

It is further ordered, That the respondent, Outdoor Supply Co., Inc., shall, within sixty (60) days after service upon it of this decision, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

IN THE MATTER OF
DOLORES ENTERPRISES, INC., ET AL.

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

Docket 7832. Complaint, Mar. 18, 1960—Decision, Aug. 9, 1960

Order requiring a New York City manufacturer of phonograph records to cease giving concealed "payola"—money or other valuable consideration—to disc jockeys of television and radio programs as inducement to broadcast its records frequently and thereby increase sales.

Mr. John T. Walker and Mr. James H. Kelley for the Commission.
No appearance for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint, issued March 18, 1960, and served on respondents March 22, 1960, charges that respondents, who are engaged in the manufacture, distribution and sale of phonograph records to independent distributors for resale to retail outlets in various States of the United States, have violated the Federal Trade Commission Act, in that they, alone or with certain unnamed record distributors, have negotiated for and disbursed "payola", i.e., 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 jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

The initial hearing, set in the complaint for June 2, 1960, in the Federal Trade Commission Building, Washington, D.C., was duly held. No appearance was made at this hearing by respondents or by anyone else in their behalf. In fact, respondents stated by telegram that they would not appear. Respondents are therefore in default for answer and appearance in this proceeding, and, under § 3.7(b) of the Rules of Practice of the Federal Trade Commission, the hearing examiner is authorized, without further notice to re-

spondents, to find the facts to be as alleged in the complaint, and to enter an initial decision containing such findings, appropriate conclusions and order.

Accordingly, the following findings are made, conclusions reached, and order issued:

1. Respondent Dolores Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1674 Broadway, in the city of New York, State of New York. Respondents Dolores Fuller and Irving Spice are, respectively, President and Secretary of said corporate respondent, and formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices herein set out. The address of the individual respondents is the same as that of said corporate respondent.

2. Respondents are now, and for some time last past have been engaged in the manufacture, distribution and sale of phonograph records to independent distributors for resale to retail outlets 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 manufacture, sell and distribute, when sold, to be shipped from their place of business in the State of New York 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 said phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. Respondents are now, and at all times mentioned herein have been, in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of phonograph records. They have, alone or with certain unnamed record distributors, negotiated for and disbursed "payola" to disk jockeys broadcasting musical programs over radio or television stations broadcasting across state lines.

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.

5. 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

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.

6. "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 jockeys to select, broadcast, "expose" and promote certain records in which the payer has a 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.

7. In the course and conduct of their business in commerce during the last several years, the respondents have thus engaged in unfair and deceptive acts and practices and unfair methods of competition. 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.

8. "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. The respondents, by participating individually or in a joint effort with certain collaborating record distributors, 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.

9. 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 manufacture, 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.

10. Respondents' said acts and practices, as herein found, 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.

11. The Commission has jurisdiction over the respondents and over their acts and practices as herein found. This proceeding is in the public interest. Therefore,

It is ordered, That respondent Dolores Enterprises, Inc., a corporation, and its officers, and respondents Dolores Fuller and Irving Spice, individually and as officers of said corporation, 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, 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 shall, on the 9th day of

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Complaint

August 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Dolores Enterprises, Inc., a corpo-