

IN THE MATTER OF
APEX PRODUCING CORPORATION ET AL.

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

Docket 7902. Complaint, May 20, 1960—Decision, Apr. 11, 1961

Consent order requiring Chicago distributors of phonograph records to cease giving concealed "payola" to disc jockeys and other personnel of television and radio programs to induce frequent playing of their recordings in order to increase sales.

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 Apex Producing Corporation, a corporation, and Dempsey Nelson, Jr., individually and as an officer of said corporation, 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 Apex Producing Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 951 East 47th Street, Chicago 15, Illinois.

Respondent Dempsey Nelson, Jr. is president and treasurer of said corporate respondent and formulates, directs and controls the acts and practices of said corporate respondent including the acts and practices herein set out. The address of the individual respondent is the same as that of said corporate respondent.

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 place of business in the State of Illinois, 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 disc jockeys could, by "exposure" or the playing of a record day after day, sometimes as high as 6 to 10 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.

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

Disc 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 have negotiated for and disbursed "payola" to disc 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 disc 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

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the disc jockey will conceal, withhold or camouflage such fact from the listening public.

The respondents have aided and abetted the deception of the public by various disc jockeys by controlling or unduly influencing the "exposure" of records by disc 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 disc 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 for the Commission.

Respondents, *pro se*.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on May 20, 1960, charging them with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On February 24, 1961, there was submitted to the undersigned hearing examiner an agreement between the above-named respondents and counsel supporting the complaint providing for the entry of a consent order.

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Under the terms of the agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it 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 finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued:

1. Respondent Apex Producing Corporation is a Delaware corporation with its office and principal place of business located at 951 East 47th Street, Chicago, Illinois. Individual respondent Dempsey Nelson, Jr., is president and treasurer of said corporate respondent and his address is the same as that of the corporate respondent.

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 Apex Producing Corporation, a corporation, and its officers, and Dempsey Nelson, Jr., individually and as an officer 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, and the broadcasting of, any such records in which

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respondents, or either of them, having a financial interest of any nature.

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, an 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 either 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 11th day of April 1961, 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.
