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ASSESSMENT OF "NON-DISCLOSURE CLAUSES" IN AGREEMENTS BETWEEN COLLECTING SOCIETIES AND USERS

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1. This note assesses the issue of non-disclosure clauses ("**NDAs**") in agreements between collecting societies ("**societies**") and users.

   In the context of negotiations between societies and users, NDAs bar societies from disclosing to their sister societies the terms and conditions of the licenses granted to users.

   This issue is particularly vivid in the context of negotiations with online users.

   Insertion of these NDAs is commonly requested by users in an attempt to protect their discretion in future negotiations with other societies.

   However, in a number of circumstances, these NDAs may hinder sister societies' right to manage their own repertoire.

   This note thus:

   - Offers a synthetic reminder of societies' right of control over the management of their repertoire (**I**); and
   - Briefly reviews the framework set by competition law to disclosures between societies (**II**).

I. SOCIETIES' FUNDAMENTAL RIGHT OF CONTROL OVER THEIR REPERTOIRE.

2. Enforceability of NDAs is subject to each collecting society's fundamental right of control over the management of its repertoire.

   Such right of control implies that a collecting society whose repertoire is included by a sister society in a multirepertoire license agreement is entitled to be informed of the conditions upon which users are granted access to it by this sister society[1].

[1] This control exerted by societies on their own repertoire was accepted by the European Commission in the "*Simulcasting*" decision stating that: "*In the absence of a minimum degree of control over the licensing terms, a society which contributed with its members' repertoire to the 'one-stop' package of repertoires would incur the risk that another participating society, in order to attract users, lowered the global royalty fee below the level considered to be acceptable by the former society and/or its members. In this situation, such society (and its members) would lose revenues when compared with the scenario where it did not participate in the*

As such, each society must be made aware of all of the main clauses of the agreement, and in particular the clauses relevant to the assessment of the actual remuneration to be received for the use of its repertoire. For instance, if the nominal rate provided by the agreement is combined with a deduction for "new services", this whole set of clauses would have to be disclosed.

It is thus highly recommended that societies abstain from including NDAs in their licensing agreements at least in so far as these NDAs are in contradiction with the right of control of any other society whose repertoire is included by a sister society in a multirepertoire license agreement to avoid being in a situation where their liability could be incurred.

3. This control over the management of their repertoire granted by copyright law to societies sets a clear limit to the enforceability of NDAs.

   NDAs contained in agreements between users and societies that prohibit or limit the information to be provided to societies whose repertoires are included in a multirepertoire license would constitute a clear violation of societies' right of control over their own repertoire.

   However, one must remain aware of the fact that this fundamental right of information and control over the repertoire - which implies the disclosure to societies whose repertoires are included in a multirepertoire license negotiated by a sister society of the terms and conditions agreed with users - remains subject to EU competition law constraints which clearly delimitate the extent of such disclosure.

II. COMPETITION LAW FRAMEWORK FOR DISCLOSURES BETWEEN SOCIETIES

4. Competition law prohibits the exchange of commercially sensitive information when such exchange may influence the price applied to customers (in this case users).

5. As such, in assessing the enforceability of NDAs, it is important to distinguish between on the one hand, a society's right of being informed of the terms and conditions applying to the exploitation of its repertoire, and on the other hand, fact specific situations which are likely to be considered breaches of competition law. As a consequence, limits must be set to discussions amongst societies.

   – First, the scope of the disclosure.

     Societies' rights are limited to a control over the terms and conditions applied to their own repertoire. Consequently, societies have no right to control the terms and conditions granted in the case of a pan European license by another society for its own repertoire (monorepertoire license). There is therefore no legal basis authorizing disclosure of the terms and conditions granted to users over a sole sister society's repertoire.

     Such exchanges over terms and conditions applicable to a license covering the sole sister society's repertoire could be seen as royalty fixing exchanges and fall within the scope of Article 101 TFEU.

     In this respect, it has to be recalled that Universal filed a complaint against several collecting societies alleging that these societies formed a collusion which aimed at fixing royalties for online music.

   – Second, a limit to the context of the disclosure.

Reciprocal Agreement arrangement."(emphasis added, § 111). Commission decision of 8 October 2002 relating to a proceeding under Article 81 of the EC treaty and Article 53 of the EEA Agreement – Case n° COMP/C2/38.014 – IFPI "Simulcasting", OJUE of 30 April 2003 L 107, p. 58.

Legitimate disclosure only applies to bilateral discussions amongst sister societies in relation to multi repertoire licenses.

Only bilateral discussions among sister societies are legitimate where the repertoire of a society is included in the multirepertoire license.

However, multilateral discussions amongst societies leading to the disclosure of terms and conditions, and in particular rates, negotiated between societies and users may amount to an exchange of commercially sensitive information and would likely be found to be in breach of competition law.

It is therefore essential to limit the scope of disclosure to bilateral negotiations and refrain from engaging in any discussion on applicable terms and conditions in a multilateral context.

– Third and finally, a distinction must be drawn between multi-repertoire / mono territorial licenses and multi-repertoire/multiterritorial licenses, as in the case of central licensing agreements, on a European basis.

  In the case of multi repertoire / mono-territorial licenses, societies other than the one which is granting the license are not competitors of the licensing society, as far as they do not manage a competing range of repertoires. Therefore nothing legally prevents a disclosure during negotiations.

  On the contrary, when multi-repertoire/multiterritorial licenses are at stake and when several societies are likely to compete for the grant of such a license, no information must be disclosed during negotiations. Naturally, as indicated above, once negotiations are concluded, each society may be informed of the terms and conditions applicable to its own repertoire.

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In certain instances, the terms of the NDA are very restrictive in that they limit the disclosure within the collecting society itself. Antitrust law as such doesn't allow nor prohibit such practice which has to be assessed on the basis of each society's statutes or governance rules.

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6. **As a conclusion, the inclusion of an NDA in an agreement between a society and a user would constitute a clear violation of sister societies' basic rights to control the exploitation of their own repertoire, when the repertoires of these societies are covered by the license agreement.**

7. **Nevertheless, such disclosure of the applicable terms and conditions must be limited to the specific context restricted in:**

   – **Scope, which must be limited to the disclosure of the terms and conditions applicable to the society whose repertoire is included in the license granted by the other society.**

   – **Context, which must be of bilateral negotiations between sister societies. Multilateral discussion over these terms and conditions would most likely be considered a breach of established competition law principles.**

   – **Finally a distinction must be drawn between multirepertoire/monoterritorial licenses where there is no competition amongst societies and multi-repertoire/multiterritorial agreements where societies compete against each other. In the latter case disclosure may only be authorized once the agreement has been concluded in order to allow the sister society to agree on the terms and conditions applicable to its own repertoire.**