

...ained in the aforesaid initial decision.
Commissioner Mills not participating.

IN THE MATTER OF
GARMISA DISTRIBUTING COMPANY, INC., ET AL.

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

Docket 7781. Complaint, Feb. 12, 1960—Decision, July 6, 1960

Consent order requiring distributors of phonograph records, with main offices in Chicago and Milwaukee, to cease giving concealed "payola"—money or other material consideration—to disc jockeys of television and radio programs or others to induce broadcasting of their records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Garmisa Distributing Company, Inc., a corporation, Garmisa Inc. of Wisc., a corporation, and Leonard Garmisa, and Edward Yalowitz, individually, and as officers of said corporations, and Myron J. Schulz, individually, and as officer of Garmisa Distributing Company, Inc., hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in

respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Garmisa Distributing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 2011 South Michigan Avenue, Chicago, Ill.

Respondent Garmisa Inc. of Wisc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 1907 West Vleit Street, Milwaukee, Wis.

Respondents Leonard Garmisa and Edward Yalowitz are president and vice president, respectively, of said corporate respondents. Respondent Myron J. Schulz is treasurer of corporate respondent Garmisa Distributing Company, Inc. Said individual respondents formulate, direct and control the acts and practices of the corporate respondents of which they are officers, including the acts and practices herein set out. The address of the individual respondents is 2011 South Michigan Avenue, Chicago, Ill.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of phonograph records in various States of the United States.

In the course and conduct of their business, respondents now cause, and for some time last past have caused, the records they distribute, when sold, to be shipped from their respective places of business in the States of Illinois and Wisconsin, to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of phonograph records.

PAR. 4. After World War II, when television and radio stations shifted from "live" to recorded performances for much of their programming, the production, distribution and sale of phonograph records emerged as an important factor in the musical industry, with a sales volume of approximately \$400,000,000 in 1958.

Record manufacturing companies and distributors ascertained that popular disk jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as six to ten times a day, substantially increase the sales of those records so "exposed". Some

Complaint

57 F.T.C.

record manufacturers and distributors obtained and insured the "exposure" of certain records in which they were financially interested by disbursing "payola" to individuals authorized to select and "expose" records for both radio and television programs.

"Payola", among other things, is the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which the payer has a direct financial interest.

Disk jockeys, in consideration of their receiving the payments heretofore described, either directly or by implication represent to their listening public that the records "exposed" on their broadcasts have been selected on their personal evaluation of each record'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" is the "payola" payoff.

PAR. 5. In the course and conduct of their business in commerce during the last several years, the respondents have engaged in unfair and deceptive acts and practices and unfair methods of competition in the following respects:

The respondents alone, or with certain unnamed record manufacturers, have negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines, or to other personnel who influence the selection of the records "exposed" by the disk jockeys on such programs.

Deception is inherent in "payola" inasmuch as it involves the payment of a consideration on the express or implied understanding that the disk jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents, by participating individually or in a joint effort with certain collaborating record manufacturers, have aided and abetted the deception of the public by various disk jockeys by controlling or unduly influencing the "exposure" of records by disk jockeys with the payment of money or other consideration to them, or to other personnel which select or participate in the selection of the records used on such broadcasts.

Thus, "payola" is used by the respondents to mislead the public into believing that the records "exposed" were the independent and unbiased selections of the disk jockeys based either on each record's merit or public popularity. This deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they otherwise might not have purchased and, also,

to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records.

PAR. 6. The aforesaid acts, practices and methods have the capacity and tendency to mislead and deceive the public and to hinder, restrain and suppress competition in the offering for sale, sale and distribution of phonograph records, and to divert trade unfairly to the respondents from their competitors and substantial injury has thereby been done and may continue to be done to competition in commerce.

PAR. 7. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. John T. Walker and Mr. James H. Kelley for the Commission. Altheimer, Kabaker, Lipson & Naiburg, of Chicago, Ill., for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The complaint in this matter charges the respondents with violations of the provisions of the Federal Trade Commission Act by the payment of money or other valuable consideration to induce the playing of certain phonograph records over radio and television stations in order to enhance the popularity of such records.

On June 1, 1960, there was submitted to the undersigned hearing examiner an agreement between the above-named respondents, their counsel and counsel supporting the complaint providing for the entry of a consent order. Attached to said agreement is a letter from counsel for the respondents stating that Leonard R. Garmisa, one of the individuals who executed the agreement and waiver, is one and the same as Leonard Garmisa (no middle initial), one of the individuals named in the complaint.

Under the foregoing agreement, the respondents admit all the jurisdictional facts alleged in the complaint. The agreement provides that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact, and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have

Order

57 F.T.C.

the same force and effect as if entered after a full hearing, the respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Garmisa Distributing Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 2011 South Michigan Avenue, Chicago, Ill.

Respondent Garmisa Inc. of Wisc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 1907 West Vleit Street, Milwaukee, Wis.

Respondents Leonard Garmisa and Edward Yalowitz are president and vice president, respectively, of said corporate respondents. Respondent Myron J. Schulz is treasurer of corporate respondent Garmisa Distributing Company, Inc. Said individual respondents formulate, direct and control the acts and practices of the corporate respondents of which they are officers, including the acts and practices herein set out. The address of the individual respondents is 2011 South Michigan Avenue, Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, Garmisa Distributing Company, Inc., a corporation, and Garmisa Inc. of Wisc., a corporation, and their officers, and Leonard Garmisa, and Edward Yalowitz, individually and as officers of said corporations, and Myron J. Schulz, individually and as officer of Garmisa Distributing Company, Inc., 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 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 6th day of July, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That 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.