

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7777. Complaint, Feb. 5, 1960—Decision, May 26, 1960

Consent order requiring New York City manufacturers and distributors of phonograph records to cease giving concealed "payola" to television and radio disc jockeys to induce playing their records in order to increase sales.

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

The corporate respondents: Herald Music Corp., Ember Records, Inc., Ember Distributors, Inc., all by Al Silver, president of each and all said corporate respondents, appearing *pro se*.

Al Silver, individual respondent, appearing *pro se*.

Jack Braverman, individual respondent, appearing *pro se*.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

The complaint in this proceeding was issued by the Federal Trade Commission on February 5, 1960, charging respondents with violating the Federal Trade Commission Act by paying money or other valuable consideration to disc jockeys who conduct musical programs on radio and television stations so as to induce, stimulate or motivate the said disc jockeys to select, broadcast, "expose" and promote certain recordings in which respondents have a direct financial interest.

The complaint alleges further that the said disc jockeys, in consideration of the said payments, did represent, either directly or by implication, to their listening public that the recordings "exposed" on their broadcasts had been selected as the result of their general evaluation of each such recording's merits or its general popularity with the public; whereas, in truth and in fact, one of the principal reasons or motivations, guaranteeing the record's "exposure," was the payments described above.

The complaint further alleges that such action deceived the public because it resulted in unduly influencing such exposures of the recordings and misled the public into believing that the recordings so "exposed" were the independent and unbiased selection of the disc jockeys based either on the record's merit or its public popularity.

After being duly served with a correct copy of the complaint as required by law, respondents appeared and negotiated an Agreement Containing Consent Order to Cease and Desist dated April 7, 1960, which purports to dispose of all of this proceeding as to all of the parties without the necessity of conducting a formal hearing. The Agreement for a Consent Order to Cease and Desist was accompanied by a Waiver signed by all of the respondents wherein and whereby respondents waive the application of Rules 3.21 and 3.25 of the Commission's Rules of Practice and agree that the Federal Trade Commission may proceed to act immediately on this initial decision without waiting thirty days as contemplated by Rule 3.25(f). The Agreement Containing Consent Order to Cease

and Desist, and Waiver, were received by the hearing examiner on April 18, 1960. The agreement of April 7, 1960, has been signed by the respondents, by counsel supporting the complaint, and has been approved by the Director, the Associate Director, and the Assistant Director of the Bureau of Litigation of the Federal Trade Commission. This agreement contains the form of a consent cease and desist order which the parties have agreed is dispositive of the issues involved in this proceeding. The agreement has been submitted to the hearing examiner in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive: Any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Said agreement provides further that: The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and said agreement; the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; the order to cease and desist set forth in the agreement may be entered in this proceeding by the Commission without further notice to the respondents and that, when so entered, said order shall have the same force and effect as if entered after a full hearing; said cease and desist order may be altered, modified or set aside in the manner provided for other orders; and the complaint may be used in construing the terms of the order. The agreement provides that it is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement of April 7, 1960, containing consent order, and it appearing that the order provided for in said agreement covers all of the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, the agreement of April 7, 1960, is hereby accepted and ordered filed at the same time that this decision becomes the decision of the Federal Trade Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings. The undersigned hearing examiner having considered

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the agreement and proposed order, and being of the opinion that the acceptance thereof will be in the public interest, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent Herald Music Corp., Ember Records, Inc., and Ember Distributors, Inc., are corporations, organized, existing and doing business under and by virtue of the laws of the State of New York with their office and principal place of business located at 150 West 55th Street, in the City of New York, State of New York;

Individual respondents Al Silver and Jack Braverman are president and secretary-treasurer, respectively, of each of the corporate respondents, and formulate, direct and control the acts and practices of said corporate respondents. The address of the individual respondents is the same as that of the corporate respondents;

3. Respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act;

4. The complaint herein states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the public interest.

ORDER

It is ordered, That respondents Herald Music Corp., a corporation, Ember Records, Inc., a corporation, and Ember Distributors, Inc., a corporation, and their officers, and respondents Al Silver and Jack Braverman, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any

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person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 26th day of May, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

OPTI-RAY, INC., ET AL.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7235. Order, May 27, 1960

Order modifying desist order of May 6, 1959,¹ by including a proviso in subparagraph (a) of paragraph 1.

Before *Mr. Harry R. Hinkes*, hearing examiner.

Mr. Morton Nesmith and *Mr. John J. Mathias* for the Commission.

Blumberg, Singer, Ross & Gordon, of New York City, for respondents.

ORDER MODIFYING ORDER TO CEASE AND DESIST

This matter having been heard on the respondents' motion filed September 4, 1959, requesting modification in certain respects of the outstanding order to cease and desist herein; and

¹ 55 F.T.C. 1729.

It appearing from the motion and from evidence adduced at a hearing held pursuant to the Commission's order of September 30, 1959, reopening the proceeding and referring the case to a hearing examiner, that the present public interest requires a modification of the order as hereinafter indicated:

It is ordered, That the order to cease and desist included in the hearing examiner's initial decision filed February 26, 1959, and adopted by the Commission as of May 6, 1959, be, and it hereby is, modified by substituting for subparagraph (a) of paragraph 1 thereof the following:

"(a) That their lenses have a given diopter curve unless such is the fact; provided, however, that in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus $\frac{1}{16}$ th diopters in any meridian and a difference in power between any two meridians not to exceed $\frac{1}{16}$ th diopter and a prismatic effect not to exceed $\frac{1}{8}$ th diopter shall be allowed."

It is further ordered, That the respondents, Opti-Ray, Inc., a corporation, and Leo Goldgram and Irving Goldgram, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist as so modified.

Commissioner Tait not participating.

IN THE MATTER OF
ENDEAVOR PRESS ET AL.