
IN THE MATTER OF
CHESS RECORD CORP. ET AL.

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

Docket 7723. Complaint, Jan. 6, 1960—Decision, Sept. 2, 1961

Order dismissing—for the reason that specific statutes have been enacted by Congress adequately protecting the public interest since its issuance—complaint charging three affiliated record concerns in Chicago with giving illegal “payola” to disc jockeys and other personnel of radio and television stations.

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 Chess Record Corp., a corporation, Argo Record Corp., a corporation, Checker Record Co., a corporation, and Leonard Chess and Phil Chess, individually, and

Complaint

59 F.T.C.

as officers of said corporations, 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. Respondents Chess Record Corp., Argo Record Corp., and Checker Record Co. are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal office and place of business located at 2120 South Michigan Avenue, in the City of Chicago, State of Illinois.

Respondents Leonard Chess and Phil Chess are president and secretary-treasurer, respectively, of the corporate respondents, and formulate, direct and control the acts and practices of said corporate respondents, including the acts and practices herein set out. The address of the individual respondents is the same as that of said corporate respondents.

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 record 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 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.

"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 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 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. Arthur Wolter, Jr., for the Commission.

Mr. A. Bradley Eben, Chicago, Ill., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission on January 6, 1960, issued its complaint against the above-named respondents charging them with having violated the Federal Trade Commission Act by reason of their engagement in unfair and deceptive practices and unfair methods of competition in that the respondents are alleged to 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. It is further alleged in the complaint that deception is inherent in "payola" inasmuch as it involves the payment of money or consideration on the expressed or implied understanding that the disk jockeys will conceal, withhold or camouflage such fact from the listening public.

An answer to the foregoing complaint was filed on March 28, 1960. This answer is essentially a general denial except that the respondents admit that the sales of phonograph records have been to distributors and jobbers located in various states of the United States.

Subsequent to the filing of the aforesaid answer the hearing dates ordered by the undersigned hearing examiner have been rescheduled and the hearing of the case adjourned at the request and consent of counsel for respondents and counsel supporting the complaint. On January 17, 1961, hearings in the above-entitled matter were cancelled in accordance with the request of counsel subject to being rescheduled on ten (10) days' notice if the trial of the issues was required. No hearings have ensued since the issuance of the foregoing order.

On June 2, 1961, prior to the offering of any evidence herein, counsel supporting the complaint submitted a motion requesting that the complaint be dismissed without prejudice. The basis for this recom-

mentation is set forth in the motion of counsel supporting the complaint as follows:

Subsequent to issuance of the complaint on January 6, 1960, in this matter, Congress amended Section 317 of the Communications Act of 1934 (47 U.S.C. 317), requiring disclosure that broadcast matter has been paid for, so as to exempt from the announcement requirement that the furnishing of "any service or property furnished without charge or at a nominal charge" where such service or property is not to be identified beyond that "which is reasonably related to the use of such service or property on the broadcast." (Public Law 86-752; 74 Stat. 889). In the Report of the House Committee on Interstate and Foreign Commerce (H. Rept. No. 1800, 86th Congress, 2d Sess.) which accompanied the bill (S. 1898) that became the "Communications Act Amendments, 1960" a number of examples were given to illustrate what the exempting proviso was intended to permit. According to one of the examples given a record distributor, may under the amended act, furnish records to a radio station or a disk jockey without requiring an announcement unless the number of copies of a particular release exceeds the number required for broadcast purposes. Similarly, the House Committee Report cites a situation where a Coca Cola distributor may properly furnish to a station a Coca Cola dispenser for use in a drug store dramatic scene without any announcement being made. Prior to the amendment, the receipt of any records, merchandise as a prop, or consideration in virtually any form, had been interpreted as requiring an appropriate announcement. See Public Notice of Federal Communications Commission dated March 16, 1960 (FCC 60-239, PUBLIC NOTICE 85460).

Following enactment of the amendment the Federal Communications Commission, under date of September 21, 1960, issued a public notice (FCC 60-1141, 93746, PUBLIC NOTICE-G) declaring "that, to the extent that its Rules and Regulations or interpretations are inconsistent with those provisions of the new act which are now in effect, the Rules and Regulations and interpretations will be considered to be superseded thereby." The Federal Communications Commission further stated in said September 21, 1960, release that until further interpretative and clarifying announcements and rules can be issued, all interested parties may consider the examples set forth in the House Committee Report as "useful indications of Congressional intent underlying the September 13, 1960 amendment to the Commission Act."

In addition, the "Communications Act Amendments, 1960" added an entirely new section (Sec. 508) which not only requires disclosure of the receipt of any valuable consideration (unless announcement is waived under Sec. 317) on the part of a broadcast licensee employee but also requires disclosure of "any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration . . ." Violation of this section constitutes a criminal offense enforceable on action of the Attorney General.

Since the disclosure requirements with respect to furnishing consideration to persons connected with broadcast licensees and the receipt thereof by the latter have been modified as a result of specific Congressional action, counsel supporting the complaint considers the continued prosecution of this matter an unnecessary expenditure of time, effort and funds in determining the legality of the alleged practice since the protection of the public interest is now fully assured by specific statute.

Counsel supporting the complaint, therefore, respectfully submits that the dismissal of this matter will in no way impair or derogate the public interest

It would appear from these recommendations of counsel supporting the complaint that the Communications Act of 1936 has been amended in several particulars, and that as a result of these amendments the continued prosecution of this matter is an unnecessary expenditure of time, effort and funds in determining the regularity of the alleged violations since the protection of the public interest is now fully assured by specific statute. It would further appear that respondents offer no objection to the granting of this motion since no answer or reply thereto has been filed subsequent to the filing of the motion on June 5, 1961.

After considering the motion to dismiss, the law and the amendments referred to therein and the omission of counsel for respondents to reply thereto, the hearing examiner accepts the reasons offered in support of the motion and concurs in the opinion of counsel in support of the complaint that the dismissal, without prejudice, of the complaint herein will in no way impair or derogate the public interest even though the statutory amendments heretofore referred to do not vitiate the jurisdiction of the Federal Trade Commission in the within matter. Accordingly, it is

Ordered, That the complaint herein be, and the same hereby is, dismissed, without prejudice to the right of the Federal Trade Commission to initiate further proceedings against the respondents, should future circumstances or events so warrant.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall, on the 2d day of September 1961, become the decision of the Commission.

IN THE MATTER OF

JACK M. BERRY & COMPANY, INC.