DOCTRINE

COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS AT A TRIPLE CROSSROADS: SHOULD IT REMAIN VOLUNTARY OR MAY IT BE "EXTENDED" OR MADE MANDATORY?

Dr. Mihály Ficsor*

I. Introduction

It is kind of legal commonplace that the exclusive right of authors to exploit their works or to authorize others to do so is a basic element of copyright. Where recognized, this right is also important for the beneficiaries of related rights. The exclusive nature of a right means that only its owner – and nobody else – is in a position to decide whether he or she will authorize the performance of any of the acts covered by the right; and if he or she decides to do so - under what conditions and against what kind of remuneration.

It goes without saying that an exclusive right may be enjoyed, to the fullest possible extent, if it may be exercised individually by the owner of the right himself. In such a case, the owner maintains his control over the exploitation and dissemination of his work,[1] and he may more or less closely monitor whether his rights are duly respected.

At the time when the international copyright system was being established, the individual exercise of certain rights – first of all the right of public performance of non-dramatic musical works – seemed very difficult. Later, with the ever evolving technologies, the number of areas in which the individual exercise of rights was becoming equally difficult, and in some cases even impossible, started to grow: the establishment of collective management organizations in such cases was the logical solution for the right owners.

In the case of a traditional, fully fledged collective management system, the right owners authorize collective management organizations to monitor the use of their works, to negotiate with prospective users, to grant them licenses under certain conditions and on the basis of a tariff system, to collect the remuneration, and to distribute it among the owners of rights. Many elements of the management of rights in that type of system are standardized – in fact, they may even be "collectivized": the same tariffs, the same licensing conditions and the same distribution rules may apply to all works which belong to a given category; sometimes social and/or "cultural" deductions are also made, etc.

There are certain cases where the right owners do authorize the collective management organization to carry out only some of the functions that have been mentioned. In some countries, for example, the authors of dramatic works have preferred to leave collective

* President, Hungarian Copyright Council, Budapest.

[1] In this paper, unless the contrary follows from the given context, "copyright" means also related rights, and "work" also means objects of related rights.

negotiations and establishment of framework agreements with the representatives of theatres, to their societies – this is one of the reasons why such a system may be characterized as collective management, even though a partial one. However, as a rule, they conclude directly their contracts with each of the theatres, and entrust the collective management organization with only the monitoring of performances, as well as the collecting and distribution of royalties.

For corporate right owners – producers, publishers, etc. – it also becomes inevitable or at least desirable in certain situations to set up an organization or to join an existing one in order to exercise their rights. Although some of them - e.g. music publishers in some countries – are members of traditional collective management organizations and accept their rules thereof, others prefer different forms of exercising their rights which have as little "collective" elements as possible. This leads to the setting up of an agency-type system, where the only exclusive task, or almost, is the collection and transfer of royalties as quickly and as precisely as possible, at as low cost as possible, and as much in proportion with the value and actual use of the productions involved as possible. The most developed form of such agency-type systems – frequently referred to as rights-clearance systems – is the one where tariffs and licensing conditions are individualized. Thus, the main element of joint management in this case is that one single licensing source is offered, with a significant reduction of transaction costs for both owners of rights and users.

Fully-fledged collective management organizations and agency-type bodies as those described above, do function side by side. Occasionally they also establish alliances or "coalitions", when this is needed for pursuing of common interests or for the joint exercise or enforcement of certain rights.

There is a form of partial collective management which needs special mentioning: the management of mere rights to remuneration (the reason why in this case the management system is not a fully fledged one, is the fact that the rights themselves are not exclusive). It's worth noting that there could be significant differences between various rights to remuneration: from the viewpoint of their roots or their copyright status. In some cases, what is involved is the limitation of an exclusive right to a right to remuneration (e.g. in several countries the exclusive right of reproduction, as regards "private copying" and reprographic reproduction – at least in certain cases – is limited to a mere right to remuneration); in other cases, the right itself is established as a mere right to remuneration (such as the resale right or the "Article 12 rights" of performers and/or producers of phonograms); and in another group of cases, the right to remuneration is a "residual right" (for example, the European Community's Council Directive No. 92/100/EEC of November 19, 1992, on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property has introduced such a right in favour of the authors and performers – the "unwaivable right to equitable remuneration" in respect of the rental of phonograms and audiovisual works (into which their works or, respectively, performances have been incorporated).

With the ever broader application of the digital technology, and particularly with the world-wide use of the Internet, a new situation has emerged: the individual exercise of rights has become possible and practical in a much broader and broadening field - through the application of technological protection measures (TPMs), electronic rights management information (RMI), and their combination in complex digital rights management systems (DRMs). This influences the scope of those exceptions and limitations of exclusive rights that

may be justified and acceptable on the basis of the "three-step test" provided for in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10 of the WCT and Article 16 of the WPPT. For example, distribution of copies through interactive transmissions supported by DRM – resulting in what is regarded now as "private copying" – is becoming a basic form of exploitation of works; therefore, in the cases where owners of rights apply DRMs, and in particular TPMs, it would not be in accordance with the requirements of the "three-step test" to reduce the exclusive right of reproduction, in general, to a mere right to remuneration.[2]

Since, as mentioned above, from the viewpoint of right owners, collective management – particularly when it involves fully fledged "collectivization" of the various management elements – goes along with quite extensive restrictions of exclusive rights, it will be fair to raise the question in which cases and under what conditions such restrictions may be justified and acceptable. This paper discusses this question in respect of two forms of non-voluntary collective management – mandatory collective management and extended collective management – on the basis of the international copyright norms and the "*acquis communautaire*"[3] of the European Union.

II. Mandatory Collective Management

Before analysing the Berne Convention, from the viewpoint of when and under what conditions mandatory collective management may be permitted (this analysis is relevant also for the TRIPS Agreement and for the WCT, which incorporate the substantive provisions of the Berne Convention by reference[4]), it is worth to answer to a few preliminary questions: (i) If somebody is in the position of doing something but it is provided that he can only do so in a certain way, does that represent determining/imposing a condition? (ii) If somebody owns something but it is provided that he can only use it in a certain manner, does that represent determining/imposing a condition? (iii) If somebody is granted a right but it is provided that he can only exercise it through a certain system, does that represent determining/imposing a condition?

It is obvious that only definitely affirmative replies should be given to each of these questions.

The Berne Convention contains provisions – Article 11*bis*(2) and Article 13(1) – which provide that it will be a matter for legislation in the countries of the Berne Union to determine the *conditions* under which certain exclusive rights may be exercised. They read as follows (emphasis added):

– Article 11*bis*(2): "It shall be a matter for legislation in the countries of the Union *to determine the conditions under which the rights mentioned in the preceding paragraph*[5]

[2] It is another matter, that, in some *specific* cases, such as copying of certain works, for example, in the framework of distant education program – with appropriate guarantees that only the intended beneficiaries may get access to the works – exceptions and limitations may be justified.

[3] The entire body of European Union laws is known as the acquis communautaire. This includes all the treaties, regulations and directives passed by the European Union institutions as well as judgements laid down by the European Court of Justice.

[4] See Article 9.1 of the TRIPS Agreement and Article 1(4) of the WCT.

[5] Under paragraph (1) of the same Article, "[a]thors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other

may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

– Article 13(1): "Each country of the Union may *impose* for itself reservations and *conditions on the exclusive right granted to the author* of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

In general, these provisions are regarded as a legal basis for the application of non-voluntary licenses, since they define the minimum requirements to be respected when such conditions are applied; namely that they must not, under any circumstances, be prejudicial to authors' rights to obtain an equitable remuneration. This does not mean, however, that non-voluntary licenses may be regarded as the only possible "conditions" mentioned in these provisions of the Berne Convention; other conditions as well – practically, restrictions – of the exercise of the exclusive rights concerned, may also be applied.

Mandatory collective management of rights is such a condition, since it means – in term of the questions we asked above, that (i) although the owners of these rights are in the position of doing something (namely, enjoying the exclusive right of authorizing the acts in question), it is provided that they can only do so in a certain way; (ii) although they own such exclusive rights, it is provided that they can only use them in a certain manner; and (iii) although they are granted such rights, it is provided that they can only exercise their rights through a certain system (namely, collective management).

Since the possibilities of "determining/imposing conditions" are provided for in the Convention in an exhaustive way, it can be deduced, on the basis of the *a contrario* principle, that in general, mandatory collective management of *exclusive rights* may only be prescribed practically in the same cases as non-voluntary licenses (which result in mere rights to remuneration).

In the previous paragraph, the words "exclusive rights" are emphasized. This was necessary for pointing out that what was discussed above should not be interpreted to mean that mandatory collective management may only be prescribed in cases where, in the provisions of the Berne Convention or other international norms on copyright and related rights – the expression "determine/impose conditions" (under which the rights concerned may be exercised) is used. Mandatory collective management is obviously permissible also in cases (i) where a right is not provided for as an exclusive right of authorization but rather a mere right to remuneration (as in the case of the resale right under Article 14*ter* of the Convention, or, in the field of related rights, the so-called "Article 12 rights"[6] of performers

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means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

[6] The expression "Article 12 rights" refers to the rights provided in Article 12 of the Rome Convention which reads as follows: "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is

and producers of phonograms); (ii) where the limitation of an exclusive right to a mere right to remuneration is allowed on the basis of some other wording (as is the case in respect of Article 9(2) concerning the right of reproduction[7]); or (iii) where a "residual right" is concerned, i.e. a right to remuneration (usually of authors and performers) which "survives" the transfer of certain exclusive rights (such a residual right "by definition" cannot be in conflict with the exclusive nature of the right concerned, since it is only applicable after the latter has been duly exercised.)

The best example for a "residual right", is the "unwaivable right to remuneration" under Article 4 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter: the Rental Right Directive[8]). And as long as we have mentioned them here, it will be justified to start the review of the *acquis communautaire,* as far as mandatory collective management is concerned, with the provisions on the "unwaivable right to remuneration".

First, paragraph 3 of the Article 4 of the Rental Right Directive provides that "[t]he administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers"; then, paragraph 4 deals with the question of possible prescription of mandatory collective management. Its relevant part reads as follows: "Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed […]".

This provision is significant from the viewpoint of the issue of mandatory collective management not only because it indicates that, in the case of this "residual right" collective management may be imposed (i.e. may be made mandatory), but also because it has an *a contrario* implication. Since the directive has found it necessary to provide that, in this case, collective management *may* be imposed, by this it indicates implicitly that, under the *acquis communautaire* - unless this possibility does not follow directly from the provisions of an international treaty to which the EU Member States are parties – there is a need for such a permission; or in other words: *mandatory collective management is not allowed in any case where the international norms on copyright* (such as the provisions of the Berne Convention, as discussed above) *or, in respect of a specific right not covered by such norms* (such as the right of rental), *the acquis communautaire – do not explicitly permit it.*

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used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration." (Article 16.1(a) of the Convention provides for the possibility of reservations to Article 12, which may go even so far as to no application of the Article.) It is to be noted that Article 15 of the WPPT also provides for similar rights to remuneration for performers *and* producers of phonograms.

[7] Article 9(2) uses the expression "to permit the reproduction of […] works". This may mean – subject to the said test – either free uses or, as it is clarified in the report of Main Committee I of the 1967 Stockholm revision conference (see paragraph 85 of the report), the reduction of the exclusive right to remuneration to a mere right to equitable remuneration. It is on this basis, that, in case of widespread and uncontrollable private copying, in certain countries, a right to remuneration is applied (usually in the form of a levy on recording equipment and material) to which is, of course, the obligation to grant national treatment extends without any reasonable doubt whatsoever.

[8] Paragraph 1 of Article 4 of the Rental Right Directive provides as follows: "Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental." And paragraph 2 of the same article adds that "[t]he right to obtain an equitable remuneration for rental cannot be waived by authors or performers."

The Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereinafter the Satellite and Cable Directive) goes further: in the case of cable retransmission, not only it permits the imposition of collective management, but it makes such management mandatory. Article 9.1 of the directive provides as follows: "Member States *shall* ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society [emphasis added]." The directive also regulates the legal technique to be applied so that all such rights of copyright owners and holders of related rights may be concentrated in the repertoire of a collective management organization (or possibly in more than one organization, from which holders of rights may choose one[9]).

This provision of the Satellite and Cable Directive is in accordance with the above-stated principle that in the case of exclusive rights, mandatory collective management may only be prescribed where the relevant international norms allow it, either through permitting for the prescription of conditions for the exercise of rights (the imposing of collective management being obviously a condition) or through limiting it to a right to remuneration in certain cases (in which cases, the exclusive nature of the rights concerned disappears not only in respect of the decisive "upstream" stage – that is, in the relationship between the owners of rights and the collective management organizations – but also in respect of the "downstream" stage between the organizations and the users). This is so since, in respect of authors' "exclusive right of authorizing […] any communication to the public by wire […] of the broadcast of [their] works" granted by paragraph (1)(ii) of Article 11*bis* of the Berne Convention, paragraph (2) of the same Article provides that "[i]t shall be a matter for legislation in the countries of the [Berne] Union to *determine the conditions under which the rights mentioned in* [paragraph (1)] *may be exercised".* As far as related rights are concerned, neither the Rome Convention, nor the *acquis communautaire* provide for *exclusive* rights of authorization for cable retransmission and this situation has not changed since the adoption of the Satellite and Cable Directive; it may be added that the international norms adopted in the meantime – the relevant provisions of the TRIPS Agreement and the WIPO Performances and Phonograms Treaty (WPPT) – have not introduced such rights neither.

Article 10 of the Satellite and Cable Directive provides for one exception to mandatory collective management of cable retransmission rights, namely for the cable retransmission rights of broadcasting organizations.[10] This refers to one of the basic principles concerning

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[9] Article 9.2 and 3 of the Satellite and Cable Directive provide as follows: "2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator an collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter."

"3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive."

[10] Article 10 of the Satellite and Cable Directive provides as follows: "Member States shall ensure that Article 9 [prescribing mandatory collective management] does not apply to the rights exercised by a broadcasting

collective management; namely that collective management, even when it might be possible under the international norms and/or the *acquis communautaire,* is only justified where the individual exercise of rights is impossible or, at least, highly impracticable due to the number of right-owners, the number of users or other circumstances of uses. Broadcasting organizations are relatively less numerous (in contrast to authors and owners of related rights other than the rights of broadcasting organizations); hence, they may be able to manage their rights individually.[11]

The Directive 2001/84/EC of the European Parliament and the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (hereinafter: the Resale Right Directive) does not prescribe mandatory collective management for the collection and distribution of royalties for the resale right, but allows Member States to do so. Article 6.2 reads as follows: "Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1." As discussed above, in this case the prescription of mandatory collective management is allowed under the international copyright norms, since it corresponds to the nature of the resale right (*droit de suite*) under Article 14*ter* of the Berne Convention: it is a mere right to remuneration (it is also only a right to remuneration under Article 1 of the Resale Right Directive).

It may be deduced, on the basis of the *a contrario* principle that, where the international copyright norms and/or the *acquis communautaire* provide for an exclusive right which can be exercised individually and the relevant norms do not allow for the prescription of *conditions* for its exercise (nor permit its limitation to a mere right to remuneration), it would be in conflict with those norms to subject the exercise of such a right to the condition that it may *only* be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and, consequently, under the *acquis communautaire*) in the case of the right of public performance (Article 11 of the Berne Convention), the right of public recitation (Article 11*ter*) or the right of "making available to the public" (Article 8 of the WCT and Articles 10 and 14 of the WPPT[12]).

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organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights."

[11] It is another matter, that broadcasting organizations still have found collective management of their cable retransmission rights advantageous. They have established the Association for the International Collective Management of Audiovisual Works (AGICOA) of which one of the most important tasks is exactly the collective management of cable retransmission rights.

[12] Articles 10 and 14 of the WPPT provide explicitly for "rights of making available" of fixed performances and phonograms, while, under Article 8 of the WCT, such a right is provided for as a "sub-right" of the right of communication to the public in the following way: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), *11ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them"* (the text relating to the right of "making available", as a sub-right of the right of communication to the public, is emphasized). It is to be noted that the 1996 Diplomatic Conference which adopted the WCT, has also adopted an agreed statement concerning the above-quoted Article 8 which states as follows: "It is […] understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)" [of the Berne Convention]. Article 11*bis*(2) provides for the possibility of countries of the Berne Union "to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised". The rights mentioned in that "preceding paragraph" – paragraph 11*bis*(1) – are the right of broadcasting and the rights of retransmission and certain "public communications" of broadcast works; that is, sub-rights of the right of communication to the public clearly other than the right of making available to the public Thus, Article 11*bis*(2) obviously is not applicable in respect of the right of "making available". It is another matter that recital (26) of the Information Society Directive contains

This does not mean that owners of rights may not and do not create collective management systems where such management is not mandatory. On the contrary, the oldest and the most efficiently functioning collective management system, both at national level and at international level, through the International Confederation of Societies of Authors and Composers (CISAC), has been established specially for the management of the public performance right. In such cases, extended collective management systems may also be applied (see below). However, in the case of voluntary collective management, any right owner may decide whether to authorize the collective management organization to represent him and to exercise his rights. In the case of extended collective management there is also a possibility for any right owner, as discussed below, to "opt out" from the collective system.

III. Extended Collective Management

One of the most important elements of fully developed collective management systems is the possibility that collective management organizations may grant blanket licenses to users for the use of the entire world repertoire of works or other protected subject matter, as far as the rights managed by them are concerned.

It is to be noted, however, that even where the system of bilateral reciprocal representation agreements is fairly well developed (e.g. as in the case of "performing rights"), the repertoire of works in respect of which a collective management organization has been explicitly given the power to manage exclusive rights is, practically, never the entire world repertoire (since, in certain countries, there are no appropriate partner organizations to conclude reciprocal representation agreements with, or because certain authors do not include their works in a collective system).

There are two basic legal techniques for ensuring the functioning of the blanket licence systems.

The first legal technique is the "guarantee-based system" which involves the following elements: (i) the lawfulness of authorizing the use of works not belonging to the organization's repertoire is recognized by law (either by statutory law or by case law); (ii) the organization must guarantee that individual right owners will not claim anything from users to whom blanket licenses have been granted and, if they still try to do so, that such claims will be settled by the organization, and, that any user will be indemnified for any prejudice and expense caused to him as a result of justified claims by individual owners of rights; and (iii) the organization also should guarantee that it treats owners of rights, who have not delegated their rights to it, in a reasonable way, taking into account the nature of the right involved.

The other legal technique for ensuring the conditions for blanket licenses seems to be more appropriate in the case of exclusive rights, since it *avoids the paradoxical situation of leaving the solution for the problem of those owners of rights who do not wish to participate in the collective system, to this very collective management organization in which they do not wish*

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the following statement: "With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned." This is another matter since encouraging collective management does not mean making it mandatory.

to participate. This alternative legal technique is the so-called extended collective management system. The essence of such a system is that, if there is an organization which is authorized to manage certain rights by a large number of owners of rights and, if it is sufficiently representative in the given field, the effect of such collective management is extended by the law also to the rights of those owners of rights who have not entrusted the organization to manage their rights; however, with a possibility for the latter to "opt out" from the collective system.

In an extended collective management system, there should be special provisions for the protection of the interests of those owners of rights who are not members of the organization and who do not wish to participate in the collective system. Those owners of rights should have the option of freely choosing between either claiming individual remuneration (as in the case of the application of the guarantee-based system) or "opting out" (that is, declaring that they do not want to be represented by the organization). In the latter case, they should take care of the exercise of their rights. Of course, in the case of "opting out" from the collective system, a reasonable period of time should be given to the organization so that it may exclude the respective works or objects of related rights from its repertoire, however the procedure of "opting out" should be simple and not burdensome (for example, a right owner should be able to "opt out" in a simple declaration concerning all his existing and future works, without being obliged to offer an exhaustive list. Without this, the "opting out" system might be transformed into a *de facto* formality).

An extended collective management system seems to better correspond to the exclusive nature of rights and to the related requirements of the international copyright norms and/or the *acquis communautaire* than a simple "guarantee-based system". This is duly and fully recognized also under the *acquis communautaire.*

This is clearly reflected in the provisions of Articles 2 to 4 of the Satellite and Cable Directive. After that Article 2 provides that "Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works […]", and Article 3.1 adds that "Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement" (that is, it must not be subject to a non-voluntary license system), Article 3.2 outlines what is an extended collective management system. It reads as follows:

> "A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:
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> - the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and
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> - the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively."

This provision *authorizes* (the "may" language indicates this) Member States to introduce such an extended collective licensing system, which reflects the position that such an authorization is *needed*, and that, where it is not granted, in the fields expressly covered by the

acquis, no extended collective management may be appropriate (not mentioning, of course, the mandatory collective management).[13]

This is confirmed by Article 3.3 and 4 which indicate that *even the extended collective management may only be justified where it is truly indispensable, and where the right owners usually do not intend to – or could hardly – exercise their exclusive rights on an individual basis.* Article 3.3 identifies a category of works where this is not the case, providing that "[p]aragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography", while Article 3.4 underlines the exceptional nature of extended collective management by introducing a specific notification procedure.[14]

There is one more directive which refers to extended collective management: namely Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter: the Information Society Directive), which, in its recital (18), states as follows: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses."

It seems obvious, however, that this may hardly be interpreted as an authorization for applying any kinds of arrangements – including extended collective management systems – in respect of any uses and any category of protected subject matter. The principles reflected in Article 3 of the Satellite and Cable Directive certainly must be duly taken into account.

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[13] For example, the right of public performance of authors is not covered by the *acquis communautaire.* In the case of that right, for example, extended collective management may be justified (but, since it is an exclusive right, mandatory collective management obviously is not permitted).

[14] Article 3.4 provides as follows: "Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the *Official Journal of the European Communities* (C series)."