions” includes compulsory licences and mandatory collective management; the latter, furthermore, should be broadly construed as a copyright limitation.

The BC only allows imposition or determination of conditions in three cases. The first includes remuneration rights not based on limitations, such as the resale right. The second refers to compensated limitations, like private copying. The third covers “residual rights” of remuneration that survive transfer of some exclusive rights and are applicable thereinafter as remuneration claims; these typically benefit authors/performers and are qualified as unwaivable or non-assignable. None of these cases involves collective management of exclusive rights.

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642 Sinacore-Guinn, 1993, pp. 298–299, theorises that “mandatory affiliation” is adequate only if predicated on economic necessity or the nature of the affected rights (i.e. of remuneration). In other cases, it should be “subjected to strict scrutiny as to whether a less intrusive option exists”. However, the author argues for the distinction of collective rights management from non-voluntary licences. See Sinacore-Guinn, 1993, pp. 370–378. See also Ficsor, 2016, pp. 51–52; Mihály Ficsor, 2010, pp. 53–59.
645 See Ficsor, 2016, pp. 49–66, for the most recent elaboration of this view.
646 Ficsor, 2016, pp. 57–66; Mihály Ficsor, 2010, pp. 49–51. In this respect, Ficsor states that mandatory collective management “is a limitation (not an exception since the rights is still applicable although in a limited form; an exclusive right is limited by the condition that it may only be exercised through collective management”. See also Sinacore-Guinn, 1993, pp. 300–303.
648 See Arts 14ter BC. On a similar allowance for related rights of performers and phonogram producers, see Arts 12 RC (and the similar provision in Art. 15 WPPT). On the conceptual distinction between self-standing and limitation-based remuneration rights see von Lewinski, 2008.
649 See Art. 9(2) BC for the reproduction right.
To bolster this position, Ficsor points to the preparatory works of the 1928 Rome Conference of the BC, and notes the absence of clear indications that the term “conditions” excluded obligatory collective management. Instead, the debates between national delegations demonstrate that different types of mechanism could be included in this terminology. This, he believes, places the model squarely within the scope, and therefore the requirements, of Articles 11bis(2) and 13 BC. 651

This position would also find support in acquis regimes of mandatory (and obligatory) collective management. On the one hand, both the Rental Rights and Resale Right Directives state that Member States “may” impose or provide for the scheme. 652 This wording is a mere permission, not an obligation, to implement the model. Where such an obligation does exist, in the SatCab Directive (which omits the auxiliary verb “may”), a derogation is made for broadcasting organisations. 653

From here, Ficsor argues a contrario that mandatory collective management can only be implemented exceptionally, when in line with international treaty provisions and expressly recognised in the acquis. 654 In sum, the scheme is only admissible for “an exhaustively determined scope of exclusive rights”. 655

The consequence of this interpretation is that mandatory collective administration (or compulsory ECL) of mass online use covered by the exclusive rights of reproduction and communication to the public would likely constitute a copyright limitation, subject to the three-step test. 656 The only types of ACS escaping that qualification are voluntary collective licences or (arguably) ECL with opt-out. 657

3.3.4.2.2 Broader Applicability to Exclusive Rights

In contrast, another school of thought views mandatory collective management as consistent with minimum rights and limitations at international and EU level, and not bound by the compulsory licensing provisions of the BC. Despite the functional similarity, it is argued, mandatory collective management is not technically a copyright limitation but rather an option to regulate the exercise of exclusive rights. 658

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652 Arts 5(3) and (4) Rental Directive and 6(2) Resale Right Directive.
653 Arts 9(1) and 10 SatCab Directive.
656 See Séverine Dusollier & Colin, 2011, p. 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...”.
Proponents of this view argue that the regime of the BC compulsory licences should not determine the future scope of mandatory collective management schemes. Study of the respective preparatory works shows that Articles 11bis(2) and 13(1) BC have specific justifications. They are “permitted restrictions in favor of particular groups of users”, namely broadcasters and record companies, based largely on the fear of refusal to license by CMOs. The purpose of the licences is to benefit those users by pre-empting negotiating conflicts with CMOs, while ensuring that rights holders receive fair remuneration for the permitted uses.

In that light, von Lewinski interprets the BC reference to “conditions” as meaning not “any conditions” on the exercise of rights but only “certain conditions” favouring some types of user (broadcasters and record producers) whose interests justify the compulsory licences. Consequently, only those limited conditions fall within the scope of Articles 11bis(2) and 13(1) BC. In other words, we should not generalise the requirements of the BC compulsory licences to other schemes designed to regulate the exercise of copyright, such as mandatory collective management.

In support of this point, it is noted that the only international or EU copyright regime for mandatory collective management of exclusive rights is in the SatCab Directive. This is relevant because collective rights management has existed in Europe since the mid-eighteenth century, and from an early stage copyright treaties recognised compulsory licences and copyright limitations. Therefore, the argument goes, the absence of a reference in the text of the BC favours the view that mandatory collective management was not considered to affect the nucleus of exclusivity.

A more persuasive argument draws a conceptual and legal-technical distinction between legal licences and mandatory collective management. Whereas the first restrict the nature or existence of copyright, mandatory collective management restricts the “options of exercise”. The effect of legal licences is to place copyright uses “outside the field of exclusiveness”, meaning that the permission to use a work does not flow directly (individual licensing) or indirectly (through a CMO) from the rights holder. Rather, the authorisation flows from the law.

In mandatory collective management, the powers to authorise and enforce copyright shift from the authors to their representative, the CMO, whose sole and main purpose is to act for the collective benefit of its members. As members, authors have an indirect path to influence the

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660 See supra 2.4. See also von Lewinski, 2004, pp. 5–6.
663 For a brief historical account, see Schierholz, 2010, pp. 1151–1153.
terms and conditions of licensing and distribution. In this way, although the options for exercise of copyright are modulated, the right remains exclusive.

Article 9(1) SatCab Directive is a case in point, as the positive dimension of the right (to grant an authorisation) remains intact, but there is some regulation of its exercise. While moral rights are left untouched, the economic right remains transferable by contract or legal presumption. This can happen for example in the case of a “broadcasting organization initially transmitting the subject matter”, provided no prior transfer of the right was made to a CMO. Where the transfer to the broadcaster occurs, the right cannot be subject to collective exercise.

This view would be consistent with recital 12 CRM Directive, which lists mandatory collective management as a type of arrangement “concerning the management of rights”, along with individual management or ECL. From the conceptual and legal standpoints, then, a legal licence effects a much deeper transformation in the relationship between author and user, effectively severing the tie between them. This tie, while eroded and intermediated, is retained in mandatory collective management.

The distinction can be questioned where CMOs have an obligation to license users. Peukert, for example, argues that if the law imposes an unqualified legal obligation to grant licences “to any person so requesting… exclusive rights are in fact reduced to a mere right to remuneration administered by a collecting society.” Kur and Schovsbo express a similar concern that obligations to license, coupled with the monopoly position of CMOs, might lead exclusivity to “become illusionary, at least in practice.”

Although the argument is valid, it must be contextualised in the acquis. The CRM Directive does not impose a default obligation to license users. Rather, it imposes an obligation to negotiate in good faith with users, allowing justified refusals to license by CMOs. A similar rule is contained in Article 12 SatCab Directive. At best, these are mitigated and qualified obligations to license. Even then, their objective is to prevent abuse of a dominant position by CMOs, pursuant to Article 102 TFEU. Hence, the obligation to license finds its legal justification in competition

672 See Sinacore-Guinn, 1993, pp. 400–402, for an early critique.  
674 Kur & Schovsbo, 2011, p. 14. The authors concede however that the case might be different if CMOs “were forced to enter in more efficient competition with each other”, as required in OMR Recommendation 2005. Cf. Kur & Schovsbo, 2011, p. 14 (& 79).  
675 Art. 16, Recital 31 and Annex–1(c) CRM Directive. See supra 3.3.1.
law. In its interaction with copyright, competition law functions as an external limit on the exercise of rights, but not their existence.676

In addition, a qualified obligation to license in mandatory collective management will not translate into significantly different practices from those occurring in voluntary collective licensing. CMOs are in the “business of yes”; even when managing exclusive rights under a voluntary licence, a CMO “would think twice before saying no to a willing licensee”.677

Finally, from the viewpoint of a systematic interpretation of the acquis, it is difficult to qualify mandatory collective management as a limitation. While this model is mentioned in the recitals of other directives, it was left out of the exhaustive menu of limitations and exceptions in Article 5 InfoSoc Directive.678 Thus, to qualify it as a limitation appears inconsistent with the acquis from a legal-technical standpoint.679

On balance, these conceptual and legal-technical arguments make the theory for a broader application of mandatory collective management more persuasive. However, they do not give carte blanche to the application of this regime to exclusive rights. In fact, they simply set aside the requirement of compliance with the three-step test, but not the strict requirements for application of this regime to a category of online use. Where those requirements are met, the application of mandatory collective management should be considered a valid policy option for an ACS to “grant licences for non-commercial uses of any rights, categories of rights or types of works and other subject-matter” on behalf of rights holders, in line with Article 5(3) CRM Directive.

3.3.4.3 Legalisation Proposals

Mandatory collective management is an enticing option for regulation of large-scale individual use in digital networks. The sheer number of end-users, conditions of use, territorial and substantive fragmentation of rights, and diversity of works make individual management too cumbersome or undesirable in the online environment, providing a good case for collective exercise of the exclusive rights involved.680

In addition, the model is well suited to overcoming the challenges faced by voluntary collective licensing. First, it targets the problem of rights holders’ lack of willingness to rely on CMOs to

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administer their rights. Second, it safeguards the integrity and value of the licence by avoiding the withdrawal of works through opt-out which is possible in voluntary ECL.

These challenges are addressed by making it mandatory for online exclusive rights to be managed by CMOs, reducing the possible opposition from rights holders. End-users are able to lawfully use works merely by obtaining a licence from CMOs or an intermediary licensee. In the context of an ACS, CMOs would likely negotiate with intermediaries—like ISPs or online service providers—to operationalise the end-user licence.

Among the ACS proposals studied, it is possible to find two modalities of mandatory collective management. In the first modality, the scheme applies to regulate two online rights (reproduction and communication to the public) and regulates the whole ACS. In the second modality, mandatory collective management applies to the right of making available, whilst the right of reproduction is regulated through a legal licence, usually an extension of the private copying limitation. A prominent example is the French “license globale”, which proposes that the right of making available is transferred by operation of law to a CMO approved by the government. A similar design has been suggested for the German content or culture flat-rate models, and Dimita’s global dissemination right.

In all instances, end-users can choose to opt-in to the system through agreements with ISPs, subject to the provision of adequate pre-contractual information. In effect, this makes the ACS voluntary for end-users. Finally, one French proposal uses mandatory collective management as a fall-back regulation model in case stakeholder negotiations for voluntary collective licensing are unsuccessful within a specified time period.

As noted in the previous paragraph, the main challenge to an ACS of this type relates to its functional similarity with compulsory licensing. Due to the contentious nature of the issue, even scholars that do not qualify mandatory collective management as a copyright limitation suggest, for reasons of legitimacy, subjecting this ACS option to the three-step test.

3.3.5 Legal Licences: Statutory and Compulsory

3.3.5.1 Characterisation and Legal Framework

The terms “statutory” and “compulsory” licences are commonly used as synonyms. They generally refer to licences imposed by law to regulate certain copyright use against the payment of compensation, remuneration, tariffs, contributions, or levies. But use of the terms is not uniform in legal and academic texts, which often denote diverse but partially overlapping

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681 von Lewinski, 2005, discussing P2P.
682 Bernault & Lebois, 2005, noting that this variation would be based on stakeholder agreements.
684 See Roßnagel et al., 2009, and Dimita, 2010, designing a complex international multi-layered CMO system.
686 See Zelnik, Toubon, & Cerutti, 2010, discussing an ACS for on-demand music download services.
688 Peukert, 2005, p. 18, exemplifying with US law and academic writings.
To grasp the scope of ACS proposals based on these models, it is important to explore the possible meanings of statutory and compulsory licences.

In Chapter 2, while recognising the interchangeable use of “compulsory” and “statutory”, a preliminary distinction was made with reference to international and EU law. It was stated that statutory licences restrict the nature of a pre-existing exclusive right by the application of a compensated limitation, whereas compulsory licences apply to self-standing remuneration rights.

Another distinction can be drawn on the basis of the procedure used to determine the compensation or remuneration. Thus, Colin defines a licence as “statutory” where the executive branch, via delegation of its legislative counterpart, is unilaterally entitled to fix the amount of compensation without prior stakeholder consultation. In this context, the compensation paid is often qualified as a “levy”. Conversely, a licence is “compulsory” if the remuneration is fixed through a bilateral or multilateral negotiation between the parties involved in the use of works.

The term compulsory licence typically applies where there is a legally predetermined obligation to contract, i.e. “where the right holder is obliged to grant a license according to a specific procedure”. In this scenario, the legislator forces upon rights holders the basic terms of the license in the law. If no agreement is reached pursuant to those terms, users can appeal to administrative or judicial authorities, who can unilaterally fix the compensation or remuneration amount. The law thus incentivises licensees and licensors to negotiate under the shadow of the licence. An example of such a provision is the “cover” licence under the compulsory mechanical licensing scheme in the US Copyright Act.

In the field of competition law, a compulsory licence means a remedy for actual or potential anti-competitive behaviour. The licence is construed as an inter partes obligation between rights holders and users to contract on reasonable terms, pursuant to a judicial or administrative ruling. Here, the licence operates more as a direct restriction to freedom of contract than to exclusivity.

In this dissertation, “legal licence” is the shorthand for the entire gamut of statutory or compulsory licences discussed above, excluding those imposed as remedies for competition law violations. For a legal licence, the law defines the scope and subject matter of the scheme, designates the CMO responsible for its management, and identifies the intermediary debtors of

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689 The interchangeable use of these terms is typical in copyright scholarship. See Lucie Guibault, 2002, p. 25.
690 Compulsory licensing is mentioned in Arts 11bis(2) and 13(1) BC, Art. 15(2) in fine RC, and Art. 10(2) Rental Right Directive. (On the BC compulsory licence, see supra 2.4). Art. 8(2) and Recital 21 SatCab Directive mention statutory licensing in the negative.
691 Cf. supra 2.2.3.
693 Peukert, 2005, pp. 18–19.
the remuneration. The law can establish the tariff paid under the licence directly or indirectly, through delegation to a governmental, administrative, judicial, or even an independent authority. Within those modalities, the law may subject the determination of tariffs to stakeholder negotiations, which can involve CMOs, intermediaries, consumer representatives, and experts.\(^{700}\)

From a normative standpoint, a legal licence—like a copyright limitation—can have economic and/or non-economic motivations. The first relate to technology-based market failures that make effective individual management impractical or too cumbersome. The second relate to significant public interests requiring unrestricted (but remunerated) use, for example relating to the promotion of access and dissemination of works, fair remuneration to creators, or the respect of fundamental rights.\(^{701}\)

A potential ACS will apply to use covered by the existing exclusive rights of reproduction and communication to the public.\(^{702}\) As noted in Chapter 2, international law leaves little space for a broad legalisation scheme applying to these rights under the compulsory licences for broadcasting and communication to the public in Article 11\(\text{bis}(2)\) BC.\(^{703}\) The same conclusion is valid for the compulsory licence in Article 13 BC. This licence is limited to the recording of musical works and accompanying words (provided the authors consented to a first recording) and to the country where it is imposed (i.e. it does not automatically “carry its lawful character” outside that territory). It is therefore unsuitable for the types of content and use covered by a broad ACS.\(^{704}\)

In light of the limited scope of compulsory licences in international law, a legal licence ACS will likely affect the nature of the exclusive rights of reproduction and communication to the public, transforming them (for the licensed uses) into non-exclusive rights of remuneration or compensation.\(^{705}\) In the acquis, it is possible to identify a myriad of such rights traditionally recognised as benefiting creators in relation to exploiters.\(^{706}\) Table 2 provides an overview of these rights.

### Table 2. Acquis Remuneration and Compensation Rights

<table>
<thead>
<tr>
<th>Right / rights holders</th>
<th>Type and nature</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rental of films and phonograms / author and performer</td>
<td>Equitable Remuneration (unwaivable)</td>
<td>Article 5 Rental Right Directive</td>
</tr>
</tbody>
</table>

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\(^{700}\) P. Bernt Hugenholtz & Quintais, 2016 (forthcoming). See also SWD CRM Directive 2012, p. 197, with a definition of “compulsory licence” that includes many of these elements.

\(^{701}\) See, identifying some of these motivations, Ginsburg, 2014b; Lucie Guibault, 2002, p. 22. On the respect of fundamental rights as an emerging justification for limitation in the case law of the CJEU, see infra 4.4.1.4, 4.4.4.1, 4.4.4.3, and 5.3.3.6.

\(^{702}\) See the detailed analysis in Chapter 4.

\(^{703}\) Cf. supra 2.4.

\(^{704}\) Historically, Art. 13 BC reconciled the rights of authors and music publishers with those of record producers in relation to the mechanical reproduction of musical works. Cf. Ricketson & Ginsburg, 2006, pp. 809–814. N.B. Art. 14(3) BC expressly excludes audiovisual works from this regime.


### Table: Rights and Legal Bases

<table>
<thead>
<tr>
<th>Right / rights holders</th>
<th>Type and nature</th>
<th>Legal basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public lending of works and related subject matter / at least authors</td>
<td>Remuneration (optional)</td>
<td>Article 6 Rental Right Directive</td>
</tr>
<tr>
<td>Broadcasting (wireless) of phonograms / performers and phonogram producers</td>
<td>Single Equitable Remuneration</td>
<td>Article 8(2) Rental Right Directive</td>
</tr>
<tr>
<td>Annual supplementary remuneration (during term extension) for transfer or assignment of</td>
<td>Annual Supplementary Remuneration</td>
<td>Article 3(2a)-(2e) Term Directive</td>
</tr>
<tr>
<td>exclusive rights in exchange for a non-recurring payment / performer</td>
<td>(unwaivable)</td>
<td>(2011)</td>
</tr>
<tr>
<td>Resale of art works / author of an original work of art</td>
<td>Remuneration (inalienable, unwaivable)</td>
<td>Arts 1 and 2 Resale Right Directive</td>
</tr>
<tr>
<td>Use of orphan works by specific organisations / holders of right of reproduction and the right of making available to the public provided in Articles 2 and 3 InfoSoc Directive</td>
<td>Fair Compensation (unwaivable)</td>
<td>Article 6(5) Orphan Works Directive</td>
</tr>
</tbody>
</table>

The contours of equitable remuneration and fair compensation are explained in Chapter 2. As noted there, the main distinction between the concepts is that equitable remuneration is based on the notion of “economic value of the use”, whilst fair compensation is based on the notion of “harm”. Furthermore, while the CRM Directive relies on an umbrella concept of “appropriate remuneration” based on the “economic value of the use”, a systematic interpretation of the InfoSoc Directive suggests that future compensated limitations to its exclusive rights should probably be subject to fair compensation.

These distinctions matter because they will shape the nature and method of calculation of the remuneration or compensation of any legal licence ACS under EU law, especially as both fair compensation and equitable remuneration are autonomous concepts of EU law.

#### 3.3.5.2 Legalisation Proposals

The most common ACS proposals are for stand-alone or combined legal licences. The majority of those refer to limitation-based licensing schemes for online use that expand existing

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707 This view relies on recital 36 InfoSoc Directive. See supra 3.3.2.1. The fact that the limitation to these rights in the Orphan Works Directive in linked to a right of fair compensation seems to confirm this interpretation.

708 See supra 2.2.4 and, regarding fair compensation, infra 4.4.3.3. On the shape of the compensation element in a future legal licence ACS, see infra 5.3.3.3, 5.3.3.4, and 6.2.
systems, commonly private copying. Only in rare cases do authors suggest legal licences for newly created self-standing remuneration rights, such as Dimita’s “global dissemination right” or Lincoff’s “online transmission right” for music.\textsuperscript{710}

In many cases, it is unclear whether the legal licence provides direct authorisation to consumers or to commercial users acquiring them for the benefit of the former.\textsuperscript{711} However, the bulk of sources can be read as providing the legal authorisation directly to end-users\textsuperscript{712}, with few instances of explicit licensing of commercial intermediaries.\textsuperscript{713} As the proposals are diverse, it is important to explore some representative examples.

One of the most influential and developed proposals is Netanel’s non-commercial use levy. This model aims to enable unhindered non-commercial P2P file sharing for most protected works, excluding software and unpublished works.\textsuperscript{714} The proposal, in many respects, approximates European private copying systems, which are usually coupled with obligatory collective management of the respective fair compensation right.\textsuperscript{715}

Netanel’s model would impose a levy on the sale of products/services whose value is substantially enhanced by P2P, and distribute the resulting proceeds to rights holders in proportion to the volume of downloads and use of works, as measured by digital tracking and statistical sampling. It would cover acts of uploading, downloading, streaming, and digital adaptations (including remixes). Users would have either a right or a protected legal privilege to engage in these acts and rights holders would be barred from using technological measures to prevent such acts.\textsuperscript{716} The non-commercial nature of the uses would eliminate secondary liability for the provision of related products/services, which would however subsist for commercial uses, considered to be excluded from the levy’s scope.\textsuperscript{717}

In its initial five years of existence, the levy amount would be based on the adjusted net revenues displaced by P2P. The rate would be set through negotiation by interested stakeholders under the

\textsuperscript{709} The list of proposals is extensive. Among those not cited previously, see e.g. Attali, 2008; Creation-public-internet, 2011; Hayward, 2008; Love, 2003; Mehra, 2008; Oksanen & Valimaki, 2005; Schulman, 1999; Seay, 2010; Sobel, 2003.

\textsuperscript{710} Dimita, 2010; Lincoff, 2002. These rights are explained in more detail infra in 3.4.2.

\textsuperscript{711} See, e.g., Schulman, 1999.


\textsuperscript{713} For such rare cases, see: Lincoff, 2002 (proposing a one-stop-shop for music where licences are granted to “service operators” or end-user members of P2P networks and similar online communities); Sobel, 2003, (advancing a digital retailer model where ISPs act as first level licensees of digital works by paying a wholesale price to rights holders and then “reselling” such works to subscribers at market-based retail prices); and Seay, 2010 (suggesting a model for commercial use similar to broadcasting licences).

\textsuperscript{714} Netanel, 2003. An updated version of Netanel’s proposal is reported in Quintais, 2014, pp. 4–6. The original 2003 proposal excluded books because there were no established practices or markets for e-lending of digital books at the time.


\textsuperscript{716} Netanel, 2003; Quintais, 2014, pp. 4–6. Because of the proposed payment structure, product and service suppliers would likely not support the levy. Therefore, from a feasibility perspective, Netanel argues that the best option is to spread the payment obligation among a wide pool of debtors and targets, subject to the “substantially enhanced value” criterion. Potential candidates include Internet access subscriptions, P2P platform providers, personal computers, tablets, CD burners, MP3 players, blank CDs, mobile phones, and mobile phone data plans.

\textsuperscript{717} Quintais, 2014, p. 5. The exclusion is justified by the political challenges in restricting exclusivity for such uses.
threat of mandatory arbitration and pursuant to a “fair income/return” standard set forth in the US Copyright Act for compulsory licences. The latter would not only recognise the contribution of P2P devices/services but also of authors to the creative sphere, while maximising public access to works and securing a “reasonable remuneration” for rights holders.\footnote{Netanel, 2003; Quintais, 2014, p. 5. According to Netanel, the criterion suggested takes into consideration: that not all P2P displaces copyright revenues, that the system should not finance pre-digital models or ensure oligopoly profits, and that consumers should be empowered in digital markets.}

In contrast to Netanel, Litman advances a proposal for a hybrid legal licence ACS, combining statutory and voluntary licences for online music sharing. The system would operate on a “presumption of shareability”, meaning that unless digital copies of works indicate otherwise through a specific format (a “*.drm” file) containing electronic rights management information, the work can be freely shared. By using such a format, subject to specific requirements and a pre-determined grace period, rights holders could opt out of the system and make their works ineligible for sharing under the legal licence. The system would preferably be managed through a regulated government agency, and the compensation paid solely to creators via a mechanism designed to “bypass unnecessary intermediaries”.\footnote{Litman, 2004.}

In a more recent work, Depreeuw and Hubin explore—and ultimately disavow—the possibility of a limited ACS based on the application of the compulsory licence of Article 13 BC. This licence would apply to the first downstream reproduction of musical works by end-users, meaning the download or streaming of works following their lawful online availability. To avoid territorial fragmentation and be consistent with the requirements of the BC, the authors propose that the licence is implemented in the acquis, that the authority competent to determine the remuneration is set up at EU level, and that the debtor of the remuneration is the person or entity making the work available (i.e. the content provider). The latter could then pass on the amount to end-users, as occurs in private copying systems.\footnote{Depreeuw & Hubin, 2014, pp. 96–98, drawing a parallel with the American tradition, where compulsory licences of different types exist in relation to online use of musical works and sound recordings. The authors are sceptical of the benefits of imposing such a solution in the EU and call for empirical research on the matter (especially as they consider the market to be functioning in respect to these uses). See also Bernault & Lebois, 2005, pp. 44–45, arguing that a licence based on Art. 13 BC would be compatible with international law.}

The main benefit of a legal licence ACS is that it would efficiently solve most challenges associated with territorial and substantive fragmentation, representing a comparative advantage in relation to pure collective management systems. However, to the extent a legal licence covers use within the scope of the exclusive online rights of reproduction and communication to the public in the InfoSoc Directive, it entails expansion of existing limitations to those rights. The licence must therefore pass the three-step test, which looms as a significant legal obstacle. (Chapter 4 maps the potential scope of a legal licence ACS, and Chapter 5 assesses its admissibility under the three-step test.)
3.3.6 State Systems

3.3.6.1 Characterisation and Legal Framework

State Systems are legal regimes external to copyright that allow unfettered online use while guaranteeing some level of remuneration for creators. For the most part, they are theoretical constructs presented as alternatives to the recognition of intellectual property rights.\(^{721}\)

Economics scholars suggest that grants or subsidies awarded by the State may sometimes be more efficient in fostering and rewarding creative endeavour than intellectual property rights.\(^{722}\) The earliest literature on this topic focuses on alternative regulation of patents, as viewed from the perspectives of economics and law and economics.\(^{723}\) This literature challenges the economic justification for patent systems and argues for more efficient alternatives, ranging from publicly funded research and development frameworks, taxation-based funding through \textit{ex post} rewards or prizes for inventors.\(^{724}\)

In this context, Shavell and Van Ypersele propose reward systems where innovators are paid directly by the government and innovations pass directly into the public domain, thus implementing an incentive without monopoly.\(^{725}\) The problem, common to industrial reward systems, is the information required for determination of reward systems or, put differently, the need to index rewards to the value of inventions.\(^{726}\) Still, the authors conclude that intellectual property rights do not possess fundamental social advantages over reward systems; furthermore, an optional reward system, where innovators can choose between such legal protection and a reward system, is superior to an intellectual property regime.\(^{727}\) The conclusion seems to be that for most alternative systems based on patent rewards or prizes, the success of their implementation depends on the definition of “appropriate conditions… carefully selected for the particular economic environments in which they are to operate”.\(^{728}\)

Beyond \textit{ex post} reward proposals for patents, it is possible to find precedents for State Systems in the inception of public lending rights and, to a more limited extent, in publicly funded private copying systems.

Public lending right systems are “government schemes to pay writers for their public good authorship, without interfering with users’ ability to access large bodies of works through free

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\(^{723}\) For an historic analysis of such proposals in England, prior to 1800, see MacLeod, 1988. On the topic, see also Arrow, 1962; Machlup & Penrose, 1950; Polanyi, 1944; B. D. Wright, 1983.

\(^{724}\) See the sources listed in the preceding footnote. For all, see Ekersley, 2012, pp. 95–98.


\(^{728}\) Ekersley, 2012, p. 98. See also Abramowicz, 2003.
public libraries.” Such schemes predate current EU legal systems for public library lending, which rely on a harmonised exclusive or (optional) self-standing remuneration right for acts of lending. In the acquis, “lending” is defined as “making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public”.

This harmonisation was the end result of an increase in lending activities by public libraries, which caused several European countries to introduce a public lending right for authors over the course of the twentieth century. Although in some instances this right was internal to copyright, the majority of European countries initially dealt with public non-commercial lending outside the copyright system.

This was done in a plethora of ways. These included national funds constituted by library subscription taxes, direct budget allocation, government attribution/distribution of amounts per author/volume represented in public libraries, or through grants and assistance on the basis of works made available without charge in public libraries (proportional to their annual budget).

In the field of private copying, the situation is different. Most Member States implemented Article 5(2)(b) InfoSoc Directive with device or media based levy systems. However, at least three countries—Norway (since 1995), Spain (since 2012), and Finland (since 2015)—have adopted systems where fair compensation is paid out of the State budget, a model that resembles State Systems.

The Norwegian Copyright Act states that authors shall receive fair compensation through annual grants via the State budget. The fair compensation is “funded by the Norwegian Government, as a post on the national budget”, and subsequently collected by an umbrella CMO (Norwaco).

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729 Eckersley, 2012, p. 99, noting that historically, the application of public funds to copyright was viewed with scepticism, as the subsidising entities’ preferences could lead to lack of losses in cultural diversity and raised concerns of censorship.

730 Arts 2(1)(b) and 6 Rental Right Directive. For an analysis of the public lending right in several countries prior to the implementation of the Rental Right Directive, see ALAI, 1983.

731 Report on the Public Lending Right in the EU 2002, p. 3.

732 Ibid., pp. 3–4. See also ALAI, 1983: “it is possible to distinguish two main groups: countries that do not recognize and those that apply the public lending right. Among the latter, some have sought a solution outside the province of copyright, and in fact only one, the Federal Republic of Germany, has accepted public lending right as an integral part of its copyright law”. Countries that did not recognise any public lending right were Italy, France and Belgium (to the extent that the existing law was considered “dead letter”). For a description of the UK example of the 1979 Public Lending Right Act, see ALAI, 1983.

733 ALAI, 1983, for Belgium.

734 ALAI, 1983, for the Netherlands and Sweden.

735 ALAI, 1983, for Denmark, noting that works of multiple authorship were outside the system and translators had a special regime. N.B. the distribution of amounts could be done on a simple pro rata basis (e.g. as in the Dutch “Fund for Literature” system) or pursuant to complex distribution mechanisms and detailed payment matrices (e.g. the system implemented via the Swedish Author’s Fund, an apparent precursor of modern private copying levy systems).

736 ALAI, 1983, for Finland.

737 WIPO & Stichting de Thuiskopie, 2016, p. 8. On the history and development of private copying systems, see supra 2.3. See also Opinion AG in EGEDA II, ¶16, mentioning in addition Estonia as a country that finances the compensation for private copying from the General State Budget.

738 See Art. 12 Norwegian Copyright Act.
which then distributes it to member (secondary) organisations representing national and foreign rights holders categories. In Finland, as of 2015, an amendment to the copyright law “introduced a new financing system for fair compensation”, which replaced the previous device-based levy system with “financing from the annual state budget.”

Spain has had a similar regime since December 2012. The Ministry of Culture determines the amount of compensation, which is paid once a year to competent CMOs from the State budget. According to the law, the amount in question should reflect “the damage actually caused to the rightholders as a result of reproduction of works which have been accessed legally”, calculated on the basis of various criteria. However, since 2012, the total amount distributed to CMOs has been exactly EUR 5 Million each year. Furthermore, payment of the amount to rights holders is made on the basis of pre-defined distribution keys.

It is doubtful whether the indirect market proxy systems implemented by either legal regime for determination of compensation adequately preserves a link—as required by Article 5(2)(b) InfoSoc Directive—between the act of reproduction causing the harm to rights holders and the amount of fair compensation. If they do not, a significant part of these systems is functionally similar to State Systems for the private copying activities covered.

At least in relation to the Spanish system, some doubts were clarified by the CJEU in EGEDA II. The Spanish Supreme Court asked whether the Spanish scheme is compatible with Article 5(2)(b) of the InfoSoc Directive, taking into account that it is based on an estimate of the harm actually caused but cannot “ensure that the cost of that compensation is borne by the users of private copies”. Should this be answered in the affirmative, the Spanish court further asked whether that scheme remains compatible if the total amount allocated by the budget for these purposes must be “set within the budgetary limits established for each financial year.”

In its judgment, the CJEU noted that under Spanish law the revenue allocated to the payment of fair compensation is financed from the general budget resources, i.e. by all taxpayers, including legal persons. Furthermore, the law does not contemplate exemptions for legal persons in this respect, or allow for their reimbursement. Therefore, because it fails to “guarantee that the cost of compensation is ultimately borne solely by the users of private copies”, the Spanish scheme is incompatible with Article 5(2)(b) of the InfoSoc Directive. (This conclusion made it unnecessary for the CJEU to examine the second question referred by the Spanish court.)
Despite this outcome, EGEDA II does not preclude a system that finances fair compensation for private copying through the State Budget. Rather, it opens the door for such a system provided it ensures payment of fair compensation to rights holders and guarantees its actual recovery.\(^{748}\) In disavowing the specific set-up of Spanish law, the CJEU clarified that any such alternative to the traditional levy scheme must ensure that the cost of compensation is ultimately borne solely by the final user. This goal can, in theory, be achieved by allocating the revenue for private copying compensation to a budgetary item that excludes taxes imposed on legal persons.\(^{749}\) Whether any implementation of this model is practical or cost-effective is, of course, a separate empirical question. Looking forward, it remains unclear what the impact of this judgment will be on those Member States (currently: Finland and Norway) that, like Spain, finance the private copying compensation through the State Budget.

### 3.3.6.2 Legalisation Proposals

Pure State Systems are external to copyright. A good early example is provided by Shavell and Van Ypersele’s 2001 proposal for a mandatory or optional reward system. The mandatory system provides that works enter the public domain upon release or publication, entitling creators to a mere claim to government rewards.\(^{750}\) In the optional variant, authors have the choice whether to join the system. In neither model, however, are authors allowed to opt out.\(^{751}\)

Another early proposal, dating from 2003, is Baker’s “artistic freedom voucher” (or “AFV”) system. The AFV, presented as “an Internet Age alternative to copyrights”, was meant to function as a different mechanism to incentivise the creation and supply of works. In this system, individuals would be given refundable tax credits of about USD 100, which they would allocate to specific “creative workers” or intermediaries (similar to CMOs) set up to pass the collected funds to creators. Both creators and intermediaries could only benefit from the voucher if registered in the system. Once registered, the recipients of the vouchers would be ineligible for copyright protection of their works for a period of time (e.g. five years). All works created by individuals within the AFV system would automatically enter the public domain. Creators would be allowed to opt out of the system at a later stage, subject to certain conditions, namely a grace period from the date a creator last received public funds.\(^{752}\)

In 2004, Fisher published his influential monograph on legalisation models, in which he proposes the adoption of a “tax-and-royalty” system. Although the author advances different ACS designs (e.g. based on legal licences and voluntary collective licensing), his preferred extending the scope of a levy to all taxpayers, but of a system of financing based on a different rationale.” See Opinion AG in EGEDA II, ¶52

\(^{747}\) CJEU, EGEDA II, ¶43. For an analysis of the second question, see Opinion AG in EGEDA, ¶¶54–70.

\(^{748}\) CJEU, EGEDA II, ¶37.

\(^{749}\) For example, national laws could provide for a scheme for exempting legal persons’ taxes from inclusion in this budgetary item or, alternatively, allow legal persons to seek reimbursement of their taxes used for this purpose. Another possibility, briefly addressed by the AG, would be to introduce a specific tax or duty on natural persons to finance fair compensation. See Opinion AG in EGEDA, ¶51. Whether any of these variants is practical or cost-effective is, of course, a separate empirical question.

\(^{750}\) Shavell & Ypersele, 2001, noting that the ex post calculation can be based on sales or other more sophisticated methods.

option appears to be for a “governmentally administered reward system”. The system would apply to commercial and non-commercial use for “entertainment” works (mostly audio and video recordings). For a work to deserve consideration, a rights holder would have to opt in to the system and register it with a government agency (the Copyright Office). This agency would attribute a unique filename to the work, later used to track all transmissions of digital copies thereof and estimate its usage. The money to compensate rights holders for use of their works would be raised through taxes. Periodic payments amounting to a share of the tax revenue would be made to registrants by the competent agency, based on the relative usage and popularity of works. Once in place, this system would lead to the amendment of copyright law so as to eliminate most exclusive rights for online use. As result, music and films would be “readily available, legally, for free”.

Conversely, Eckersley sets forth a “virtual market reward/remuneration system” that provides blanket licensing for online use. The system relies on a government-run administrative structure. It includes a tripartite compensation structure, comprising (1) progressive income taxation, (2) levies on goods, and (3) levies on Internet access services. An original feature of this proposal is that the distribution of the sums collected is determined based on end-user voting mechanisms. As described by Eckersley, this system approximates a state-run model with little reliance on copyright protection for the digital works and use covered.

Finally, French scholar Philippe Aigrain and the advocacy group Quadrature du Net advance a high level proposal for the application of the doctrine of exhaustion to online acts of “non-market sharing of digital works between individuals”, namely those involving the rights of reproduction and communication to the public. The objectives of this proposal are twofold. First, to place online acts of non-market sharing between individuals outside the scope of copyright protection. Second, to enable “the recognition of new social rights to remuneration and access to financing for contributors.”

To achieve this second aim the proponents discuss different models for the remuneration of creators affected by the exhaustion of rights for digital works, but indicate a preference for the “Creative Contribution scheme”. This scheme would be implemented through a legally organised resource pooling system, including a statutory contribution. Creators would be entitled to a “remuneration/reward” funded through a monthly “flat-rate contribution” on Internet household

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754 Fisher, 2004, pp. 199–258. In his preferred model, Fisher proposes financing the ACS through an income tax; however, the possibility of taxing devices, media and services (like Internet subscription) are also analysed. Cf. Fisher, 2004, pp. 249–251.
756 See Eckersley, 2004, expanded by the author in Eckersley, 2012. In the latter version, the underlying legal mechanism lacks detail but the author expressly promotes a public funding approach, based on precedents external to copyright, such as public lending rights and government reward systems. Only the 2004 version entertains the notion of an opt-in right. Cf. Eckersley, 2004, p. 165.
758 La Quadrature du Net & Aigrain, 2013, pp. 5–6.
connections, distributed “on the basis of data stored by voluntary users about their non-market use in the public sphere (P2P sharing, recommendation, posting on blogs, etc.)”.

### 3.4 Attributes of Alternative Compensation Systems

The preceding sections provide a typology of models for copyright reform. It is now clear that most ACS are not radical departures from past and existing copyright laws, but rather adaptations of the same to regulate mass online use. This section furthers the taxonomy of ACS by looking into their constituent parts. It categorises a set of attributes that assist in defining the scope and characteristics of ACS and provides a snapshot of how they are addressed across different proposals.

The attributes analysed are the following: *subject matter scope, substantive rights scope, compensation type, management system, compensation target*, and *burden of compensation*. Depending on the type of ACS or specific legalisation proposal, the composition of each attribute may vary. By breaking proposals down into these components, it is possible to identify elements susceptible of transplant across ACS. These transplants may in turn improve the legal feasibility or normative desirability of the “recipient” system.

The results of this analysis are twofold. First, it allows a better understanding of legalisation proposals, enabling comparison of benefits and costs between proposals and against the status quo, as well as their impact on rights holders and users. Second, it identifies discrete attributes that can be selected from different models to devise a more flexible ACS.

#### 3.4.1 Subject Matter Scope

In theory, an ACS can cover any type of digital content used online that is susceptible of copyright and related rights protection. This includes music, video, text, e-books, photos and other visual works, databases, software and videogames. Some of these categories can be aggregated into different classifications reflecting the nature of the work (e.g. “multimedia works”) or specific content valuations (e.g. “entertainment works” or “pornography”).

Legalisation can therefore fluctuate between universal and restricted approaches regarding subject matter scope. A universal approach, applying to all types of subject matter, is consistent with the objective of wholesale legalisation professed by many ACS proponents. On the other hand, a vertical or sectorial approach is legally more feasible and susceptible of customisation to areas with higher levels of unauthorised file sharing—audio-visual content and, to a lesser extent, music and e-books—while not applying to areas where infringement by end-users is less problematic, like videogames, software and databases.

From a different perspective, because most types of ACS rely on collective rights management, pragmatism favours applying an ACS to the categories of content traditionally managed by

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759 La Quadrature du Net & Aigrain, 2013, pp. 5–6, 11–14. On the design of the creative contribution system, see Aigrain, 2012. See also Patry, 2011, p. 182, proposing a “worldwide exhaustion of digital rights once a work has been licensed in one country” as “[n]ational or regional exhaustion is a relic of the analog world”.

760 Heijden, 2014, discussing case selection and the importance of comparative research by design.

761 See, e.g., Kantar Media, 2015, showing a low level and volume of online infringement of videogames and software in the UK for the period between March and May 2015.
CMOs: music, text, visual and audio-visual. This would operate to the exclusion of subject matter such as videogames, software and databases.\footnote{P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).}

These considerations are not lost on legalisation proponents, whose models vary in the subject matter covered, ranging from ACS covering online music, through online music and audio-visual works, to all types of content.\footnote{Applying to music, see, e.g., Lincoff, 2002; Litman, 2004; Love, 2003. Applying to music and audiovisual works, see, e.g., Beltrandi et al., 2007; Fisher, 2004. Applying to all types of content, see, e.g., Grassmuck & Stalder, 2003; Peukert, 2005; Sterling, 2008, 2009.} Even in models that are universal by default, it is possible to find proposals that carve out certain categories of works, such as software (possibly including videogames), software and databases, and periodic publications.\footnote{Excluding software, see, e.g., Netanel, 2003 (discussing previously publicly released expressive subject matter), and Röhnagel et al., 2009 (describing the proposal by the German Green Party). Excluding software and databases, see, e.g., Aigrain, 2012; Bernault & Lebois, 2005. Excluding periodic publications, see, e.g., Partido Comunista Português (Grupo Parlamentar), 2012.}

Another variation of note are proposals that subject the inclusion of works in the system to certain requirements, such as prior publication or making available (either offline or online)\footnote{See, e.g., Netanel, 2003, and Aigrain, 2012, pp. 84, 102, 116, 158 (requiring the first publication to be online).} absence of restrictions through TPMs,\footnote{See, e.g., Eckersley, 2004; Grassmuck & Stalder, 2003, pp. 4–5.} and embargo periods in the context of media chronology systems.\footnote{See Beltrandi et al., 2007 (covering file sharing reproductions from legal sources), and Creation-public-internet, 2011.} Beyond these conditions, subject matter exclusions are either unjustified or grounded in particular market failures, technological limitations (e.g. of tracking and measurement systems), the non-expressive nature of certain works (e.g. software and databases), or legal compliance concerns.\footnote{This is of particular relevance in the exploitation of audiovisual works. See, e.g., Creation-public-internet, 2011; L’ALLIANCE public.artistes, 2006b, 2006c.}

### 3.4.2 Substantive Rights Scope: Authorised Use

In general, an ACS authorises use protected by copyright that takes place in the digital network environment, meaning use over the Internet, either through wired or wireless means. Because an ACS aims at solving a problem situated in the digital realm, it does not usually apply to analogue use of works. Beyond that common core, there is a significant diversity of legalisation proposals.

A common approach is to identify the types of online act authorised in the system. Thus, while some proposals target discrete acts like downloading, uploading, or webcasting, others legalise bundles of online acts involved in specific technologies, such as P2P.\footnote{See, e.g., Colin, 2011a; Lohmann, 2008; von Lewinski, 2005.}

These acts or bundles are then subject to legal qualification as substantive rights according to the law applicable to the proposal. In general, the rights include reproduction, communication to the

\footnotesize{\textsuperscript{762} P. Bernt Hugenholtz & Quintais, 2016 (forthcoming).\textsuperscript{763} Applying to music, see, e.g., Lincoff, 2002; Litman, 2004; Love, 2003. Applying to music and audiovisual works, see, e.g., Beltrandi et al., 2007; Fisher, 2004. Applying to all types of content, see, e.g., Grassmuck & Stalder, 2003; Peukert, 2005; Sterling, 2008, 2009.\textsuperscript{764} Excluding software, see, e.g., Netanel, 2003 (discussing previously publicly released expressive subject matter), and Röhnagel et al., 2009 (describing the proposal by the German Green Party). Excluding software and databases, see, e.g., Aigrain, 2012; Bernault & Lebois, 2005. Excluding periodic publications, see, e.g., Partido Comunista Português (Grupo Parlamentar), 2012.\textsuperscript{765} See, e.g., Netanel, 2003, and Aigrain, 2012, pp. 84, 102, 116, 158 (requiring the first publication to be online).\textsuperscript{766} See, e.g., Eckersley, 2012; Fisher, 2004; Grassmuck & Stalder, 2003, pp. 4–5.\textsuperscript{767} See Beltrandi et al., 2007 (covering file sharing reproductions from legal sources), and Creation-public-internet, 2011.\textsuperscript{768} This is of particular relevance in the exploitation of audiovisual works. See, e.g., Creation-public-internet, 2011; L’ALLIANCE public.artistes, 2006b, 2006c.\textsuperscript{769} See, e.g., Fisher, 2004, Netanel, 2003, pp. 41–42, and Eckersley, 2012, pp. 135–139 (considering “non-monolithic” works to be the best fit for his virtual market, and excluding DRM-ed subject matter). Pornography is a special case, as it is implicitly or explicitly excluded from analysis in most ACS proposals. See, e.g., Eckersley, 2004, p. 163 & n.266; Gratz, 2004, pp. 428–429. For the example of an author whose proposal includes pornography, see Aigrain, 2012, p. 164.\textsuperscript{770} See, e.g., Colin, 2011a; Lohmann, 2008; von Lewinski, 2005.}
public, making available, online distribution, and adaptation (or the right to prepare derivative works). The identification of such types of right is either express or derives from the reference to a category of rights.

For instance, proposals for online music may refer to “mechanical rights” and “performing” or “performance” rights, terms whose meaning evolved over time. In EU law, “mechanical rights” traditionally meant rights “to reproduce musical works in a physical music carrier such as a record or a CD”, but the term currently refers to rights “to reproduce a musical work for online uses”; i.e. online reproductions. 771 “Performing rights”, on the other hand, generally refer to rights in the communication of works through acts like “broadcasting on TV or radio, playing of music in places such as bars or concert halls”; the term is nowadays used with reference “to the making available of work or other protected subject matter in the Internet”. 772

The legal qualification also depends on the technical characterisation of acts. For instance, whether an act is on-demand (an upload in a P2P network) or linear (the transmission of a webcast) may lead to different qualifications as, respectively, an act of making available online, or a wireless communication to the public. In international copyright law, the former act triggers an exclusive right while the latter allows for compulsory licensing. 773

The qualification may also vary depending on the applicable law. For example, in EU law, acts of download and upload in a P2P network qualify as a reproduction and communication to the public respectively (Articles 2 and 3 InfoSoc Directive). However, in the US, there are conflicting views on the application of the distribution right in Section 106(3) US Copyright Act to this type of interactive dissemination of works. 774

Furthermore, it is not always clear what right applies to certain online activities. A case in point is that of remixes, mash-ups and user-generated content. These activities involve different exclusive rights, some harmonised at international level and the acquis—reproduction and communication to the public—and others not, like the right of adaptation. 775 (It is also worth noting that the vast majority of ACS deal only with economic rights, to the exclusion of moral rights. 776)

To address these substantive fragmentation challenges, some reform proposals suggest the creation of new rights that encapsulate the relevant acts authorised by the ACS, typically

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772 Ibid., p. 197.
773 See supra 2.4.2.1.
775 See Quintais, 2012, p. 75. On the right of adaptation in the acquis, see Eechoud et al., 2009, pp. 83–84, noting that the only explicit reference to this right in the acquis is found in Art. 4(b) Software Directive, despite general recognition of the right at national level. See also P. Bernt Hugenholtz & Senftleben, 2011. At international level, a general adaptation right and specific provisions for translations and cinematographic adaptations are found, respectively, in Arts 12, 8 and 14 BC.
776 In this respect, an ACS could raise concerns in its articulation with the moral rights of disclosure and integrity (where transformative uses are authorised in the system). See Quintais, 2012, pp. 75–76. See also Goldstein & Hugenholtz, 2013, pp. 363–365, discussing the moral right of integrity under international copyright law and several national laws.
applying to online acts of communication to the public and functionally dependent acts of digital reproduction. Illustrations are Lincoff’s “online transmission right”, Sterling’s “Internet right”, Dimita’s “global dissemination right”, and Aigrain’s “positive social right of sharing”. It is noteworthy that few proposals address the right of adaptation and, those that do, allow its withdrawal from the ACS.

Beyond the online character and type of authorised use, a major distinction in legalisation proposals relates to the purpose or nature of use, namely whether the same is “commercial” or “non-commercial”. Most proposals target non-commercial, not-for-profit or “non-market” activities over the Internet, as their ultimate aim is to enable large-scale online use by individuals.

As noted in Chapter 1, this dissertation also focuses on copyright reform for non-commercial online use. Based on its use in the acquis—in relation to compensated limitations and collective rights management—“non-commercial” should probably be qualified as an autonomous concept of EU law. The concept, however, has nebulous contours.

The term “commercial” can encompass several meanings, including “economic”, “for profit”, “business” and the like. Yet, the scope of non-commerciality is difficult to define, especially in the online environment. At the very least, commercial should not be a synonym for economic. In private copying, for example, a limitation the scope of which excludes all economically significant use would be devoid of meaning and application, as many copying acts bear that significance.

The challenges inherent in defining the concept could explain why ACS proponents often shy away from drawing hard and fast lines as to its meaning, beyond linking the use to online acts of natural persons. For Netanel, for instance, non-commercial means that individuals “cannot be selling copies of, access to, or advertising in connection with the protected work”. Grassmuck adds that users cannot earn revenue nor solicit donations from the public, while a French law proposal requires use not be directly or indirectly commercial, a terminology borrowed from the private copying limitation in Article 5(2)(b) InfoSoc Directive.

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778 Sterling, 2008, 2009. The new internet right would cover the substantive rights of reproduction, communication to the public and making available when involved in the same transmission and for global purposes.
782 While the terms “non-commercial” and “not-for-profit” are of common usage, the term “non-market” is mostly used by Aigrain in works on this topic, most notably in Aigrain, 2012, pp. 15, 84, 207 & n.5. The author borrows the term from Benkler, 2006.
783 Cf. supra 1.2.
784 Karapapa, 2012, p. 82.
785 Poort & Quintais, 2013.
786 See, e.g., Dimita, 2010, p. 212 & nn.1513, 218, for whom non-commercial means use not made in the course of business and should be better defined at international level.
787 Netanel, 2003, p. 43.
Some ACS designs authorise only online use for “personal enjoyment”, excluding economic benefits. In one case, this entails a prohibition that “a site or a community makes available entire collections or provides its sharing services for any commercial purpose”. Others, however, permit the use of intermediary “sharing platforms”, enabling the operation of centralised and decentralised systems, while exonerating a broad swath of intermediaries (caching, browsing, hosting or others) from liability, irrespective of physical location.

3.4.3 Compensation Type

The type of compensation is the economic claim of copyright owners linked to the permission to use their works. This claim comes with different labels: payment, tariff, royalty, licence fee, remuneration, compensation, levy, contribution or tax. The compensation is influenced by the nature of the right subject to authorisation. Some terms, like “rights revenue” or “tariff” apply to different types of system irrespective of whether they involve exclusive or remuneration rights. Other terms are specific to the scheme they apply to. For example, the term “levy” is overwhelmingly used for the payment of compensation in a statutory licence, “licence fee” or “royalty” are more common in voluntary collective licensing, and “taxes” and “rewards” are the province of State System proposals.

3.4.4 Management System

The management system refers to the “nuts-and-bolts” of an ACS, namely the calculation, collection and distribution of the compensation. For the most part, legalisation proposals take inspiration from and extend upon existing models of collective management and statutory licensing.

The determination of the amount of compensation has two facets: the total amount of compensation generated by an ACS, and the specific amount paid by the users for the authorised use. The latter amount relates to the burden of compensation, and is dealt with below under that heading (3.4.6).

As regards the total amount generated by the system, in collective rights management models that quantum is determined through contractual negotiation and tariff setting by CMOs, and is usually not problematic. In legal licence and State System ACS, this determination is imposed by law, with the intervention of a government agency and/or stakeholder negotiations, subject to judicial or administrative review. The calculation of the amount is a complex and debated aspect of the system, mainly because it is one of the main elements in assessing its feasibility.

It is possible to calculate the overall amount of compensation in an ACS using different ranges and reference points, depending on the policy objective of the system. These objectives include

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789 See Rocha, 2010, with a translation and explanatory comments to Art. 88(B) of the Brazilian “Compartilhamento Legal” proposal.
790 See Partido Comunista Português (Grupo Parlamentar), 2012, proposed Arts 3 and 4.
791 See Geiger, 2010, p. 528, criticising the use of the term “levy” in this context.
792 Cf. supra 3.3.2
794 There are also hybrid systems containing newly created entities for this purpose. See, e.g., Mehra, 2008 (proposing a digital clearinghouse), and Dimita, 2010 (proposing a specific WIPO agency).
compensating revenue losses from piracy, curing a market failure, providing fair remuneration, or incentivising creation and access to works.

Some proposals set as a lower threshold the status quo rights revenues for comparable authorised use; if this threshold is met, the ACS is welfare increasing. Other proposals target the lost profits from unauthorised use; if the ACS covers these losses, it cures the market failure that motivated its adoption. 796 A third approach establishes a welfare increasing compensation range, using current rights revenue levels as a floor, and the value attributed by consumers to an ACS as a ceiling, for example by measuring their willingness to pay through contingent valuation methods. 797

Whatever the model, there seems to be agreement that the total amount of compensation requires periodic adjustment after adoption of the ACS, as the baseline values become gradually less representative of changing market conditions over time. 798

Except for tax-based State Systems, collection of compensation is usually the competence of a CMO designated in the ACS. Most proposals include a variation of the following set-up. The law mandates an umbrella CMO to administer the system, including collection and subsequent distribution to second-level organisations, which represent different categories of rights holders. For reasons of efficiency, the CMO will collect the amount from an intermediary debtor, like an ISP or online service provider, who may then have the right to pass it on to the final user. Some proposals devise specific government agencies for purposes of collection and distribution. 799

The distribution of the compensation involves numerous considerations, many of which are well known to collective rights management. First, it is necessary to define the beneficiaries of the compensation, namely the categories of rights holders entitled to it. Here, there is a binary choice between proposals that benefit creators—often because of the unwaivable nature of their remuneration rights—or all rights holders. 800 The allocation of the amounts to each category is determined by law or stakeholder negotiation, and often creators are allocated a fixed share due to the unwaivable nature of their remuneration rights under the ACS. 801 Some proposals reserve a portion of the amounts collected for social and cultural purposes. 802

The subsequent issue is how to divide the compensation among individual rights holders within a category. Individual distribution is typically the competence of second-level CMOs representing
each category and only seldom of an umbrella organisation or central agency. Most proposals suggest distributing the compensation based on the measurement of online use—including relative and actual use of works online,—contingent valuation methods, or negotiated distribution keys. In one notable exception, Eckersley proposes a progressive distribution system, where the compensation for lower income creators is proportionally higher than for those with higher income.

Methods for measurement of online use include anonymous monitoring, sampling, tracking, census, or a combination thereof. Proposals that rely on monitoring online use typically require some type of registration of works or rights management information in a central registry to enable the measurement. More sophisticated ACS consider the length of works and trace units of consumption (e.g. download counts), or use decentralised metrics or contingent valuation surveys (e.g. by having end-users assume a role in distribution through voting mechanisms or user sampling). It is worth noting that a significant number of proposals stress the need for these methods to respect the privacy of end-users.

Regarding distribution, some authors note the need to define a distribution threshold, meaning that amounts collected are only distributed to rights holders if the administrative costs are covered (including management fees), and the rights holder has a minimum audience.

Finally, the implementation of an ACS would require the implementation of an operational infrastructure enabling the features described above. Although built on existing collective management infrastructures and expertise, most ACS proposals would require additional capabilities, namely related to the technical systems and databases for registration of works, and measurement of online use.

3.4.5 Compensation Targets

The compensation target is the good or service selected as the aim of the payment obligation. This attribute is less relevant for voluntary licences, where the payment is predominantly negotiated between CMOs and commercial users. These then have a right to offer file sharing licences to end-users, either as a stand-alone or bundled with other goods or services, such as

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803 See McDaniel, 2007, for a critical analysis of issues related to certain non-voluntary ACS proposals (limited to online music) for division and distribution of levied amounts, either through measurement of usage or contingent valuation methodologies. McDaniel ultimately denotes a preference for voluntary industry-led changes to the copyright system. Cf. McDaniel, 2007, p. 312. For an example of a specific method, see Lincoff, 2008, referring to benefits realised by online service providers.

804 Eckersley, 2012.

805 For an example of the first, see Fisher, 2004. For examples of the second, see Aigrain, 2008; Baker, 2003; Eckersley, 2012.


807 Eckersley, 2012; Fisher, 2004. For an example of the second, see Eckersley, 2012 and Baker, 2003 (relying on a selection by tax payers on their tax form of a beneficiary creators or intermediary, or alternatively on direct payments of the tax refund).

808 Proposals vary in this respect, but for examples of elaborate new systems with numerous implementation requirements, spanning from certification requirements for intermediaries, to specific administrative resolution procedures, see Baker, 2003; Eckersley, 2012; Fisher, 2004.
Internet access. In these models, users have the choice of participating in the ACS by acquiring a licence in addition to their normal service.\footnote{See, e.g., Beltrandi et al., 2008, 2007; Lohmann, 2004.}

In non-voluntary ACS, this attribute is more complex, involving a higher level of legislative intervention. For efficiency reasons, the majority of proposals target internet access services, imposing the compensation as a surcharge on the monthly household subscription paid by users to ISPs. In some cases, albeit rare, mobile connections are also targeted.\footnote{See, e.g., Dimita, 2010, p. 219; Grassmuck, 2010a; Partido Comunista Português (Grupo Parlamentar), 2012.}

The payment obligation is either fixed (a “flat rate”) or varies according to type of connection, speed of access, income of the household, or other factors, which may influence the decision to exempt certain targets or users from payment (e.g. based on age, income, or low speed of connection).\footnote{See, in this respect, the considerations in Vallbé et al., 2015.} A few proposals view Internet access as a utility, and therefore suggest regulatory determination of minimum and maximum price bands for access.\footnote{See, e.g., Hellings & Piryns, 2010; Morael & Piryns, 2010.}

In addition to services, a number of ACS target goods, like devices, equipment, media or supports selected on the basis of their susceptibility for use in unauthorised file sharing. In these models, the compensation amounts to a percentage of the wholesale or retail price of the good.\footnote{See, e.g., Netanel, 2003, targeting goods the value of which is substantially enhanced by P2P. See also Fisher, 2004, pp. 222–223, defining different goods as potential targets.}

In legal licences and State Systems, user participation in the ACS is usually mandatory for those acquiring the relevant good or service. If the system targets ISP subscriptions, for instance, it is compulsory for all non-exempt connected households. Finally, it is noted that State Systems use direct or indirect taxation to generate compensation. The incidence of the taxes used to fund the ACS includes personal income and connected residential properties (e.g. proportional to the value of a household with Internet connection).\footnote{Discussing some of these options in depth, see Eckersley, 2012; Fisher, 2004, pp. 216–223. See also Baker, 2003; Eckersley, 2012, suggesting exemptions for individuals or households without Internet connection.}

\subsection*{3.4.6 Burden of Compensation}

This final attribute identifies the party bearing the direct and indirect burden of liability for payment. Such party will be the user or an intermediary. In voluntary collective licensing, the burden of compensation lies directly with the licensee, typically a commercial user, who then offers his services to end-users on market-based prices.\footnote{See, e.g., L’ALLIANCE public.artistes, 2006b, 2006c; Lincoff, 2008.}

In other types of ACS, where the target of compensation is a good or service, the provider of the same is typically the debtor of the compensation, which is owed to the CMO with competence for collection. However, in an arrangement similar to private copying systems, most proposals allow that intermediary to pass on the amount of the payment or levy to the end-users. The result is that consumers effectively bear the burden of compensation, unless the intermediary chooses
to absorb it or the consumer is exempt from payment. This approach is justified to the extent the beneficiary of the authorisation to use works in the ACS is the end-user.\textsuperscript{816}

Whichever the model, from the perspective of end-users, an ACS is a single-interface black box through which they either choose or are obliged to pay money in return for the authorisation to use works online, which money is distributed to rights holders.\textsuperscript{817} In this respect, most proposals are silent on whether the ACS “levy” should be visible for end-users acquiring it, allowing it to be incorporated in the price of the Internet subscription without discrimination.\textsuperscript{818}

### 3.5 Conclusions

This chapter aims at an in-depth conceptual and legal understanding of the nature, scope and effects of ACS. Based on existing legalisation proposals, it advances a taxonomy of legal schemes that qualify as ACS, their attributes, and possible combinations, against the background of international and EU copyright law.

The taxonomy categorises five types of ACS or rights acquisition schemes for the wholesale legalisation of online use. These are, from least to most restrictive of the exclusive right: voluntary collective licensing, ECL, mandatory collective management, legal licences, and State Systems. Outside the classification are private ordering models that do not involve collective rights management, and proposals relying on uncompensated limitations, which lack the essential remuneration element.

The first three models are based on collective rights management. Both voluntary and extended collective licensing (with opt-out) are restrictions on the exercise of the exclusive right, but not on its nature. They may apply as legal mechanisms for ACS with legislative amendments that, although challenging, would retain the exclusive nature of the licensed rights.

However, issues with territorial and substantive fragmentation of copyright, costs of management and supervision, and the reliance on the continued participation of rights holders—including, in ECL, not exercising large-scale opt-outs—raise serious doubts that systems of voluntary licensing can provide the type of all-encompassing multi-territorial and multi-repertoire blanket authorisation for mass non-commercial use required by an ACS.

In this respect, the remaining types of ACS, classified as “non-voluntary” licences, are more promising. As noted, the term in quotations is used ambiguously in law and commentary. Here, it means that the exercise of copyright is imposed \textit{prima facie} on the rights holder, but does not require a transformation from exclusive to remuneration right. While it is not contentious that such a transformation results from the application of legal licences (with the accompanying copyright limitation), it is less clear whether that is the case for mandatory collective management, or for compulsory ECL (without opt-out).

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\textsuperscript{816} For examples of proposals allowing the payment to be passed on to end-users, see: Aigrain, 2008; Attali, 2008; Baker, 2003; Beltrandi et al., 2007; Bernault & Lebois, 2005; L’ALLIANCE public.artistes, 2006a; Lincoff, 2002; Love, 2003; Netanel, 2003; Zelnik et al., 2010.

\textsuperscript{817} The remaining attributes constitute a hidden complexity for end-users and are usually defined and managed by legislators, rights holders and intermediaries.

\textsuperscript{818} Exceptionally requiring visibility of the levy, see Creation-public-internet, 2011; Modot et al., 2011; Songwriters Association of Canada, 2011.
To solve this conundrum, the analysis contrasts the opposing theories on the application of mandatory collective management to exclusive rights. Although this regime has functional similarities with compulsory licences, it does not seem possible to qualify it as a copyright limitation from the conceptual or legal-technical perspectives.

The consequence is that the adoption of a mandatory collective management ACS for online exclusive rights for non-commercial purposes is not subject to the three-step test. Instead, it must respect the stringent requirements for the imposition of collective management as the sole mode of exercising those rights. However, this issue is unsettled in scholarship and not formally recognised in international treaties, meaning that such a proposal is contentious both as a matter of law and as a legitimate policy option. Therefore, it is advisable to explore whether an ACS following this regime would pass the three-step test.819

Legal licences, which can be statutory and compulsory, require the adoption of a compensated limitation to the rights authorised by an ACS. As noted in Chapter 2 and further explored in the present chapter, international copyright law leaves limited space for EU-wide compulsory licensing of mass use, and certainly not for a broad blanket non-commercial licence for the rights of online reproduction and communication to the public. Where these rights are exclusive and not covered by a copyright limitation at EU level (a topic explored in Chapter 4) a legal licence ACS is subject to the three-step test.

Yet, aside from this legal challenge, a legal licence combined with collective management of underlying remuneration or compensation right(s) is conceptually the best solution to achieve wholesale legalisation of non-commercial use with fair remuneration. The main reason is that it adequately addresses the territorial and substantive fragmentation challenges of EU copyright law, while leveraging the infrastructure and expertise of CMOs.

State Systems, for their part, are proposals based on tax or rewards models external to copyright. Their adoption would require the replacement of copyright protection for the authorised use by a publicly funded system. Thus, even for non-commercial mass use, they constitute an unrealistic path for reform.

Further to the identification and characterisation of the above types of ACS, this chapter categorises and provides a snapshot of a set of attributes of legalisation schemes: subject matter scope, substantive rights scope, compensation type, management system, compensation target and burden of compensation. The analysis of attributes assists in defining the scope and characteristics of legalisation schemes.

The examination of carefully selected models and attributes reveals a complete picture of the scope and effects of legalisation schemes. The analysis confirms what the previous chapter hinted at, namely that most ACS types and attributes are not radically different from existing copyright mechanisms.

819 See, following a similar logic, Colin, 2011a, pp. 45–46; Séverine Dusollier & Colin, 2011, pp. 819–827. See also Geiger, 2015b, p. 19: “...a less ‘intrusive’ alternative would be subordinating creative uses to the mandatory collective administration of works, as this would not be a limitation but a way of exercise of the exclusive right, which would therefore be more likely to be compatible with the three step-test”.
Rather, they are extensions and adaptations of existing regimes—namely of collective rights management and legal licences—with the objective of enabling a model of fairly remunerated access to (predominantly) mass non-commercial use online. The point is important as it is often obscured by the presentation of these models as holistic, and therefore impractical, alternatives to the status quo. Instead, by looking at ACS as a matrix of interoperable models and attributes, the taxonomy offers not only an exploration of flexibility in copyright law, but also a toolbox for policy makers to select the most legally consistent and adequate ACS blend of copyright reform.