

IN THE MATTER OF
COLUMBIA BROADCASTING SYSTEM, INC., ET AL.
ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8512 Complaint, June 25, 1962—Decision, July 25, 1967

Order requiring the Nation's leading producer and distributor of phonograph records to cease lessening competition in the mail order record market by conspiring with other record manufacturers to fix or control royalties paid recording artists, costs of records, and preventing other record clubs from acquiring phonograph records of certain manufacturers on the same terms as respondent acquires such 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 Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., hereinafter referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Sec. 45), 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:

[As hereinafter used, the following terms will have the designated meanings:

- "Artist" — Instrumental, vocal or recitative performer who records for a producer or manufacturer of records.
- "Catalog" — A printed listing of all available phonograph records by title offered to customers by a manufacturer or producer under his labels.
- "Dealer" — A retailer primarily engaged in over-the-counter selling of phonograph records, musical supplies and related products to ultimate consumers.
- "Disc"
(or "Record") — A phonograph record either seven inches or twelve inches in diameter.
- "Jacket" — A cardboard cover, enclosing an LP, showing the names of the selections and artists, and sometimes depicting the artist.

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- "Label" — The manufacturer's trade name or trade style under which a record is merchandised.
- "r.p.m." — Speed in revolutions per minute of turntable.
- "LP" — A long-playing, twelve inch disc designed to be played on a turntable revolving at $33\frac{1}{3}$ r.p.m.
- "Single" (or "45") — A seven inch disc designed to be played on a turntable revolving at 45 r.p.m.
- "Master" (or "Master recording") — An original recording or duplicate thereof embodying the performance of an artist on magnetic recording tape or wire or on a lacquer or wire disc or other material from which a phonograph record may be manufactured.
- "Licensed Master" — A master to which the right to manufacture, distribute, sell and advertise has been granted.
- "Press" — Manufacture (records)
- "Subscription method" (or "Club method") — A method of direct sale whereby the consumer contracts to buy a specified number of records within a designated period of time.]

COUNT I

PARAGRAPH 1. Respondent Columbia Broadcasting System, Inc., hereinafter referred to as CBS, is a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at 485 Madison Avenue, New York 22, New York. It maintains eight operating divisions, including News, Television Network, Television Stations, Radio, Electronics, Laboratories, International Divisions and Records. During 1960 its total volume of business amounted to approximately \$464,500,000.

Respondent CBS, through its Columbia Records Division, hereinafter referred to as Division, is now, and for many years last past has been, engaged, directly or indirectly, in the recording, manufacture, sale and distribution of phonograph records. Said records bear respondents' labels, including: "Columbia"; "Epic"; "Perfect"; "Stereo 7"; "Alpine"; "Legacy"; "Harmony" and

"Okeh". It is the largest manufacturer of phonograph records in the United States, owning and operating four pressing plants located in Bridgeport, Connecticut; Pitman, New Jersey; Terre Haute, Indiana and Los Angeles, California.

Respondent CBS, through Division, manufactures LPs and singles from masters embodying performances it has recorded. CBS sells and distributes said LPs and singles through approximately eleven wholly owned distributors to dealers and others for resale to members of the public; and to approximately twenty-eight independent distributors for resale to dealers and others. In addition, CBS sells and distributes LPs directly to members of the purchasing public through the Columbia Record Club, a wholly owned subsidiary, hereinafter described.

During 1960 CBS' net sales of records amounted to more than \$54,000,000. Its expenditures for advertising and sales promotion, excluding amounts expended by the Columbia Record Club and by a subsidiary through which distribution to its wholly owned branches is effected, amounted to approximately \$2,156,406.

PAR. 2. During 1955, respondent CBS formed and put into operation the Columbia Record Club, Inc., hereinafter referred to as Club, a wholly owned corporate subsidiary of CBS. The Club is a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at 799 Seventh Avenue, New York, New York.

The Club conducts a subscription method of business through which it offers to sell, sells and ships LPs to members of the purchasing public, located throughout the United States, pursuant to contracts whereby the Club member chooses a specified number of records, in accordance with an initial offer, hereinafter referred to as an "enrollment offer," at a special price in return for a commitment to purchase a specified additional number of records within a year at the "regular list price." The "regular list price" as used in this connection, and sometimes hereinafter referred to as "suggested list price," is the price at which CBS suggests that dealers resell its records to members of the purchasing public at retail. The suggested list prices of the majority of records offered through the Club are \$3.98, \$4.98, \$5.98 and some at \$6.98. After a member has fulfilled his contractual commitment he is eligible to receive a "bonus" or "free" record for each two additional records purchased at specified regular list prices. Respondents maintain warehouses in Terre Haute, Indiana; Brooklyn, New York and Santa Barbara, California, from which points the Club ships records to its members.

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Respondent CBS, through the Club, engages in extensive advertising and promotional campaigns by direct mail, newspapers and nationally circulated magazines. For example, during 1960, advertising expenditures were approximately 5½ million dollars. Its advertisements appeared in such newspapers as the New York Times, Chicago Tribune and many others as well as in such magazines as Life, Time, Saturday Evening Post, Esquire, Holiday, Good Housekeeping, National Geographic, and numerous others.

An actual and representative advertisement of the Club directed to the attention of members of the public reads, in part, as follows:

* * * the greatest savings ever offered by any record club **BRAND-NEW SELECTION**—Today's best-selling albums from America's leading record companies—exclusively from the *Columbia* record club! Any 6 of these superb \$3.98 to \$6.98 long-playing 12-inch records—in your choice of **REGULAR** high fidelity **OR STEREO** for only \$1.89 if you join the Club now and agree to purchase as few as 6 selections from the more than 400 to be made available during the coming 12 months * * * at regular list price plus small mailing and handling charge. * * *

Through this device members of the public who take advantage of CBS' enrollment offer are able to purchase phonograph records at prices that are substantially lower than the prices paid for the same phonograph records by dealers who compete with the Club in selling or attempting to sell to ultimate consumers. Moreover, a Club member meeting his entire year's obligation pays prices that are lower per record than those paid by said dealers.

As a result of respondents' extensive promotional campaign, together with the wide choice of recordings afforded the consumer by reason of respondents' control of the works of numerous artists pursuant to licensing arrangements, hereinafter described, the approximate net sales and membership of the Club have increased annually as follows:

Year	Net sales (Excluding mailing and handling charges)	Number of Members
1955 (Aug. 15 through Dec. 31)	\$1,174,000	125,175
1956	7,401,000	409,084
1957	14,888,000	687,652
1958	23,629,000	993,104
1959	30,391,000	1,052,060
1960 (Jan. through Oct.)	30,590,000	1,322,297

PAR. 3. Respondents, in the course and conduct of their business, ship their records, hereinafter referred to as "products" whether produced from owned or licensed masters, as hereinafter described,

or cause said products to be shipped from the place or places of manufacture and have been, and now are, engaged in "commerce," as that term is defined in the Federal Trade Commission Act.

Respondents, in the course and conduct of their business are in competition in commerce, as hereinafter described, with other manufacturers, including licensors, as hereinafter described, and with dealers except insofar as such competition has been lessened, restrained or otherwise injured, as hereinafter alleged.

PAR. 4. Phonograph records are mechanical reproductions of masters embodying musical and other performances by well-known and famous artists. Said performances are unique, distinctive and nonsubstitutable. As they grow in popularity, public demand is created for the specific artist, performance and label under which the recording has been produced. As a result, dealers are obliged, for business reasons, to stock all, or as many as feasible, of the recordings that have become popular under specific labels. Correspondingly, the success of a record manufacturer is enhanced by increasing the number of masters and labels it can control and promote. Customarily included among such recordings are those manufactured from original masters of CBS and those manufactured from licensed masters, as hereinafter defined.

Respondent CBS, through its ability to recruit and otherwise obtain control of the works of artists and through its control of manufacturing and distributional facilities, is an important factor in the business of manufacturing, distributing and selling phonograph records, and the records so manufactured and distributed by it constitute an essential and substantial element in the operation of retail phonograph record businesses operated in the United States. Prior to 1958 respondents advertised, sold and distributed through the Club, LPs that were produced from masters owned and controlled by CBS and bearing the labels "Columbia" and "Epic." From 1958 to the present, an important part of respondents' promotion of the Club through newspaper, magazine and other advertisements, has consisted of advertisements depicting to and otherwise informing members of the public that offerings of the Club include numerous LPs produced under labels other than, and in addition to, "Columbia" and "Epic."

PAR. 5. Dealers are compelled to stock a substantial number of records produced from masters owned or controlled by CBS as well as from the licensed masters, as hereinbelow discussed. Said dealers are in competition with the Club for the patronage of members of the purchasing public who are the ultimate consumers of said products. Said dealers are compelled to pay higher prices

than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors, as hereinbelow discussed. For example, an ultimate consumer who joins the Club pursuant to the terms of the representative offer set forth in Paragraph Two, *supra*, and who orders only popular LPs bearing suggested list prices of \$3.98, pays \$1.89 for his first six LPs and \$3.98 each for the next six LPs purchased during the first twelve months of his enrollment. Said consumer pays a total of \$25.77 for twelve LPs, exclusive of the advertised "small mailing and handling charge," or an average of \$2.14 per LP. Said consumer may choose freely among LPs manufactured from original masters of CBS as well as from LPs manufactured from licensed masters, as hereinbelow discussed, in determining which records he will receive pursuant to his enrollment offer of six records for \$1.89 as well as pursuant to his purchase of six additional records at suggested list price. At the same time dealers are obliged to pay the price of \$2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as \$2.22 each for records of the same grade and quality, exclusive of cost of delivery.

PAR. 6. In 1958, and from time to time thereafter, CBS has entered into contracts, hereinafter referred to as Licensing Agreements, with various manufacturers of phonograph records, hereinafter referred to as Licensors. The said Licensing Agreements provide that the Licensor shall grant to CBS, for the purpose of sale by direct mail as distinguished from over-the-counter sale by retail store outlets, the sole and exclusive right, privilege and license to manufacture, distribute, sell and advertise under the Licensor's label or labels, through the Club, to ultimate consumers, LPs manufactured from all original masters owned or controlled by the Licensor at the time the Licensing Agreement is negotiated and also those acquired during the term of the Licensing Agreement. Original masters thus obtained are referred to herein as Licensed Masters. The Licensing Agreements provide that CBS shall pay royalties to the Licensor computed upon a percentage of net sales, as defined in each Agreement.

From 1958 and as of September, 1961, CBS had pressed approximately 6,685,419 LPs pursuant to the Licensing Agreements; the said LPs produced by respondents have been offered for sale and sold under the Licensors' labels through the Club. From 1958 and as of October, 1961, CBS paid royalties to the Licensors, pursuant to the Licensing Agreements, approximately in the amount of

\$656,425.97. As of November 1961, the Club had used and sold LPs representing approximately 331 titles, collectively, from the Licensors' Catalogs. The exclusivity provisions of said Licensing Agreements, as hereinafter discussed, have foreclosed access by actual and potential mail-order competitors, to more than 1000 records representing more than 450 important artists.

Generally, the Licensing Agreements are effective for three or more years and are renewable at the option of respondents. The approximate dates of execution of the Licensing Agreements, names of the Licensors, names of their labels, examples of the types of recordings produced by each, and names of some of the leading artists and titles thereof, are set forth as follows [p. 34] :

PAR. 7. The Licensors are competitors of CBS in the manufacture, sale and distribution of phonograph records, including singles and LPs. The LPs, produced by said Licensors from duplicate Licensed Masters, have been and are among the most popular, by type, by label and by artist, in the industry and are included among those phonograph records that dealers are obliged to stock, as hereinabove discussed.

The exclusivity provisions of all the Licensing Agreements, except that with Vanguard, preclude the Licensors from offering or selling any of their products by direct mail to consumers and from offering or selling any of their products or licensing any of their masters to any third party for the purpose of offering for sale or selling said products by direct mail to consumers. However, said Licensors may and do produce records from masters that are duplicates of and identical to the Licensed Masters and sell them, directly or indirectly, to dealers for resale to consumers.

The Licensing Agreements further provide as follows:

1. No royalty shall be payable with respect to records distributed to members of the Club as a result of an enrollment offer or those distributed as "bonus" or "free" records.

2. Respondents shall use the Licensor's label or labels on all phonograph records manufactured from the Licensed Masters as well as on jackets or other such customary containers for such records.

3. The Licensors "recognize" that it is the policy of respondents to pay no more than half of customary artist royalty with respect to records sold by the Club and the Licensors "agree in general to conform to this policy."

In addition, various of the respective Licensing Agreements contain provisions that:

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Date	Licenser	Label	Type	Artists
May 1958	Caedmon Publishers	"Caedmon"	Spoken Word	Basil Rathbone Robert Frost
March 1959	Verve Records, Inc.	"Verve"	Popular Jazz	Ella Fitzgerald Gene Krupa Shelly Berman
April 1960	Mercury Record Corp.	"Mercury" "Emarcy"	Novelty Popular Classical	Patti Page Antal Dorati
September 1960	Warner Bros. Records, Inc.	"Warner Bros."	Popular Specialty	Everly Bros. Bob Newhart
October 1960	Kapp Records, Inc.	"Kapp" "Medallion"	Popular	Jane Morgan Roger Williams
June 1961	Vanguard Recording Society, Inc.	"Vanguard"	Folk Classical Spoken Word	Odetta Mischka Elman Charlton Heston
July 1961	United Artists Records, Inc.	"United Artists"	Popular and Motion Picture Sound Track	Eydie Gorme Steve Lawrence "Never on Sunday"
October 1961	Liberty Records, Inc.	"Liberty"	Novelty Popular	David Seville ("Chipmunks") Julie London
January 1962	Bernard Lowe Enterprises, Inc.	"Cameo" "Parkway"	Popular	Chubby Checker Bobby Rydell

1. The Licensor is restricted with respect to release dates of records produced by it from duplicate Licensed Masters to be distributed, directly or indirectly, to dealers.

2. The Licensor agrees not to offer records manufactured from duplicate Licensed Masters "for sale (to distributors) at distress prices."

3. The price at which the Club sells records manufactured from certain Licensed Masters "shall be not less than the price at which a similar * * * (type and kind) recording on the 'Columbia' label" is being sold by the Club.

4. The Licensor agrees not to reduce the suggested list price of his LPs "for sale through normal retail channels" without giving six-months written notice to CBS.

5. The Licensor agrees not to sell to certain specified subscription method sellers.

PAR. 8. During the past ten years, the industry has witnessed an increasing demand for records as a medium of home entertainment. The development of improved techniques in the manufacture of record players and in the mechanical reproduction of performances of artists has contributed in part to such increased demand. In this period, for example, the LP was introduced and so gained acceptance as to account presently for approximately 80% of the money spent by members of the purchasing public for records. Such consumer interest has reflected itself in an increase of sales of records for the period 1950 through 1960 of more than 200%.

The long-playing record market has been for many years last past and is now dominated by three companies: CBS; RCA Victor Record Division of Radio Corporation of America, hereinafter referred to as RCA; and Capitol Records, Inc., hereinafter referred to as Capitol.

PAR. 9. Historically, the large majority of records distributed by manufacturers were offered for resale to consumers through dealers. Other methods of distribution to the consumer have arisen in recent years; one of these has been the Club method by means of which the consumer may purchase directly from the manufacturer. Subsequent to the formation of the Columbia Record Club, RCA and Capitol began their own respective record Clubs which they presently operate in competition with respondents as well as with dealers. Initially, each of the said three Clubs offered only records produced from its own masters and bearing its own labels, to the consuming public. RCA and Capitol have continued to operate in this manner. The said three Clubs presently account for approximately 20% of the money spent by members of the pur-

chasing public for records; of that percentage figure, the CBS share is approximately half.

Respondents' acts and practices, separately and cumulatively, set forth hereinbefore in connection with the Licensing Agreements, have had and now have the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition.

The approximate percentages of market shares of the said three companies, collectively, and of CBS, individually, during 1960, were as follows:

PERCENTAGES OF TOTAL MARKET SHARES

	CBS, RCA and Capitol aggregate	CBS
All records	40	20
All LP's	50	24
Classical LP's	75	28
Original "cast" LP's	90	50
Subscription Method LP's (Clubs)	97	53

PAR. 10. The aforesaid Licensing Agreements, individually and collectively, have a dangerous tendency unduly to hinder competition or tend to create a monopoly and are being engaged in for the purpose, or with the effect, of creating in respondents the undue power, and respondents have in fact regularly exercised the power, to:

1. Fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products.
2. Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers.
3. Divide or allocate various markets and channels of distribution in connection with the sale or offering for sale of LPs produced under the Licensors' labels by respondents and the Licensors from Licensed Masters or duplicates thereof.
4. Establish and compel the Licensors to adhere to a fixed differential between the amounts paid as artist royalties for records sold to members of the public through dealers and the amounts paid as artist royalties for records sold to members of the public through the Club.
5. Hinder, lessen or suppress competition between respondents and the Licensors and between respondents and other manufacturers of phonograph records.

6. Hinder, lessen or suppress competition between respondents and other companies engaged in the subscription method of selling phonograph records.

7. Hinder, lessen or suppress competition between respondents and dealers in the sale of all phonograph records, including LPs produced under the Licensors' labels by respondents and by the Licensors from Licensed Masters or duplicates thereof.

8. Exclude from the market, or potentially to exclude, dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the Licensors and who have been, and would be now, in actual and open competition with the Club were it not for the competitive disadvantage to which they are subjected by respondents' aforesaid acts and practices engaged in pursuant to said Licensing Agreements.

9. Monopolize or attempt to monopolize the manufacture, sale and distribution of LPs generally, and of LPs sold through the subscription method of distribution.

PAR. 11. The aforesaid method of offering for sale and selling, directly or indirectly, LPs manufactured from respondents' original masters to dealers at prices higher than those charged to consumer-customers of the Club is unfair; has the capacity, tendency and purpose or effect of establishing and maintaining a competitive advantage to the Club over the dealer; has the dangerous tendency unduly to hinder competition between respondents and dealers in the sale of phonograph records; and has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally, and the retail sale and distribution of LPs.

PAR. 12. The acts, practices, methods and agreements of respondents, separately and cumulatively, as hereinabove alleged, are all to the prejudice of competitors of respondents; have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondents' record Club over dealers and over respondents' subscription method competitors; have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-

playing phonograph records and in the manufacture, sale and distribution of all phonograph records; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraphs One through Nine of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. In the course of operating the Club, respondent CBS has engaged, and is presently engaged in placing or causing to be placed advertisements directed to members of the purchasing public.

Said advertisements contain, among other things, references to and illustrations of various LPs bearing respondents' trademarked names "Columbia" and "Epic" and various LPs bearing the trademarks and other names of the aforesaid Licensors. Said advertisements also contain certain depictions, statements and claims that represent, among other things, to members of the purchasing public the following:

1. That they may purchase "Any 6 of these superb \$3.98 to \$6.98 long-playing 12-inch records * * * for only \$1.89."
2. That certain combinations of six of the depicted LPs have a "retail value up to \$36.88" or a "retail value up to \$37.88."
3. That the subsequent purchase of "six selections from more than 400 to be offered during the coming 12 months," pursuant to the Club member's contractual obligation, will be made "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge."

PAR. 3. Through the use of the aforesaid statements and the amounts in connection with the terms "retail value," "regular list price" and "usual list price," respondents have represented and now represent that said amounts are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, and through the use of said amounts and the lesser amounts that the difference between said amounts represents a saving to the purchaser from the price at which said merchandise is usually and customarily sold in said trade areas.

PAR. 4. In truth and in fact, the amounts set out in connection with the aforesaid statements and the terms "retail value," "regu-

lar list price" and "usual list price," were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, but are in excess of the price or prices at which the merchandise is generally sold in said trade areas, and purchasers of respondents' merchandise would not realize a saving of the difference between the said higher and lower price amounts.

The aforesaid representations have been and are, therefore, false, misleading and deceptive.

PAR. 5. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and have constituted, and now 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.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

SEPTEMBER 30, 1964

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PRELIMINARY STATEMENT

Statement of Proceedings

The complaint in this matter was issued June 25, 1962, charging Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., with violation of the Federal Trade Commission Act in the sale of phonograph records. Respondents were duly served and filed answer on September 4, 1962, admitting certain of the factual allegations of the complaint but denying generally any violation of law.

The case was initially assigned to another hearing examiner, and two prehearing conferences were held under his auspices—on September 12, 1962, and October 10, 1962.

On November 30, 1962, the case was reassigned to the present hearing examiner. A further prehearing conference was held on January 3, 1963.

Hearings began January 16, 1963, and concluded on August 9, 1963. Sessions were held in New York, Philadelphia, Washington, Chicago and Los Angeles. There were some recesses, but the trial continued substantially on a day-to-day basis.

The record consists of nearly 11,000 pages of trial transcript and approximately 1,400 exhibits, consisting of thousands of pages of textual, statistical and tabular material, in addition to a large volume of advertisements of respondents and their competitors.

The case in support of the complaint was rested April 15, 1963. The respondents opened their defense case on May 6, 1963, and

rested July 31, 1963. Hearings for the reception of rebuttal evidence began August 7 and ended August 9, 1963.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, were filed by counsel supporting the complaint and counsel for respondents. Voluminous replies to those proposals and briefs were filed by counsel for both parties.

Because of the fact that this is a "big case," with a staggering record, there was a deviation from the timetable normally prescribed under § 3.21 of the Commission's Rules of Practice (August 1, 1963).

The normal 90-day deadline for filing the initial decision after closing of the hearings was extended to allow counsel for the parties adequate time in which to prepare and present their respective proposals and contentions, as well as to afford the hearing examiner an opportunity to consider such proposals and contentions and to review the voluminous record, in order to reach an informed determination of the issues and to prepare an appropriate initial decision.

The proposed findings and supporting briefs of both parties were filed January 22, 1964. Exceptions and reply briefs were filed April 1, 1964. The submittals and counter-submittals of the parties totaled 1,409 pages.

The examiner heard oral argument on April 28, 1964. Counsel there added 173 pages to the transcript to bring the total to 11,147 pages.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions and order filed by both parties, as well as their respective replies, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of the witnesses,

hereinafter makes findings of fact, enters his conclusions drawn therefrom, and issues an appropriate order.

Statement of the Case

The issues and the opposing contentions of counsel are set forth in detail in the Memorandum Opinion *infra*. However, a brief outline of the charges contained in the complaint is appropriate here. In summary, the complaint—

(1) Challenges the legality of licensing agreements between the Columbia Record Club and certain smaller record manufacturers (outside labels) providing for Club distribution.

(2) Accuses Columbia of monopolizing, attempting to and tending to monopolize the entire record industry as well as various claimed submarkets.

(3) Alleges that the Club sells Columbia records and records of the outside labels to consumers at lower prices than dealers pay and that this alleged differential is unfair.

(4) Alleges that the advertising employed by the Club is misleading.

The practices are alleged to be unfair and deceptive and to constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Explanatory Notes

Record References—As required by § 3.21(b) (1) of the Commission's Rules of Practice, the findings of fact include references to principal supporting items of evidence in the record. Such references to testimony and exhibits are thus intended to comply with that Rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact. It should be understood that they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record in connection with such proposals.

References to the record are made in parentheses, and the abbreviations used are as described *infra*.

Supplemental Findings—The findings made and conclusions reached by the examiner on certain subjects made it unnecessary for him to discuss in his primary findings certain matters that might be significant if a contrary decision were to be made. For example, the examiner has ruled that it is not appropriate to

consider LPs as a separate market in this proceeding, and findings on such a purported market thus are inapposite.

However, against the possibility that the Commission may take a different view, the examiner has made supplemental findings on such subjects and incorporated them in an Appendix. If the Commission should reverse as to any of such matters, the delay attendant upon a remand for further findings will be avoided.

Abbreviations—Certain abbreviations are used in the course of this initial decision. Commission exhibits are abbreviated *CX*; respondents' exhibits, *RX*. References to testimony ordinarily cite the name of the witness and the transcript page number—for example, Ackerman 4165. Otherwise, the abbreviation "Tr." is used.

Counsel supporting the complaint are ordinarily referred to as Government counsel or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

The voluminous post-trial submittals of counsel have been necessarily abbreviated. The proposed findings of fact of Government counsel are abbreviated *CPF*, coupled with a paragraph number. The Government's brief is referred to as *Argument*, with page citation, and the Government's reply to respondents' submittals is simply referred to as *Reply*, again with page citations.

The proposed findings of respondents are abbreviated *RPF*, accompanied by a paragraph number. Respondents' exceptions to the proposed findings of the Government are referred to as *Exceptions*. Respondents' main brief is designated *Memorandum* and its reply brief as *Reply Memorandum*.

In Camera Exhibits—In certain of the findings, the examiner has disclosed information contained in exhibits held *in camera*. Such action was taken advisedly and in conformity with the provision of Paragraph III (D) of the examiner's order dated January 2, 1964, entitled "Order Ruling on Requests for *In Camera* Treatment of Documents." That paragraph provided that—

The right of the hearing examiner and the Commission to disclose or use *in camera* material or information to the extent necessary for the proper disposition of this proceeding is specifically reserved.

That reservation was based, in turn, on § 1.133 of the Commission's Statement of *General Procedures* (August 1, 1963). That section provides for confidentiality of evidence *in camera* but recognizes that "its use may become necessary in connection with adjudicative proceedings."

As the examiner interprets the cited provision, *in camera* status does not preclude the examiner or the Commission from disclosing,

in findings or opinions, such data as may be necessary for an adequate and informative exposition of the factual or legal issues involved in a particular proceeding. To the extent that *in camera* material has been published, it was done on that basis.

FINDINGS OF FACT

I. The Phonograph Record Industry

The phonograph record industry is a relatively new industry which began around the turn of the century, following Thomas Edison's invention of the phonograph. When Columbia entered the industry in 1938, total sales to consumers had been in a state of decline for almost two decades. From over \$100,000,000 in 1921, sales had dropped to \$26,000,000 in 1938.

By way of contrast, sales in 1961 had climbed to \$587,000,000 (CX 199b; Lieberman 4774).

In the late Thirties, records were being sold in a relatively small number of retail shops with little active promotion or advertising (Gallagher 8848). Record companies were few in number; even fewer had national distribution (Ackerman 4228).

The industry consisted basically of two companies, Radio Corporation of America (hereinafter referred to as "RCA") and Decca Records, which together accounted for approximately 75% of total sales. RCA was substantially larger than Decca; it had the most extensive classical catalog, contracts with the leading artists and symphony orchestras, and over 90% of classical record sales (Lieberman 4775-80; Chapin 7292-94).

Columbia's entry had its impact. It immediately set out to develop its catalog. In the area of classical music, it began recording works by contemporary composers, entered into agreements with classical artists and orchestras, and in 1940 cut its prices in half. In the field of popular music, Columbia began to discover and develop new talent (Lieberman 4781-85; Miller 7139-42).

Other companies entered the industry in the next decade and retail sales grew, but by the end of the 1940's there were still relatively few record companies, and only six or seven of any stature (CX 199b; Miller 7139, 7144).

Technological Developments

Until 1948, the industry had produced primarily "78s"—records which revolved on a phonograph turntable at a speed of 78 revolutions per minute (r.p.m.). The 78 r.p.m. record was

generally ten to twelve inches in diameter and contained three to four minutes of playing time on each side. In the field of popular music, 78s usually contained one song per side; on the other hand, symphonies and other long classical works, generally packaged in sets or albums, often required five or more separate records. Made of shellac, the 78s were breakable, bulky and heavy (Lieberson 78-79, 4783-84, 4792-93; Marek 1862; CX 192, p. 14; RX 44, p. 24).

Shortly after its entry into the industry, Columbia began experimenting with the development of a long-playing record (hereinafter referred to as the "LP") which operated on a phonograph turntable at a speed of $33\frac{1}{3}$ r.p.m. After years of laboratory research and development, Columbia introduced the LP commercially in 1948.

By turning at a slower speed than the 78 r.p.m. record, the LP provided more playing time. Usually twelve inches in diameter, the LP afforded 25 to 30 minutes of recorded music on each side—or the equivalent of six or more 78s. Made of vinyl, the LP was nonbreakable, lighter, less bulky, easier to store and provided better sound than the 78 r.p.m. shellac record.

The LP, moreover, practically cut the price of recorded music in half. For example, Handel's "Messiah," which formerly required up to eighteen 78 r.p.m. records costing about \$18, became available to consumers on two LPs at half the price; "South Pacific," which sold for about \$8 to \$9 on seven 78s, sold for about half that price on one LP; and a full-length performance of "Aida," which formerly required about thirty 78s, became available on two or three LPs (Chapin 7295-97; Woodell 7063; Lieberson 78-83, 4785-86, 4790-93; Marek 1862; CX 199b).

Columbia immediately offered the LP to all members of the record industry. While many companies began producing this new type of record at once, the innovation was "greeted with shouts of despair in some quarters"—including, apparently, RCA headquarters.

RCA simultaneously had been experimenting with its own long-playing record (hereinafter referred to as the "single"), which turned at 45 r.p.m. and thus also accommodated in a smaller amount of space on one record more music than the 78 r.p.m. record. Like the LP, the single was nonbreakable, lighter and less costly than the 78. The single, generally seven inches in diameter, usually contained three to four minutes of music, or one song, per side.

RCA at first refused to market LPs and, instead, proceeded to record all types of music on singles. To bolster this venture, RCA offered for sale an inexpensive phonograph that could play only 45 r.p.m. records (Lieberson 4786-95; Marek 1886-88; Hammond 7268; Miller 7159-61).

There followed the competitive "battle of the speeds" between 45 and $33\frac{1}{3}$ r.p.m. records. Within a few years, however, Columbia began producing 45s and RCA started to make $33\frac{1}{3}$ s.

Today, most established record companies market records of both speeds; virtually all phonographs are equipped to play both speeds, as well as 78s and sometimes other speeds. Almost every form of recorded music, particularly popular music, constituting the bulk of industry sales, appears on both speeds, as well as on 78s (Lieberson 4789-95).

LPs and singles now account for well over 90% of the industry's output. In 1961, the industry sold, in units, 182,000,000 singles and 173,000,000 LPs.

In addition to 78 r.p.m. records, the industry also produces extended-play records (EPs), which are 45 r.p.m. records seven inches in diameter with about eight minutes, or two songs, per side; seven inch single records revolving at $33\frac{1}{3}$ r.p.m.; and records which revolve at only 16 r.p.m. Moreover, in recent years, considerable repertoire has been issued on prerecorded tapes, in competition with phonograph records (CX 199a; Lieberson 4786-89; Gallagher 8890-94; RX 619b; RX 693, pp. 81-86).

In 1952, Columbia anticipated the development of stereophonic records by its wide distribution of a small phonograph which introduced the concept of sound coming from two places (Lieberson 4795). Stereo was commercially introduced six years later by a small company which had been recently organized (Frey 2005; CX 199b; CX 321; RX 437c; Gallagher 8762-63; Noonan 6854-55). Stereo records provide sound coming from different directions rather than a limited central source as in the case of monaural recordings (Chapin 7297; CX 192, p. 13; RX 41, pp. 18-19). Like the innovation of LPs and singles, stereo has further broadened the market for record buyers (Chapin 7297-98; RX 42, p. 26).

Industry Growth

Although opinions may vary as to the exact causes, it is undisputed that technological advances in the recording art, along with marketing innovations, have significantly broadened consumer interest in records as a medium of home entertainment,

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with the result that industry sales have grown by leaps and bounds.

Without making any finding as to the cause and effect, the fact is that after the formation of the Columbia Record Club in 1955, total sales have expanded as follows (CX 199b) :

1955	.....	\$227,000,000
1956	.....	331,000,000
1957	.....	400,000,000
1958	.....	438,000,000
1959	.....	514,000,000
1960	.....	521,000,000
1961	.....	587,000,000

In the past decade, the rate of growth of record sales has out-paced the rate of growth of the economy, measured in terms of both gross national products and disposable personal income (RX 435). Record sales have also exceeded the rate of growth of the Nation's population (RX 436). *Per capita* record purchases almost tripled between 1954 and 1961 (RX 436).

This dynamic growth has been felt in every segment of the industry. There has been a substantial increase in the number of retail outlets, distributors and subdistributors, record companies, record releases, artists, songwriters, and publishers—and in the number of Americans purchasing records.

Retail Outlets

The total number of retail outlets of all types selling records to consumers has mushroomed. Since 1955 there has been a tenfold increase in the number of such outlets—from approximately 15,000 to 150,000 (Noonan 6867). This growth has been accompanied by dramatic changes in the methods of marketing phonograph records.

In the early days of the industry, a record dealer generally carried the label of one company under an exclusive franchise in his territory. As time went by, however, dealers added other labels in order to meet the growing and varied tastes of consumers (Roskin 2096; Doctor 952-53; Goldfinger 1141; Levin 482-83; Levy 965-66; Fred Hartstone 1825; Stolon 1263; Maggid 848; Prince 5504).

Generally operating small music shops in downtown business districts, dealers sold phonograph records together with musical instruments and sheet music. Packaged in plain green sleeves and stocked behind the counter, records were not "merchandised to the eye of the consumer" and there was little active promotion

or advertising. Knowledgeable sales personnel, well versed in music, generally waited on customers. Since there were relatively few new releases from the handful of record companies then in existence, record shops generally carried a high percentage of the catalog of the various companies. Records were almost always sold at manufacturer's suggested list prices, sometimes under fair trade laws (Gallagher 8848-49, 9085; Roskin 2096-97; Stolon 1290-92; Koenig 3638-39).

The 1950's brought important changes. In certain metropolitan centers, some merchants began selling records at discount prices. They generally placed heavy reliance on newspaper advertising and promotion and large sales volume. Sam Goody became the "pioneer in the mass merchandising of records" at discount both in New York and nationally. Discounting got underway in Philadelphia and Chicago (Gallagher 8850-56; Stolon 1290-93; Inden 5544-46; Ackerman 4222, 4240).

General department and variety stores, which previously had either not carried records or actively promoted them, also began heavy merchandising in this field in the early and middle 1950's (Gallagher 8851-52; Noonan 6952-53; Pierce 5748-52). Discount department stores, epitomized by Korvette, started active promotion of records and extensive advertising (Rothfeld 3960-62, 3974-76). Such outlets sometimes used records with their "romantic" and "exciting" show-business appeal, as loss leaders in order to stimulate in-store traffic (Gallagher 8852-65; Del Padre 5638-39, 5644-45; Prince 5536; Rothfeld 3994-97; Stolon 1286-89; Noonan 591, 6932, 6952-53).

The growth of such outlets was phenomenal. For example, sales of phonograph records by Korvette increased from about \$3,000,000 in 1958 to almost \$14,000,000 in 1962 (Rothfeld 3974-77). Sam Goody had sales of approximately \$5,000,000 in 1962—with one store alone accounting for over \$2,100,000 (Stolon 1254-55). Both Goody and Korvette constantly run daily and weekly advertisements featuring low prices for records (RXs 4, 5, 143, 146, 284, 286, 9a, 12, 13b, 144, 285, 287).

Rack jobbers have opened approximately 100,000 new outlets for records since 1955 (Gallagher 8850; Noonan 6865-68, 6932).

Rack jobbing, which began in the drug and grocery fields, appeared in the record industry in the mid-1950's. The rack jobber introduced records to grocery supermarkets, drug stores, variety stores and other heavy-traffic retail outlets that had not previously carried such merchandise. Since such outlets do not specialize in records, the rack jobber normally furnishes such accounts with

various merchandising services, including the selection and rotation of inventory and the formulation and execution of advertising and promotion campaigns (Noonan 323-25, 444-45, 591; Schlang 6702-12; Arlen 770-74, 5718-22; Shocket 189; L. Smith 1408, 1414-16).

Sales of records through such outlets, virtually nonexistent before 1955, have boomed (CX 199d; Noonan 6865-68) :

1959	\$62,000,000
1960	94,000,000
1961	147,000,000
1962	200,000,000

Locations serviced by rack jobbers accounted for more than 25% of all record sales in 1961 and today represent the fastest growing segment of the retail record business (CX 199a).

The rack-serviced locations and discount houses introduced revolutionary retailing techniques to the record industry. They generally dispense with sales personnel and rely primarily upon customer self-service (Noonan 322; Gallagher 8849; Chapin 7322-23; Schlang 6701-10; Del Padre 5672, 5676; Blincoe 5693-94). They place major reliance on impulse buying and merchandise to the eye of the consumer by the in-store display of records (Noonan 322; Gallagher 8849; Schlang 6707-08).

Some stores like Korvette and Goody carry a broad selection of records, but many mass-retailers and most rack outlets generally do not stock a wide inventory of titles. In order to achieve rapid turnover, they concentrate on fast-moving popular, budget-line and children's records and tend to forego much classical and esoteric material and some forms of jazz and folk music (Gallagher 9076-77, 9108; Schlang 6707, 6710-12; Noonan 403-06; Koenig 3639-41; F. Hartstone 1793-94; L. Hartstone 1070; G. Hartstone 3479-80; Ackerman 4187, 4241).

Conventional but competitive record dealers have kept pace with this revolution in merchandising. With the deterioration of many downtown business districts (Bleyer 6977), many dealers have moved to outlying shopping centers where they find heavier consumer traffic (Gallagher 8849-50).

Records have come out from behind the counter and are promoted by point-of-sale display and in store windows, "browsing" tables and on shelves (Gallagher 8849-50; Zenger 6300-02; Karol 5579-80; RX 251). Dealers carry substantially more individual titles today than ever before (Noonan 6862-65; Karol 5574-76, 5621-23; Zenger 6302; Del Padre 5631).

Competitive-minded dealers utilize newspaper and radio advertising, direct-mail solicitations, other forms of promotion and advertising, window displays, other special displays, knowledgeable sales personnel, listening booths, special-ordering of out-of-stock merchandise and delivery service. Impulse buying has also become important in such stores, sometimes accounting for almost one-half of sales (Zenger 6300; Del Padre 5632-33, 5640, 5671-73; Prince 5507-09; Blincoe 5689; Karol 5579-80; Leonard 5983-86).

Like outlets serviced by rack jobbers, record stores have also enjoyed an enormous sales growth in the past decade (Noonan 6865-68, 6952-53). A continuing survey by the trade paper *Billboard* of phonograph record sales in stores, exclusive of those serviced by rack jobbers and of chain stores which do not buy from local distributors (hereinafter referred to as "the *Billboard* store survey"), shows that sales in such stores more than doubled between 1958 and 1962 (RX 311 *in camera*, pp. VII and VIII; Noonan 321-22).

Accompanying this growth of over-the-counter sales was the advent of merchandising of phonograph records through the mail. There were mail-order discounters on a national basis at least by 1950.

Today, mail-order sales are made not only by record dealers, but also by department stores, mail-order catalog companies and specialty mail-order houses. This method of selling records was perhaps given further impetus by the development in the mid-1950's of record clubs, which operated under subscription plans similar to those initiated about 25 years earlier by book clubs.

The past decade has also witnessed the development on a wide scale of the mail-order sale of record-packages by various large companies—for example, Reader's Digest-RCA.

While clubs and specialized mail-order vendors have grown in recent years, dealers and outlets serviced by rack jobbers have grown even more. Between 1957 and 1961, LP sales increased by a greater amount in locations serviced by rack jobbers than in any other distributional channel; stores showed the next greatest increase; and clubs were in last place (CX 199a). Thus, in that period, LP unit sales increased by 45,000,000 in outlets serviced by rack jobbers, by 43,000,000 in record stores and other nonrack outlets, and by 33,000,000 through clubs (CX 199a).

Distributors and Subdistributors

With the growth of retail outlets, there has been an accompanying expansion of wholesale outlets. The number of distributors has

increased (Gallagher 8772-75); and many established distributors have opened additional branches (Fink 1457-60; Gallagher 8791-94). There has also been a rapid rise in the number of subdistributors (Noonan 323, 326; Gallagher 9094; Shocket 187-89), such as one-stops and rack jobbers.

The one-stop provides a central location where juke box operators can purchase all their requirements at one time instead of going to a number of different distributors (Noonan 326-27). The rack jobber serves supermarkets and other busy retail outlets which carry records as a sideline. Today, rack jobbers and one-stops also sometimes sell records to dealers in competition with distributors.

Record Manufacturers

The marketing and technological innovations described above have opened the gates of the industry to hundreds of new manufacturers.

In 1938, there were only a relatively few record-producing companies. Today, there are hundreds of such companies in the United States, and many more throughout the world whose records are distributed in the United States. Apparently, there is no reasonably exact figure; some witnesses referred to "thousands" of manufacturers (Lieberson 4809; Miller 7142-45; Bleyer 6985; RX 39; Gallagher 8759; RX 310).

The influx of new firms has led to a significant dispersal of economic concentration in the industry. The smaller companies have substantially expanded their market shares and cut sharply into the position of the established companies. For example, Columbia's market share in 1962 was almost one-fourth lower than its 1945 level (RX 418 *in camera*).

The ability of new manufacturers to join the industry and prosper indicates the absence of any formidable barriers to entry. It is possible to enter the field with very little capital (Lieberson 4808; Miller 7144-45; Bennett 6509-10)—literally without "even a phone booth for an office" (Miller 7145). That fact was vividly demonstrated by manufacturer witnesses called by both sides.

For example, Government witness Randolph Wood started Dot Records in 1950 with about \$1,000; sold the company to Paramount Pictures seven years later for stock worth approximately \$2,000,000; and, by 1961, Dot's annual sales exceeded \$16,000,000 and its profits were about \$800,000 (Wood 4127-35; RX 110; RX 106, p. 3 and Notes to Financial Statement). Liberty Records was

launched in 1955 on an investment of only \$5,000 and achieved sales of more than \$7,000,000 seven years later (Bennett 6509, 6538). Kapp Records was started in 1953 with a small investment and enjoyed sales of more than \$5,000,000 by 1962 (Kapp 1558, 5807). With an initial investment of under \$1,500 in 1952, Starday achieved volume of approximately \$600,000 by 1962 (Pierce 5741-43). Caedmon, organized in 1952 with an investment of only \$1,500, developed an outstanding catalog in the spoken word field within a period of a few years (Mantell 6682-84; RX 117).

The following factors have made entry easy and relatively inexpensive:

(a) The long-playing record has made it relatively simple to record an artist's performance. Before 1948, an artist's performance had to be etched on discs by means of a process requiring elaborate and costly equipment that only a few large companies could afford (Lieberson 4790-92). Today, it is possible to record material directly on tape, often on small portable tape recorders (Lieberson 4792). This advance alone facilitated the entry of many newcomers (Lieberson 4790-92). Even with this greater convenience, many new entrants do not bother to invest in their own recording equipment and studios since excellent facilities, complete with top engineers, are available for hire (Lieberson 4808; Gallagher 8770-72; Miller 7144-45; Pierce 5742-45; Kapp 1549-54).

(b) Once a performance is taped, new entrants need not invest in expensive plant and equipment for the physical manufacture or pressing of records. There are ample custom pressing facilities available at reasonable competitive prices. Most record companies engage such facilities rather than tying up capital in their own pressing plants (Lieberson 4808-09; Gallagher 8770-72; Miller 7144-45; Kapp 5857; Wood 4105; Bleyer 6978-79, 6993; Wartell 2827-31). The trade paper *Cashbox* lists over 75 record pressers (RX 23). The proof at the trial established that independent pressers could compete in price with the major pressing companies and sometimes sold at lower prices (Wartell 2844-45).

(c) Newcomers need not make large financial investments in order to obtain national distribution for their output. There is a large and growing number of independent distributors across the nation handling many different labels, and most record companies use such outlets instead of setting up their own distribution networks (Lieberson 4810; Gallagher 8774-82). Many new entrants engage larger record companies to promote and distribute records through their established promotion departments and marketing

machinery (Noonan 394-95; Pierce 5742-44; L. Hartstone 1058-60).

(d) There is a large and growing pool of recording artists and potential artists available to newcomers (Liebersohn 4817-19; Chapin 7313-14; Noonan 644-45). Moreover, established stars switch from label to label with great frequency (Noonan 6893-96). It has been estimated that 80% to 90% of today's recording performers have changed labels more than once (Miller 7143). As in any segment of the entertainment industry, there is tremendous volatility in the popularity of particular artists (Noonan 644-45; Miller 7140-41; 7157-58). Thus, newcomers become stars overnight; established stars sometimes suddenly drop from public fancy; and former stars, who have faded, frequently make dramatic comebacks (Liebersohn 4818-19; Chapin 7305-16; Noonan 644-46, 6855-62; Miller 7140-41, 7164). In 1962, for example, several smaller companies enjoyed great commercial success as the result of new talent discoveries—Cadence with Vaughn Meader, Warner Bros. with Allan Sherman and Peter, Paul & Mary, and Vanguard with Joan Baez and The Rooftop Singers (Noonan 6855-62). Principally as the result of Meader's meteoric rise, Cadence's share of total LP sales in retail stores surveyed by *Billboard* increased over eight times between 1961 and 1962; and in that period, Warner's and Vanguard's share of LP sales practically doubled chiefly because of their new talent discoveries (Noonan 6855-62).

(e) In addition to this pool of artists, record companies have available a growing number of so-called independent producers, creative persons not affiliated with any record companies who operate on a free lance basis by selecting artists and musical material, taping performances and selling or leasing tapes or masters to record companies (Liebersohn 4856; Gallagher 8782-85; Bleyer 6960-61; Kapp 5815-16, 5833-34; RX 293, p. 11; CX 289a-e, h, z-3, z-4).

(f) Finally, there are no patent, trademark or copyright barriers to entry and no shortage of raw materials. Music in the public domain—i.e., not subject to copyright protection—is available without any royalty payment (Berman 2130-32). Musical compositions subject to copyright, once licensed to a particular record company, automatically become available to all others under the compulsory licensing provisions of the Copyright Act (17 U.S.C.A. Sec. 1(e)) (Liebersohn 4822). There is an abundance of music available to record, and the number of songwriters and music

publishers has increased significantly in the past decade (Lieber-son 4817-18; Berman 2136, 8388-89; Chapin 7311-16).

The opportunities available to smaller companies were vividly illustrated late in 1962 by Cadence Records. Formed in 1952, that company operated profitably over the years without a pressing plant and with a sales staff of only two.

In 1962, Cadence acquired the rights to a comedy LP entitled "The First Family" from several writers who had conceived the idea for the album and made a demonstration record which they had been unable to sell to other companies. The LP featured Vaughn Meader, then a relatively unknown comedian.

In only two months, between November and Christmas 1962, "The First Family" sold four million copies, to become the best-selling LP ever released, and Cadence received approximately \$7,200,000.

All pressing was done by outside custom pressers, including Columbia and RCA, which farmed out some of their own pressing work to other plants and operated over week-ends in order to meet the tremendous demand for "The First Family" (Bleyer 6956-69, 6992; cf. Wartell 2849).

Of the 24 companies with the largest LP sales during the first forty-four weeks of 1962 in retail stores according to the *Billboard* store survey, more than 80% entered the record industry in the past twenty years; more than one-half entered after the advent of the LP in 1948; and more than one-third entered after the formation of the Columbia Record Club in 1955 (RX 437).

Since the *Billboard* store survey does not cover sales of records in rack-serviced outlets, it does not fully reflect the growth of lower-priced records, known as budget-line and "kiddie" records, which enjoy the bulk of their sales, not in record stores, but in the rapidly expanding rack-serviced locations (Noonan 404-16, 10883, 10889-900; Schlang 670-77). In addition to companies which sell records in both price categories, there has been a significant growth of firms specializing in the budget and "kiddie" field (Gallagher 8787-91; Noonan 406-07).

Virtually every major motion picture producer has entered the record industry in the past decade (Lieber-son 4814; Talmadge 1835-37, 7801, 7831-33; Conkling 6186-94; Friedman 6104-08; RX 437). Besides issuing phonograph recordings of motion picture music (Friedman 6105-06; Previn 6023-26; Talmadge 7831-32; Miller 7155-57), such companies have become important factors in all fields of recorded music.

With the growth of new companies, the record industry, for-

merly centered in New York, has spread throughout the Nation, with many firms springing up on the West Coast and in the Nashville area (Ackerman 4026, 4228; Pierce 5741-42).

In addition to domestic growth, there has been a significant influx of foreign recordings into the United States. Records produced from masters made abroad by foreign artists, particularly in the popular field, are becoming increasingly significant (Noonan 6889-93; Gallagher 8785-87; Bleyer 6972; CX 248a).

Product Alternatives Available to Customers

The growth and entry of new companies, as well as technological and marketing innovations, have led to a significant expansion of product alternatives available to consumers in all fields of recorded material (Lieberson 79-80, 4811-18; Chapin 7305-16; Noonan 6862-65; RX 116). It has been estimated that there are now approximately 6000 singles and 5000 LPs released each year (Noonan 6862-65; Ackerman 4230-31; CX 199e). This represents a huge increase over the industry's output over the past seven or eight years (Noonan 563, 6862-65; Koenig 3639-40). Record dealers carry a larger selection of titles today than ever before (Noonan 6862-65; Karol 5574-76, 5621-23; Zenger 6302). Consumers have a wider selection of repertoire in every field of music.

There has been a broadening of the audience for classical records, stimulating the growth of companies releasing such material. The number of companies issuing classical records has increased and such recordings now sometimes sell in quantities formerly experienced only in the popular field. Classical sales have increased enormously (Chapin 7295-98, 7305-16, 7328-44; RX 116; RX 483 *in camera*).

There has been a similar boom in the field of popular music, another area where Columbia has made important contributions (Lieberson 80-81, 4796-97; Gallagher 8802-03, 8871, 8927-29; Stone 8556; Miller 7145-47, 7162; Gartenberg 10360).

There have been developments also in more specialized fields of musical interest. Jazz, folk, country and western and gospel music, at one time limited in appeal to a small segment of record buyers, have gained wider public acceptance—in the vernacular of the industry, some of such material has gone “pop” or become part of the “popular” category of recorded music (Lieberson 4821-22; Bleyer 6969-70; Brubeck 7424-28; Dean 7581-85; Hammond 7222-29, 7269-77; Noonan 6874-81). There has been a growth of new forms or styles of recorded music, including fads such as rock-and-roll (which reached an apex in the middle and late

1950's), the twist, the limbo, the mashed potato, the locomotion, the Madison, the bossa nova and surfing music (Miller 7153, 7163-64; Lieberman 4820-22; Noonan 645-46; Cohen 2628, 2636-38; CX 199b).

While bringing new forms of entertainment into the American home, the recording industry has also enriched the cultural life of the Nation. In that regard, Government witness Ackerman testified that Columbia has been "foremost" in assuming a cultural obligation (Tr. 4195-96). (See also Lieberman 4799-804, 4882; Hammond 7222; Chapin 7301, 7367; Previn 6022-29; Faith 6472-73, 6481; Brubeck 7424-25, 7457-58, 7444-48).

Advertising

Before the development of record clubs in the mid-1950's, there was very little consumer advertising. While industry figures are not available as to all types of advertising, the entire industry spent only about \$300,000 for media advertising in 1955 (Wunderman 6574-75). By 1962, expenditures for advertising had risen to \$11,000,000 (Wunderman 6574-75).

The clubs and other mail-order sellers of records have done extensive advertising and this has played an important part in educating consumers and making them aware of phonograph records as a medium of home entertainment.

While large discounters like Korvette, Goody and others run daily and weekly ads featuring low prices (*e.g.*, RXs 4-6, 9, 12-14, 35, 141, 143-44, 146-47, 284-87), most record dealers do very little advertising (Hartstone 1820; Schaps 3371; Wilf 2756-57). The bulk of advertising for over-the-counter sales appears to be done for dealers by manufacturers.

II. The Respondents and Their Business

Columbia Broadcasting System, Inc. (variously referred to herein as CBS or Columbia or as respondents), is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 485 Madison Avenue, New York 22, New York. (Admitted.)

CBS consists of the following unincorporated operating divisions:

- CBS News.
- CBS Television Network.
- CBS Television Stations.
- CBS Radio.
- Columbia Records.

CBS Laboratories.

CBS International. (Admitted; CX 264.)

(Paragraph One of the complaint also listed CBS Electronics Division, but that division was discontinued in 1961 (CX 264, p. 2).)

In 1955, total sales of CBS were \$316,573,000. By 1961, the total was \$473,844,000 (CX 264, pp. 34-35).

Although Government counsel disclaimed any intention of attacking respondents because of their "size or success" (Tr. 232, Prehearing Conference, Jan. 3, 1963), they emphasize, in their proposed findings, the vastness of the CBS "communications complex" (CX 194b); the growth in its over-all sales; its position in television and radio; as well as its self-described "pre-eminent position in the phonograph records industry"—a position that in 1961 "was further enhanced by a 33 percent increase in dollar volume over 1960—a new record—and large-scale expansion of its domestic and foreign operations" (CX 264, p. 2; CPF 3-4).

The CBS Annual Report for 1961 (CX 264) reports (page 8):

In 1961 the Columbia Records Division achieved the greatest dollar volume in its history, a 33 per cent increase over 1960, and strengthened further its consumer sales leadership of the phonograph record industry. The Division continued to expand its domestic manufacturing facilities and broadened the scope of its widespread national operations. The Columbia Record Club maintained its pre-eminence in the record-club field.

The evidence also supports findings that competitive record manufacturers, just like Columbia Records, are affiliated with larger companies engaged in other activities, frequently in the communications or entertainment industry. Thus, record firms are operated by other broadcasters like RCA and ABC; by large motion picture producers; by large publishing enterprises like Reader's Digest and Book-of-the-Month Club; and by large foreign record companies (RX's 291-92; RPF 37, 39, 237, 256, 274). Many of these competitors have substantial sales and assets. For example, RCA's 1961 sales were more than three times those of CBS cited above (CX 308).

To put in perspective the record sales of Columbia Records in 1961, it may be noted that the record industry also achieved its "greatest dollar volume" in 1961 (CX 199b). Note also that the annual report attributes the growth in dollar volume in part to international and other activities not involved in this case (CX 264, pp. 8-9).

Concerning the Club, its sales increased 10.9 percent in 1961

(RX 424 *in camera*), while total industry sales rose 12.7 percent (CX 199b).

Manufacture and Sale of Records

CBS entered the phonograph record business in 1939 through Columbia Recording Corporation, a corporate subsidiary acquired in 1938. The corporate name at the time of acquisition was American Record Corporation.

Columbia Recording Corporation then changed its name in 1947 to Columbia Records Inc. (CRI). CRI continued as a wholly owned subsidiary of CBS until 1954, when CRI was merged into CBS and became Columbia Records, a Division of CBS. (This Division may be referred to hereinafter as Columbia Records Division, or simply as Columbia.)

The Columbia label has been in use since 1939 and is a so-called major label. The "secondary" Epic label has been used since 1953 (CX 69a).

Other Columbia-owned record labels include "Harmony," "Perfect," "Stereo 7," "Alpine," "Legacy" and "Okeh" (CX 2a). With the exception of "Harmony," it appears that most of those labels are, for all practical purposes, inactive.

Columbia manufactures phonograph records in four plants located in Bridgeport, Connecticut; Pitman, New Jersey; Terre Haute, Indiana; and Los Angeles, California (CX 2b).

Respondents have been and are now engaged in the manufacture, wholesale distribution and (through the Columbia Record Club) retail sale of phonograph records.

Respondents formed and put into operation the Columbia Record Club in 1955. The Columbia Record Club is now a division of Columbia Records Distribution Corporation (CRDC) (Tr. 1992).

Actually, the complaint cited Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., the latter as a wholly owned subsidiary of CBS. That was the Club's status in 1960 (CX 1a). By stipulation, the parties took cognizance of a later (1962) corporate reorganization, and it was agreed that the complaint may be treated as having been amended to name in addition to CBS, Columbia Records Distribution Corporation (CRDC), a wholly owned subsidiary of CBS, and the Columbia Record Club as a division of CRDC (Tr. 1992).

CRDC, a wholly owned subsidiary of CBS, consists of two elements or divisions: (1) Columbia Distributors, consisting of

wholly owned branch operations, through which records are sold to retailers, and (2) Columbia Record Club.

There was a third entity known as the Columbia Home Music Library, but it was discontinued in mid-1962 (Lieberson 61-64).

As of April 1963, CRDC purchased records on behalf of its Club division from the Columbia Records Division of CBS (CX 783e *in camera*).

The Columbia Distributors Division of CRDC sells Columbia records to retail record dealers throughout the United States.

CRDC has 16 branches, including branches in the following cities: Baltimore, Boston, Chicago, Cincinnati, Detroit, Indianapolis, Los Angeles, Newark, New York, Philadelphia and St. Louis. These wholly owned branches sell to retail dealers located not only in their own state but also to dealers in other states (Lieberson 58, 62-63; Gallagher 9084; CX 5a-c). Sales by these branches to retailers are substantial, exceeding \$14,000,000 in 1961 (RX 442 *in camera*).

Of the 16 branches, 13 sell Columbia records only, while 3 sell both Columbia and Epic (Gallagher 9084). The distribution of Epic records is mainly through independent distributors (Gallagher 8774).

Columbia records also are sold to retailers through independent distributors or wholesalers. Such distributors handling Columbia records numbered 28 in 1960. There were then 11 wholly owned branches (CX 1a).

In 1955, Columbia had about six wholly owned branches and some 33 independent distributors. At the end of 1962, Columbia had 13 wholly owned branches and 19 or 20 independent distributors. The number of wholly owned branches was 16 by mid-1963 (Gallagher 9083-84).

The corporate setup before 1962 is not abundantly clear, but there does not seem to be any real issue between the parties on that score. It appears that for some years prior to 1962, non-Club distribution was accomplished as follows: The Columbia Records Division of CBS sold the records it manufactured to Columbia Records Sales Corporation, which in turn resold the records to independent distributors and to Columbia Records Distributors, Inc. (CRDI), a wholly owned subsidiary of CBS, which operated branches that serviced retailers. Club distribution prior to 1962 was the function of the Columbia Record Club, Inc., a wholly owned CBS subsidiary which operated the Club and which obtained Columbia-made records from CBS' Columbia Records Division.

(See CXs 1a, 59a, 783d-e; Tr. 1992; Liebersohn 62-63; Gallagher 9060-73; Keating 729-30.)

In the course and conduct of their record business, respondents have been and are engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act.

The Government proposes a finding (CPF 7) purporting to show Columbia's sales of long-playing phonograph records from 1955 to 1961, with the 1961 total supposedly representing a 657% increase over 1955. However, the figures are subject to such infirmities (see respondents' Exceptions) that they cannot be accepted as providing a basis for any meaningful comparison. (See CXs 251f, 253, 783, RXs 424, 687.)

Although rejecting those specific figures, the examiner can find that there has been a marked increase in Columbia's LP sales, and in their proportionate importance in the total sales of CBS.

Instead of those figures, respondents urge us to look to industry trends and Columbia's relative position in the industry. In terms of rapidly growing consumer purchases of LPs, Columbia's shares of sales has remained fairly stable in the period covered (RX 419). RX 419 is a tabulation, based on consumer research, showing Columbia's percentage of consumer dollar purchases of LP records, 1951-61. It shows a share of 33% in 1951, compared to 23.5% through May 20, 1961. During the ten-year period, the figure had gone no higher than 33%, but had gone as low as 22% in 1954 and 1957. For 1960, the figure was 25.4%. Thus, from 1956 (the first full year of Club operation) until mid-1961, Columbia's share of consumer dollar purchases of LPs actually showed some decline.

Columbia's Club and non-Club record business is fully integrated under common management, control and direction. There is no question that the record business is a subsidiary operation of Columbia Broadcasting System, Inc.

It may be, as respondents say in their Exceptions (page 11), that all record activities "are conducted separately and autonomously from the broadcasting and other activities of CBS" and that "Club and non-Club functions are operated independently." The fact remains that Columbia Records is a division of CBS, and the details of its operation within the corporate family do not appear to have the significance that counsel for both sides seem to attach to them. (See CPF 25-28 and respondents' Exceptions.)

It is obvious that the extensive facilities of the Columbia Broadcasting System are available to respondents, but there is no substantial evidence to support the inferences in CPF 219-221.

Contrary to those requested inferences, the evidence indicates that CBS' radio and TV facilities are made available to the Club on the same terms and conditions as to any other advertiser.

The Government's contentions to the contrary are based on two 1955 memoranda that make reference to intra-corporate bookkeeping as between the Club and CBS Radio. This is the only evidence cited by the Government to support their claim that CBS' radio and TV facilities are available "without any real expenditures by the Club" (CXs 90a and 91c; *cf.* Fennessy 7518-21 and Wunderman 6575-76).

There is no basis for a finding that Columbia has utilized the facilities of CBS' radio or TV in any unlawful manner for the benefit of its Record Club or other aspects of its record business.

Ironically, one of the documents cited by Government counsel suggests that there were disadvantages to the Columbia Records Division as a member of the CBS "corporate family." CX 90a indicates that purchase orders for Club radio advertising on CBS owned and operated stations were not "firm" but "pre-emptible."

Columbia does enjoy the advantage of research and development work conducted by CBS Laboratories, but again, this affords no basis for the sinister interpretation placed by Government counsel on a statement in a CBS annual report (CPF 222).

The examiner feels it unnecessary to resolve the question whether Columbia "has available to it the largest and best physical facilities in the record industry," as suggested by the Government in CPF 224. It does appear that the parties do agree that Columbia's Pitman, New Jersey, plant was in 1961 "the world's largest plant for manufacturing long-playing records," with an annual capacity of about 25 million records. It may be found also that Columbia has "one of the country's most advanced studios" in its Hollywood recording complex.

It is not surprising that CBS management undertook to insure the success of the Record Club operation. Again, however, there is no proof of any unlawful relationship or activities in the co-operation between Columbia Records and other divisions or subsidiaries of the CBS corporate family (*cf.* CPF 228).

In CPF 231-32, Government counsel rely on an undated, unsigned memorandum, by an unknown author, written prior to the organization of the Columbia Record Club. Its relevance to the issues of this complaint is not apparent.

Despite respondents' Exceptions to CPF 213-15, there is really no doubt that Columbia has been actively engaged in a vigorous program of obtaining exclusive contracts with key recording

artists, and that this has had the effect of appending additional talent to the already substantial catalog of respondents.

It is also true, of course, that many artists formerly signed with Columbia have switched to other labels, and that some of them (like Johnny Mathis) were of considerable commercial significance.

It is common practice in the record industry for artists to jump from label to label, with 80% to 90% of the established artists having made switches. It also is standard in the industry to use exclusive contracts with artists (see RPF 33(d) and 163). To the extent that Columbia has added artists—and lost artists—this is in keeping with a competitive industry.

Similarly, it is apparent that executive-echelon and lower-level management personnel of CBS have demonstrated an outstanding capacity for the independent development of a catalog and the discovery of new artists (see CPF 216).

III. Columbia Record Club and Its Competitors

The record industry did not create the club form of distribution. The publisher-owned Doubleday Book Clubs and the independently owned Book-of-the-Month Club (herein called BOMC) had been operating since the early 1930s (*Doubleday and Company, Inc.*, (1955), 52 F.T.C. 169, 182). The book club history was known to the record industry.

Shortly after the development of the LP in 1948, a number of mail order record clubs were organized in the United States (Lieberson 4837-38). With the development of the low-cost, light, nonbreakable LP, Goddard Lieberson, then executive vice president of Columbia Records, had foreseen the possibility of Columbia Records ultimately selling to the public through a mail-order record club. During 1950 and 1951, he and James Conkling, president of Columbia Records, held intermittent conversations with representatives of BOMC, but BOMC's "approach to a record company was not realistic" (Conkling 6170; Lieberson 4837-39). In 1953 Columbia tried its own experimental club in Ohio. The venture was unsuccessful (Lieberson 4838).

By late 1954, it became apparent that the volume of business generated by the existing record clubs was substantial, some estimates putting it in excess of \$6,000,000 (Adler 5127). Of the total dollars spent by consumers on classical purchases, 30% or more were being made through these clubs. Angel records, manufactured by EMI (which shortly thereafter purchased Capitol)

were already being sold by one club, and it was believed that other labels would soon do likewise (CX 187a).

In late 1954, Harry Sherman, BOMC chairman, advised Conkling and Lieberman that BOMC wanted to become associated with Columbia in a record club. When they rejected his proposal, Sherman said that BOMC would organize a club itself and would undertake to recruit important artists, including those of Columbia (Lieberman 4839; Conkling 6170-73).

BOMC then organized a record club and signed up artists (Brown 10,000-03; see, *e.g.*, RX 659). On July 12, 1955, it entered into a contract with the Metropolitan Opera Association for the production and distribution of opera recordings under the name Metropolitan Opera Record Club and thereafter solicited members (RXs 658, 200a-e). It made arrangements with existing record clubs, such as The Children's Record Guild, to make their records available through BOMC (RX 201b).

In 1954 and 1955, Columbia officials understood that BOMC also made approaches to various Columbia artists, including The Philadelphia Orchestra, The New York Philharmonic, Benny Goodman, Andre Kostelanetz, other Columbia pop artists with whom Columbia was currently renegotiating, and also to Columbia's West Coast A&R producer (Adler 5071-73; Conkling 6174-76). The artists were informed that they could make more money with BOMC than with Columbia (Conkling 6209-10). It was reported to Columbia executives that BOMC was offering Columbia artists substantial guarantees (Adler 5038). Conkling warned that "tremendous pressures" were being placed on Columbia artists and that virtually every important classical artist or organization in the country had been approached with the offer of "fantastic" deals (CX 187a).

Conkling and Lieberman feared that if important Columbia recording artists were signed up to club contracts by large companies like BOMC which had no interest in non-club distribution, these artists might become unavailable to Columbia for retail distribution. This would work to the serious detriment of Columbia and retailers (Lieberman 4839-40; Conkling 6177-78).

Columbia retained the Maxwell Sackheim advertising agency, direct mail specialists, to study the feasibility of Lieberman's original club idea (Lieberman 4840-41; Wunderman 6557). Lester Wunderman, of that agency, who had been advertising account executive for the Doubleday book clubs and for various record clubs, was assigned to the project (Wunderman 6553-54, 6556-57).

From the outset it was recognized that some dealers might

object to a record club. However, Columbia's executives were convinced that record clubs would benefit record retailers (Lieberson 4840-42; CX 187). In that opinion they were fortified by Wunderman's actual experience in the record club field. The records offered by the clubs with which he had worked originally had little or no distribution through retailers. As a result of the clubs' offerings, dealers requested the right to buy and sell those records, and they became popular at retail (Wunderman 6559; CX 187b).

On Memorial Day 1955, Norman A. Adler was placed in charge of the proposed club. By August 1955, the Club was in operation. A number of significant policy decisions were made at the outset of the Club and have remained in effect ever since:

A. Unlike the book clubs which normally offered their membership a single selection each month, with alternates, the Club was to be a multi-division club which would cover major areas of musical interest. Under this concept, members could join either a popular, classical, jazz, or Broadway division. Each division would offer its own monthly selections and alternates, but a member would be free to buy in his own division or from any other division. The Club thus could appeal to many musical tastes in a single national advertisement (Adler 4894-95).

B. The Club adopted a "lead time" policy different from book clubs, which offered books to club members before or simultaneously with their release to book stores. In practice, the Club does not generally offer records until they have been available at retail for at least six months, and in many instances for five to eight years (Adler 4912; Keating 5150, 5411-12). Since most albums hit their sales peak within the first few months (see RPF 290-92), record dealers generally have the opportunity to promote and sell the product before its offer by the Club.

C. Although Columbia retained the services of a consultant to advise in building its fulfillment organization, Columbia was to operate its own club and would not share this function with some outside organization (Adler 4899).

D. The dealer commission plan was established in order to encourage dealers to enroll members. Under this plan, a dealer who enrolled a member, without performing any further services, received a 20% commission on all purchases subsequently made by that member from the Club. Moreover, a dealer also receives the same 20% commission on all purchases by any new member who chooses to credit his membership to that dealer—even if the dealer had not signed up or solicited the member. Over \$1,240,000

in commissions has been paid out to dealers since 1955 by the Club pursuant to this plan (Adler 4908-10).

E. The Club established the redemption center plan, whereby a member could, at his option, redeem his bonus certificate in the dealer's store. This was designed to bring potential customers into the dealer's store, and thus to build store traffic and stimulate impulse buying (Adler 4911).

The establishment of a major record club required extensive efforts and a sizeable investment. The Club, for example, was launched with an advertising campaign that cost in excess of \$500,000.

Nonetheless, the Club was not an immediate success. Fewer members were attracted than had been contemplated. The cost per member of obtaining new members was higher than projected (Wunderman 6564-65). Both RCA and Capitol issued press releases and trade advertisements stating that they would not form clubs (Wunderman 6628). The Club also made mistakes in certain promotional policies (Liebersen 4843). By the end of 1955 the Club was deeply in the red (Wunderman 6365).

Contemporaneous financial projections for the last quarter of 1955 indicated costs of approximately \$1,800,000, with anticipated losses of up to almost \$900,000 (CX 170 and subparts). Subsequent projections for 1957 showed only the modest possibility of small profits (CX 171). This occurred at a time (late 1955) when Columbia's retail sales had spurted. In particular, the items that were sold by the Club or used as part of its introductory advertising experienced increased retail sales (Conkling 6185-86).

Columbia was faced with the alternatives of curtailing Club activities and refraining from future promotion expenses in the hope of ultimately recouping its losses, or of moving ahead and assuming more risks in order to make the Club more efficient and effective. The decision was made to assume the risks (Wunderman 6565-66; Liebersen 4843-44). It was not until 1957, a year and a half after its organization, that the Club was regarded by management as successful (Wunderman 6582-83).

Government counsel propose a finding (CPF 20) that the Club has operated at a profit since 1956, but the record support for that statement is weak (Keating 732-33). Keating testified that the Club had done so since 1959; that he had no personal knowledge prior thereto; that he "assumed" that it had operated at a profit since 1956.

In two sections of its proposed findings, entitled "Club: Formative Period and Use of Dealers" and "Club: Other Uses of Deal-

ers" (CPF 225-264), the Government covers a multitude of background data not actually in issue in this proceeding. Those proposed findings constitute an attack on the original organization of the Columbia Record Club and its alleged relations with dealers in 1955 and 1956.

The material incorporated under these headings tends to confirm respondents' contention that the Government has now abandoned its pretrial position (Tr. 232, Prehearing Conference, Jan. 3, 1963) that the proceeding was not an attack on the Columbia Record Club, its size or its success.

There is no support in the record for the Government's proposed finding (CPF 227) that "the Club was formed for the purpose of arresting the growth of independent record clubs."

Similarly, the proof does not support the Government's further claim that organization of the Record Club represented the extension of "an earlier decision to solidify control of the record industry."

Columbia encouraged dealers to enroll Club members, but at the same time the Club depended on national advertising to obtain members. During the formative period, and until 1956, record dealers were an important factor in recruiting new members, but they were of decreasing importance even in that early period.

By February 1956, the bulk of the Club members already were direct enrollees, as contrasted with dealer-enrolled members, a situation which continued to the date of trial (CX 187). At present dealer-enrolled members constitute less than 1% of total membership (Keating 741).

Dealers were asked to cooperate, and many of them have enrolled members and acted as Club redemption centers.

Dealer commissions from the Club have declined from a high of \$264,330 in 1958 to \$86,036 in 1962 (CXs 9, 656).

There is evidence suggesting that some dealers felt that such commissions failed to compensate them for business lost to the Club (Rossi 2279-80, 2286).

It is interesting to consider the over-all viewpoint of the dealers who are cited in support of the Government's contention (CPF 243) that "Dealers recognize that their early cooperation with the Club ventures turned out to be harmful to them." See respondents' Exceptions, pages 198-203.

Club Operations

The Columbia Record Club competes in the retail sale of records with other retail sellers of records. In the course of its business,

the Club has engaged in advertising and other promotional activities designed to acquire and retain Club members and thus to sell records. The Club has represented that it offers money savings and other benefits not available to the consumer through dealers.

The Club advertisements recognize that the consumer has limited funds available for records and represent that buying through the Club stretches the record dollar (CX 603, p. 2; CX 606, p. 3; CX 610b, p. 2).

The Club has five monaural divisions: Classical; Listening and Dancing; Jazz; Broadway, Movies, Television and Musical Comedies; and Country and Western. Each monaural division has a stereo counterpart. A member enrolls in one of the divisions, but is free to buy records in any of the other divisions (Keating 701, 708; Adler 4970).

The Club attracts new members by advertising in magazines and newspapers, through direct mail solicitations, and by encouraging present members to enroll a friend (Keating 676-77; Wunderman 6584-85; Ricotta 4055; Klemes 6997-98).

A group of records is offered to prospective members as an enrollment offer for a specified price, plus mailing and handling charges, with a contractual commitment on the part of the potential member to buy a specified number of other records at the regular Club price (usually equivalent to manufacturer's suggested list price), plus mailing and handling charges, during the contractual period. Thereafter, the Club magazine is mailed to members 13 times a year (Keating 704-05).

Each month's magazine contains a regular selection for each division. In addition, other records are offered for sale in the magazine as alternates. Slightly over 100 records are displayed in each magazine; on rare occasions as many as 200 have been offered (Keating 5145-48, 705-06).

Under the "negative option" plan used by the Club, an IBM selection card is enclosed with the magazine. If the member does not return the card within 14 or 15 days, he will receive the monthly selection for his division. On the other hand, he may return the card indicating that he wants to purchase a regular selection in another division or an alternate selection, or no record at all (Keating 706; CX 6b-c).

After a member has completed his contractual commitment, he may leave the Club at any time. If he continues his membership, he pays full Club list price, plus mailing and handling, for each record he buys. He receives a bonus certificate for every two records he purchases. He may use the certificate to obtain a free record,

either from the Club or through authorized dealer redemption centers (Keating 711).

The records appearing in a Club magazine are selected some four to six months in advance of the magazine mailing. Thus, on May 1, 1963, Club personnel selected the records for the Club magazine to be mailed to members in mid-September 1963 (Keating 5147-48).

Space advertising in national magazines designed to attract new members must be planned at least six months in advance of publication. Records which appear in those advertisements must be selected long in advance. For example, the records which appeared in Club space advertising between January and June 1963 had been selected as early as July 1962; and records appearing in Club space advertisements between July and December 1963 were in fact selected in January 1963 (Keating 5148-50). Once color plates are prepared, the Club cannot make changes in the format and in the selection of records because the expense is prohibitive (Keating 5411).

The records appearing in the Club's new member solicitations are drawn from a list known as the "free list," which is prepared by the Club for this purpose every six months (Keating 5151). Not all the records offered by the Club are put on the "free list"; in fact, only a limited number of records appear on the list.

With rare exceptions, no record appears on the free list until after that record has first been offered for sale through the Club at the regular Club price (Keating 5150-51, 5411-15). Exceptions to this policy have occurred only when the Club introduced a new label and wanted to make a simultaneous offering of material in the Club magazine and in the national Club advertising.

In addition, the records on the "free list" have ordinarily been available at retail between six months and several years prior to their original Club offer. Records included in the free list will be used in introductory nationwide advertising between six months and a year subsequent to their selection for the free list (Keating 5415-16, 5150).

There is ordinarily a considerable time span between the release of a record at retail, its later offer through the Club, its subsequent selection for the "free list," and its ultimate appearance in advertisements in national media designed to solicit new members.

For the most part, but subject to specific exceptions, the Club does not offer and has not offered to its members phonograph records which are not offered for sale through distributor-dealer

channels. Moreover, the Club does not offer such records to its members prior to the offer of these records for sales through distributor-dealer channels. Generally speaking, phonograph records are offered through distributor-dealer channels one or more months prior to their offer through the Columbia Record Club.

There have been "a few instances" where phonograph records offered by the Club to members were not offered through distributor-dealer channels. This was particularly true at the inception of the Club, but special pressings for Club members stopped by the end of 1957, except for certain introductory offers and certain special occasions (CX 68a, b).

At one time, the Club member had only a limited selection of records from which to choose his "bonus" record. In 1962, the Club announced "a major breakthrough" in benefits: the Club member could now use his bonus certificate for any record offered in the magazine except the current month's regular selections (CX 412, p. 6; Keating 5413).

A new member joins either a mono or stereo division, not both, and agrees to take all introductory and subsequent records in either mono or stereo. However, an enrolling member may select either mono or stereo records at the same basic introductory offer cost. It is only with respect to subsequent purchases that the member usually pays one dollar more for any given stereo than he would for the same record in mono (CX 617c, p. 2).

"Fulfillment" in the record club business is the processing of customers' accounts, new members' applications, the maintenance of the accounts receivable file with respect to the posting of sales, payments, returns, adjustments, shipping of records to members, and handling members' correspondence. Fulfillment is extremely important to the operation of a record club. If the fulfillment is poor, many members cancel and those who cancel for service reasons rarely rejoin (Gartenberg 8498).

The complex nature of the fulfillment function in a major record club was described at length by Seymour Gartenberg, the Club's Planning and Financial Vice President. In his testimony, he relied on a chart and a booklet summarizing the operation in greater detail (RX 385). His testimony and the exhibit traced the fulfillment operation from the time of the new member application through to the end of the process and indicated at each point the number of job steps necessary and the average elements of each job. The operations described in this exhibit are repeated every 28 days as a new cycle begins.

At the time this exhibit was prepared there were 1495 employees shown on the exhibit, and 180 other personnel who were not shown on the exhibit, all of whom were involved in the Club's fulfillment operations (Gartenberg 8502-13).

The complexities of the club operation also are reflected in the extraordinary Club costs of operation, including fulfillment, bad debts, advertising and promotional expense (Gartenberg 8401, 10933-35).

The magnitude of the operation is indicated by the fact that a million pieces of mail are received by the Club each week. The Club alone sends out 250,000 pieces of mail per week (Keating 5154).

In addition to those expenses, the average unit production cost per net invoiced record is substantial (see RX 686 *in camera*).

The conduct of the fulfillment operation and other functions of large record clubs thus require extensive commitment of personnel, money, know-how, and specialized expertise.

Club membership has increased from fewer than a half-million in 1956 to a total approaching 2 million in 1962 (CXs 8, 257 *in camera*).

Club members are located throughout the United States (CX 654a-b *in camera*), but despite the claims of Government counsel, there appears to be no substantial basis for a finding that the concentration of membership parallels the over-all dispersion of the population. See CPF 22 and respondents' Exceptions.

Club sales increased from over \$7,000,000 in 1956, the first full year of operation, to over \$50,000,000 in 1962 (RX 424 *in camera*; CX 783e *in camera*).

Counsel disagree as to the proper percentage figures to describe the rate of increase in Club sales (see CPF 20 and Exceptions).

Here, as elsewhere, is demonstrated the fact that lawyers are among those who may be said to use statistics as a drunk uses a lamp-post—more for support than illumination.

It is not necessary for the purposes of this proceeding to resolve the statistical conflicts between the parties. No statistical legerdemain is needed to demonstrate that Club sales have increased substantially and consistently.

Club advertising expenditures have been substantial. It is not surprising that Club advertising costs have been considerably greater than non-Club advertising expenditures. (Cf. CXs 50, 655, 665, 78-79.) However, non-Club advertising expenditures have been increasing. The total for the first eleven months of 1962 was

almost triple the 1959 level. Columbia spends more on non-Club national advertising than any other record company. (See RPF 498g and h; Wunderman 6569-75.)

The Club's basic introductory offer in effect in each of the years 1961-63 has been as follows:

- 1961—five records for \$1.97 in return for a commitment to buy five records during the year at the regular list price.
- 1962—six records for \$1.89 in return for a commitment to buy six records during the year at the regular list price.
- 1963—six records for \$1.99 in return for a commitment to purchase six records during the year at the regular list price.

Government counsel proposed a finding (CPF 19) that the basic introductory offers in effect in 1961 were five for \$1.97 and six for \$1.89. The record, as summarized by Government counsel in their Appendix B, does not permit a finding that six for \$1.89 was a basic introductory offer in effect in 1961.

Only three 1961 advertisements contained the six for \$1.89 offer (CX 763, 764, 111). These all ran in newspapers on the very last day of 1961—Sunday, December 31.

Of the 30 other 1961 advertisements listed in Appendix B, 21 contained the standard offer of five for \$1.97.

Nine other advertisements contain a wide variety of different offers. Eight of these were tests. None offered six records for \$1.89. (See respondents' Exceptions, p. 6.)

Other Record Clubs

RCA entered the record club business in 1958 by establishing three separate record clubs—a classical club, a popular club and an opera club. It anticipated that its clubs would enhance the sale of RCA records through all channels of distribution (RX 652). In contrast to Columbia's multi-divisional concept, RCA Club members were, for many years, limited in their selection and could not choose records from the other RCA clubs. For example, a member of the RCA Classical Club could not buy a popular record offered by the RCA Popular Club (Adler 4896-97).

RCA appointed Book-of-the-Month Club (BOMC) as its exclusive sales agent and delegated to it the task of handling advertising, promotion and fulfillment, and the selection and scheduling of the records to be distributed (RX 652f).

Under the terms of the contract, BOMC agreed to bill records to club members at the "manufacturer's nationally advertised prices" established by RCA (RX 652g). RCA agreed that it would not operate a competitive record club or supply RCA records to a com-

petitive record club (RX 652m). BOMC was required to make a substantial yearly guarantee of sales (RX 652o). When the RCA arrangements were established, BOMC's existing club, Music Appreciation Records, was "coordinated" out of existence as a separate record club and was amalgamated into the RCA Club (RX 202a-d). In addition, RCA took over the management of the Metropolitan Opera Club, previously operated by BOMC, which was then reconstituted as the RCA-Victor Metropolitan Opera Club (RXs 190a-e, 188a-e). RCA thus obtained at the outset mature and experienced mail order facilities and personnel, access to a large mailing list, two existing record clubs and a group of important classical artists (Adler 4900).

The RCA clubs had an immediate competitive impact. They achieved sales of almost \$14,000,000 in their first year of operation (CX 305). The initial RCA classical offer was known as a "blockbuster"—the nine symphonies of Beethoven conducted by Toscanini, a seven-record set, offered to new members for \$3.98 (Lieberson 4844-45). This offer by RCA attracted 324,000 members in 1958 and was repeated in 1959 and 1960 (RX 649).

In or about 1961 RCA terminated its arrangements with BOMC. The latter company, however, continued to have temporary fulfillment duties to RCA, and, moreover, evidently felt morally obligated not to compete even indirectly with RCA for some time thereafter (Adler 5004-05).

In April 1961 RCA arranged for Reader's Digest to administer its clubs as an exclusive agent (Marek 1885; RX 706a). Each party was to retain 50% of the proceeds of the club (RX 704i). Reader's Digest agreed to refrain from other record activities, and RCA agreed not to operate any other record club. The term of the exclusive contract was eight years, with an option in Reader's Digest for an additional five year extension (RX 704n-o).

Reader's Digest has the world's largest book club, the Reader's Digest Condensed Book Club, with about 3,000,000 members; and its monthly magazine has a circulation of almost 14,000,000 (Adler 5008). After the merger of efforts, RCA adopted the multidivisional club concept. RCA and Reader's Digest also jointly developed the largest nonclub mail order record business in the world (see RPF 256-72).

The Columbia Club had developed a new advertising technique known as the "gate-fold"—and had held this favorable position in the Reader's Digest Magazine for many years. The format was a combination of a short back page, the inside flap and the facing page. The advantage was that the reader who grasped the maga-

zine in his hand almost inevitably had to open the back page and flap and see the advertisement (Adler 4939-40; RX 119). When Reader's Digest entered into its contract with RCA, the Columbia Club's request for the gate-fold position was summarily rejected, and thereafter RCA Club advertisements were frequently run in that position (Adler 4939-45, 5106-07; RX 120). The refusal of Reader's Digest to accept the Columbia Record Club's advertising in this position was due to a prior "commitment" to RCA (Hitesman 10135-36).

The RCA clubs engaged in extensive advertising and promotional campaigns by direct mail, newspapers and nationally circulated magazines. Their advertisements appeared in such newspapers as the New York Times, the Chicago Tribune and many others, as well as in such magazines as Life, Time, Saturday Evening Post, Esquire, Holiday, Good Housekeeping, National Geographic, and many others (RX 646a-n). They used many direct mail lists (RX 647). Their advertising expenditures in 1961 for media advertising alone were in excess of \$3.5 million (RX 651a).

Capitol also entered the record club field in 1958. As noted previously, it had been acquired by EMI two years earlier. EMI's annual report reference is instructive:

* * * [I]n the face of strong competition from two other large record companies in the U.S.A., Capitol launched its own record club. This project was costly * * * (RX 41, p. 26).

Capitol was marketing records under the labels of Angel and Capitol. The Angel label specializes in classical music and opera (Bonbright 3487, 3534; L. Hartstone 1111-12). The Capitol label carries all types of material. Capitol initially set up two separate clubs, the Angel Record Club which offered primarily classical material, and the Capitol Record Club, which had three separate divisions. Some years later the two clubs were combined (Adler 4897; Bonbright 3514).

The Capitol and Angel Clubs had available to them all the catalogs of EMI's many affiliates throughout the world (Adler 4897; RX 42, p. 23; RX 44, p. 23). EMI represented in its advertising that one out of every four records sold in the world was an EMI record, that EMI was the world's largest producer and distributor of phonograph records, and that the great majority of the artists and orchestras of international fame who fill the concert halls and opera houses throughout the world recorded for EMI, most of them exclusively (RX 39a-e). EMI also had a large roster of outstanding popular artists who were available to Capitol.

Capitol contracted to have its fulfillment arrangements handled by Greystone Press, a substantial factor in the mail order business at the time (Adler 4907-08, 5016-17). Greystone's president, John Stevenson, had been operating a classical record club and had a large and well-integrated advertising and promotional organization. Stevenson became an officer of Capitol (Adler 4907-08).

Other record clubs were thereafter organized and were identified in the record, including the Universal Record Club, Diners' Record Club, Shakespeare Record Club, the 99¢ Record Club, Businessmen's Record Club, Music of the Month Club, Family Record Club, Christian Faith, Word, The Jazz Club of America, Living Shakespeare, Music Appreciation Records, Louisville Music Treasures, Citadel Record Club, The Jewish Record Club, and clubs affiliated with credit card companies (Lieberson 4838-39, 4857-59; Adler 4914-15, 5090-97; Keating 5355-57; RXs 194a-b, 196-98). Dealers also commenced to operate their own record clubs (Rossi 2291; Liepman 3391; Hurst 3225; Hollander 3138, 3153-54).

However, respondents' own statistics show that such clubs, in the aggregate, account for 10% or less of total club sales of records. Except for the Diners' Record Club, there was virtually no detailed information developed concerning any of them. The most that can be said is that such clubs were disseminating advertisements in publications and by direct mail.

IV. Licensing Agreements

Beginning in 1958, Columbia began to press LPs pursuant to contracts with other record companies, and these records on "outside labels" were offered for sale and sold through the Club.

Columbia produced and sold such outside label records pursuant to licensing agreements with various manufacturers, hereinafter referred to as licensors or as outside labels.

In the words of the complaint (Par. Six), the licensing agreements provide that the licensor shall grant to Columbia, "for the purpose of sale by direct mail as distinguished from over-the-counter sale by retail store outlets, the sole and exclusive right, privilege and license to manufacture, distribute, sell and advertise under the Licensor's label or labels, through the Club, to ultimate consumers, LPs manufactured from all original masters owned or controlled by the Licensor at the time the Licensing Agreement is negotiated and also those acquired during the term of the Licensing Agreement." The licensing agreements provide that Columbia shall pay royalties to the licensor computed upon a percentage of net sales, as defined in each agreement.

As of September 1961, Columbia pressed approximately 6,685,-419 LPs pursuant to the licensing agreements and offered them for sale under the licensors' labels through the Club.

The principal licensors include Caedmon Publishers (later called Caedmon Records, Inc.), Verve Records, Inc., Mercury Record Corporation, Warner Bros. Records, Inc., Kapp Records, Inc., Vanguard Recording Society, Inc., United Artists Records, Inc., Liberty Records, Inc., and Cameo-Parkway Records, Inc.

Nature of the Agreements

The agreements provide for the transmittal of either magnetic recording tapes or wires, or lacquer or wire discs, from the licensors to Columbia (*e.g.*, CX 23a). All these instruments are original recordings from which Columbia may manufacture phonograph records, and they may be regarded as used interchangeably in the licensing agreements. The lacquer disc or recording contains the same embodiment of a performance that the tape preceding it contained (Wartell 2830). In the usual course of manufacture, the performance embodied in a tape is transferred to a "lacquer master" or "master lacquer" (Wartell 2830); this is then sent to the factory where it undergoes a process of electroplating, making a series of matrices (dies or molds) from which phonograph records are produced (Lieberson 138; Wartell 2829-32; CX 19d; CX 192). As used in these findings, the terms "master recording(s)," "licensed master(s)" or "master(s)," mean any original recording of a performance, irrespective of the exact form; that is, whether magnetic recording tape or wire, lacquer or wire disc.

Each of the licensing agreements contains a definition of "master recordings" consistent with that general description, but further delineating the extent to which all or some of the licensor's "master recordings" are specifically covered by the particular agreement. One of the indicia of the general product scope of the agreements is found in the definitions of "master recordings." The most recent Caedmon contract provides that this phrase

shall mean any original recording * * * listed in [Caedmon's] then current catalog at any time during the period of this agreement. (CX 22a.)

The Mercury contract defines "master recordings" as:

any original recording * * * owned or controlled by you at any time during the period of this agreement. (CX 34a.)

Other contracts contain a definition of "master recordings" identical to that in the Mercury agreements—for example, Warner (CXs 39a, 514a, 519a, 537a), Kapp (CX 41a), Vanguard (CX

43a), United Artists (CX 44a), Liberty (CX 45a), Cameo-Parkway (CX 453a), Carlton (CX 234a).

The master recording—the very subject of each licensing agreement—represents the physical embodiment of the creative, artistic and technological skills of the licensor who produced the particular master. But it does not necessarily follow, as urged by Government counsel (CPF 44), that by obtaining a license to use such master, Columbia has, in the legal sense of Section 7 of the Clayton Act, made an “acquisition” of “a valuable asset embodying the artistic skills of the Licensor and all of the Licensors’ efforts to obtain artists and promote their labels.”

Columbia made no “acquisition” of the masters, which in the words of the contracts, were merely on “loan.” The Club received merely a short term license to manufacture, distribute and advertise, as defined by the contracts.

Columbia did not obtain plenary “rights of ownership” with respect to the records manufactured from the masters within the so-called “club market.”

The contracts show on their face that Columbia lacked the indicia of complete ownership. For example, the Club was required to use the label or trade name of the licensor; to release the records only in the precise form submitted by the licensor, and could not thus “couple” performances so as to create a new record; it was obliged to return or destroy the masters at the end of the agreement. Moreover, Columbia could not pledge or otherwise encumber the masters. Finally, the licensors had the absolute right to repurchase any inventory of records at the end of the agreement at net manufacturing cost (see, *e.g.*, CX 44d-e).

Columbia retained a contractual right to sell any records which had been manufactured or which were in process of manufacture at the termination date of the contract. This “sell-off” right was subject to immediate divestment if any outside label exercised the absolute option to buy the inventory at net manufacturing cost (see, *e.g.*, CX 22). This provision and the provisions that the master recordings were “on loan” show the transitory nature of the arrangements and refute the contention that Columbia “owned” the records.

Even for purposes of record club distribution, Columbia’s rights to the records manufactured from the masters were *not* “unlimited.”

Important limitations appear in the contracts themselves. Thus, some of the contracts, by their terms, were nonexclusive—an obvious limitation on Columbia’s rights (Vanguard, Carlton, and the

original Cameo contract; CXs 43b, 234b, 453b); four contracts provided for a partial exclusivity release (Liberty, United Artists, Caedmon and Kapp; CXs 41b-c, 22b, 45b, 44b); three provided for a complete exclusivity release (Caedmon, Liberty, United Artists; CXs 22c, 45b-c, 44c); some had specific lead time limitations (Kapp and Cameo; CXs 41c, 453b); one (Cameo) required the release of a specified number of records and the use of records in a specified percentage of the Club's space advertising (CX 453c); and in others, Columbia's rights are qualified in a variety of other ways. Hence all of Columbia's rights were limited in a sense which makes any claim of complete "ownership" untenable.

The so-called contractual "grant" was of "the right, privilege and license" to manufacture, distribute, sell and advertise the records.

The licensing agreements typically provide:

You [Verve] hereby grant to us [Columbia] solely for the purpose of sale by direct mail in accordance with the merchandising method known and understood, in the mail order business, as the "subscription" or "club" plan as distinguished from individual over-the-counter sales by retail store outlets receiving their phonograph records from phonograph record distributors, the right, privilege and license during the term of this agreement to manufacture, distribute, and sell and advertise the manufacture, distribution and sale through subsidiaries, affiliates and licensees, including without limitation the Columbia LP Record Club * * * (CX 23c).

Thus, although the sole rights licensed by the outside label to the Club were for record club distribution, there was no specific agreement by Columbia not to offer the records in other channels.

The licensing agreements provide in effect that the licensors will not compete with Columbia in the direct mail or club methods of distribution. For example:

You [Mercury] agree that during the term of this agreement you will not * * * (1) sell by direct mail, (2) offer for sale by direct mail * * * phonograph records manufactured from master recordings which you now own or control or which you may hereinafter own or control. (CX 34c.)

In addition to restrictions covering sale by the licensors themselves in the direct mail or club channels of distribution, the parties have agreed that the licensors may not sell to third parties engaged in direct mail or club distribution. For example:

* * * you [Verve] will not * * * authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control. (CX 23j-k.)

The fact that the early Caedmon and Verve contracts (CXs 20, 23k) singled out by name particular competitors and prohibited sales to them does not really change the legal significance of the

exclusionary clause. Nor does the elimination of such specificity in later contracts make the restriction less complete.

Restrictions on the licensors' *own* direct mail or club sales are absolute except in the case of Caedmon (see *infra*). A "release" provision for sales to third parties in some of the contracts allows the licensors to sell certain records to competitors if Columbia declines to offer Club distribution. For example, the United Artists licensing agreement has no exception to the restrictions for approximately 17 months. Thereafter, the contract provides for the following "release" procedures:

(a) The release only pertains to records of artists who have had at least two LPs released through record dealers and whose records Columbia has not released through the Club;

(b) United Artists must request in writing that Columbia use the records not previously released;

(c) Columbia is given 60 days to decide whether it intends to use the record within six months; if Columbia has no such intention, then

(d) United Artists may attempt to obtain another offer;

(e) Columbia is given an additional 30 days to decide whether it intends to use the record within three months; if it has no intention of using the record within three months, then

(f) United Artists is free to offer the records to another club, but

(g) "Such direct mail sale by a person other than us [Columbia] shall be on a label other than one owned and/or controlled by you [United Artists]" (CX 44b-c).

Despite this release provision, United Artists regards its agreement as exclusive (Talmadge 7853).

The same provision appears in the Kapp agreement (CX 41b-c). The Liberty agreement omits (a), (e), (f), (g), above, but states:

Such direct mail sale by a person other than us [Columbia] shall be on a label other than one used by you [Liberty] for the general retail distribution of phonograph records. (CX 45b.)

The Caedmon contract also omits (g) (CX 22).

The testimony cited by the Government in CPF 84 fails to prove that the release provision represents an effective bar to any substantial offer by Kapp or any other licensor of records through another club or direct mail operation.

The restrictions agreed upon between Mercury and Columbia restricting Mercury's own sales and sales to others in the direct mail business, are absolute prohibitions with no exceptions (CX 34c).

The partial exclusivity release clauses, varying in form, are found in the Caedmon, United Artists, Kapp and Liberty agreements. They provide a mechanism whereby the outside labels, if they desired, could offer through others specific records not used or to be used by the Club.

Under such contract provisions, if the outside label exercised its option, Columbia would be thereafter precluded from offering any records of that artist through the Columbia Record Club (see, *e.g.*, CXs 41b-c, 44b).

There was no testimony that any outside label found the partial exclusivity release clause "involved and tortuous," as the Government describes it. The fact is that the clauses worked in practice. Thus, Kapp did offer various Kapp records, including "The Messiah" and a "Bizet Symphony," through BOMC, a substantial competitor, and the Catholic Record Club, among others (Keating 5240-41; Kapp 5774-79; RX 148). Caedmon records were also sold through BOMC (Stipulation, Tr. 9990; Mantell 6691-92, 6698-99). Similar permission was given Verve, even though Verve did not have such a clause in its contract (Keating 5241).

In addition, the Caedmon contract explicitly authorized Caedmon to sell through the Shakespeare Recording Society or any other company in which Caedmon had an interest (CX 22d).

The Verve contract authorized Verve to enter into artist exchanges with respect to two of its principal artists, Ella Fitzgerald and Oscar Peterson (CX 23d).

Thus, the restrictions were clearly not "absolute," and Columbia did not have "absolute discretion." (*Cf.* CPF 83.) There was no evidence that any outside label desiring to offer individual records through some channel other than the Columbia Record Club was prevented from doing so by the allegedly "involved and tortuous" provisions of the contracts; the proof was all to the contrary.

Summary of Outside Label Contracts

The various licensing agreements, or outside label contracts, may be summarized as follows:

Caedmon Records—The first outside label contract was with Caedmon Publishers (later Caedmon Records, Inc.) and was dated May 15, 1958 (CX 19). Caedmon featured spoken word material, particularly authors reading their own works. Among their competitors in the spoken word field are record companies such as Spoken Arts, Spoken Word, and Folkways (Mantell 6691-93; Asch 2058). (RPF 101.)

Caedmon signed with Columbia after it had unsuccessfully sought to have its records merchandised through the RCA Record Club and through the Diners' Record Club (Mantell 6691-92). (RPF 103.)

The term of the contract was one year. The agreement could be extended annually for a period up to five years, provided that Caedmon records were offered to more than 75% of the Club membership, and that the Club had sold at least 10,000 records in each preceding year. If the Club failed to meet that guarantee, Caedmon had the right to terminate (CXs 19d-e, 21b).

The Caedmon contract, like the Verve contract, *infra*, involved an agreement that Caedmon should not sell certain specified subscription method sellers.

Caedmon also agreed not to reduce the suggested list price of its LPs for sale through normal retail channels without giving six months' written notice to Columbia.

The original Caedmon agreement (CX 19b) contained a provision as follows:

The records manufactured by us [Columbia] hereunder shall be sold by us through the Columbia Record Club at a retail price of \$4.98 each (including excise tax and packaging); and you [Caedmon] agree that, during the period of this agreement, the suggested retail list price of \$5.95 each, for records embodying such performances manufactured by you for sale to normal retail channels, will not be reduced by you without at least six months written notice to us.

Paragraph 4c (CX 19c) provided that Caedmon would not sell by mail-order methods of any kind or nature whatsoever and would not authorize or consent to such sale by any third party, with the understanding that this was not intended to restrict the distribution and sale of phonograph records through normal retail channels.

Paragraph 4c soon was revised to provide that Caedmon would not "distribute or sell or authorize or consent to the distribution or sale by any third party of phonograph records manufactured from any of the master recordings, through any mail order club which regularly distributes or offers for sale to its members significant quantities of phonograph records of a musical nature, including, without limitation, the 'Book-of-the-Month Club,' 'Music Treasures of the World,' any RCA Victor record club, and any Capitol record club." (CX 20.)

A new contract was executed with Caedmon as of April 15, 1961 (CX 22). (RPF 105.) The term was two years and one month (CX 22a). Caedmon was free to sell by direct mail to the

Shakespeare Record Society or to any other company in which Caedmon or its stockholders had a controlling interest (CX 22d). Otherwise, Caedmon agreed to authorize no sales through other record clubs (CX 22d), but no clubs were named.

The new contract contained no provisions comparable to Paragraph 3b of the original contract, relating to prices. Instead, Paragraph 11a provided for payments by Columbia of "a royalty of ten (10) percent of the royalty price."

"Royalty price" was defined to mean Columbia's retail selling price after deductions as follows:

- (1) Excise or similar tax.
- (2) Container or packaging charge.
- (3) Charge for program notes.
- (4) Postage and handling charges "provided any such additional charge is deemed to be included in the retail selling price." (Whether it is so deemed is not now apparent to the hearing examiner. Neither party seems to have referred to this provision in the discussion of the propriety of including or excluding mailing and handling charges in figuring the Club price.)

As in the Kapp contract, *infra*, the new Caedmon agreement contained a partial exclusivity release clause effective a year and a month after the contract date (CX 22b).

Another new provision (hereinafter referred to as the "complete exclusivity release clause") which had not appeared in prior contracts was inserted in the 1961 Caedmon contract. At any time after a year and a month from the date of the contract, Caedmon was unqualifiedly free to grant club rights to the Caedmon catalog to any competitive record club offering terms "more favorable" than those contained in the contract with Columbia. Columbia did not retain the right to match any such competitive offer (CX 22c).

Verve Records—The second outside label contract was with Verve Records, Inc., and was dated March 31, 1959 (CX 23). In 1959 Verve had an outstanding jazz catalog and significant humorous material (RX 293, p. 11).

The term of the agreement was 3½ years, or 3 years from the Club's first offer of Verve material, whichever occurred first (CX 23b). Subject to specified limitations, there was an option to renew the contract for an additional two years (CX 23s-t).

The contract granted distribution rights for 20 specified records, as well as rights to such other Verve masters as might be agreed upon (CX 23c-d). The grant of exclusivity with respect to records of Ella Fitzgerald and Oscar Peterson, two of Verve's leading

jazz artists, however, was limited (CX 23d-e). Columbia guaranteed the sale of 500,000 Verve records during the term of the contract (CX 23m).

The Verve contract also contained (1) a provision imposing restrictions with respect to the release dates of records produced by Verve from duplicate licensed masters for distribution, directly or indirectly, to dealers; (2) an agreement by Verve not to offer records manufactured from duplicate licensed masters for sale to distributors at distress prices; (3) an agreement that the price at which the Club sold records manufactured from certain licensed masters should be not less than the price at which a similar type and kind of record on the Columbia label was being sold by the Club; and (4) a provision restricting Verve's sales to other record clubs, including specifically RCA-Victor and Capitol.

The original Verve contract contained a definition (CX 23b) of "royalty price" similar to that contained in the Caedmon contract.

The term "distress price" was defined as a distributor discount lower than the formula discount of "less 50%—less 10%" of the suggested retail list price of any phonograph record.

Paragraph 4 entitled "Dumping," read as follows: "You appreciate and recognize that our direct mail exploitation of phonograph records manufactured from the Licensed Masters will be adversely affected if at the same time phonograph records manufactured from certain Licensed Masters are being offered for sale to your distributors at distress prices. You therefore agree not to offer phonograph records manufactured from the Licensed Masters listed on Schedules A and B hereof to your distributors at such distress prices. However, our sole remedy for your breach of the provisions contained in this paragraph (as such breach relates to Schedule B only) shall be as stated in paragraphs 5(b) and 5(c) below. For purposes of this paragraph, inadvertent or casual selling shall not be considered a sale at a distress price." (CX 23g-i.)

Paragraph 5(b) provided in effect that if Columbia determined that the Verve label had depreciated to the status of a low price label through distress selling or through the consistent offering of records on the Verve label at retail prices comparable to the prices at which Columbia Harmony and RCA Camden records were being sold, Columbia might release records manufactured from the Licensed Masters under the Columbia label after having given Verve written notice of its election so to do. It was provided further in paragraph 5(c) that the provisions of paragraph 5(b)

should not be used to frustrate the basic intent of the parties to utilize the Verve label. Columbia agreed that a substantial change in the existing situation and status of the Verve label would be required before it might invoke the provision of paragraph 5(b).

Paragraphs 3 and 4 of the Verve contract were waived by Columbia, February 17, 1960 (CX 32).

In February 1962 (four months before the issuance of the complaint), Columbia and MGM (which had acquired Verve) agreed to terminate the contract, effective June 30, 1962, although the termination agreement was not actually executed until June 22, 1962 (Maxim 1728-29; CX 288b). Columbia retained the right to sell certain Verve records until December 31, 1962 (CX 288b-c) (RPF 106-08; CPF 30).

Mercury Records—Columbia's third outside label contract, dated April 1, 1960, was with Mercury Record Corporation (CX 34). Mercury's catalog included jazz and humorous material, as well as a variety of popular and classical material (Keating 5185; CX 398).

The term of the contract was three years and six months (CX 34a). Columbia guaranteed the sale of one million Mercury records (CX 34e). Columbia had the option to renew the contract for a two-year term, provided it had paid royalties to Mercury on at least 916,666 records, and then only upon the extension of another substantial guarantee (CX 34a-i). (RPF 109-112.)

Kapp Records—The next outside label contract, dated October 7, 1960, was with Kapp Records, Inc. (CX 41). Columbia was interested in Roger Williams, a romantic pianist, and other popular Kapp artists, as well as humorous material (Keating 5190; CX 265c).

The term of the contract was three years and four months (CX 41a). Columbia guaranteed the sale of 150,000 Kapp records per year, and a total of 600,000 during the term of the contract (CX 43f).

A new clause was inserted (hereinafter referred to as the "partial exclusivity release clause") which had not appeared in earlier contracts. After one year and four months from the date of the agreement, Kapp was free to take steps to have records of Kapp artists not used by the Club released for direct mail sale by other companies. In such instances, the Club would be precluded from releasing thereafter any records of that artist (CX 41b-c). (RPF 113-116.)

United Artists Records—The contract with United Artists, Inc., was executed on July 1, 1961 (CX 44).

U.A. had a catalog of about 30 motion picture soundtracks and had a reputation for putting out successful soundtracks (Talmadge 7831-32, 1838-39). The Club was interested, among other things, in U.A.'s Hollywood material and the twin pianists Ferrante and Teicher, former Columbia artists, who primarily recorded songs from motion pictures.

The term of the contract was three years and four months (CX 44a). Columbia guaranteed the sale of 400,000 records (CX 44e-f).

The U.A. contract also contained a partial exclusivity release clause operative 15 months after the contract date and a complete exclusivity release clause effective 22 months from the contract date (CX 44b-c). (RPF 120-24.)

Liberty Records—The contract with Liberty Records, Inc., was dated October 25, 1961 (CX 45). Liberty had developed a series of West Coast teen-age artists and certain established pop and novelty artists such as Martin Denny, Julie London and The Chipmunks (Keating 5201).

The term of the contract was three years and four months (CX 45a). Columbia guaranteed the sale of 300,000 records (CX 45e-f).

Like the Kapp, U.A., and the new Caedmon contracts, the Liberty contract contained a partial exclusivity release clause effective 16 months after the contract date (CX 45b); and like the U.A. and new Caedmon contracts, the Liberty contract had a complete exclusivity release clause effective 22 months after the contract date (CX 45b). (RPF 125-29.)

Cameo-Parkway Records—The first contract with Cameo-Parkway Records, Inc., was executed in December 1961 (CX 453). Cameo-Parkway, organized only a few years previous, had become highly successful in recording new dance styles such as the twist and other rock and roll music performed by Chubby Checker, Bobby Rydell, and others (Cohen 6739-44, 2226-27).

The original contract was a one-year nonexclusive agreement which provided for no guarantee to Cameo (CX 453a). Thereafter, Cameo demanded a yearly guarantee of \$40,000 in royalties. The guarantee was a highly important factor to Cameo in the later negotiations. The contract then became exclusive (Cohen 2651-52; Keating 5240; CX 452b-c).

In the original contract, Columbia agreed to include one Cameo record in 75% of its new member solicitation space advertising (CX 453c). When the agreement was later modified, the Club agreed to offer for sale 12 different Cameo albums during the

contract term and to use Cameo records in 90% of its space advertising (CX 452a-b).

By an amendment, the term of the contract was extended for one year, and the Club agreed to offer not less than 18 Cameo records during the extended term (CX 451a-b). As a one-year contract, it did not contain any contractual provisions limiting exclusivity (RPF 130-33).

Warner Bros. Records—The first agreement with Warner Bros. Records, Inc., dated September 15, 1960, covered club distribution rights to the record "The Button Down Mind of Bob Newhart" (CX 39).

The contract covered only one record rather than a catalog; Warner Bros. was a new record company and did not have an extensive catalog.

From time to time thereafter, Warner Bros. officials suggested that the Club offer additional Warner Bros. records (Conkling 6191; CXs 533, 544, 557, 530a-b, 182, 521, 527).

The Warner material distributed by the Club consisted of movie soundtracks, folk, humor and teen-age material. Each contract was for a term of approximately three years and embodied a substantial guarantee:

Date	Album	Guarantee
September 15, 1960 (CX 39).....	"The Button Down Mind of Bob Newhart"	100,000 records
December 2, 1960 (CX 514).....	"Gone With the Wind"....	40,000 records
February 15, 1961 (CX 517).....	"A Date With the Everly Brothers".....	100,000 records
May 1, 1961 (CX 519).....	"The Button Down Mind Strikes Back"....	Regular selection in the mono- phonic Broadway, Movies, Television and Musical Comedy Division for one month
January 29, 1962 (CX 537).....	"The Music Man".....	150,000 records
September 27, 1962 (RPF 134-39)	"Peter, Paul and Mary"	100,000 records

Vanguard Recording Society—The contract with Vanguard Recording Society, Inc., was dated June 1, 1961, and was a one-year agreement covering 12 specific records. The agreement did not contain a guarantee (CX 43) and was nonexclusive.

Vanguard had developed a catalog containing classical and authentic folk music (Keating 5201-02). Vanguard had previously offered certain of its records to the RCA and Capitol clubs for distribution, but its offer had not been accepted (M. Solomon 1945-46).

Vanguard approached Columbia and suggested club distribution (M. Solomon 1955). Club officials agreed to offer 12 Vanguard records on an experimental basis (RPF 140-42).

Other Contracts—In CPF 30, all the contracts in evidence are improperly lumped together as "Licensing Agreements." Actually, the Aristocrat Record Corp. contract (CX 703) (evidently made to settle a dispute with an artist) and the contract with Roulette Records, Inc. (CX 698), each covered *one* LP.

Thus, they are not "Licensing Agreements" as that term was defined by Paragraph Six of the complaint because they do not involve a license on "all original masters" coupled with an agreement to pay "royalties" which are "computed upon a percentage of net sales," as alleged in the complaint. Rather, these two contracts involved a flat payment for the right to distribute one record each. They do not contain many of the provisions contained in the other contracts, and the relationship of the parties was obviously different.

Similarly, the Carlton Record Corp. contract was a one-shot nonexclusive one-year agreement on one record (CX 234).

Technically, the various Warner Bros. contracts (CXs 39, 514, 517, 519, 537, 552) are not "Licensing Agreements" either, as the term was defined by Paragraph Six of the complaint. They do not involve a license on "all original masters" as alleged in the complaint, but merely a license on individual records only.

Neither are the Vanguard and original Cameo-Parkway contracts (CXs 43, 453) "Licensing Agreements" as the term was defined by Paragraph Six of the complaint. They do not involve a grant of "sole and exclusive" rights as alleged in the complaint, but rather were nonexclusive contracts (CPF 30 and Exceptions).

Each of the contracts required the Club to merchandise the records under the label name of the licensing company. Thus, Columbia has used the licensors' labels on records and on record jackets and has utilized in advertising and promotion their distinctive "logos" (CPF 38). Each of the contracts related to

record club rights only and did not involve other retail distribution in any way.

The Caedmon and Verve Contracts

Respondents have vigorously excepted to the manner in which Government counsel have dealt with the facts concerning the early Caedmon and Verve contracts. Respondents complain that the bulk of the Government's proposed findings on the outside label agreements constitute nothing more than an attempt to rewrite *all* of the agreements in the mold of the two abandoned contracts.

Respondents had sought to remove what they call "this dead 'issue'" from the case prior to trial. In a motion to dismiss portions of Count I of the Complaint, dated September 28, 1962, respondents showed that the provisions of the early Caedmon and Verve contracts had been abandoned prior to the investigation or the filing of the complaint herein. That motion was denied, and permission to appeal was refused.

Respondents contend (Exceptions, page 13) :

In the findings submitted by complaint counsel, there are no less than 50 separate paragraph references to the provisions and terms of these obsolete contracts. They are treated generally—contrary to fact and law—as if they still existed at the time of the trial. Every effort is made to relate all of the subsequent agreements to these early contracts. The circumstances surrounding their execution and abandonment are totally ignored.

The record indicates the following :

The Verve agreement was executed in March 1959. Verve was then believed by Columbia officials to be in a precarious financial position. As early as December 17, 1958, Adler had pointedly referred to Verve's "weak financial position" (CX 81c). In a subsequent memorandum, the concern became "full-blown" that Verve might be forced, because of this acute financial crisis, into the position of a low quality "budget-line."

There was grave doubt of Verve President Norman Granz's ability "to enforce any contractual guarantees he gives" (CX 82a-b). The contractual provisions arose in this highly unique factual situation.

Early in 1960, however, the terms and conditions of the Verve contract were reviewed by Club executives and by their counsel. From a business point of view, it was concluded that the contract had been drafted to meet a business eventuality which, after almost a year of actual operation, had not in fact occurred. From a legal viewpoint, counsel felt that the purposes and effects of Paragraphs 3 and 4 of the Verve contract might be later mis-

construed and misinterpreted—exactly as they have been in the Government's proposed findings. Accordingly, in February 1960, Columbia waived Paragraphs 3 and 4, and Verve promptly agreed to the contract amendment (Keating 5180-84; CX 32). That was prior to the commencement of the Commission investigation that led to this proceeding.

Government counsel called no witness from Verve. They called a representative of MGM, which had purchased Verve, but did not question him concerning the reasons for the termination of the Columbia-Verve contract, or as to what in fact had been done by the parties pursuant to Paragraphs 3 and 4 of the contract. It was established in the record that MGM and Columbia had agreed in February 1962 to terminate the contract, effective the end of June 1962 (Maxin 1729; CX 288). Thus, the Verve contract was not in effect when the complaint issued, except with respect to four individual records that had been locked into the Club's advertising schedule. Nonetheless, in the Government's proposed findings there are no less than 38 separate paragraph references to the provisions of the old Verve contract.

The obsolete Caedmon contract predated the Verve contract by a full year. That contract was also reviewed by Club officials, and by their counsel, in early 1960. That was before the Commission's investigation started. A decision was made, for reasons similar to those involved in the Verve agreement, to enter into an entirely new contract with Caedmon.

The new agreement was prepared, but it was not immediately executed because, in the meantime, Sam Goody had filed a lawsuit against Columbia and Caedmon alleging the illegality of this contract on other grounds. Columbia's counsel advised that no change should be made in the contract pending the lawsuit since any such change might be misused by Goody in the then pending litigation. The Goody lawsuit was dismissed with prejudice in late February 1961, and a new contract was entered into by Columbia with Caedmon as of April of the same year—14 months before the complaint issued herein (Keating 5184; RPF 192 (footnote)).

The new Caedmon contract eliminated the principal contractual provisions later referred to in the complaint. Despite this, there are, in the Government's proposed findings, no less than 12 separate paragraph references to specific terms of the early Caedmon contract.

All the facts surrounding the amendment of the Verve contract in early 1960, its termination in early 1962, and the execution of

the new Caedmon contract in 1961 were fully disclosed during the course of the precomplaint investigation. There is no claim that these facts came to the attention of Government counsel for the first time only after suit was filed. There is some basis for respondents' charge that the early-abandoned contracts are used as a tactic to invalidate the other contracts.

Position of Licensors

Individually, the licensors registered relatively small market shares of LP sales reported in the *Billboard* dealer survey (RXs 452-53 *in camera*). However, in the aggregate, 10 licensors accounted for 12% of the 1961 LP sales measured by the *Billboard* store survey. In 1962, nine licensors accounted for nearly 14%.

Those figures afford some measurement of the importance of the licensors, but they are subject to various qualifications and infirmities as noted in respondents' Exceptions (pages 231-34). It must be kept in mind also that the Club did not "acquire" even those small shares by its contracts. Ordinary retail sales remained unaffected; the contracts related only to record club sales.

Annual sales of several of the licensors may be described as substantial, ranging from \$5,000,000 in the case of Warner Bros. and Kapp, and \$7,000,000 for Liberty and United Artists, up to \$10,000,000 for Mercury.

Several of the licensors are subsidiaries of corporations with 1961 current net assets ranging from \$40,000,000 to \$90,000,000 (CPF 302). Whether such companies had ample resources to enter the record club business is speculative.

Respondents have admitted that the outside labels were and are "competitors" of Columbia Records in the manufacture, sale and distribution of records through conventional channels of distribution. (See also Kapp 1510, 5796; Talmadge 1838; Maitland 3777; Mantell 6683-84, 6696; Linick 3704; CPF 46.) The evidence indicates that they are not now, and never were, competitors of the Columbia Record Club, or of Columbia Records in the distribution of records through a record club.

None of them was shown to have even considered the establishment of a competitive major record club. None of them was shown to have either the resources, experience, or desire to create a major record club. Most of them had never enjoyed any record club distribution prior to their contracts with Columbia.

They are competitors in the sale of records to consumers; they are "all trying to get that consumer dollar" (Talmadge 1838).

While many dealers did identify Columbia as an "important"

label in their stores, there was not any unanimity on this point. For example, one dealer, unhappy with Club competition, led a boycott of Columbia records.

Concerning non-Columbia records, there was some recognition of the "importance" of the outside labels, but also evidence that their importance to some dealers was minimal or even nonexistent. (Compare CPF 47 with respondents' Exceptions.)

Catalog Distribution and Exclusivity

The agreements with outside labels were full catalog arrangements, except in the case of Warner Bros., which had a limited catalog, and Vanguard, whose records were being offered on an experimental basis. Full catalog arrangements were deemed essential by each of the other contracting parties.

There was no proof that Columbia conditioned its arrangements with any outside label on the grant of a catalog deal or that it "imposed" any restriction. The record showed that Columbia bargained in a number of cases for catalog rights in accordance with industry custom, because it wanted a broad supply of repertoire for the Club.

For its part, the Club was not interested in making arrangements merely on individual hit records (Keating 5164-65). The Club, a voracious consumer of repertoire, needed far more than a few monthly hit selections. More than half the Club's sales are accounted for by records which are not regular monthly selections (Gartenberg 8418).

For their part, the outside labels were not interested in Club promotion of merely a few important artists and the "cherry picking" of hit records. As they testified, they desired broad catalog exposure to promote their label images and to feature their primary and secondary artists.

None of the outside labels complained that the catalog contract provisions were "restrictions" upon them.

The outside labels wanted and bargained for a full catalog deal, again according to industry custom. They did not want merely promotion of their top artists or well-known records (see, e.g., Bennett 6511; Kapp 5777). They wanted the Club to use more—not less—of their catalogs and their artists. They knew that the way to accomplish this was to follow industry custom and practice and license their catalogs on an exclusive basis (RPF 146). They knew that a company with a full catalog arrangement can use this as a selling point in attracting new artists (Ostin 3541). They believed that full catalog deals would allow them to recoup losses on

certain items in their catalogs which had been unsuccessful at retail.

To encourage the broadest possible use and promotion of their artists and repertoire, they uniformly insisted on firm guarantees. They repeatedly encouraged the Club to use more and more of their catalogs, including current repertoire. (See, *e.g.*, Mercury, CXs 346, 352b-c, 381, 370, 377, 430-35; Kapp, CXs 186, 269, 275-76, 278-83; Liberty, CXs 492, 498, 500.) And Warner Bros. which did not have a full catalog deal, kept up a constant barrage of suggestions and recommendations for Club use. (See, *e.g.*, CXs 182, 521, 527, 530, 533, 544 and 557.)

There was no evidence that any outside label which entered into a contract for catalog distribution wanted, or would have had any interest in, an arrangement covering distribution of less than its full catalog. That the full catalog deal gave the outside labels the desired in-depth distribution is established in the record by the total absence of any complaint by these companies on that score, as well as by the statistics.

Thus, the Club was shown to have offered 76 Caedmon titles, 279 Mercury titles, 124 Kapp titles, 68 United Artists titles, 77 Liberty titles, 26 Cameo-Parkway titles and 86 Verve titles. These statistics do not include the stereo versions of those records, many of which were also used by the Club (RXs 638a, 644a, 639a, 643a, 640a, 641a; Gartenberg 8423-25, 10352).

With the exception of the experimental arrangement with Vanguard, each of the contracts was an exclusive club distributorship agreement. The agreement with Cameo-Parkway, originally non-exclusive, was converted into an exclusive contract when Cameo demanded a firm guarantee.

Exclusivity was desired by each of the contracting parties. From the Club's point of view, it was entitled to exclusivity because it would spend millions of dollars promoting the artists, labels and records of the licensor companies and needed to have an opportunity to recoup this investment. This investment of effort and money required a reasonable protection so that others might not unjustifiably and unfairly profit therefrom. In addition, each exclusive contract at the outset contained a firm guarantee of royalties inserted at the demand of the outside labels. The Club needed exclusivity to ensure its ability to meet the contractual commitments imposed by the licensors (Keating 5239-40).

The outside label manufacturers recognized the Club's need for exclusivity in order to permit most effective distribution, and believed that such exclusivity promoted their own business interests.

Not a single representative of any outside label was shown to have objected to exclusivity, or believed that such an arrangement was unnecessary for the Club to meet its contractual commitments and to effectuate the purposes of the agreements.

The Government contends there was no business justification for the exclusivity provisions of the licensing agreements. That contention is rejected by the examiner.

To respondents' argument that it was necessary for them to obtain restrictive agreements with the licensors in order to comply with the terms of the royalty guarantee in various licensing agreements, Government counsel reply that the licensing agreements had other provisions that "adequately assist" Columbia in realizing the guaranteed sales (CPF 74).

Interestingly enough, Government counsel point to a provision in several of the contracts granting Columbia an additional period of time after termination of the contracts in which to sell the licensors' records if sales have been insufficient in volume to meet the guarantee. Such a provision indicates to the examiner that at the time of entering into the contract, there was no certainty on the part of either party that the Club would be able to meet the guarantee within the term.

Government counsel go on to argue that exclusivity was not important in helping to meet guarantees because the guarantees were in fact met. As respondents note, this is circular reasoning. The guarantees were met where there was exclusivity, and respondents can plausibly argue that if there had not been exclusivity, the guarantees might not have been met.

As of June 25, 1962, the date of the filing of the complaint herein, the following exclusive catalog contracts were in full effect:

Label	Contract date	Original term of contract
1. Mercury (CX 34).....	April 1, 1960.....	3 years, 6 months
2. Kapp (CX 41).....	October 7, 1960.....	3 years, 4 months
3. Caedmon (CX 22).....	April 15, 1961.....	2 years, 1 month
4. United Artists (CX 44).....	July 1, 1961.....	3 years, 4 months
5. Liberty (CX 45).....	October 25, 1961.....	3 years, 4 months
6. Cameo-Parkway (CX 453).....	December 15, 1961.....	1 year

As already set forth, each of the most recently made agreements contained additional built-in provisions narrowing the period of exclusivity. Thus, the Caedmon, United Artists and Liberty contracts contained complete release clauses which enabled the licensors, at points well within the contract term, to take their entire

catalog out of the Club if they obtained better offers from competitive clubs. Columbia retained no right of first refusal in the event of an exercise of this unilateral option on the part of the licensor. The acceptance of any such competitive offer would have completely terminated Columbia's exclusive club rights.

In addition, the Caedmon, United Artists, Liberty and Kapp contracts contained partial release clauses which permitted the licensors, again well within the contract term, to remain in the Club, but to release through other clubs or direct mail sellers records which the Club did not propose to offer.

In January 1963, most of the partial and complete release clauses had been operative for a long period of time. By the time the trial record closed in August 1963, all of those clauses were operative:

Contract date	Partial release of exclusivity	Full release of exclusivity
(Caedmon) April 15, 1961.....	May 31, 1962.....	May 15, 1962
(Kapp) October 7, 1960.....	February 28, 1962....	
(United Artists) July 1, 1961.....	October 31, 1962.....	April 30, 1963
(Liberty) October 25, 1961.....	March 31, 1963.....	August 31, 1963

There was no evidence, or claim at the trial, that any outside label was coerced or forced into negotiating an agreement for Club distribution. On the contrary, the evidence showed that many of the outside labels had affirmatively solicited such distribution.

There was no evidence, or claim at the trial, that any record manufacturer was wrongfully excluded from Club distribution.

There was no evidence, or claim at the trial, that Columbia, during the negotiations with outside labels, imposed onerous, difficult or unwanted conditions. On the contrary, the record showed that the negotiations were hard bargaining sessions and that Columbia was often forced to increase its offers in order to meet the demands of the outside labels.

There was no evidence, or claim at the trial, of any complaint by any outside label as to the duration of the contract or as to any other feature or term of the contract.

There was no evidence, or claim at the trial, that the Club used too little of the repertoire of any company, offered records as part of enrollment and bonus offers to a degree disproportionate to the amount offered for sale, favored Columbia records over those of the outside labels, preferred one outside label at the expense of another, or used the record club to obtain some advantage for Columbia in non-Club sales.

Columbia's contracts with the outside labels under attack in this case followed in form and substance long-established customs and practices in the record industry.

Purpose and Effect of Exclusivity

The Government contends (CPF 57) that "respondents' main interest was in obtaining the key artists" of the licensors while imposing "restrictions" of their full catalogs. Actually, the record indicates that the Club was interested in obtaining a wide diversity of catalog material and not just a few hit artists. The outside labels, of course, wanted Club distribution for all their artists, not just their "key artists." The record shows they obtained it.

The Club gave exposure to more than 350 outside label artists, or groups of artists (RXs 638, 639, 640, 641, 643, 644; CXs 780, pp. 510-48; 285).

Government counsel flatly state (CPF 57) that Columbia's main interest in acquiring access to the Kapp catalog "was for the purpose of obtaining Roger Williams, the Kapp pianist." Not only is this contradicted by the testimony cited (Keating 5190); but the claim also is refuted by the proof that the Club exposed some 61 Kapp artists, or groups, besides Williams (RX 639).

In instances where Columbia has exclusive rights to the licensor's entire catalog, there is no concurrent obligation on the part of Columbia to use the entire catalog. However, it appears that the Club has distributed a substantial proportion of the outside label catalogs. (Compare CPF 60 and respondents' Exceptions to CPF 59, 60.)

The record does not support the Government's claim (CPF 62) that Columbia entered into the licensing agreements for the purpose of discouraging independent minor labels from forming a competitive record club. Even if CX 81 were interpreted to that effect (but see respondents' Exceptions), the circumstance would shed little light on the main issue. Without more—considerably more—it fails to show monopolistic intent.

Whatever the purpose may have been, the fact is that uncontradicted statistical evidence (RXs 356-58) shows that the share of total club sales by "independent" record clubs has grown substantially—and not decreased—as the Columbia Club added outside labels. Their share of sales increased from 2% in 1959 to 8% in mid-1961, during the time in which Columbia's sale of outside labels grew substantially (RX 425 *in camera*).

Despite respondents' protestations (Exceptions, page 41), there

is no real dispute that the licensors, contractually, were prohibited from selling to the Diners' Record Club.

It does not follow, however, as contended by Government counsel, that the exclusive club distribution arrangements between Columbia and the licensors constituted "an important factor in the elimination of the only significant independent record club."

In the first place, there is no record support for that characterization of the Diners' Record Club. (See RPF 365-66 and respondents' Exceptions to CPF 450.)

Moreover, there is doubt that even under the findings proposed by Government counsel, it may properly be said that agreements between Columbia and its licensors constituted "an important factor" in the elimination of the Diners' Record Club. (See respondents' Exceptions to CPF 63-64.)

Under Solomon's own version of events (Tr. 3788, 3801-02), the asserted refusal of the three "majors" (Columbia, RCA-Victor and Capitol) to sell directly to his club was more important than any inability or difficulty in obtaining the records of the licensors.

As noted elsewhere, the record hardly supports the Government's contention that the Diners' Record Club was a victim of monopolistic practices on the part of Columbia.

Although, under the licensing agreements, the licensors are barred from competing in the so-called club market, this is not accurately characterized as removing them as effective competitors. The outside labels were not engaged in such distribution at any time and thus were not "removed" from it.

There was no evidence that the outside labels were ready, willing and able to become record club competitors. It might be properly inferred that they were in the status of potential competitors in that area of distribution.

The examiner rejects the proposed finding (CPF 73) that Columbia has such "control" over licensors' records as to give Columbia "inordinate power * * * that may carry over to dictating the repertoire and actual contents of Licensors' records." The sweeping statement that "This has already occurred in several instances and is likely to occur more regularly" is not supported by the record. (See CPF 176-77 and Exceptions thereto.)

The generalized, speculative, opinion testimony of RCA's Marek adds nothing in the way of factual proof.

Background of the Agreements

CPF 182-212, appearing under the heading "Background of Licensing Agreements," apparently are designed to show that

there was no business reason, or at least no necessity, for Columbia to sign any agreements with any outside labels. In those proposed findings, Government counsel attempt to show that the Club had sufficient repertoire without adding outside labels.

In a case involving charges of monopolization and attempted monopolization, it cannot be said that such evidence is irrelevant or immaterial. Some consideration must be given to the question of Columbia's motive or intent. However, there are distinct limitations on an *ex post facto* assessment of business judgment by a Government agency or court. Bureaucratic or judicial second-guessing of businessmen in the competitive struggle is not to be countenanced under the guise of making an antitrust judgment.

It seems to the examiner that only in a very clear case would it be appropriate for him, from the vantage point of hindsight, to hold that the professed business justification of a particular course of action was simply window dressing.

This is not such a case.

The examiner finds that there was a valid basis for Columbia to believe that from a business standpoint, it was necessary or desirable to enlarge the selection of records available to Club members.

In the examiner's opinion, counsel for both sides have become carried away with this subject and have devoted an inordinate amount of time and space to it.

Despite the reservations indicated above, and because of the earnestness and zeal devoted to the subject by both parties, the examiner has determined to include some of the detailed findings proposed by counsel that he deems supported by the record.

The Club has available to it the catalog of LPs on the "Columbia" and "Epic" labels (Keating 5465; CXs 148, 149, 113). The 1963 "Columbia" catalog alone has over 2,000 mono LP albums (RX 297). In comparison, Mercury, the ninth ranking company in the industry in 1961 (CX 241a), has approximately 967 albums in its catalog (CX 398). Columbia has boasted of having "the world's largest long-playing catalog" (CX 651, p. 39, CX 194b).

The "Columbia" catalog contains every form of recording: classical, popular, jazz, folk, humor, poetry, language, documentaries, dramas, literature, Broadway shows, and motion picture sound tracks (Lieberson 84-85).

Many of the LPs in the catalog consist of dormant material or records of historical or cultural interest with little or no present sales appeal (Keating 5476; Lieberson 139-40; see RPF 44). Columbia rarely "cuts out" records. Sales of 1000 units are enough to keep material in Columbia's catalog (Hammond 7220).

A great deal of the material was originally recorded more than 20 years ago.

The claimed count of 2000 LPs also must be evaluated in the context of the entire industry's output. The industry releases 5000 new LPs and 6000 new singles each year (see RPF 30, 40). *Schwann* lists approximately 25,000 LPs currently and regularly available (CX 319, p. 6).

In support of their contention that such a catalog was adequate for Club purposes, Government counsel here list names of artists and quote blurbs from Club magazines about particular performers. But if we are to put ourselves in the record business and try the adequacy of the Columbia-Epic catalog, an unevaluated list of names tells little.

Schwann (e.g., CX 319) shows that most artists have recorded for a variety of different labels at one time or another (either under contract or on a free lance or exchange basis). What counts—and what the Government's proposed findings do not show—is the commercial significance of the artists and of the material they recorded for Columbia, the age of that material, the present whereabouts of the artists, or the availability of comparable or more current material on other labels. This void is not filled by quoting advertising blurbs that a performer is “emotionally unbridled,” or “delightful” (CPF 192) or that he has a “velvet voice” (CPF 213).

But the record does contain meaningful evidence in point. Various industry experts called by both sides—including manufacturers, dealers, a trade-paper representative, artists and leading A&R personnel—testified at length about repertoire. In general, their testimony confirmed that Columbia's catalog was deficient in certain areas and lacked diversity in others.

The showing respondents made was not a lawyer's afterthought dreamt up for trial in order to justify the outside label agreements. Contemporaneous memoranda (e.g., CX 81) and surveys in 1958 and after showed member dissatisfaction with the diversity of material offered and concern about this by Club officials. Subsequent events show that the original decision to meet this problem by outside labels was sound. Government counsel themselves point out that records of outside labels accounted for over 30% of Club sales in 1961 and over 36% in 1962 (CPF 453-54).

Against this background of behaviour, contemporaneous documents and expert opinion testimony about repertoire, Government counsel find little solid support for their position. Respondents, in their Exceptions (page 128), picturesquely accuse Government

counsel of "name-dropping and advertising blurbing" and seeking to substitute their own "expertise" about jazz and other areas of music for that of professional record people.

On consideration of CPF 184-212, the Exceptions thereto, and RPF 83-99, the examiner essentially adopts respondents' summary of the proof in this area:

Humor—The Government's proposed findings do not even attempt to rebut the evidence that Columbia needed outside product in this area.

Rock and roll—Government counsel were able to come up with only one so-called rock and roll artist in the entire Columbia catalog—one who came to Columbia long after the Cameo and Liberty agreements.

Romantic piano material—Only two Columbia candidates are nominated in this important category—and neither fits.

Motion picture soundtracks—Except for one or two records, the Government points to no successful material of this type in Columbia's catalog.

Spoken Word—The findings show the relative lack of diversity of Columbia's material, particularly compared to that of smaller companies like Caedmon which specialize in this area. (But *cf.* Lieberman 4800-01; Mantell 6696.)

Folk—Government counsel can find only one folk artist of commercial importance with any significant amount of material in Columbia's repertoire.

Jazz—The proposed findings in this area are longer than all the other catalog findings combined. All the detail may be interesting for jazz collectors, but it does little to advance the issues in this case. Just as Government counsel's prolix findings on contractual provisions focused primarily on the obsolete Verve agreement, so the findings on repertoire center on the 1959 business justification for that same agreement. Since the contract was no longer in effect at the date of trial, the emphasis on jazz is strange. When all is said and done, the record shows only three important jazz artists on the Columbia roster. One had refused to record for Columbia since 1958 and left shortly thereafter for a succession of other labels. Another had only four albums in the catalog in 1959, with most of his output on other labels. The third achieved his primary success long after 1959.

Other areas—Except for a few cursory remarks, the Government's proposed findings do not even attempt to deal with the desire of Club members for greater diversity in other areas.

The examiner does not suggest, however, that Columbia did not

enjoy considerable success in those and other fields. The "Columbia" label stands high in the classical field.

In the important original Broadway cast field, Columbia has an impressive catalog (RX 297, pp. 1,2; CX 404, Vol. 6, No. 10, pp. 10, 11; CX 93, p. 8). The two best selling original cast recordings of all time were Columbia's "South Pacific" and "My Fair Lady" (CX 737b; Lieberman 4797). But Columbia did not profess repertoire weakness in those areas.

Columbia was the pioneer in recording "pop" (*i.e.*, popular) music on LPs (Lieberman 4796). Its pop artists have consistently appeared on the best seller charts. It is too much to say, however, that the range of pop music on the Columbia and Epic labels is "complete."

In the spoken word field, Columbia ranks well among the major companies (Mantell 6696; Lieberman 4800-01).

Important original movie soundtracks have appeared on the Columbia label, including "West Side Story," "A Star is Born" and "The Bridge Over the River Kwai" (CX 410, p. 2; CX 414, pp. 1, 11; see also Lieberman 85).

Despite the text and citations in CPF 205-08, Government counsel failed to show Columbia was blessed with an abundant supply of commercially significant folk music.

In 1957, the Columbia Record Club was operating four monaural divisions, with 13 "monthly" magazine mailings per year. The regular and alternate selections alone required 150 monaural records. Additional material was needed for special promotions and for the Christmas catalog (Adler 4970-77; CX 81c). The stereophonic counterparts of the four monaural divisions were added shortly thereafter. This complicated the repertoire problem since, due to differences in taste, the same selections could not always be offered to monaural and stereophonic members. The Club was a voracious consumer of repertoire (Adler 5110, 4970-71).

There were unmistakable signs that members were dissatisfied with the limited choice of artists and repertoire offered by the Club. The original Club plan with respect to bonus records had been to offer special Club records which were not taken from the regular Columbia catalog. This plan was abandoned because of members' complaints, after tests that showed members preferred the offer of regular catalog material as bonus selections (Wunderman 6566-69).

Members demonstrated their dissatisfaction with the Club's repertoire in many other ways. A large number returned the negative option selection cards each month and indicated that

they did not want to order any records. Members sent letters complaining about the lack of variety of selections. An increasing number of records was being returned each month. There was a marked decline in the "pull rate" (the number of each selection shipped divided by the gross members eligible to receive shipment) of the monthly selections.

Finally, there was an increasingly large annual dropout rate of members which averaged at least 50%—far more than had been originally anticipated (Adler 4962-63, 4966-68, 5107; Wunderman 6566-69).

The Club's attempt to broaden its selection in 1956 and 1957 by offering records of Epic, a subsidiary Columbia label, did not stem the tide of member dissatisfaction (Adler 4971; RX 365).

In 1957, Alfred Politz Research, Inc., was retained to do a comprehensive study of the likes and dislikes of Club members and ex-Club members. In a report submitted in December 1957, Politz showed statistically that members were dissatisfied with the variety of repertoire offered to them through the Club, both in terms of lack of alternate selections and in terms of bonus records (Simonson 7046-50).

Of ex-Club members, 25.6% listed lack of selection as the principal disadvantage of belonging to a record club; 19% of Club members listed the limited selection of records offered through the Club as a distinct disadvantage of belonging to a record club (RX 482).

A breakdown by Club division showed that in each case limited selection of records was regarded as the principal disadvantage of record club membership. In each case this was regarded as most significant by members who had left the Club at the time of the survey (RX 493).

Many records in the Columbia catalog, although not formally cut out, were basically dormant at retail and had little sales appeal (Keating 5476). Record buyers demand a variety of material in any particular musical category and in different musical categories. Thus, for example, a fan of popular music desires performances by a variety of different popular artists, although they are frequently recording the same or similar material.

In addition, there were important deficiencies in the Columbia catalog in specific areas of musical interest—including the fields of jazz, rhythm or rock and roll, folk music, spoken word, Hollywood musical material, humorous material and performances by "romantic" pianists (see, *e.g.*, Adler 5108, 4968; Wunderman

6566; Keating 5166, 5381, 5342-44; Chapin 7410-12; Miller 7157-58; CX 81b, ¶2).

The catalog deficiencies were unquestioned—except now by the Government. There was no immediate agreement, however, as to how best to solve the problem.

One group within the company urged that Columbia should attempt to sign up more artists and make them available for Club distribution. Adler, on the other hand, felt that this course of action was not feasible and that no single company could assemble a sufficient variety of talent to meet the varied and various demands of consumers. Adler recommended that Columbia proceed to make arrangements on an experimental basis with smaller record companies in order to supplement the catalog (Adler 4967, 4972; CXs 81b-c).

The contemporaneous business judgment of the Club's executives in 1958 with respect to the existing deficiencies in the Columbia catalog was fully confirmed at the trial by several knowledgeable and unimpeachable witnesses.

John Hammond, a leading jazz critic who had been responsible for many developments in that field since the 1930's and who returned to Columbia in October 1959, testified that Columbia's jazz catalog was weak and that its contract jazz artists were, for the most part, not commercially salable. Columbia did not even have a female jazz vocalist.

Hammond explained that "pure jazz" and "pure jazz artists," examples of which may be found in the Columbia catalog, were important historically and artistically, but were rarely important factors in commercial sales (Hammond 7212-19). Hammond testified that there were many different jazz labels, that Sam Goody alone offered for sale 40 different such labels, that the small independent record companies were the leaders in this field, and that jazz accounted for only $\frac{1}{2}$ of 1% of Columbia's total sales (Hammond 7225, 7227, 7289). He identified the prominent jazz labels including, among others, Roulette, Blue Note, Riverside, Atlantic, Verve and Argo (Hammond 7225).

The Government's expert witness, Thomas Noonan, confirmed that Columbia did not have a diversity of jazz product and was not considered a leading jazz label; he added Fantasy and Prestige to the list of well-known jazz labels (Noonan 6877).

Andre Previn testified that tastes in jazz were more mercurial than in any other form of music, that jazz catalogs therefore frequently go out of date and that the larger record companies,

including Columbia, were not important in the jazz field (Previn 6034-36).

This testimony was confirmed by dealer witnesses specializing in jazz (see, *e.g.*, Zenger 6034-35).

Mitch Miller, who had headed A&R at Columbia for years, testified that Columbia's jazz catalog contained primarily historical jazz and very little contemporary or mainstream jazz (Miller 7154, 7173-75). It was precisely this type of jazz that was not commercially salable (Hammond 7218-19; Keating 5473-79).

(Jazz aficionados may pursue the argument further by comparing CPF 191-204 with respondents' Exceptions thereto, as well as RPF 89-90; the latter are adopted in substance.)

The Club executives' appraisal of Columbia's catalog deficiencies in rhythm and rock and roll music was confirmed by Mitch Miller. He had consistently refused to have anything to do with this type of music from the time of its introduction in the mid-1950's, despite the fact that many other companies, including RCA with Elvis Presley, were successfully recording and selling rock and roll (Miller 7152-53, 7186).

Government expert Noonan confirmed that Columbia was not a leading label in this field, and he named RCA, Motown, Vee Jay, Cameo-Parkway, Tamla-Gordy, Liberty and others as being the significant companies in this area (Noonan 6881-82).

With respect to folk music, a popular trend today, Hammond testified that in 1959 Columbia's folk catalog was virtually non-existent; certain examples of so-called "pure" folk music in the catalog were not commercially salable (Hammond 7218, 7229-30). Hammond's testimony was confirmed by other witnesses, who added that the important labels in the folk field today include Capitol, Prestige, Vanguard, Folkways and Elektra (Miller 7154-55; Noonan 6881; Zenger 6305).

As for movie soundtrack material, Miller recalled that in the old days record companies could freely bid for movie soundtracks. As a result of the postwar creation of record company subsidiaries by nearly all motion picture film companies, and the granting of soundtrack recording rights to those subsidiaries, it became very difficult for Columbia and other record companies to obtain soundtracks for recording unless there was some prior legal commitment on the part of the artist (Miller 7154-57).

For example, Andre Previn testified that he tried to get Columbia the record rights to the movie soundtracks which he had scored in Hollywood, but he failed and the rights invariably went to the movie company's record subsidiary (Previn 6026).

Friedman, of Warner Bros., for example, testified that since the creation of its record subsidiary, that company has not granted soundtrack rights to any other company (Friedman 6105-06). Similar testimony was furnished by other witnesses (Noonan 6883-84; Talmadge 1835-37, 1839, 7831-32; Lieberman 4814; Miller 7155-57).

The original views of the Club's executives in 1957 concerning the inadequacies of the Columbia catalog and the findings of the Politz report in that year were subsequently confirmed by statistical studies and tests which showed that Club members remained dissatisfied with the Club's limited repertoire and wanted more variety.

Early in January 1960, the Club tested an advertisement of a preselected small group of records against an advertisement offering a more diversified choice; the latter advertisement attracted 75% more members (Keating 5302). Subsequent Club tests showed similar results. For example, the Club's traditional TV Guide form of advertisement which contained Columbia, Epic and outside label material, resulted in a 66% better response from consumers than an advertisement containing only Columbia and Epic product (Klemes 7001-03; RXs 315a-d, 315e-h; RXs 316a-d, 316e-h).

During 1960, Stewart-Dougall and Associates, a market research firm, was retained to determine what steps could be taken to keep members in the Club longer and to encourage them to make greater purchases (Skelly 7891). The study was completed in the fall of 1960, but the tests for the study had been conducted over the prior nine-month period (Skelly 7892), during which time the only outside label material offered by Columbia was Caedmon and Verve.

The study revealed that as members remained in the Club longer, they became more and more dissatisfied with the lack of variety offered in repertoire (Simonson 7051). Stewart-Dougall reported that the principal reason for members leaving the Club was the lack of variety of selection offered (Skelly 8267-69). This single factor was mentioned as the primary cause of dissatisfaction by almost 40% of the ex-members who stated they were not glad they joined the Club. The single most important recommendation by members was to offer a greater variety and better selection (Skelly 8272-74; RXs 341, 343).

The Club's concern with the serious problem of membership drop-out—or "shrinkage"—was also readily documented. Viewed historically, shrinkage had steadily risen from 4.7% in 1955,

the Club's first year, to 64.7% in 1959; thereafter, although still large, the upward trend seems to have been arrested (RX 365). The Club's policy on outside labels was in part directed to arrest this growth in shrinkage which was a reflection of the serious lack of diversity of the Club's catalog (Adler 4966-67).

The business judgment of the Club with respect to the need for outside label material has clearly been proved sound. In 1961, 30% of the records selected for purchase by Club members were outside label records (RXs 422, 425 *in camera*). This indicates that members wanted more variety.

The action of the Club in offering more variety of product paralleled the actions of dealers themselves—and even then left the Club with far less catalog than dealers. Initially, dealers were limited to a single label (*supra*). They soon found it necessary to offer more labels in order to remain competitive and to serve the needs of their customers (Doctor 952-53; Goldfinger 1141; Levy 965-66; Levin 482-83).

While the Club was offering approximately 100 records each month, the stores of the Hartstone brothers were carrying 25,000 records (Fred Hartstone 1825; CX 319, p. 6). Goody was offering some 400 to 450 different labels, while the Club was offering seven or eight (Stolon 1263). The Record Hunter regularly offered customers more than 5,000 different records on more than 300 labels (Maggid 848). The Doubleday stores offered some 70 to 80 different labels (Prince 5504).

Each of these retail witnesses would have deemed themselves benefited if their larger competitors were limited in sales to one label only, and one Government witness frankly admitted this (Freedman 2593).

Price-Fixing

The price-fixing phase of this case has its anomalous aspects too. It is charged in essence, among other things, that Columbia has agreed with the outside labels to sell \$3.98 records for \$3.98. Yet in the face of a proposed finding to that effect, the Government also asks the hearing examiner to find that "Of course * * * the Club does not sell at \$3.98 * * *." (CPF 115, footnote 62a.)

The examiner is constrained also to agree with respondents' description of the "Note" preceding CPF 111 as "obscure." It is another example of the ambivalence that permeates the proposed findings and briefs of the parties to this proceeding.

As stated by respondents (Exceptions, page 81), the record shows that since 1955 the Club "has generally sold \$3.98 records

for \$3.98, \$4.98 records for \$4.98 and \$5.98 records for \$5.98."

The record also shows that a \$3.98 record is, generally, a "pop" record classification; a \$4.98 record is, generally, a "classical" classification; and a \$5.98 record is, generally, an "original Broadway cast album" or special set classification. These classifications are well understood in the trade and by consumers (RPF 529).

Those "prices" of \$3.98, \$4.98 and \$5.98, respectively, are also the generally prevailing suggested manufacturers' list prices for those general record classifications. Those also are the prices at which virtually all retailers in fact sold up until a few year ago, and the prices at which thousands of retailers throughout the country, who are not regularly engaged in the practice of discounting, actually sell those records today.

The Club has generally sold the outside label records at the manufacturers' suggested retail prices. On several occasions, the Club has determined that the suggested list price of the outside label records was too high for Club members and, in such instances, the Club has sold at lower prices.

Whether such determination and action were "unilateral" or pursuant to agreement is the issue to be determined.

At any rate, the Club has consistently sold Verve \$4.98 records for \$3.98. And it has consistently sold Caedmon's \$5.95 records at a price of \$4.98 (Keating 5449-50; Gartenberg 8540).

The average price per record to a record club member in his first year of membership is a function of the price charged for the enrollment records, and the price charged for commitment records, including mailing and handling charges. The average price to Club members was lower in 1962 than in 1961 because of a competitive lowering of the form of the Club's introductory offer. It is conceded by Government counsel that the Club unilaterally determines the form and composition of the introductory offer (see, *e.g.*, CPF 133, footnote 78). It thus can and does unilaterally determine the average price of records to Club members.

It appears that the price-fixing allegations are based on three types of outside label contracts.

The two earliest contracts, Caedmon and Verve, had particular provisions that do not appear in any of the subsequent contracts. They will be dealt with separately.

Most of the contracts fall into a second classification in which the Club agreed that it would pay royalties to the outside labels of a specified percentage of the so-called "royalty price." That was defined as the Club's "selling price," less four rather compli-

cated deductions (including, for example, excise taxes and album covers).

That is the standard type of royalty arrangement commonly used throughout the economy—a percentage rate based on selling price minus certain expenses. Indeed, those provisions followed standard custom and practice in the record industry. Agreements with artists provide for payment of royalties on a similar basis—*i.e.*, a percentage rate based on selling price minus certain deductions (including, for example, excise taxes and album covers).

In a third category is a handful of contracts that contained a clause following the definition of “royalty price” specifying what the base price would be for the computation of royalties.

The Caedmon and Verve Pricing Provisions

The first licensing agreement—with Caedmon under date of May 15, 1958—contained language indicating agreement by the parties on (1) the Club price and (2) the “suggested retail list” of the Caedmon product. Paragraph 3(b) of the 1958 Caedmon agreement read:

The records manufactured by us [Columbia] hereunder shall be sold by us through the Columbia Record Club at a retail price of \$4.98 each (including excise tax and packaging); and you [Caedmon] agree that, during the period of this agreement, the suggested retail list of \$5.95 for records embodying such performances manufactured by you for sale through normal retail channels, will not be reduced by you without at least six months written notice to us. (CX 19b.)

Subsequent Club literature represented for Caedmon records a Club price of \$4.98 and a “regular list price” of \$5.95 (RX 134, pp. 2-6; RX 135, pp. 2-9).

Respondents’ argument that there was no agreement with respect to the Club price because the parties did not use the word “agree” in referring to that price is specious. It does not require any involved or tortuous or contrived straining to interpret the simple statement in a contract or agreement that one of the parties will sell the records at a retail price of \$4.98 each as constituting a “fixing” of the Club price by agreement.

Respondents concede, as they must, that there *was* agreement concerning pricing conduct by Caedmon, but they argue that the agreement was not as to the actual retail selling price of Caedmon records. According to respondents, “Caedmon agreed merely *that it would not reduce its suggested list price without giving the Club written notice.*”

In stating further that “This was the entire extent of the

'agreement,' respondents would ignore that the notice must be "at least six months." Such a provision is inconsistent with the claim that Caedmon had "complete freedom" to change its suggested retail price.

Respondents point out that the written notice specified here would enable the Club to correct statements as to Caedmon's list price in advertising and promotional material.

It may be noted that the provision was omitted in the April 1961 Caedmon contract (CX 22).

Regarding the Club's own price, respondents state that "nothing in this contract evidences that the Club did not have complete freedom to change the Club selling price." That contention is rejected by the examiner.

It was Keating's testimony that in the case of Caedmon, the Club made a unilateral decision that Caedmon's suggested list price was too high, and the further unilateral decision to sell Caedmon records to members at a price below Caedmon's suggested retail price (Keating 5449-50).

Respondents take the position that "this testimony is fully consistent with the provisions of this contract." That is true in a sense—except that the so-called "unilateral decision" was incorporated in an agreement.

It is worth noting, however, that the witness from Caedmon (Mrs. Mantell) was not interrogated regarding this matter by either party. Neither side refers to any further testimony or evidence regarding it.

Royalty payments to Caedmon were to be based on the Club's selling price. Paragraph 4(b) of the 1958 Caedmon contract provided:

Royalties in respect of phonograph records hereunder shall be based upon our [Columbia's] retail sales price (exclusive of all taxes) for replacement records, but exclusive of all packaging and shipping charges (CX 19b).

Royalty provisions of that type are normally based on selling price (Ostin 3555; Lieberman 4832).

There is no evidentiary support for the Government's claim (CPF 112) that by virtue of the Caedmon contract, "a precedent was established tying the agreed upon Club price to royalty payments to the Licensor."

Contrary to CPF 113, the evidence does not support a finding that before entering into the Verve contract, the Club found it "necessary" to obtain an agreement from Verve allowing Columbia to sell Verve records at \$3.98.

The record does show these facts:

(1) The pop and jazz records of Verve had suggested list prices of \$4.98 (mono) (Shocket 182); while the Club price for equivalent product—pop and jazz albums (CL series)—was \$3.98 (CX 95d, pp. 42, 150).

(2) On December 17, 1958, the Club's Mr. Keating wrote a memorandum regarding Verve, reading in part as follows: "We understand that most of the Verve catalog has a suggested retail list price of \$4.98. We would want the right to sell the record through the Club at \$3.98 if we so desire" (CX 82a-b).

The memorandum indicates only that the Club wanted to be perfectly free to sell Verve records at whatever price it decided on.

CX 160b, also relied upon by the Government, is a preliminary memorandum by Bill Bell, in charge of artists and repertoire for the Club, in which Bell raised a number of repertoire and business problems which he felt ought to be considered; one of these was the price at which the Club would sell the Verve records.

Paragraph 22 of the Verve contract stated:

We [Columbia] agree that the price at which we sell or cause to be sold any of the records manufactured from the Licensed Masters shall be not less than the price at which a similar type (i.e., jazz, "pop", motion picture sound track, original Broadway "cast") and kind (i.e., monaural and stereophonic) on the "Columbia" label is being sold by the direct mail method herein contemplated (CX 23t-u).

Government counsel interpret that provision as constituting an agreement "in effect" that Columbia may sell the Verve records at \$3.98, a price equivalent to Columbia's price for similar product.

Respondents, on the other hand, refer to the quoted language as "merely the familiar 'most favored nations' clause found in many contracts." Strictly speaking, they are correct in contending that there is no agreement that Columbia will sell Verve records at \$4.98, or at \$3.98, or at any specified price. Columbia did agree that it would not sell Verve's records at a price lower than the price at which similar type Columbia records were being sold through the Club. To the extent that the prices of those Columbia records were \$3.98 or \$4.98, the effect was to maintain a similar price for the Verve records and to put a "floor" under the price.

(The arrangement is essentially similar to provisions found in a distribution contract the legality of which was specifically upheld in *United States v. Columbia Pictures*, 189 F. Supp. 153 (S.D.N.Y. 1960).)

After the contract was in effect, the president of Verve wrote to a Verve distributor:

There will be no mention whatsoever of price differentials in any advertising by the Columbia Clubs.

I think, Al, this corrects the two major evils of the Columbia Clubs as far as your dealers are concerned. It's true it doesn't eliminate the very real problem of their price being lower than ours, but, as I explained to you at the meetings, they are absolutely firm in their decision that they either terminate the agreement or keep the \$3.98 price. If we ever have original cast albums, as they do, or classics, they, of course, will charge \$4.98 in line with their own price (CX 638).

Government counsel seek to use the Granz letter (CX 638) to establish the truth of the matter asserted therein. But Granz never testified, and the letter was specifically *not* admitted for that broad purpose (Hirsch 4044-45).

To the extent that the letter may disclose Granz's contemporaneous state of mind, it tends to confirm the fact that the decision of Columbia to sell the \$4.98 Verve records at \$3.98 was a unilateral decision which Verve had *not* agreed to in the previously executed contract. Thus, Granz states in the letter "they [Columbia] are absolutely firm *in their decision* that they either terminate the agreement or keep the \$3.98 price" (CX 638; emphasis added). Thus, Granz's contemporaneous writing tends to corroborate Keating's testimony that Columbia had *unilaterally* decided to sell Verve records through the Club at \$3.98 and not \$4.98 (Keating 5151-52; see also Gartenberg 8539-40).

The whole episode seems to add up to something less than Government counsel contend for, but also to something more than respondents are willing to concede. There *was* some kind of a meeting of the minds between the parties relative to the pricing policies and practices of the Columbia Club in the sale of Verve records. There was concerted tampering with the price structure.

Thereafter, Club literature made this claim:

NEW SAVINGS

Verve records are nationally advertised at a list price of \$4.98. Regardless of list price, however, all Verve selections offered by the Club will be available for only \$3.98, and you also earn regular Bonus record credit. (RX 136, page 11; also see page 13.)

It is at this point (CPF 115) that the Government interjects its somewhat baffling footnote:

Of course dealers do not sell at \$4.98 and the Club does not sell at \$3.98 since Bonus records are regularly included * * *.

Paragraph 12 of the Verve contract provides for the payment by Columbia to Verve of a "royalty of five (5) percent of the royalty price with respect to ninety percent (90%) of [Columbia's] net

sales of phonograph records manufactured from the Licensed Masters." (CX 23L-M.)

The term "royalty price" is defined in paragraph 1(e) as follows:

"Royalty price" as used in this agreement shall mean our [Columbia's] retail selling price of any phonograph records less (1) any excise or other similar tax, (2) the charge made by us for any record container, such as album sleeve, jacket or other such type of packaging included in with such records, (3) the charge made by us for any extraordinary librettos or program notes included with such records (it is the intention of the parties that this last preceding reference not be considered a reference to liner notes), and (4) the charges made by us to the retail purchaser for postage and handling, provided any such tax or charge is included in the retail selling price. The charge referred to in items (2) and (3) above shall be no greater than the same amount as we deduct in determining artists royalties for the leading Columbia recording artists whose records are sold by the Columbia LP Record Club. (CX 23b.)

Despite its apparent complexity, paragraph 1(e) simply makes it clear that the base to which the 5% royalty payment was to be applied was the Club's retail "selling price" less four deductions.

Government counsel insist on referring to that selling price as "the agreed upon selling price" (CPF 116). There is no evidence in the record that the Club's retail selling price may properly be so described. At most, the "agreement" referred to previously established a floor beneath the price but did not set a specific price.

Whether by agreement or not, the Club continued to offer Verve records at \$3.98 (CX 337, p. 20), while the Verve suggested list price remained \$4.98 (CX 319, last unnumbered page; Shocket 182).

Paragraph 4 of the Verve contract stated:

You appreciate and recognize that our [Columbia's] direct mail exploitation of phonograph records manufactured from the Licensed Masters will be adversely affected if at the same time phonograph records manufactured from certain Licensed Masters are being offered for sale to your [Verve's] distributors at distress prices. You therefore agree not to offer phonograph records manufactured from the Licensed Masters listed on Schedules A and B hereof to your distributors at such distress prices. However, our sole remedy for your breach of the provisions contained in this paragraph (as such breach relates to Schedule B only) shall be as stated in paragraphs 5(b) and 5(c) below. For purposes of this paragraph, inadvertent or casual selling shall not be considered a sale at a distress price. (CX 23g-i.)

"Distress price" was defined in Paragraph 1(f) as:

* * * a distributor discount which is lower than the formula discount of "less 50%—less 10%" of the suggested retail list price of any phonograph record or in the absence of any suggested list price the price at which we sell any such record by direct mail. (CX 23b-c.)

The contract provision here cited (Paragraph 4, which was waived by the parties in February 1960) is one which is not found in any other outside label contract. It obviously originated in the circumstances peculiar to the Verve contract. It was feared that Verve might be compelled to dump its repertoire in such a manner as to depreciate the value of the Verve name (CX 82). In effect it provided that if Verve were to convert itself into a budget line label, thus depreciating the value of the Verve name, Columbia could offer the records on the Columbia label. The paragraph was carefully limited in its application to records from 12 specific Verve masters originally listed on Schedules A and B of the 1959 contract (CXs 23g-h, 24, 25). It merely reflected the concern of Club officials in 1958 about Verve's financial condition.

Verve was absolved from "responsibility" for pricing at the retail or dealer level (CX 23c), and thus the contract did not, in terms, prohibit dealers from selling Verve records at, below, or above the Club's retail price. However, if Verve chose to sell the records at "distress prices," or if the Verve label had depreciated at retail to the status of a "low price label," such as the Columbia "Harmony" and the RCA "Camden" budget lines, Columbia, under Paragraph 5 (CX 23i), could elect to release phonograph records manufactured from the Verve masters on the "Columbia" label after giving Verve "written notice." (Camden, for example, then had suggested list prices of \$1.98 and \$2.98 (CX 316, p. 256).)

The contract makes clear that the purpose of this clause was not to prevent competitive retail price reductions by Verve. Thus, sales which were "casual" or "inadvertent" were not to be considered "distress" sales (CX 23h-i). Nor were sales by Verve during sales programs, in accordance with practices "customary" in the record industry, to be deemed "distress" sales. Finally, Verve's limited agreement was with respect only to its prices to its distributors, and not with respect to retail selling prices (CX 23c).

The limited intent of the parties was further made clear in a contract clause which specified that the "distress selling" provision was not to be used to "frustrate the basic intent of the parties hereunder to utilize the 'Verve' label" (CX 23i-j). It was to be invoked only if the Verve name had become "depreciated" (CX 82b).

Despite its limited effect with respect to a handful of records, Paragraph 4 of the Verve contract was waived by a contract amendment dated February 17, 1960 (CX 32).

There is no evidence in the record as to what price those records were in fact sold by Verve to its distributors.

But Columbia failed to waive either Paragraph 1(f), defining

"distress price," or Paragraph 5, which was designed to discourage not only "distress selling" by Verve, but also

the consistent offering of records on the "Verve" label at retail prices comparable to the prices at which the present Columbia "Harmony" and RCA "Camden" records are being sold.

If Columbia determined that as a result, the Verve label had depreciated to the status of a low price label, Columbia could "release phonograph records manufactured from the Licensed Masters under the 'Columbia' label" after giving Verve written notice (CX 23i).

Respondents take the position that Paragraph 5 of the Verve contract was described by Paragraph 4 as being the "sole remedy" available to Columbia in case Verve breached the "distress price" provisions of Paragraph 4.

"Obviously," say respondents, "when Paragraph Four dealing with 'distress prices' was waived by the parties in February 1960, it was not also necessary to waive the 'definition' of 'distress prices' which is contained earlier in the contract (CX 23b-c), or the 'sole remedy' for the breach of waived Paragraph Four which appears in Paragraph Five."

The trouble with respondents' argument is that Paragraph 5 not only was the sole remedy for breach of Paragraph 4; it also stood on its own feet in providing a remedy for selling at budget line prices, as well as at distress prices.

Despite all the explanations and qualifications, the contract obviously had the capacity and tendency to influence and control Verve's prices.

The contract provision was in effect for eleven months. The record does not disclose Verve's actual selling prices to distributors before the February 1960 waiver.

It does not appear that any other contract had comparable provisions.

In CPF 120, Government counsel refer to an "extension" of the Verve agreement on March 14, 1962. Because the extension retained the terms and conditions of the 1959 agreement "except as herein expressly modified" (CX 287), Government counsel think it strange that Paragraph 5 was not rescinded at that time. Respondents' answer is that Paragraph 5 already was ineffective because of the 1960 waiver.

Regarding the extension, respondents explain that the Verve contract was about to expire in March 1962 unless Columbia exercised its option. But the parties had agreed in February 1962 that the contract was to be terminated (Maxim 1729), and re-

spondents say that some provision had to be made to permit a carrying on of operations pending agreement on the details of termination. The contract was in fact terminated as of June 1962 (CX 288).

The investigation in this matter commenced in 1960, and changes in the Caedmon contract were adopted after that time. A letter dated December 7, 1960, from counsel for respondents indicates on its face that the investigation had been in progress for a considerable period of time (CX 1a).

On April 15, 1961, the Caedmon contract of 1958 was rescinded and the explicit agreement about price (CPF 111) was removed. The new contract included a provision tying the royalty payment to "*** our [Columbia's] retail selling price ***" (CXs 22a, 22e). This was similar to the provision in the 1959 Verve contract (CX 236).

As indicated previously, an attempt had been made to replace the Caedmon contract considerably before the investigation began in this matter. (See p. 89, *supra*.) For reasons similar to those stated concerning the Verve agreement, Club officials, on advice of counsel, decided in 1960 to enter into an entirely new contract with Caedmon. It does not appear to be disputed that this was before the Commission's investigation started.

The new agreement was prepared, but was not immediately executed because of a pending lawsuit. A new contract was entered into (CX 22) by Columbia with Caedmon as of April 1961. (Keating 5172-84; RPF 192 (footnote).)

The new Caedmon contract eliminated the principal contractual provisions challenged by the complaint.

Government counsel have not disputed respondents' claim that the facts surrounding the revision of the Caedmon and Verve contracts were fully disclosed during the precomplaint investigation.

Respondents complain that "The early abandoned contracts are used here as a tactic to invalidate the later contracts although no connection was ever shown between them. * * * The fact that complaint counsel rely so heavily on the two obsolete contracts merely highlights the sophistry and weaknesses of the attack on the later agreements" (Exceptions, page 15).

Of course, respondents claim too much when they deny any "connection" between the contracts. But there is enough truth in respondents' contention to provide a troublesome problem for the examiner. It is certainly true that the terms of the new Caedmon contract were substantially different from the terms of the

old contract, and that despite the efforts of Government counsel to view the Caedmon and Verve contracts as "precedents," the later contracts do not contain the challenged provisions.

Under the new Caedmon contract, as well as under the Verve, Mercury, Kapp and Warner Bros. contracts, royalties were to be paid by Columbia by applying the royalty formula in the contract to a base price—which was the Club's selling price. Except as the Government undertakes to color that arrangement by reference to the abandoned price-fixing provisions, the use of Columbia's selling price as the measure of royalty payments is legally unobjectionable.

Columbia sold Caedmon records through the Club at a price of \$4.98, and Caedmon maintained a suggested list price of \$5.95. In 1961, the Club offered many Caedmon records and consistently made the following representation:

... \$4.98 (regular list price \$5.95) (CX 564, pp. 4-7, 10-13; see also RX 134f, RX 135a-i).

As recently as Christmas of 1962, Columbia was representing that the Caedmon regular list price was \$5.95 and the Columbia price through the Club was \$4.98 (CX 593, pp. 16 and 17). The *Schwann* LP catalog for December 1962 shows that Caedmon has maintained its \$5.95 suggested list price (CX 319, page 282).

The "Royalty Price" Provisions

In CPF 124, Government counsel get carried away by their theory that "royalty price" is the key to a price-fixing agreement between Columbia and each of its licensors. Government counsel state:

Following the precedent of the Verve-CBS Agreement, CBS and Mercury agreed that payments to the Licensor shall be made on the basis of a "Royalty Price." This "Royalty Price" was defined by and related to the Club selling price and the Licensor's suggested list price.

Actually, the Mercury contract of 1960 did not follow any Verve precedent, and it is misleading to state that the royalty price was "defined by and related to the Club selling price and the Licensor's suggested list price."

Paragraph 1(d) does define royalty price as Columbia's "retail selling price" less certain deductions. Those deductions are described as follows:

- (1) Any excise or other similar tax.
- (2) The charge made by Columbia for any record container.
- (3) The charge made by Columbia for any "extraordinary librettos or program notes included with such records."

(4) The additional charge made by Columbia to the retail purchaser for postage and handling, provided any such additional charge is deemed to be included in the retail selling price.

The contract further provides that the charges for items (1) through (4) "shall be no greater than the same amount as we [Columbia] deduct in determining artist royalties for the leading Columbia recording artist whose records are sold by the Columbia Record Club."

The definition of royalty price concludes:

For purposes of calculating the royalties payable to you [Mercury] during the term of this agreement under the formula set forth in paragraph 11 hereof it is agreed that the royalty price on records with a suggested retail price in the United States of \$3.98, \$4.98 and \$5.98 shall be \$3.46, \$4.42, and \$5.26 respectively. The royalty price on records with a different suggested list price shall be determined by the general criteria outlined above (CX 34b).

In the Verve agreement, the royalty was to be paid on the base of the defined "royalty price" (CX 23L). In the Mercury agreement, however, the actual royalty payment provision (Paragraph 11(a), CX 34d) contains no reference at all to the term "royalty price." Subject to specified qualifications, a base royalty of 5% is payable on 95% of Columbia's "net sales" of phonograph recordings manufactured from Mercury's master recordings. Net sales are defined as gross shipment less returns.

Paragraph 11(b) contains the usual provision specifying that no royalty shall be payable with respect to "free" or "bonus" records.

The only references to "royalty price" in the Mercury contract appear in connection with paragraph 11(c), which involves a complicated procedure in case the amount of free and bonus records exceeded certain amounts, and in connection with paragraph 11(d), which provides for certain adjustments if records on which royalties were paid totaled less than one million (CX 34d-e).

The new language was apparently inserted in this contract for use in calculating the payments to be made under those provisions.

The contract language quoted in CPF 124 becomes the focal point of many of the Government's subsequent proposed findings. Government counsel argue that the "royalty price" means the licensor's suggested list price. Respondents deny this and say that the record shows that it refers to the Club's selling price.

Although the dispute involves a crucial legal issue, the difference is essentially one of semantics rather than actualities. This is be-

cause, as respondents themselves concede (Exceptions, page 91), the Club's selling price "is normally suggested list price."

But whether it refers to Club selling price or licensor's suggested list price, the question is whether the royalty clause amounts to an agreement between the parties as to the prices which the Club will charge.

Analysis of the contracts and the testimony shows that the "royalty price" is not necessarily related to the suggested list prices of the outside labels. There was no testimony to support such a construction of the contracts, and Government counsel cite none.

In their brief (page 343), Government counsel themselves seem dubious:

"It is the position of complaint counsel," they say, "that the Licensing Agreements have a specific formula requiring list price selling. But irrespective of the actual words used, the understandings of the parties and their actions show an unlawful combination. * * *"

One gets the impression that their "position" is a shaky one and that they virtually concede that "the actual words used" are at least ambiguous. If so, the burden was on them to clarify them or otherwise prove the intent and meaning they have ascribed to them.

As a matter of fact, the contract clause emphasized in CPF 124 follows immediately after the generalized definition of "royalty price," and the reference is obviously to the Club's selling price less specified deductions. Again we note that the Club's selling price is normally suggested list price.

In the Liberty contract, then, the formula is applied in the contract itself, so that giving effect to the specified deductions, the royalty price is \$3.46 for a \$3.98 record, \$4.42 for a \$4.98 record and \$5.26 for a \$5.98 record.

Just how this contractual arrangement amounts to a price-fixing device is not made clear by the Government.

We are inclined to agree with the respondents that the diversity of the contractual provisions suggests that undisclosed business considerations, rather than any uniform pricing policy, are apparently involved. Thus, the Kapp contract, which was executed subsequent to the Mercury contract, does not contain the new clause quoted in CPF 124. Neither does it appear in the subsequent Caedmon, United Artists or Cameo contracts (CXs 22, 44 and 453), or in the first Warner Bros. contract (CX 39).

There is additional internal evidence from the contracts themselves that the language relied on by Government counsel was not

necessarily intended to refer to the suggested list prices of the outside labels. In their exceptions (page 92), respondents note the inclusion of suggested list prices inapplicable to specific licensors.

Although this may have been the result of careless draftsmanship, it is at least suggestive that the Government's interpretation is not well founded.

The fact that the complaint makes no reference at all to that contract clause, now claimed to be so important, also raises a question as to the validity of the Government's interpretation. Other specific contract clauses deemed restrictive were referred to or summarized in the complaint.

One wonders also why no attempt was made by Government counsel to develop, either through respondents or through the licensors or otherwise, why the contractual provisions demonstrated such substantial differences.

The important thing, however, is that even if the royalty price language could be construed as a reference to the list price of the outside label, it still did not establish an agreement by Columbia to sell at list price. The Club may lawfully use as the base for royalty payments to outside labels the selling price, the suggested list price, actual sales or the number of pages in the telephone book.

In the final analysis, the Mercury 7½% royalty for a \$3.98 LP is computed on a base of \$3.46—which amounts to 26¢ per record.

There is no evidence in this record to show that the agreement to pay Mercury 26¢ per record in any way fixes the Club selling price on \$3.98 LPs—either at \$3.98 or at any other figure.

Despite Government claims to the contrary (CPF 125), none of the provisions in the Mercury contract required Mercury to keep Columbia "informed about any prospective price changes," and there is no evidence that Mercury did so. The lone exhibit cited in support of this finding (CX 380) is hardly proof of any price fixing arrangement.

Subsequent Warner Bros. licensing agreements (CXs 514, 517, 519, 537) defined "Royalty Price" as Columbia's "retail selling price" less certain deductions, and further specifying the "present" royalty price as a stated amount applicable to records with a "suggested list price" of a designated amount. For example:

At present the royalty price of an album with a suggested list price of \$3.98 is \$3.46, and the royalty price of the stereo counterpart of such album with a suggested list price of \$4.98 is \$4.42 (CX 514a).

At present the royalty price of an album with a suggested list price of \$4.98 is \$4.42, and the royalty price of the stereo counterpart of such album with a suggested list price of \$5.98 is \$5.26 (CX 537b).

The fact that the contracts specify a royalty price in relationship to designated suggested list prices is hardly justification for the Government's statement (CPF 126) describing them as "further defining the royalty price as the Licensor's suggested list price less certain deductions."

That addition to the royalty provision merely mathematically defined the price base to which the royalty percentage set forth in Paragraph 8 of the contract was to be applied (CX 514c).

Without more, the examiner attaches no special or sinister significance to the fact that before Columbia and Warner Bros. entered into the agreement (CX 514) covering Club distribution of the album "Gone With the Wind," a Columbia official wrote that he understood that the suggested retail price of the album was \$3.98 mono and \$4.98 stereo (CX 183a).

It is a fact that the Club prices charged for the Warner Bros. album "Gone With the Wind" (CX 514) were the Warner Bros. suggested list prices: \$3.98 for mono (CX 405, Christmas Catalog, page 15); \$4.98 for stereo (CX 584, page 13).

A similar provision was also contained in the Liberty contract (CX 45) and the Vanguard contract (CX 43). It was not in the original Cameo-Parkway agreement (CX 453) but was added by amendment a month later (CX 452).

Thus, in some of the contracts, the specific figure is given as a statement of fact as to what the royalty price was at the time (*e.g.*, CX 43). In other instances (*e.g.*, CX 45), "it is agreed" that the royalty price on records bearing specified suggested retail prices shall be designated amounts.

According to the Government's analysis, the contracts thus relate the royalty price alternatively to the Club selling price and the licensors' suggested list price. Applying the mathematical theorem that things equal to the same thing are equal to each other, Government counsel propose this "formula":

Royalty Price = CBS retail selling price [less certain deductions].

Royalty Price = suggested list price [less certain deductions].

Therefore, CBS retail selling price = Licensors' suggested list price [less certain deductions] (CPF 128).

The formula as stated contradicts the very conclusion contended for. The Government is saying *not* that the "CBS retail selling price" is the licensors' suggested list price, but that the CBS price is that suggested list price *reduced by certain deductions*. Do they mean that CBS' selling price of \$3.98 is equal to the royalty price of \$3.46 (Mercury's list after deductions) (CPF 124)?

Even if this turns out to be the result of a misplaced footnote reference, it still points up the fallacious approach of Government counsel.

At any rate, assuming the "formula" to have been inadvertently misstated, there are at least two other flaws in the Government's theory.

Even if all the agreements had incorporated the identical language—and it is clear that such is not the case—the mechanical arithmetic formula advanced by Government counsel (CPF 128 and 129) is not established by the contracts. The royalties were to be based on the Club's selling price. That selling price was subject to the deduction of various charges such as taxes, packaging charges, extraordinary libretto charges and postage and handling charges. This, then, was the royalty price—the Club's retail selling price less certain deductions.

To illustrate how the formula would apply, several of the contracts, for reasons not developed at the trial by either party, specified that "at present" the royalty price is \$3.46 for an album with a suggested list price of \$3.98, and \$4.42 for an album with a suggested list price of \$4.98 (CX 43a). In other contracts, specific amounts are agreed on as the royalty price.

It is significant also that some of the contracts (*e.g.*, CX 45b) after specifying the royalty price for records with suggested retail prices of \$3.98, \$4.98 and \$5.98, provide further that "The royalty price on records with a different suggested list price shall be determined by the criteria outlined above."

Government counsel seek to bolster their price-fixing interpretation by cryptic references to an "exchange" of list price information (CPFs 125, 128 (footnote 72), 129). Not only is the proof cited insufficient; there is substance also in the suggestion of respondents that list price information is a matter of common knowledge in the industry and is regularly published in the *Schwann* catalog.

In CPF 129, the Government demonstrates the logic of its position that references in the licensing agreements to "suggested retail price" or "suggested list price" *must mean* the licensors' suggested prices for the licensors' records.

But that still proves nothing as to price fixing by agreement. The Government's position is weakened, rather than strengthened, by counsel's reference to the alleged exchange of information about the licensors' suggested list prices (CPF 129).

In the examiner's opinion, Government counsel have failed to carry their burden of proving that the royalty price provisions of

these contracts establish an agreement by Columbia to sell either at its own suggested list price or at the suggested list price of the outside label.

Despite the contention of Government counsel that both respondents' officials and licensors' officials were "hostile," it does appear that some effort might have been made to develop by testimony at the trial the purpose and intent of the parties in connection with this contractual language. The Government may argue that respondents also had an opportunity to explain these provisions, but the burden of proof is on the Government. The circumstances here are not such as to shift to respondents even the burden of going forward with evidence on this point.

Government counsel propose a finding (CPF 130) that

Mr. Keating testified that the Club prices are the suggested list prices of the "... record companies that may be offering them" (Keating 684, 686).

This is a classic example of misrepresentation of the record by tearing a statement out of context. This is not a fair representation of Keating's statement.

Keating was being asked to explain the meaning of the phraseology "\$3.98 to \$6.98 records" in the Club's advertisements. His complete answer was that those figures

refer to the Club price for the record when offered for sale during the period of his membership. They also refer to the suggested list price of these records by Columbia Records, or by any of the other record companies that may be offering them (Keating 684).

A little later, Keating was asked how he acquainted himself with the prices of the outside labels. Again his answer was that the price used in the Club advertising was "the club price or, in many cases, the suggested list price of these [outside] labels" (Keating 685-86).

According to Keating (Tr. 686), the suggested list price of other labels "is a matter of common knowledge in the industry from Schwann's Catalog, from charts, from almost anything you want to see."

The position of Columbia is epitomized in the testimony of Keating when he was recalled as a defense witness. This colloquy ensued (Tr. 5151-52) :

Q. Has the Columbia Record Club always sold at the manufacturer's suggested retail price?

A. We have sold at the manufacturer's suggested list price, with two exceptions.

Q. What were those two exceptions?

A. They were Caedmon and Verve. In each instance we felt that the suggested list price was high and we unilaterally made the decision to offer them at a lower price to club members.

Q. Do you have any agreement with any of your outside labels as to the price at which you will sell their records through the Columbia Record Club?

A. No.

In the course of an extended cross-examination, Keating was asked by Government counsel:

With respect to Caedmon, Verve, Cameo-Parkway, Kapp, Liberty and others, who sets the price for club members?

The answer was:

Columbia Record Club.

The Columbia Record Club "always" sets that price (Keating 5449-50).

Although Keating was called as a Government witness and was subjected to a lengthy cross-examination when he was called by respondents, that appeared to be the extent of his interrogation on the question of price fixing.

Keating was not asked why different royalty provisions were inserted in the different contracts. The burden of proof remaining with the Government, the examiner is inclined to agree with respondents that "Presumably there were valid business considerations" underlying the various royalty arrangements.

Despite the emphasis by Government counsel on the juxtaposition of royalty prices and suggested list prices in some of the contracts as proof of agreement that the Club's selling price would be the licensor's suggested list price, the "exclusion" of the suggested list price reference in a licensing agreement is also alleged to be consistent with an understanding that Columbia will maintain the licensor's suggested list price (CPF 131).

The Government concedes that the first Warner Bros. contract (CX 39) was entered into in September 1960, *after* the royalty price device allegedly had been used for price-fixing purposes. They emphasize that this was after the Mercury contract (CX 34), but the Warner Bros. agreement simply defined "royalty price" as Columbia's "retail selling price" less specified charges.

But, says the Government (CPF 131), "Even the exclusion of suggested list price reference in the Licensing Agreement does not alter the fact that the Agreements are signed by the Licensor and CBS with the understanding that CBS will maintain the Licensor's suggested list price."

To fill the void, Government counsel point to a precontract letter from the president of Warner Bros. commenting on the royalty price provision in the proposed contract. The letter stated in part:

Reference, paragraph 1(d). The first line refers to "our retail selling price". I would like to be certain that "our" (meaning Columbia Records) pricing of the Newhart album will not be less than our (Warner Bros.) suggested retail selling price. The first album is priced at \$3.98 monaural, and \$4.98 stereo. We don't know what the price of the second album will be. It will probably be the same, and certainly not less (CX 510b).

Government counsel cite the quotation without further comment except that the agreement was signed on September 15, 1960.

Perhaps Government counsel feel that the inference is inescapable. Or perhaps they are reluctant to point up the evidentiary inadequacy of these two circumstances as showing understanding and agreement.

CX 510b merely contains a statement by Conkling that he wanted assurances that the Club would not sell below Warner's suggested retail selling price, and he apparently wanted a change in the definition of Paragraph 1(d) of the contract.

Whatever Conkling wanted in this connection, there is no evidence that any such assurance was given to him, either in the correspondence or in the subsequent contract (CX 39). We are not cited to any other testimony or other evidence.

In a notable feat of draftsmanship, "the omission of any explicit reference to suggested list prices was also incorporated" into the Kapp contract of October 7, 1960 (CX 41) and the United Artists contract of July 1, 1961 (CX 44). Those contracts define royalty price in terms of Columbia's "retail selling price" and make no reference to anybody's suggested retail or suggested list price.

Undaunted by the omission of even the cryptic reference previously relied on, Government counsel now rely on the bare fact that Columbia "has in fact maintained the Licensors' suggested list prices in those instances where there was no explicit agreement * * *" (CPF 133).

Respondents do not except to the proposed finding that Columbia actually charged the suggested list prices of Warner Bros., United Artists and Kapp.

As a matter of fact, respondents concede (Exceptions, page 96) that "Since 1960, the Club has generally sold outside label records at the regular Club price, which has generally been equivalent to the suggested retail price."

Respondents further cite the fact that the Club has in fact sold below suggested list prices, in the case of Caedmon and Verve, as "further proof that there was no express agreement of the parties to sell at list price."

Respondents justifiably accuse Government counsel of confusion and inconsistency. In footnote 78 to CPF 133, the Government says that the agreements on price "pertain only to records where there is a charge by the Club." There is a charge by the Club for the introductory records and yet Government counsel apparently take the position that the introductory price is unilaterally fixed by Columbia and without any agreement on the part of the outside labels. As a matter of fact, Government counsel chide the licensors as having "abdicated to CBS control over the form of the introductory offer" (see Kapp 1590-91).

At the same time, Government counsel explain that "The Licensor has no interest" in the terms of the introductory offer. Furthermore, Government counsel have taken the position that the outside label records being sold through the Club are completely the property of Columbia (CPF 33-34), and it is not clear what control is being abdicated.

The examiner is not convinced that the Club's price policy for licensors' records is so inconsistent with the "kind or type of music" appearing on such records as to compel an inference that the licensor's suggested list price is "the determinative factor."

Again, in proposing a finding to that effect, Government counsel exhume the Verve and Caedmon contracts as representing "Exceptions * * * by *express agreement of the parties*" (CPF 134, footnote 79).

Without going into any details, it does appear that Club prices conform generally to the broad classifications reflected in this record—that is, "pop" records at \$3.98, classical records at \$4.98, original cast albums at \$5.98 (RPF 529). Within each such classification, however, there are and have been variations depending upon the material employed or other special circumstances.

Government counsel propose a general finding (CPF 134) that "The list price of most stereo pop albums is \$4.98," but "the Club has sold a Licensor's stereo records at \$3.98 when the Licensor's suggested list price deviated from the pattern." They point to Cameo-Parkway as an "example," but they cite no other instances, and the examiner is aware of none.

As evidence, presumably, of price fixing by agreement, the Government notes that unlike most companies, Cameo-Parkway has a stereo pop suggested list price of \$3.98 (Cohen 2634-35),

and CBS maintains the Cameo list price of \$3.98 as the Club's retail price. (Government counsel cite RX 308a, page 17, as support for this proposed finding; the citation is erroneous.)

In other words, we are asked to find Columbia guilty of price fixing because of the Club's failure to sell Cameo stereo records at \$4.98, a price \$1.00 higher than Cameo itself valued them, and \$1.00 higher than the prices of dealers selling Cameo records at list price.

But Government counsel invite us parenthetically to see a later proposed finding (CPF 136) "for *agreement* between Cameo-Parkway and CBS to deviate from the policy." It appears that this means an agreement to deviate from the deviation.

The Curious Case of Allan Cohen

Government counsel summarize the price-fixing allegations in this sweeping statement:

The significance of the connection between the royalty price provision, the suggested list price, and the CBS retail price in the Licensing Agreements, is perfectly clear to the Licensors. It means that CBS has agreed to charge the Licensor's suggested list price (CPF 135).

As the record support for such a serious allegation, Government counsel cite only the following testimony on cross-examination of a Cameo-Parkway officer appearing as a defense witness:

Q. Did you speak of some of the advantages to you of the Columbia Record Club, Mr. Cohen?

A. Yes.

Q. Is it your understanding that the Club sells Cameo and Parkway records after the introductory offer at your suggested list price?

A. Yes.

Q. What is that understanding based on?

A. On the contractual agreement.

Q. What part?

A. In the contract there is a definition of retail list price and it is spelled out in detail (Cohen 6760).

That testimony, of course, does not support the broad finding sought. Presumably, an agreement to fix prices might be reflected in an understanding independent of a written contract, or it might be incorporated into the written contract itself. But in the latter case, the contract must speak for itself.

Although the testimony quoted also speaks for itself, it is important, in view of the position of Government counsel, to determine what it does show and what it does not show. Cohen did not testify that there was an understanding about prices independent of the contract. He did not even testify that there was such an understanding about Club prices in the contract itself. He had

been asked by Government counsel the simple factual question whether the Club "sells Cameo and Parkway records after the introductory offer at your suggested list price?" Perhaps the phraseology was unfortunate; he was asked whether that was his "understanding." The Club, of course, in fact does sell Cameo and Parkway records at the suggested list price; Cohen, naturally, knew this, so he replied "Yes." He was then asked what his "understanding" was based on and he replied "On the contractual agreement."

"In the contract," he said, "there is a definition of retail list price and it is spelled out in detail" (Cohen 6760).

Government counsel did not ask Cohen to identify specifically the part of the contract to which he was referring. Presumably, Government counsel now ask the hearing examiner and the Commission to relate this testimony to the "royalty price" clause in the Cameo-Parkway licensing agreement (CX 453), as amended (CX 452).

But this attempted bootstrap operation cannot supply a "definition" that is not in the contract; nor can it warrant a finding that the price-fixing provision was "spelled out in detail."

Obviously, Cohen's "understanding" of the contract cannot as a matter of law vary what the contract said.

It is suggestive, however, of some doubt on the part of Government counsel with respect to their "formula" (CPF 128) that they think it necessary to rely on such testimony as this.

In his first appearance as a Commission witness, Cohen had indicated some lack of familiarity with the contractual provisions (Cohen 2652). It may be that Cohen misunderstood the contract, or perhaps he misunderstood the question. The latter seems likely in view of the facts referred to in the findings that follow immediately.

In the Government's view of the operation of the licensing agreements, Columbia and the licensor "reach an understanding" if Columbia wants "to deviate from the Licensor's suggested list price as the Club retail selling price" (CPF 136). In a footnote, they cite the Caedmon and Verve contracts. The only other evidence they refer to to support such a finding also comes from the cross-examination of Mr. Cohen of Cameo-Parkway

Q. Are there occasions in the course of your dealing with the club when officials from the club ask you questions respecting the price they are going to get for a particular Cameo or a particular Parkway record?

A. This has only happened this one time.

Q. What was the nature of that, sir?

* * * * *

A. A discussion was had with reference to a possible future release, and the official asked me if it was satisfactory if the retail list price would be \$4.98 stereo.

Q. What did you reply sir?

A. Yes (Cohen 6760-62).

Government counsel interpret this testimony to mean that a Columbia representative contacted Cameo-Parkway "For the purpose of offering Cameo-Parkway stereo at \$4.98 rather than at the Cameo-Parkway list price of \$3.98" (CPF 136).

It will be recalled that the testimony just quoted had been billed earlier (CPF 134) as proof of "*agreement* between Cameo-Parkway and CBS to deviate from the policy."

It will be noted also that this testimony is quoted in support of a general finding that "In the operation of the Licensing Agreements, CBS and the Licensor reach an understanding if CBS desires to deviate from the Licensor's suggested list price as the Club retail selling price" (CPF 136).

Thus, we find the Government undertaking to convert testimony relating to an alleged agreement between Columbia and Cameo-Parkway to raise the "retail list price" of a Cameo record into a finding that there was an agreement to "fix" the Club price of the record.

Government counsel have made this switch without any record support and under somewhat extraordinary circumstances that deserve to be set out in some detail.

Cohen, originally a Government witness, was called as a defense witness on June 4, 1963. On cross-examination by Government counsel, and over objection by respondents, Cohen testified, as we have seen, to the effect that a Club "official" (later identified as William Bell, the Club's director of artists and repertoire) had asked Cameo to change Cameo's "*retail list price*" of a particular stereo record from \$3.98 to \$4.98, and that Cohen had agreed to this (Tr. 6760-62; emphasis added).

Government counsel had undertaken to show that the conversation between Cohen and a Columbia Club official had to do "with a current club policy and current distribution of a Cameo or a Parkway record through the club" (Tr. 6756).

Government counsel did not, in the questioning of Cohen, establish the identity of the official or the identity of the record concerning which the agreement was allegedly made.

Government counsel sought to show that this particular conversation did "resemble previous conversations" that the witness had had with Columbia people "in a general way" (Tr. 6757-58).

It was not until redirect examination by respondents' counsel that the witness identified the record involved in the conversation. The witness stated: "It is a record that hasn't been released yet . . . I don't even know the name of it. The artist is Maynard Ferguson" (Cohen 6769).

It is important to compare the question put to Cohen with his answer. He was asked:

Are there occasions in the course of your dealing with the club when officials from the club ask you questions respecting *the price they are going to get* for a particular Cameo or a particular Parkway record? [Emphasis added.]

His answer was "This has only happened this one time" (Tr. 6760).

The next question was: "What was the nature of that, sir?"

Objection was noted; there was discussion; the question was re-read; the objection was overruled; and the witness was allowed to answer (Tr. 6760-62). His answer was:

A discussion was had with reference to a possible future release, and the official asked me if it was satisfactory if the retail list price would be \$4.98 stereo (Tr. 6762).

To the official's question, Cohen replied "Yes."

If this testimony were accepted at face value, it could be interpreted as evidence of a charge that Columbia and Cameo had agreed to fix *retail list prices*—and that is an allegation of the instant complaint.

In their Exceptions (page 101), respondents state:

The testimony took respondents' counsel by surprise. Under the rule in effect during the trial, respondents' counsel were not permitted to discuss the facts with Mr. Cohen before his redirect examination. Although the testimony was not credible, it had to be refuted after investigation.

Approximately two months later, respondents called their Mr. Bell. Over strenuous objections by Government counsel, Bell testified in substance as follows:

That in April 1963 he had first listened to a Cameo record entitled "New Sounds of Maynard Ferguson"; that this record had been previously released by Cameo at retail; that Bell had seen reports in the trade press about its commercial success; that it was selling at a suggested retail list price of \$3.98; that in all of his years in the record business, he knew of no instance where a record was released by a manufacturer at a particular suggested retail price which was then raised by the manufacturer within a few months; that Bell had not asked Cameo to raise its stereo "retail list price" from \$3.98 to \$4.98; that Cameo had not in fact

charged its retail list price; and that the Club had not released the record (Bell 10, 287-99).

There was an extended colloquy in which Government counsel claimed respondents were trying to impeach Mr. Cohen (Tr. 10, 291-96). In the course of this colloquy, Government counsel offered to stipulate in effect that Cohen had "intended" to testify about an agreement to raise and fix the *Club price* of the Cameo record (Tr. 10, 296-97).

Ironically (although there was no stipulation), counsel for the parties are actually in agreement on this point. Respondents' counsel stated (Tr. 10, 294): "I don't think the witness Cohen answered the question that was put to him or else the report of it was not accurate in the transcript."

Respondents' counsel further conceded that the conversation was with Mr. Bell and "related to the price at which the Columbia Record Club would sell a Cameo-Parkway record" (Tr. 10, 295).

Respondents' counsel quoted Cohen's answer, as recorded at Tr. 6762, and stated that "that answer could not have been responsive to the question that was asked"; the conversation "was related to the price at which the Columbia Record Club would sell the record" (Tr. 10, 296).

It was at this point that Government counsel expressed willingness to stipulate that "the words retail list price was intended by Mr. Cohen in the very context of that line of questioning to be the club price." Government counsel did not know whether it was "the fault of the reporter or Mr. Cohen," but the Government was "quite willing to say that the line of questioning indicated the club price" (Tr. 10, 296).

Respondents' counsel took the position, however, that he didn't know what was intended by Mr. Cohen and that it was necessary to "deal with the record as it stands now," with "a serious ambiguity" admitted by the Government.

Government counsel thus conceded that Cohen's testimony on this point was either wrong or wrongly reported. Nevertheless they cite that testimony, which stands otherwise uncorrected in the record, in support of a proposed finding (CPF 136) that a CBS representative contacted Cameo-Parkway for the purpose of offering Cameo-Parkway stereo records at \$4.98 rather than at the Cameo-Parkway list price of \$3.98.

For further support of their interpretation of the Cohen testimony, Government counsel cite (CPF 137) their cross-examination of Bell. They say that Bell "confirmed the fact that he had had

conversations with Mr. Cohen of Cameo-Parkway about the Club price for Cameo-Parkway stereo records." They cite Tr. 10, 298:

Q. Mr. Bell when you spoke to Mr. Cohen did the subject of the price the Club might charge for that Maynard Ferguson stereo record come up?

A. Yes, it did.

That was all he was asked. Bell was not asked how the subject had "come up," who had brought it up or, indeed, exactly what it was that had "come up." He was not asked to state the conversation. He was not asked who had initiated the call.

It is significant also that although Cohen did not identify the Club "official" and was not asked to identify him, Government counsel stated their "understanding that Mr. Bell was the man with whom Mr. Cohen spoke" (Tr. 10, 297). That was long after Cohen testified, and that understanding was not stated until the question was directly put to counsel by the hearing examiner (Tr. 10, 296).

Government counsel did not recall Cohen to correct what they have conceded was erroneous testimony, nor have they requested any correction of the transcript.

The inherent credibility of this episode may also be tested by considering the significance of the claim being made by Government counsel. We are asked to find that Bell was suggesting that the Club price be raised from \$3.98 to \$4.98. That would mean that the Club record would be priced at least \$1.00 higher than the same Cameo record at retail. That higher price, of course, also would have carried higher royalties payable by Columbia to Cameo.

This whole matter of Cohen's testimony may seem to occupy an inordinate amount of space in relation to its singular lack of probative significance.

It is gone into at some length, however, because it dramatically demonstrates the quantum and the quality of the "proof" relied on by Government counsel in support of the price-fixing allegations.

The Government's concluding proposed finding relating to price fixing (CPF 138) is somewhat extraordinary. Counsel cite unequivocal testimony by Columbia officials to the effect that the Club has always set the Club's selling price for licensor's records (Keating 5151; Gartenburg 8539-40).

Government counsel first propose a finding that, except for the instances of Caedmon and Verve records, Columbia has sold the records manufactured from the licensed masters at the licensors' suggested list prices. They cite the testimony of the Club's general manager (Keating 5151-52) in support of that finding, but scoff at his further statement that in the case of the Club's below-list

selling of Caedmon and Verve records, Columbia had "felt that the suggested list price was high" and "unilaterally made the decision to offer them at a lower price to club members."

Government counsel characterize that statement as "extraordinary." They contend also that Keating's further assertion that the Club has no agreement with any of its outside labels as to the price to which the Club will sell such records is "completely rebutted by the very terms of the Caedmon and Verve contracts," and by "other direct evidence."

In support of their claim of "other direct evidence" rebutting Keating's denials, the Government refers to CPFs 135 and 136, which relate to the discredited testimony of Allan Cohen.

In a footnote to CPF 138, Government counsel refer to the "completely unambiguous and clear language of the early Caedmon and Verve contracts."

One wonders whether Government counsel is here suggesting, in an inadvertent Freudian slip, that the other contracts relied on may not be so characterized; that they are ambiguous and unclear. Actually, of course, as we have seen, even the "unambiguous and clear language" of the Caedmon and Verve contracts required considerable explanation by Government counsel.

Finally, Government counsel ask the examiner and the Commission to interpret Keating's testimony "as a statement that nothing has changed since the 1958-1959 Caedmon and Verve Agreements, and that the precedents established then are presently operative."

This concluding statement by Government counsel, it seems to the examiner, constitutes an admission by the Government that its price-fixing charges, in the last analysis, rest solely on the Caedmon and Verve agreements, and that all the rest of the testimony and other evidence cited is just so much window-dressing. It tends to confirm the contention of respondents that the price-fixing charge would be completely groundless were it not for those two contracts.

While declining to admit that they were guilty of price fixing in those two instances, respondents do concede that the language is suspicious on its face and prompted them prior to complaint or investigation to initiate steps to eliminate any suggestion of price fixing.

Although the question is not without difficulty, the examiner has concluded that the challenged provisions in Columbia's initial contracts with Caedmon and Verve each did constitute horizontal price-fixing agreements in violation of law, but further, that there was complete, good faith abandonment by respondents, and that

the steps toward such abandonment were not taken simply to avoid prosecution.

Paragraph Ten (1) of the complaint alleged that the licensing agreements were being engaged in for the purpose, or with the effect, of creating in respondents the undue power to fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products, and that respondents had in fact regularly exercised such power.

That allegation is not supported by reliable, probative and substantial evidence.

Artists' Royalties

Government counsel devote some 23 pages of proposed findings to a subject entitled "Agreements Respecting Artists' Royalties." Although the complaint (subparagraph 3(3) of Paragraph Seven and subparagraph 4 of Paragraph Ten) makes references to such arrangements, the subject is one that was virtually ignored in the course of hearings, except as covered by documentary evidence.

Subparagraph 3(3) of Paragraph Seven alleges that in the licensing agreements:

The Licensors "recognize" that it is the policy of respondents to pay no more than half of customary artist royalty with respect to records sold by the Club and the Licensors "agree in general to conform to this policy."

According to Paragraph Ten (4), the licensing agreements have the purpose or effect of empowering respondents to

Establish and compel the Licensors to adhere to a fixed differential between the amounts paid as artist royalties for records sold to members of the public through dealers and the amounts paid as artist royalties for records sold to members of the public through the Club.

The antitrust significance of those challenged provisions of the licensing agreements is not made clear. The examiner is at something of a loss to find a connection between the matter of artists' royalties and the competitive injury alleged in this case.

CPF 86-110 do not enlighten us in that regard. It is not claimed (except perhaps in the most general terms) that the alleged agreements regarding artist royalties adversely affect dealers, or manufacturers, or competing record clubs, or publishers, or the public, or indeed anyone. It is suggested for the first time in the Government's brief—but not in the proposed findings—that the agreements adversely affect artists (Government brief, page 345).

The Government did not call a single performing artist to testify that those contractual provisions adversely affected him

or were otherwise unreasonable. Respondents called many artists as witnesses, but none of them was cross-examined by Government counsel on the subject.

The cases cited in the Government brief suggests only that this conduct is related to price fixing, but that appears to be the only basis on which the practice can be said to be illegal. On the basis of the sketchy evidence adduced, and under the circumstances here, that appears to be remote, and as far-fetched as respondents' defensive claim that the contracts are immune from antitrust prosecution as involving the labor of a human being. Although, obviously, royalties are an element of cost, the Government failed to show the relationship between artist royalties and ultimate price, or otherwise to prove that the matter constitutes price fixing.

The position of Government counsel, as borne out by the documentary evidence in the record, can be distilled as follows:

Columbia has maintained a policy of paying its own artists one-half their customary royalties with respect to records sold by the Club, and of paying no royalties with respect to "free" and "bonus" records distributed by the Club.

The licensing agreements covered the subject of artists' royalties and provided in general for licensors to follow a similar policy insofar as practicable.

There appears to be no real dispute as to those facts, but we are left in the dark as to the unlawful effect that may result. There is no charge or suggestion of coercion or other unfair practice by Columbia.

The concept of reduced royalties on club sales did not originate with Columbia's contracts with the outside labels. It did not originate with the record clubs. There is testimony that authors traditionally received something less than their regular royalty rates on sales of books through book clubs, (Conkling 6189). Similarly, there is evidence that it is traditional in the record industry that artists and publishers do not receive royalties on records distributed free by record clubs (Ackerman 4231; Wood 4138).

The evidence adduced by Government counsel is at best only suggestive. The record does not show the connection between the licensing agreements and the so-called "record club clauses" incorporated by record manufacturers into artists' contracts. In at least one case, such a clause was incorporated in artists' contracts by a licensor long before the existence of the licensing

agreement with Columbia (CPF 104 and Exceptions, pages 75-76).

Only four of Columbia's contracts with artists were put in evidence, and not a single one of the licensors' contracts with their artists.

Neither does the record show that Columbia had more than a casual interest, since the outside labels were obligated under the contracts to pay the artists' royalties in any event.

Much of the Government's argument with respect to royalties revolves around the Verve contract, now expired.

Whereas Ella Fitzgerald agreed with Verve to accept reduced royalties on record club sales (CX 28), it is also true that where Verve had agreed to pay a higher artist royalty, Columbia agreed to compensate Verve for this additional expense (CX 33). CPF 87 demonstrates that royalties were not reduced with respect to one Verve artist.

The Verve agreement contemplated that Verve would attempt to persuade its artists to accept typical club royalties, but where such consent could not be obtained, Columbia reimbursed Verve for the additional artists' royalties paid.

The view taken by the examiner makes it unnecessary to discuss in detail respondents' waiver of the royalty provisions. Suffice it to say that to whatever extent the contractual provisions regarding artists' royalties might be held to be illegal, Columbia was not relieved therefrom by its action in waiving such provisions subsequent to the issuance of the complaint. (Compare CPF 107-110 with respondents' Exceptions, pages 77-79.)

Other "Concerted Activity"

Under the heading "Other Concerted Activity," the Government has proposed some forty findings (CPF 139-181) intended to demonstrate that:

The Licensing Agreements establish a continuing and close-knit relationship between CBS and each of its Licensor-competitors, encouraging the exchange of confidential information (CPF 139).

The first section (CPF 139-148) is rather aptly described by respondents as follows:

These findings consist of a stringing together of a melange of innocuous documents dealing with a variety of matters which do not establish "concerted activity" in any meaningful antitrust sense. They are for the most part merely routine communications on various business matters.

Entitled "Communications about artists," CPF 149-154 suggests that the licensing agreements have led to non-competitive relationships in connection with the signing and retaining of artists.

The next section, entitled "Communications about repertoire and release schedule," suggests that Columbia obtains unfair access to the recording schedule and release information of its licensors, to its advantage and to the disadvantage of the licensor (CPF 155-62).

The Government also complains that "the Club regularly receives non-Club sales information from the Licensors" (CPF 163); that copyright information is exchanged (CPF 164-75); that the licensing agreements allow Columbia to exercise its influence over the licensor's selection of repertoire and artist material, and Columbia exercises such power and influence (176-77); and that Columbia obtains "special concessions" from the licensors, such as a waiver of artists' royalties for special records (CPF 178-80).

The matters adverted to by Government counsel in CPF 139-48 suggest, perhaps, that when competitors get together in a joint venture, the resulting "cooperation" may lead to some diminution of competition between them—or at least such an impression may be created.

But unless and until the relationship, the exchange of information or other cooperative activities ripen into agreements or combinations cognizable under the antitrust laws, the mere existence of friendly relations between competitors is not actionable. Government lawyers may be suspicious—indeed, they should be, but their suspicions cannot substitute for proof.

The nebulous nature of the Government's charges under this section is demonstrated by such statements as these:

The Licensing Agreements have come to serve as a vehicle for one competitor to convey confidential information to a second competitor about a third competitor (CPF 147).

* * * * *

The Agreements encourage the alignment of CBS and the Licensors against the interests of other competitors (CPF 148).

The correspondence cited does not quite measure up to proof of those inflammatory accusations. The letters may be suggestive of a relationship on which Government counsel frown, but they do not constitute unlawful practices, and the Government actually does not make such a claim except by innuendo.

Interestingly enough, the order which the Commission said it had reason to believe should issue if the facts were found to be as alleged in the complaint, contained no prohibition against the

activities covered by this section of the Government's proposed findings.

However, Government counsel propose a new clause 1(g) that would forbid Columbia to enter into or maintain any contract or understanding with any other record manufacturer whereby respondents

Exchange, distribute, or relay to such manufacturer or producer any information relating to: future prices, price policies, negotiations with artists, recording schedules, and copyright or artist royalties or other cost factors.

Communications About Artists

CPF 149-154 bear the heading "Communications about artists." Respondents agree with Government counsel that it is important for record companies to be able to attract new artists and retain established artists. It is fair to say also that this record shows that recording artists generally want their records distributed through a record club (RPF 223-31).

As noted by respondents (Exceptions, page 109), this is a factor to be taken into account in weighing the relief sought here by Government counsel. Respondents contend that by forbidding Columbia to continue its distribution arrangements with the outside labels, the order proposed here would deny record club distribution to the smaller companies in the industry and would, therefore, "make it more difficult for those companies to retain and attract artists and bid for properties."

Except in the most general way, there is no evidence to support the Government's proposed finding (CPF 150) that Columbia received "commercial benefit" from otherwise confidential information about the relationship between the licensors and their recording artists. Despite the innuendo, there is no charge and no evidence that Columbia obtains or misuses confidential information about artists or other business data furnished by the licensors. The record establishes nothing unlawful in that respect.

In CPF 151-53, Government counsel attempt to show that, as a "quid pro quo" for the licensing agreements, Columbia refrains from competing with outside labels for artists. The record is to the contrary.

Billed as "a dramatic illustration of the genuine quid pro quo of the Licensing Agreements," the only instance cited relates to Gene McDaniels, a Liberty artist. As shown by quoted testimony (Linick 3669 *et seq*; Keating 5270-71, 5454-56), McDaniels had an exclusive contract with Liberty and was in the midst of a lawsuit with Liberty concerning that contract. (Also see Bennett

6518-20.) Despite the contract and the litigation, McDaniels' agent was going around and offering McDaniels' services to "various record companies," including Columbia (Keating 5454). The telephone call referred to in these findings occurred at that time—October 1962 (Keating 5433). McDaniels' exclusive contract with Liberty, which was to expire in April 1964 (CX 477c), still had over a year and a half to run.

The testimony quoted by the Government shows that Keating called Bennett to find out whether McDaniels was really free to negotiate with other record companies because Columbia (with specific knowledge of the contract's expiration date and trade-paper reports about the lawsuit) did not want to be liable for inducing breach of McDaniels' agreement. Far from showing cozy relations between Columbia and Liberty, the quoted testimony discloses that Bennett warned Keating "that anyone who signed Gene McDaniels would have a nice lawsuit on their hands" (Keating 5270-71).

Although Linick indicated that the call was a "fringe benefit" of the Liberty-Columbia contract, his basic position confirms Keating's testimony (emphasis added):

that Gene McDaniels' incident was one where *the artist was under contract* with us and the Record Club was aware that they were (*sic*) under contract.

Now, I wouldn't say that they would call us if *an artist that was not under contract* with us approached them.

* * * * *

... [they called] in the case of Gene McDaniels, *since he was under contract* to Liberty at the time.

The testimony of Linick, Keating and Bennett negates the requested inference that there was an agreement not to compete for artists (Keating 5264; Bennett 6521; Linick 3674). Nor can such an understanding be inferred from Columbia's refusal to sign an artist who was under an exclusive contract that had over 1½ years to run and thus was not free to negotiate. It is not surprising to find a Columbia official seeking to avoid entanglement in a suit for inducing breach of contract. (See Bennett 6520.)

The record shows that Columbia and the outside labels do compete for artists who are free of prior contractual commitments. Thus, during the period of the licensing agreements, Patti Page and Nichols & May switched from Mercury to Columbia, and Steve Lawrence and Edie Gorme left United Artists for Columbia (Keating 5265; CX 803). Similarly, Columbia artists have gone to outside labels during the period of the licensing agreements.

Johnny Mathis, the most commercially successful artist to switch labels in many years, left Columbia for Mercury (see Exceptions, page 178). Kirby Stone, "a highly popular recording artist," switched from Columbia to Warner Bros.; and that company was apparently on the verge of signing Mathis before he was snared by Mercury (Friedman 6104-05). The Four Lads left Columbia for Kapp (Keating 5472). (Compare CX 265d, CX 318, page 197 and CX 320, page 213.) Gerry Mulligan left Columbia in 1959 (Hammond 7254)—and by 1961, had five new releases on Verve. (Compare CX 316, page 243, and CX 320, page 264.)

Government counsel seek to dismiss such evidence indicating competition for artists by remarking (CPF 154, footnote 87):

That certain artists may have left a Licensor to go with CBS raises a question, not involved herein, as to whether (1) that Licensor may have had no objection, (2) the artist was determined to leave in any case, (3) the artist was not commercially successful with the Licensor * * *.

Such conjecture is no substitute for evidence.

The Adler memorandum (CX 81d) referred to in CPF 154 and in many other Government proposed findings, consists of Adler's speculation in 1958 about the possible results of the addition of outside labels. He pointed out that some outside labels might fear that artists would switch to Columbia because of the Club; or, conversely, that the outside labels might actually be in a better position to hold their artists because of Club distribution.

The record, five years later, shows what actually happened. All the outside label witnesses testified that their artists wanted club distribution and that such distribution enhanced their ability to retain and attract artists. Other manufacturer witnesses, called by the Government, also attested to the fact that the availability of record club distribution was important in negotiating with artists (see Exceptions, page 108). We have seen that various Columbia artists have in fact left Columbia for outside labels where they would still have club distribution and, at the same time, some artists from outside labels have switched to Columbia. In summary, there has been the normal switching of labels that is common in the record industry.

In here urging that Columbia agreed not to compete with its licensors for artists, Government counsel find themselves at odds with the position they have taken elsewhere in their proposed findings.

In CPF 394, they quote the same language from the Adler memorandum and state that Columbia officials welcomed the outside label contracts "as a method of obtaining more artists for

CBS, *even artists of the Licensors.*" Similarly, in CPF 213, Government counsel refer to 12 artists who switched to the Columbia label in the past few years—including four from outside labels (Patti Page, Steve Lawrence, Edie Gorme, and Nichols & May)—and cite this as an example of Columbia's "vigorous program of obtaining exclusive contracts with key recording artists."

Yet, in CPF 154, Government counsel claim that "ways had to be devised of assuaging" the alarm that outside label artists would switch to Columbia and that the Gene McDaniels incident shows that "when the chips were down . . . respondents backed up their assurances."

Thus we are asked to find (1) that Columbia uses the outside label agreements to raid outside label artists and (2) that Columbia assures the outside labels "overtly or covertly, that they would not find artists deserting them for CBS."

We are led, almost inevitably, to conclude that neither inconsistent finding is correct.

Repertoire and Release Schedules

CPF 155-162 deal with "Communications about repertoire and release schedules." It is not apparent, however, how this material resolves any of the issues in this case. In general, the correspondence cited merely shows that the outside labels wanted to obtain increased use of their repertoire by the Club. With thousands of new record releases each year, it is hardly surprising that they would want to call the Club's attention specifically to their current or proposed releases.

Contrary to the Government's proposed findings, the Club does not "regularly receive" detailed information about the "future plans"; the contracts did not so provide; and Keating did not so testify (compare Keating 718 with CPF 162; see also Keating 5264).

Keating's testimony was confirmed by the outside labels. Bohanan of Liberty denied that Liberty regularly advised the Club of its future recording plans; it did call the Club's attention to particular items and it did discuss the possible sales potential of such items, just as Liberty discussed this same subject with their other distributors (Bohanan 6378-79).

Although Green of Mercury pointed out that he supplied the data to the Club, not to Columbia Records, this would not be controlling if in fact there were anything illegal in the relationship. It is worth noting that Green said there never had been any use of the information by Columbia Records (Green 2545-46).

There was no proof of the disclosure of "trade secrets" to a competitor, or any indication that the outside labels were giving away valuable secrets which could be used against them at retail (the source of their major income). No evidence was introduced to show any disclosure of truly confidential information or any misuse.

It may be conceded that record producers do not "normally" make their future recording schedules known to competitors, but "release information" is regularly made available to distributors long before retail release.

Government counsel want a finding (CPF 157) that "Mercury regularly submits recording dates and locations for all records used by the Club," but we are left in the dark as to the significance of this. The implication, of course, is that this is data regarding *future* plans. But the examples cited relate to recording dates long since past.

Sales Information

The evidence does not support the broad finding (CPF 163) that the Club "regularly receives non-Club sales information."

Moreover, the characterization of the Club as a "clearinghouse" for detailed information is unfair, and is not supported by the record. A "clearinghouse," by dictionary definition, is an agency for the collection, classification and distribution of information. There was not one iota of proof at the trial of any "distribution" by the Club of any information conveyed to it at any time by any outside label.

The miscellaneous reference to sales figures of individual records by United Artists and Warner Bros. was clearly in the context of their touting the possible distribution of these particular records through the Club by indicating their popularity with the public (CXs 294a, 295, 527b, 533a-b). The Liberty data referred to was likewise unexceptionable.

None of the information was shown to give Columbia any advantage in its non-Club business.

CPF 163 "is much ado about nothing." If the Government must rely on Columbia's receipt of such information to support its claim of illegality, the case rests, indeed, on a shaky foundation.

Copyright Information

It is true, as urged by Government counsel (CPF 164), that the licensing agreements "cause communication between CBS and the Licensors of specific and general information about copyright royalty rates and payments to publishers and other copyright

owners by the Licensors." However, it is not apparent why this is sinister in the antitrust sense. It does appear, not surprisingly, that before the licensing agreements, Columbia did not know what the copyright arrangements were between licensors and publishers (Keating 737). But there was no showing that such royalties were confidential. The fact that the publishers do not regard this data as confidential, or as competitive data, is illustrated by the fact that only two agents (Harry Fox and Herman Starr) represent the bulk of all music publishers.

In view of the position taken by the Government (CPF 164-75), some brief summary of this matter seems called for. The record supports the following findings:

The record industry operates under a so-called "compulsory licensing provision." This means that if any record company has obtained a license from a publisher or other copyright owner and has recorded a particular selection, then any other company has an automatic right to do the same thing, subject only to making a payment of two cents to the copyright owner; this is called the "statutory rate" (L. Hartstone 1072). This relates to copyrights of musical and other compositions. A phonograph record is not copyrightable (Berman 8390).

Copyright royalties are payable to music publishers by the manufacturer of a record. Royalties are payable on each song used on a phonograph record, unless it is in the "public domain" (Berman 2124; Scopp 1662, 1676; CXs 395-96). The amount of royalties payable by a manufacturer on any specific selection varies, depending on a wide variety of circumstances (Scopp 1663):

(a) The copyright "statutory" rate is 2 cents per selection, and many selections bear this rate. Frequently, however, licenses are negotiated at rates of $1\frac{3}{4}$ cents per selection, $1\frac{1}{2}$ cents per selection, and even 1 cent per selection (Brown 1830; Scopp 1664-65);

(b) If a record manufacturer embodies on his record 12 songs from one publisher, he may be given a special reduced rate (Scopp 1665);

(c) Special rates may be given on records containing a medley of songs or on show albums (Starr 1686-87);

(d) The rate also varies with the suggested retail price of the record; records selling at a suggested retail price in excess of \$3.00 bear a higher royalty rate than lower-priced records (Berman 8381; Starr 1687);

(e) There are considerable variances in the rates charged by different music publishers (Starr 7711).

Government counsel proclaim (CPF 164) that the contracts themselves require that the licensor make available copyright agreements. The reason, never recognized, or at least never stated, by Government counsel, is also set forth in the contracts themselves. The explanation is that the licensors are not the manufacturers of the Club records. Under the agreements with the licensors and the arrangements with the publishers, Columbia Records is obligated to pay the copyright royalties on all outside label records distributed through the Columbia Record Club (Berman 8374). This obligation is specifically contained in the licensing agreements and directly precedes the agreement of the licensors to make available the copyright agreements relating to records used in the Club (see, *e.g.*, CXs 41d and 34c).

In view of the substantial differences in copyright payments, varying as they do from selection to selection, and from record to record, and from publisher to publisher, it is obvious that Columbia Records, which was reporting and paying the royalties, had to be supplied with the information concerning who was to be paid and how much. This explains the various communications with the outside labels referred to in CPF 164-175.

There was no evidence that the copyright information thus supplied was used or could be used for any purpose other than the compilation of the royalty reports and the payment of royalties.

Although this section of the findings is headed "Copyright information exchanged," there is no evidence to support the statement that any copyright information was "exchanged." The outside labels simply supplied the information needed by Columbia to pay the copyright royalties.

If Columbia was not kept "abreast" (CPF 169), the publishers would not be paid.

The record does not show, as suggested in CPF 165, that "before the Club will release any Licensor's record, it must have in its possession, at the very least, copies of copyright agreements." On the contrary, the very document quoted requests copies of the publisher agreements "on Mercury material *which we have used to date*" (CX 352a, emphasis added).

Two other examples of cryptic references to copyright matters will illustrate the nature of the Government's proposed findings in that area:

According to Government counsel (CPF 174), the Warner Bros. album "The Button Down Mind Strikes Back" presented a "special situation." They propose this further finding: "Shortly after the

Agreement respecting this album was signed Warner Bros. wrote the Club 'in connection with the license for' this album and stated:

our contractual relationship is such that we pay for *artist royalty and the material*. This is done by way of a lengthy [sic] contract and not a simple form. However, as in the case of the first LP, we are obligated to pay 15¢ for the license portion for the material itself (Emphasis added, CX 522). [Quotation corrected.] See also CX 548, 549, 555.

The significance of this to the issues eludes the examiner.

The so-called "special situation" referred to appears to be merely an instance where Warner Bros. did *not* supply the copyright agreement. As indicated, Warner Bros. explained that it had a lengthy contract with Bob Newhart covering both artist royalties and payments for the material used, and it preferred to supply only the copyright figures (CX 522). On Newhart material, Warner Bros. collected the copyright royalties on behalf of the publisher (CX 533c), so the Club, of course, had to know the amount of the royalty to be paid in this instance to Warner Bros.

The Government also proposes this finding: "The submission of copyright information is not always confined to the Licensor and the Club; occasions arise where the publisher discusses copyright arrangements for Club sales of a Licensor's record, *with the Club*, with the knowledge and concurrence of the Licensor" (CX 541).

The references to direct discussions of a publisher "with the Club, with the knowledge and concurrence of the Licensor" (CPF 175) hardly requires such obscurity of treatment. The exhibit dictates on its face that the "publisher" involved was Herman Starr (CX 541). Since 1961, Starr had responsibility for Warner Bros.' record subsidiary and Mike Maitland reported directly to him (Starr 1695, 7710).

Finally, CX 541, cited by Government counsel, concerns the record "The Music Man," and Starr had testified that he had personally negotiated the contract for Club distribution on behalf of Warner Bros. (Starr 1697). It was hardly surprising, therefore, that "publisher" and record manufacturer Starr had discussed arrangements "*with the Club*" (emphasis supplied by Government counsel), or that this had taken place "with the knowledge and concurrence of the Licensor" (Warner Bros., by whom Starr was employed).

Leading publishers and representatives of publishers and writers appeared as witnesses. None was questioned about any alleged misuse of claimed confidential information. No evidence was introduced as to any conceivable misuse. The complaint has no allegations on this point.

Like some of the other material extending the record and the Government's Proposed Findings, the inclusion of CPF 164-175 suggests a paucity of substantial proof.

Influence Over Repertoire

In substantially the same category are CPF 176-77, entitled "Influence over repertoire." They are as follows:

176. The Licensing Agreements allow CBS to exercise its influence over the Licensors' selection of repertoire and artist material and CBS does so exercise power and influence.

Mercury is receptive and responsive to this kind of influence. On December 5, 1961, the Executive Vice President of Mercury wrote to Mr. Bell:

"Would you please submit a summary to me concerning the recommendations for product change you made during your recent visit with us" (CX 429a).

177. When Mr. Keating submitted the first Agreement to Warner Bros. for execution on July 29, 1960, he mentioned "several additional points" among which were several strong suggestions designed to edit the content. Following these suggestions Mr. Keating wrote:

"We are otherwise completely satisfied with the content and order of the record. If the above changes can be made, I would appreciate your having the necessary tape editing done at our expense so that when we obtain the lacquers or mothers from you they will reflect these changes" (emphasis added, CX 509a-b).

It is interesting that although these changes were presented ostensibly in the form of a suggestion,—"subject to your approval"—Mr. Keating conditioned his direction that the tape editing be done at CBS expense on the "changes being made" (CX 509b).

Mr. Conkling was quick to comply. On August 10, 1960, he replied:

"I will work on the edits that you suggest. I don't think they will be any problem. One other line you might like us to take out (and I can work on this if you want) is the cemetery dedication in the Abe Lincoln track. Let me know" (CX 510c).

[Footnotes omitted.]

To put these "facts" in perspective, an abridged version of respondents' Exceptions (pages 122-24) is presented here:

These proposed findings do not stand completely on their own feet. Thus, in CPF 73, there had been an ominous warning that Columbia's "control" had lodged "inordinate power" in Columbia which "may carry over" to dictating repertoire. There then followed the claim that this "has already occurred in several instances and is likely to occur more regularly." Government counsel did not cite the "proof" in juxtaposition to the earlier allegation, but footnoted a cross reference to CPF 176 and 177 for the "proof."

The report of certain oral "recommendations" by Mr. Bell at the outset of the Club contract with Mercury (CX 429a), totally unexplained in this record, does not show any "influence" by

Columbia and does not represent any exercise of "power and influence" over Mercury's catalog or repertoire. The mere fact that Mercury expressed interest in Bell's unexplained repertoire suggestions hardly warrants the characterization that Mercury is "receptive and responsive to this kind of influence."

Government counsel's reference to Keating's comments on the Bob Newhart record has its amusing aspect. Counsel's failure to quote Keating's alleged "several strong suggestions" is, perhaps, understandable when we look at the record.

It appears from the exhibit that in referring to the proposed release by the Club of a Bob Newhart comedy album, Keating made two suggestions for change (which, of course, were "subject to your [Warner Bros.] approval") and for which the Club was prepared to pay (CX 509a-b). The proposed changes were in segments of what Mr. Keating tactfully described as "the john" portion of the record. Mr. Keating said in this connection:

Would it be possible to eliminate "hell" from the phrase "How the hell do they get back to it" and to eliminate the sentence, "Well, some poor clown walking down the street you know"?

Keating did not believe these suggestions would "alter the impact of the skit" (CX 509a-b).

According to CPF 177, Conkling was "quick to reply." Conkling's reply, written some 12 days later, indicated that it was no problem (CX 510c).

The references to the correspondence involving "the john" episode serve to illustrate the weakness inherent in the exaggerated positions taken in the Government's proposed findings.

Although CPF 178-81 are entitled "Concessions," the exhibits cited do not reflect "concessions" of any kind. The proposals are rejected as unwarranted and irrelevant.

V. Dual Pricing

The Government's proposed findings titled "Dual Pricing" (CPF's 265-82) refer only to Columbia records. No reference is made to outside labels. The dual pricing claim alleged in the complaint apparently has been abandoned with respect to outside labels (*infra*; see CPF's 314-27 and Exceptions). Moreover, the findings Government counsel proposed do not prove the dual pricing claim as to Columbia records. By disregard and distortion of the record, they misstate prices paid for Columbia records both by dealers and by Club members.

In computing the average price paid by Club members, Govern-

ment counsel omitted mailing and handling charges, and also erred in limiting their figure to the first-year average. The record also fails to support the allegations of the complaint, and the Government's proposed findings, with respect to the prices paid by dealers. Dealers pay far lower *average* prices than the range of prices set forth in the complaint.

The allegations concerning dual pricing—to the effect that Columbia discriminates in price by selling to consumers at lower prices than to dealers—appear in four separate paragraphs of the complaint.

After setting forth the *modus operandi* of the Club, involving an introductory offer of records at a special price, Paragraph Two of the complaint makes this allegation:

Through this device members of the public who take advantage of CBS' enrollment offer are able to purchase phonograph records at prices that are substantially lower than the prices paid for the same phonograph records by dealers who compete with the Club in selling or attempting to sell to ultimate consumers. Moreover, a Club member meeting his entire year's obligation pays prices that are lower per record than those paid by said dealers.

Paragraph Five reads in pertinent part as follows:

Dealers are compelled to stock a substantial number of records produced from masters owned or controlled by CBS as well as from the licensed masters * * *. Said dealers are in competition with the Club for the patronage of members of the purchasing public who are the ultimate consumers of said products. Said dealers are compelled to pay higher prices than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors * * *. For example, an ultimate consumer who joins the Club pursuant to the terms of the representative offer * * * and who orders only popular LPs bearing suggested list prices of \$3.98, pays \$1.89 for his first six LPs and \$3.98 each for the next six LPs purchased during the first twelve months of his enrollment. Said consumer pays a total of \$25.77 for twelve LPs, exclusive of the advertised "small mailing and handling charge", or an average of \$2.14 per LP. * * * At the same time dealers are obliged to pay the price of \$2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as \$2.22 each for records of the same grade and quality, exclusive of cost and delivery.

The conclusionary allegations respecting the practice of dual pricing are contained in Paragraph Eleven of the complaint, as follows:

The aforesaid method of offering for sale and selling, directly or indirectly, LPs manufactured from respondents' original masters to dealers at prices higher than those charged to consumer-customers of the Club is unfair; has the capacity, tendency and purpose or effect of establishing and maintaining a competitive advantage to the Club over the dealer; has the dangerous tendency unduly to hinder competition between respondents and dealers in

the sale of phonograph records; and has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally, and the retail sale and distribution of LP's.

In addition, Paragraph Ten charges that the licensing agreements, individually and collectively, have been engaged in for the purpose or with the effect of empowering respondents to:

Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers.

According to Paragraph Ten, such "undue power" has been "regularly exercised" by respondents.

Thus, the allegations of Paragraphs Two and Five embrace the pricing of both types of records—those produced from masters owned or controlled by Columbia as well as those produced from licensed masters.

However, the "effects" paragraph of the complaint (Par. Eleven) is limited to the sale of "LPs manufactured from respondents' original masters."

On the other hand, Paragraph Ten may be interpreted as charging that the following effects are attributable to respondents' alleged influence on the pricing of licensors' records:

Lessening competition between respondents and dealers in the sale of phonograph records, "including LPs produced under the licensors' labels by respondents and by the licensors from licensed masters or duplicates thereof."

Excluding or potentially excluding from the market "dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the licensors and who have been, and would be now, in actual and open competition with the Club were it not for the competitive disadvantage to which they are subjected" by respondents' practices under the licensing agreements.

There are several grounds that require rejection of the Government's proposed findings on dual pricing. The two basic deficiencies—which perhaps make academic the others—were foreshadowed in the complaint itself.

Literally, Paragraph Two of the complaint invites us to compare the price (unspecified, but amounting to about 31¢ per record) paid by a consumer accepting Columbia's offer of six records for \$1.89 with the prices (amounts unspecified) paid for the same phonograph records by dealers who compete with the Club in selling or attempting to sell to ultimate consumers. Actually, Government counsel do not rely on that approach, which ignores the further commitment on the part of the consumer to buy six additional

records "at regular list price." Although they do halfheartedly espouse such a theory in CPF 279, they essentially—and properly—rely on a comparison of dealers prices with the price paid by a Club member meeting his entire year's obligation.

That approach, of course, is in accord with the illustrative example used in Paragraph Five of the complaint, where reference is made to an "average" price of \$2.14 per LP paid by a Club member during the first twelve months of his membership. That is on the basis of the purchase of six \$3.98 LPs for an aggregate price of \$1.89 under the introductory offer, plus the purchase of six additional \$3.98 records for \$3.98 each, or a total of \$25.77 for twelve LPs, "exclusive of the advertised 'small mailing and handling charge.'"

Actually, the complaint sets forth an accurate means for measuring the average price paid by Club members in their first year of membership—except that it merely refers to, but refuses to add in, the mailing and handling charges paid by members. As might be expected, Government counsel stand on the \$2.14 figure and decline to add in the mailing and handling charges applicable to both the introductory offer and each of the additional six records that the new member is required to purchase.

(For discussion of the principles, legal and otherwise, underlying the determination that mailing and handling charges should be included, see Memorandum Opinion, *infra*.)

Thus arises the first basic deficiency in the allegations and proof under the dual pricing charge. By omission of mailing and handling charges, actual average first-year-member prices are understated by a substantial amount.

Additionally, in both pleadings and proof, the Government ignores the higher average prices paid by second-year Club members. Nor are there any allegations or proof as to the average prices paid by all Club members, new and old ones, during a typical year.

Just as the complaint and the proposed findings of the Government understate the prices paid by Club members, they also overstate the prices paid by dealers.

As we have seen, the complaint alleges that while first-year Club members were paying an average price of \$2.14 for \$3.98 LPs, dealers were at the same time

obliged to pay the price of \$2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as \$2.22 each for records of the same grade and quality, exclusive of cost of delivery.

Even aside from question of the substantiality of the proof of that allegation, it is apparent that it is unfair to compare the *average* price paid by the consumer with the *highest* price paid by a dealer. Obviously, the only proper comparison with the *average* price paid by consumers is the *average* price paid by dealers.

Government counsel demonstrate their own partial acceptance of such a comparison in their so-called pricing survey (CX 219), showing an *average* gross dealer price of \$2.30—a price lower than the *average* price (including mailing and handling charges) paid by first-year Club members in either 1961 or 1962.

That *average* price is before the application of additional discounts shown to have been taken by the dealers. It is not necessary to resolve the dispute between the parties regarding the propriety of figuring in such discounts.

That is because the inclusion of mailing and handling charges in the *average* consumer price and comparison of that total amount with the *average* dealer price shown by the Government (CX 219) are enough to destroy the factual basis for the charge of discriminatory pricing on the part of Columbia.

However, against the possibility that the Commission may disapprove those adjustments, the examiner has included in an appendix additional findings that otherwise would require, in his opinion, dismissal of the dual pricing charges.

Prices Paid by Club Members

The Club is a mail-order business. As indicated in the Club's advertising, members must pay mailing and handling charges on their enrollment records and on all records purchased thereafter. The amount is not specified but is described as "small." Those charges are more than mere postage. They are an inseparable part of a member's cost and cannot be excluded in computing *average* prices (see, *e.g.*, Blincoe 5695-700; Inden 5570). In 1961 and 1962, mailing and handling charges were 55 cents for the introductory offer and 35 cents for each record purchased thereafter. These charges were increased in 1963 as postage rates rose (Keating 5142-45).

The Club's enrollment offer has varied from time to time, but the general formula has been constant. A new member is offered a particular shipment of records at a stated price, plus mailing and handling charges, in return for a contractual commitment to buy a specified number of additional records over the next twelve months at the regular Club prices, plus mailing and handling

charges (Keating 679-80, 691-92). After a member fulfills his original commitment, he receives one free record for every two which he purchases at regular Club prices, plus mailing and handling charges (Keating 5145; Blincoe 5699). The regular Club prices are generally \$3.98 for popular, \$4.98 for classical and \$5.98 for original-cast monaural albums (Keating 5144; Bien 7419-21). Stereophonic records generally cost \$1 more per record (Keating 685).

Under the terms of the basic introductory offer that prevailed in 1961, the Club offered new members five records for \$1.97, plus mailing and handling charges, in return for a contractual commitment to purchase five additional records during the year at the regular Club prices, plus mailing and handling charges (Keating 691-92). Under that offer, in 1961 a monaural division member paid an average of more than \$2.41 for each of the ten \$3.98 records which he purchased in his first year of his membership—as contrasted with the figure of \$2.14 alleged in the complaint.

Under the terms of the basic introductory offer that prevailed in 1962, which is specifically referred to in the complaint, new members received six records for \$1.89, plus mailing and handling charges, in return for a contractual commitment to buy six additional records at the regular Club prices, plus mailing and handling charges (Keating 679-80, 691-93). Under that offer, in 1962 a monaural division member paid an average price of about \$2.37 for each of the twelve \$3.98 records which he purchased in his first year of his membership—as contrasted with the figure of \$2.14 alleged in the complaint.

While the complaint (Pars. Two and Five) refers to the Club's 1962 introductory offer, which results in a slightly lower average price per record for a new member than the 1961 introductory offer, Government counsel at the trial sought to compare the average price paid by a member under the 1962 offer with average prices paid by dealers in 1961 (CX 219, footnote).

Since the Club began operations, the basic offer to members remaining in the Club after completing their contractual commitment has not varied. As noted above, for every two records purchased at regular Club prices, plus mailing and handling charges, the member receives a free record (Keating 5145; Blincoe 5699). Thus, in 1961 and 1962, a member remaining in the Club after completing his contractual commitment, paid an average price of \$2.88 for a \$3.98 record, including mailing and handling charges—as contrasted with the figure of \$2.14 alleged in the complaint.

The Government's argument in CPF 277 regarding mailing and handling charges is specious and is rejected.

Similarly, the halfhearted suggestion that the cost to Club members might be further reduced by deducting the value of various "free" goods is also rejected. Among other things, the advertisements cited were not properly applicable to 1961 Club offers. Moreover, such an adjustment is outside the pricing allegations of the complaint. It is obvious also that if the value of such items were deducted from the prices paid by Club members, fairness would require that similar treatment be accorded various merchandising aids and cooperative advertising furnished by Columbia to dealers (See RPFs 497-502).

Despite the fact that one of the crucial issues in connection with the dual pricing charge is whether or not the mailing and handling charges should be included in the price paid by the Columbia Record Club member, neither side availed itself of one area of proof provided in the licensing agreements themselves.

In several of the licensing agreements, there is a definition of "royalty price." It specified that the royalty price shall mean Columbia's retail selling price less certain deductions. Those deductions include "the additional charge made by us [Columbia] to the retail purchaser for postage and handling, provided *any such additional charge is deemed to be included in the retail selling price.*" (CX 22a; emphasis added.)

Evidence showing whether the postage and handling charge *was* deemed to be included in the retail selling price would have been highly relevant, but not necessarily conclusive, in resolving the appropriate basis of comparison between the Club price and the dealer price.

However, this is a matter to which neither side adverted in connection with the dual pricing charge, and the examiner's review of the record has failed to disclose any information on that subject.

In the Mercury contract (CX 34), for example, it was specified that the royalty price meant Columbia's retail selling price less (1) any excise or other similar tax, (2) record container charge, (3) the charge made for "extraordinary" librettos or program notes, and (4) postage and handling charges if "deemed to be included in the retail selling price."

Applying that formula, the Mercury contract set forth that the royalty price on records with a suggested retail price of \$3.98 shall be \$3.46; for \$4.98 records, \$4.42; and for \$5.98 records, \$5.26. That means total deductions for the four items listed of

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52¢ off \$3.98 records; 56¢ off \$4.98 records; and 72¢ off \$5.98 records.

Those deductions, of course, are large enough to include a 35¢ postage and handling charge, but that is about as far as the inference can be carried in the present state of the record.

Prices Paid by Dealers for Columbia Records

There is no dispute as to the basic price structure for Columbia LPs. That structure is as follows:

Suggested retail list price	Wholesale list price (dealer cost subject to discount)
\$3.98 (mono)	\$2.47
4.98 (mono)	3.09
4.98 (stereo)	3.09
5.98 (mono)	3.71
5.98 (stereo)	3.71
6.98 (stereo)	4.33

(CXs 51, 94, p. 1.)

Despite the reference in Paragraph Five of the complaint to the quoted dealer prices as being "exclusive of cost of delivery," neither party has proposed any findings, or cited any evidence regarding the presence or absence of delivery charges over and above the prices charged by the Columbia branch distributors. The parties have proceeded on the basis that the prices paid by dealers were delivered prices, and the examiner so understands and finds.

The examiner rejects the sweeping finding proposed by the Government in CPF 268. All that the record shows is that in the normal course of business, *some* (not many) dealers *sometimes* pay the full wholesale price (\$2.47, \$3.09 or \$3.71—see CPF 267) on a not inconsequential volume of purchases of Columbia LPs.

The base wholesale list prices set forth in CPF 267 are all subject to "programs" and discounts widely utilized by dealers, thereby reducing the prices they pay. (See RPF 497.) The Government's own exhibit (CX 219) demonstrates this fact by showing *average* prices actually paid by dealers.

But in CPF 268, the Government ignores the facts of record concerning average prices paid by dealers and, instead, proposes a finding that "many dealers pay the full wholesale price * * * on a substantial volume of purchases of Columbia LPs." (But see CPF 271.)

Even if it could be found that the evidence supported that claim, it obviously would shed no light on the *average* prices paid by

dealers, and, as discussed *infra* (see CPF 278 and Exceptions), it would not resolve the dual pricing issue in the Government's favor.

But the evidence—the very testimony cited in the Government's proposed findings—does not even support that proposition.

(a) Stolon did not testify that Goody buys a “substantial volume” of Columbia LPs at full wholesale list prices. On the contrary, he testified, at the very transcript reference cited (Tr. 1284–85) that the “bulk” of Goody's purchases are at prices below the wholesale list prices. In 1961, Goody purchased 86% of his records from Columbia branches during program periods at less than full wholesale prices (RXs 390a–d); and on those purchases, as well as on other purchases, Goody took advantage of cash discounts, the bonus-to-sell, and the Christmas program to reduce prices below the full wholesale prices (RXs 390a–d; RFP 497).

(b) Maggid of The Record Hunter did not testify that he buys a “substantial volume” of Columbia LPs at full wholesale list prices. His invoices show that 72% of The Record Hunter's purchases from Columbia branches were made during program periods at lower prices (RXs 390a–d). Moreover, Maggid conceded that he thought that The Record Hunter regularly took the 2% cash discount and tried to take the 5% bonus-to-sell discount regularly, and that those items should be deducted in computing his average cost per record (Maggid 850–53).

(c) The proposed finding that Blincoe “usually pays \$2.47” is contrary to the record. Blincoe testified that he tries to “buy most of our bulk during the restocking plan” (Tr. 5687); that he makes most purchases at \$2.47 “*outside of the deals that I mentioned*” (Tr. 5705–06; emphasis added); and that “upwards of fifty percent” of his purchases are made during programs (Tr. 5712).

(d) Prince did not say that some dealers “usually” pay \$2.47. He testified that Doubleday probably paid \$2.47 “on occasion,” but that “there are a great many deals” whereby it can “buy a quantity of items or a quantity of one item at a better price” (Prince 5534–35).

(e) The record does not support the claim that Liepmann “usually” pays \$2.47. Liepmann testified that he pays \$2.47 outside of programs and lower prices during programs (Tr. 3392–93). The record fails to show the percentage of his purchases during and outside of programs.

The testimony of Dunlap is irrelevant because he buys from an “independent distributor” rather than a Columbia branch (Tr. 5898–99).

Even if the dealers cited in CPF 268-69 had given the testimony attributed to them by the Government, their experience would have been atypical. With respect to 43 dealer witnesses called by the Government who purchased records from Columbia branches in 1961, 77% of the 388,000 records they purchased that year from those branches were bought during program periods; and, on those records, as well as on purchases outside of programs, they took advantage of cash discounts, the bonus-to-sell, and the Christmas program to reduce their prices. (See RPF 497.)

The Government's pricing exhibit (CXs 218-19) can hardly be described as a "survey conducted at random of 18 Philadelphia dealers (and one in Chicago)," as suggested in CPF 270. CXs 218-19 are simply a tabulation that covers 16 dealers in Philadelphia (not 18), two in Chicago (not one), and one in New York who is ignored in CPF 270. It was not a survey—at random or otherwise. A random survey of dealer prices in New York, Chicago and Philadelphia would hardly end up with 16 Philadelphia dealers out of 19.

The only witness who testified in support of CXs 218-19 was a Commission statistician. His testimony was that he merely tabulated certain invoices given to him by complaint counsel; that he did not participate in the selection of the 19 dealers; that they were selected by Government counsel; that he did not know the basis for their selection or whether they were "representative" of anything; and that this was merely a tabulation and not a sampling (Wyckoff 260, 269-70, 284).

The "random" basis for selection turned out to be the fact that every retailer appearing on the tabulation was also on the Government's witness list (Tr. 289).

Even so, CX 219 shows that the 19 selected dealers purchased 71% of their records from branches during "program" periods in 1961—a figure somewhat lower than the 77% average for all 43 testifying dealers who bought from branches, as shown by RXs 388-90.

Aside from other defects, the first tabulation in CPF 271, based on CX 219, contains errors as to "Total units bought at full list." Instead of 5954 units bought at \$3.71, the figure should be 2527, and instead of 750 units bought at \$4.33, the figure should be 343.

In the second tabulation in CPF 271, the average gross price for LPs with a retail list price of \$5.98 should be \$3.42.

The fact that CX 219 is hardly representative of dealers generally, and not even representative of the 43 dealer-witnesses who

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purchased from Columbia branches in 1961, is shown by the fact that those 19 paid higher average prices in 1961 than the other 24 dealers. CX 219, therefore, is contrary to the record as a whole.

The parties are not too far apart on what might be called the average gross price paid by dealers in each price category. That fact may be shown as follows:

Retail list	CX 219	RX 388	RX 389	RX 390
\$3.98	\$2.30	\$2.31	\$2.30	\$2.27
4.98	2.83	2.86	2.81	2.82
5.98	3.40	3.41	3.42	3.37
6.98	4.02	4.03	4.05	3.96

As we shall see, there is no doubt, on the basis of that evidence, that the *average* price paid in 1961 by dealers was lower than the *average* amount paid by Columbia Record Club members in 1961 for the records received in their first year of membership. (See *infra*).

By selective use of respondents' own tabulations (RXs 388 and 389), Government counsel, in CPF 272-73, have set forth tabulations purporting to show the portion of total unit sales made at full wholesale list. In CPF 272, covering transactions with 18 of the 19 dealers listed on CX 219, it appears that of the total unit sales made by Columbia branches to those dealers,

33.07% were at \$2.47 (RX 389a),
 30.14% were at \$3.09 (RX 389b),
 30.16% were at \$3.71 (RX 389c),
 39.83% were at \$4.33 (RX 389d).

Similarly, the tabulation (RX 388) showing prices paid by certain other dealers outside the New York area is said to show unit purchases at full list as follows:

33.69% at \$2.47 (RX 388a),
 34.93% at \$3.09 (RX 388b),
 32.76% at \$3.71 (RX 388c),
 30.57% at \$4.33 (RX 388d).

Those proposed findings cannot be accepted at face value. Literally, the exhibits are open to the interpretation placed on them by the Government—for example, RX 389(a) shows 5,328 "Records Purchased at \$2.47" out of total units of 16,109, or 33.07%. However, the exhibits, when examined in their entirety in the light of the testimony, show that even on records purchased outside of restocking programs, dealers received various discounts

which had the effect of reducing prices below the stated wholesale list prices.

Moreover, the use of RXs 388 and 389 without reference to RX 390 gives a distorted picture. The three exhibits, taken together, show that only about 23% of the 388,000 records tabulated were purchased outside of restocking programs.

The Government arrived at those higher percentages by simply referring to two of those exhibits (RXs 388 and 389) and by ignoring RX 390, which reflects more than twice as many purchases as the other two exhibits. Neither side tabulated for RX 390 the percentages of records bought at full wholesale list in the various price categories. Such a computation shows:

18.88% at \$2.47 (RX 390a),
16.43% at \$3.09 (RX 390b),
16.68% at \$3.71 (RX 390c),
15.87% at \$4.33 (RX 390d).

CPFs 275-82 must be largely disregarded because they are based on a false comparison. Having tabulated prices paid by dealers in 1961, Government counsel should have compared prices paid by Club members in 1961. Instead, however, the consumer prices relied on are based on the 1962 Club offer of six records for \$1.89 (plus commitment) and not on the 1961 offer of five for \$1.97 (plus commitment). (The "commitment" refers to the joining members' promise to buy additional records.)

The actual 1961 Club offer resulted in a higher average price (\$2.42) than the 1962 offer (\$2.37). (See CPF 319 and RPFs 491-94.)

Since the Government's proof as to dealer prices related to 1961, the only valid and proper comparison of Club prices to consumers must likewise be for 1961.

Even assuming *arguendo* that the introductory offer purportedly summarized in CPF 275 was in effect in 1961, the prices per record set forth in this proposed finding are still mathematically incorrect and are also improper because they do not include mailing and handling charges paid by members (see RPF 491).

CPF 275 cryptically observes that a Club member is "subsequently billed for mailing and handling." The evidence is that members pay for their records and for the mailing and handling charges at the same time—after the records have been shipped to them. On the basis of the 1962 Club offer, a member who bought six \$3.98 records at \$1.89 and then bought six more \$3.98 records for \$23.88, paid an average of \$2.15 for each of twelve

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\$3.98 LPs. When mailing and handling charges are included, the average price is \$2.37.

A member who purchased under the same offer but bought only \$4.98 records paid an average of \$2.65 for each of twelve \$4.98 records. That becomes \$2.87 when mailing and handling charges are included.

For a member who bought only \$5.98 records, the average price for each of twelve \$5.98 records was \$3.15, or \$3.37 with the inclusion of mailing and handling charges.

Comparing those prices with the Government's own average dealer cost figure (CX 219) results in a tabulation as follows:

Retail list price	Average price exclusive of mailing and handling charges	Average price including mailing and handling charges	Average gross dealer cost in 1961 (per CX 219)
\$3.98	\$2.15	\$2.37	\$2.30
4.98	2.65	2.87	2.83
5.98	3.15	3.37	3.40

Under the offer *actually* in effect in 1961 (five for \$1.97, buy five), the comparable tabulation would be as follows:

Retail list price	Average price exclusive of mailing and handling charges	Average price including mailing and handling charges	Average gross dealer cost in 1961 (per CX 219)
\$3.98	\$2.19	\$2.42	\$2.30
4.98	2.69	2.92	2.83
5.98	3.19	3.42	3.40

CPF 278, as a conclusionary finding based on CPF 267-77 must be rejected as involving the same deficiencies as the earlier findings on which it admittedly rests. Like those earlier findings, CPF 278 is contrary to the record because it overstates prices paid by dealers and understates prices paid by Club members (see Respondents' Exceptions to CPFs 267-73 and 275).

The reference to Epic records in CPF 278 is unwarranted. As conceded earlier by Government counsel (CPF 9), Epic records are distributed to dealers primarily by independent distributors rather than Columbia branches. The Government introduced no evidence concerning prices of Epic records to dealers and otherwise have requested no findings on that score. An attempted back-door inclusion of Epic in CPF 278 is rejected.

As suggested in the earlier proposed findings of the Government, CPF 278 introduces a theory of dual pricing different from that alleged in the complaint.

CPF 278 undertakes to compare the *average* prices paid by Club members, not with *average* prices paid by dealers, but with the prices which dealers allegedly pay for "a substantial part" of their purchases. It already has been shown that the evidence does not support the facts underlying the Government's so-called substantiality test.

In any event, if the test is to be the price paid for a "substantial part" of purchases, then that test should be applied to Club members as well as to dealers. Applying that theory, Club members purchase "a substantial part" (that is, 50%) of their records at full list price (that is, \$3.98, \$4.98, \$5.98, etc.) during their first year of membership; and 66 $\frac{2}{3}$ % at full list price thereafter.

On the other hand, dealers purchase only about 23% of their records outside of programs (that is, at \$2.47, \$3.09 and \$3.71) and receive various discounts even on those purchases.

CPF 279 is rejected as frivolous. That proposed finding is based on the fact that approximately 10% of the Club membership are delinquent (Keating 696). On the basis that those "delinquents" who paid \$1.98 for six records and then left the Club have paid a unit price of approximately 33¢ for records in all list price categories, CPF 279 then suggests that such a price is a "loss leader," and that no other record dealer can offer records at such a price.

CPF 280 is also rejected as unsupported by the evidence. Here the Government alleges that "CBS has the *power* as an integrated manufacturer-retailer to offer records at any price," particularly popular records constituting "the heart of the dealers' inventory." The flimsy basis for that charge is pointed up by the fact that the examples cited are wholly erroneous. A correction was later submitted, but only after the errors had been exposed by respondents' Exceptions.

CPF 281 is rejected. That proposal involves still another dual pricing theory. However, not only does that theory go beyond the dual pricing charge as alleged in the complaint, it also goes beyond the evidence in the record.

Those findings all rest on Government counsel's conjecture that if a consumer, "*as can be expected*," selects only high-price records in his enrollment offer and only low-price records thereafter, certain low average prices would result.

The evidence does not support Government counsel's speculation of what "can be expected" (see Gartenberg 8419-21).

CPF 281 is also unacceptable because of various other discrepancies (see Exceptions, pages 219-21).

The rejection of most of the Government's proposed findings under the dual pricing charge requires rejection of the conclusionary finding contained in CPF 282, as follows:

This basic price structure has produced its inevitable result: the dealer is compelled to compete with the retail arm of an *essential* supplier within the framework of a built-in differential insuring that the price he pays remains higher than the price paid by those consumers whose business he had sought to keep. In the circumstance of this intrinsic disparity, it surely was no surprise that dealer after dealer testified that he tries or would like to, *but cannot*, compete with the Club * * *.

Prices Paid by Dealers for Outside Label Records

The proposed findings of the Government titled "Prices paid by dealers for Licensors' records" (CPFs 314-18) and "Unfair advantages * * *" (CPFs 319-27), are rejected as outside the scope of the complaint.

The complaint charges, in effect, that respondents cause the outside labels to sell records to dealers at higher prices than the Club charges its members for the same records.

Specifically, Paragraph Five alleges that "* * * dealers are compelled to pay higher prices than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors." Paragraph Ten (2) alleges that the licensing agreements were engaged in for the purpose or with the effect of creating in respondents the undue power to "Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers."

Thus, the complaint is directed against an alleged unfair disparity between prices paid by dealers on the one hand and by Club members on the other hand. In CPF 314-27, however, Government counsel have shifted their attack and have come up with a charge different from that contained in the complaint. In CPF 314-27 they contend that the Club itself, as distinguished from its members, acquires records of outside labels by purchase or by license at lower prices than are paid by dealers—a more or less conventional Robinson-Patman Act price discrimination

charge. The complaint contains no such charge, and the proposed findings are, therefore improper.

This variance between allegation and proof evidently stems from the failure of Government counsel to establish the dual pricing claim that is alleged in the complaint. The evidence does not show that dealers paid higher prices for records of outside labels than the prices paid by Club members (see RPF 491-95, 505-12).

In these proposed findings, Government counsel do not even make any claim with respect to the average price paid by dealers for records of outside labels or charge that the average price to dealers is higher than the prices to Club members.

Although Government counsel have not made such a concession, it appears that the dual pricing charge in the complaint, as far as outside labels are concerned, has thus been abandoned.

At any rate, there has been a failure of proof, and those allegations are dismissed.

(For further findings on this subject, applicable in the event of Commission disagreement with this ruling of the examiner, see Appendix.)

VI. Competitive Effects

The complaint (Pars. Ten through Twelve) accuses respondents of monopolizing or attempting to monopolize four allegedly separate markets or lines of commerce:

1. The manufacture, sale and distribution of phonograph records generally—in other words, the entire phonograph record market, consisting of all types of records sold through all types of outlets.
2. The manufacture, sale and distribution of LP's generally—in other words, the entire LP market, consisting of all LPs sold through all types of outlets.
3. The retail sale and distribution of LPs.
4. The manufacture, sale and distribution of LPs sold through the "subscription method"—in other words, the so-called record club market.

The Relevant Market

Thus, we must consider, first, whether there are, in fact, two product markets—one embracing all records and the other limited to LPs. Within each of those product markets, we are asked to find at least two lines of commerce—(1) their manufacture and (2) their sales and distribution generally.

Within the so-called LP market, the Government would have us look for effects in two further submarkets—(1) the retail sale and distribution of LPs and (2) the sale and distribution of LPs “through the subscription method”—*i.e.*, retail sales through record clubs.

In addition, the complaint (Par. Four) appears to suggest that each phonograph record constitutes a separate market unto itself by the allegation that each record is “unique, distinctive and non-substitutable.”

Before we can determine the effects of the licensing agreements, we must first determine the market or markets in which such effects appropriately may be measured.

We shall first consider the facts as to the existence of an LP market separate from the phonograph record market. Essentially, this means distinguishing LPs from 45 r.p.m. singles.

Next, assuming there is an LP market, we shall look at the functional lines of commerce and determine whether there is a “record club market” for LPs separate from the retail market generally for LPs.

In addition to consideration of markets as such, the case poses issues requiring us to examine the state of competition between Columbia and (1) the licensors; (2) other record manufacturers; (3) retail record dealers; and (4) other “subscription method” sellers—*i.e.*, record clubs.

Here too, definition of a relevant market is desirable, if not necessary, in assessing the nature of competition and the effect of respondents’ practices.

LPs Not a Separate Market

The finding of the examiner is that LPs and record clubs are not separate markets. The examiner also rejects the contention that each phonograph record is a unique market for antitrust purposes.

The only relevant market or line of commerce in this proceeding consists of all types of phonograph records distributed through all types of outlets.

The examiner gave consideration to whether LPs might be viewed as a “submarket” within the total record market. Some of the facts may point in that direction, but on balance, the examiner cannot find sufficient distinctions between LPs and 45 singles to hold that LPs constitute a well-defined submarket that is itself an appropriate market for antitrust purposes. (See Memorandum Opinion, *infra*.)

(Technically, the elimination of LPs as a separate product market disposes of the issue as to a record club market, since, literally, that market is referred to only as a segment of the LP market. However, we shall consider whether club distribution is a submarket of the total record market.)

LPs and Singles—The question whether LPs and 45 singles are different is dramatized by the opposing viewpoints of two witnesses:

To Mitch Miller, "an LP is nothing but a long single" (Tr. 7161).

To Samuel Stolon, of Sam Goody, Inc., LPs are different from 45s:

Well, by sight they are different. They are different in size, different in speed, and different in the element of sales.

* * * * *

Well, they have two different markets. The 45's will tend towards a teen market, while the LP's will tend towards a general market (Tr. 1264).

The facts, pro and con, may be summarized as follows:

Singles and LPs are different physical products in the sense that a single is a smaller object than a long-playing record. An LP is a disc, usually 12 inches in diameter, that revolves at a speed of $33\frac{1}{3}$ revolutions per minute; it is this circumstance from which is derived its description as a 33 or $33\frac{1}{3}$ (Lieberson 78). An LP usually contains between 25 and 30 minutes of playing time on each side and is known also as an album.

Generally speaking, a single is seven inches in diameter and revolves at 45 revolutions per minute. (However, there are $33\frac{1}{3}$ r.p.m. singles.) The single we are concerned with here, sometimes known as the "45," normally contains one selection per side. This single usually has about two to three minutes of playing time on each side.

An LP contains (on both sides) the equivalent of six to eight 78 r.p.m. records. An LP may contain 12 different songs as distinguished from the two songs ordinarily appearing on a single.

There are also 45 r.p.m. EP's (extended play), as well as 16 r.p.m. and 78 r.p.m. records. Recently, prerecorded tape has been put on the market.

Over 95% of phonographs in use today play $33\frac{1}{3}$, 45 and 78 r.p.m. records—and frequently other speeds as well (see RPF 402). Most consumers can play all speeds on the same machine.

The great bulk of records are sold to consumers in the form of LPs and singles. Of approximately 172 million records sold in

stores covered by the *Billboard* survey, more than 100 million were singles; 70 million were LPs; and more than one million were EPs (RX 311, pages VII-VIII, *in camera*).

In dollar volume, the breakdown in 1961 was LPs, 75%; singles, 24%; and EPs, 1% (CX 199a).

Although Government counsel propose a finding (CPF 355) that the "kinds of music" sold on LPs are different from the "kinds of music" sold on singles, the record fails to support such a sweeping generalization.

The broad category of "popular" music accounts for some 80% to 90% of total industry sales. This type of "pop" music, recorded by leading pop artists, appears on records of all speeds.

Singles, EPs, 78s and prerecorded tape, as well as LPs, offer all categories of "popular" music, including such forms as dance music, background music, ballads, Latin music, compositions from Broadway plays and Hollywood motion pictures, country and western music, rhythm and blues, standard tunes of Tin Pan Alley, "pop" hits of the day, rock and roll and the twist (see RPF 391).

The leading popular recording artists perform the same type of material on both 33 $\frac{1}{3}$ r.p.m. and 45 r.p.m. records, as well as on prerecorded tape. The identical performance of a popular song by a particular artist is frequently available to consumers on both speeds at the same time. It has become standard industry practice to follow a successful single by a particular artist with an LP that includes the rendition appearing on the single, together with eleven other performances by the artist, also appearing on singles. Such LPs typically use the same title as the hit single.

Conversely, selections are often taken from LPs and released on single records.

Some companies base virtually their entire output of LPs on singles and release on LPs all performances which appear on singles, whether or not those singles are "hits."

Companies issue LPs following, not only their own, but also their rivals' hit singles; and they sometimes license masters of singles released by other firms for incorporation into LP's (see RPF 392).

Government witness Wood of Dot Records summarized this trend with the testimony (Tr. 4106) that hit singles create a "tremendous amount of sales excitement" and, therefore, "you can make a wonderful long-playing album using the single as the title and as the lead song." Similarly, Archie Bleyer testified (Tr. 6970) that the best way to have a successful LP is to "hook it to a

single." United Artists stated that a "smash" single "is the greatest sales tool in the world for the [follow-up] album" (CX 293h).

A great deal of serious music is simultaneously available on 45s, LPs and tapes. Columbia, for example, has issued successful singles by the Mormon Tabernacle Choir and the Philadelphia Orchestra conducted by Eugene Ormandy. One of those singles "The Battle Hymn of the Republic," taken from an LP, sold approximately 500,000 copies. In addition, Columbia has released other successful singles containing classical themes.

The RCA catalog lists a great number of classical EPs and more than 125 singles containing works by Brahms, Haydn and other masters performed by the Chicago Symphony Orchestra, the Boston Pops Orchestra, Mario Lanza, Jan Peerce and other well-known classical artists. RCA's singles of "Claire de Lune," Ravel's "Bolero," "Jalousie," "Malaguena" and light concert music have had great commercial acceptance over the years.

In addition, Mahalia Jackson and other performers have recorded religious, spiritual, gospel and inspirational music on all speeds. Government witness Ackerman stated (in an article in an RCA Record Club magazine): "In the pop singles category, for instance, the past year has seen any number of moderate hits of a religious or inspirational nature, and several really big ones * * * " (see RPF 397; compare CPF 355).

It is true that the introduction of the LP was important to the reproduction of jazz, but it is not true that jazz is sold "primarily" on LPs (CPF 356).

The record contains a long list of jazz musicians (and folk singers as well) who have had successful 33 $\frac{1}{3}$ r.p.m. and 45 r.p.m. records. Their hit singles have generally been taken from, or later incorporated into, LPs.

While in the past jazz and folk artists rarely had hit singles, today many such artists enjoy large sales volume on both speeds. This is true, for example, of jazz artists like Dave Brubeck, Ray Charles, Stan Getz, and Ella Fitzgerald; and of folk singers like Burl Ives, the Kingston Trio and Peter, Paul & Mary (see RPF 395).

Government counsel claim too much (CPF 357) when they characterize original Broadway cast and motion picture soundtrack music as "sold almost entirely on LPs."

There are many examples of hit singles and LPs containing songs from Broadway plays and motion pictures (see RPF 394). Teicher, for example, testified that he and Ferrante record dual piano performances of motion picture themes and lighter classical

material and that "Whatever we do on a single we will do on an LP and vice versa" (Tr. 7019, 7027).

Novelty and humorous material is also available on singles and is not "almost entirely sold on LPs."

Artists in this field, such as Allan Sherman, Stan Freberg, Spike Jones, Homer and Jethro, Lou Monte, The Chipmunks and many others, release both 33 $\frac{1}{3}$ r.p.m. and 45 r.p.m. records.

Sherman, whose LP "My Son the Folksinger" was one of 1962's best-sellers, subsequently released a single entitled "Hello Mudduh, Hello Fadduh." Similarly, London Records followed its humorous single "Monster Mash," which it claimed was the number one single in the country, with an LP of the same title. A Chipmunks' novelty single on the Liberty label, which sold over 6 million copies, also appeared on an LP. (Compare CPF 358, RPF 396.)

The Government relies heavily on the testimony of an RCA representative (Marek) in urging that LPs constitute a separate market (CPF 360). However, even though he did testify that "essentially, by and large," LPs and 45s constitute "two different markets," he recognized "an overlapping of the frontier between LP and 45." (Marek 1861; and see respondents' Exceptions, pages 300-01.)

(Marek is vice president and general manager of the RCA Victor Record Division, Radio Corporation of America.)

Although there are differences in the kind of popular music on LPs and that on singles, it is also true that the same kind of popular music appears on both types of records. It is an over-simplification to say that most popular LPs are background music, but that such is not the case with singles (CPF 361; compare respondents' Exceptions). Nor does the record support the claim that the singles market is "primarily rock and roll."

Trade paper popularity charts list LPs separately from singles. Similarly, separate charts are published for various types of music, and separate statistics are published showing sales through various types of outlets.

The so-called "break-outs" and sales life of many LPs and singles are quite similar. The longevity of popularity depends on the artistic performance and public taste—not the speed of the record. Both singles and LPs have become standard sellers or "evergreens," enjoying continued popularity for many years. On the other hand, both singles and LPs may follow an abbreviated sales pattern. Different generalizations might be drawn as to those aspects of LPs and singles, but they do not represent truly distinguishing characteristics.

The record fails to support CPF 364. There are differences in the promotional techniques used for singles and LPs, but radio stations are used for both (see RPF 404).

Both 33 $\frac{1}{3}$ r.p.m. records and 45 r.p.m. records have their birth at a recording session in the same studios, with the same A&R directors, musicians, engineers, microphones, quality controls, tape and equipment. They are generally manufactured in the same plant, sometimes on the very same machines using the very same raw material. Although Columbia now presses out LPs by a compression method using vinyl and generally produces singles from polystyrene by injection molding, this later process was developed by Columbia and is not used by all companies. Where different machines are used, the machines used to press LPs can, within a matter of a few hours and at little expense, be converted to produce singles.

The same distributors and the same retail outlets normally carry records on both speeds. Singles, LPs and EPs are all sold by mail order.

Some singles are manufactured of vinyl, as are LPs. All LPs are not made of the same type of vinyl.

There are variances in the packaging of the two types of records.

Columbia has indicated some recognition of LPs and singles as separate markets, characterized by differences in the kinds and number of manufacturers and type of music. The 1958 CBS Annual Report stated:

Columbia Record sales in the single 45 rpm record market have declined for two reasons: first, the production by many small independent manufacturers of popular recordings with relatively unknown artists have [sic] claimed a larger share of the market; and second, the Division has not attempted so far to meet the large demand for rock and roll recordings (CX 652, page 43).

Respondents, of course, point out that businessmen frequently use the term "market" in broad marketing or merchandising terms and do not generally have in mind a court-approved definition. Actually, the paragraph of the annual report relied on by the Government illustrates how loosely the term was used. The paragraph begins: "In the popular music market, the long-playing record has shown particularly impressive growth, now accounting for two-thirds of total dollar sales in the popular record category."

The Government here is not contending that there is a "popular music market."

The Government also relies on the use of the term "market" by

Columbia officials in their testimony regarding LPs and singles (CPF 367), but this is hardly more than a makeweight.

It is significant that the very subject of this legal controversy—the licensing agreements—expressly limit the coverage to “so-called 12” LP albums as that phrase is commonly understood in the phonograph record industry” (CX 23a).

Research reports on the record industry cover LPs and singles separately. Again, however, there are also separate research reports on monaural sales, stereo sales, sales by rack, sales by price categories, and perhaps other variations. Incidentally, the *Billboard* study lists singles and EPs separately, although both revolve at a speed of 45 r.p.m.

Despite the proposed finding (CPF 370) of Government counsel that the purchasers of singles “are the youthful, teenage consumers,” while LPs “are sold to a wider range of consumers,” the examiner must agree with respondents when in their Exceptions (page 308) they say: “The purchasing public for records cannot be classified into rigid and distinctive age groups. All age groups purchase records on all speeds. Consumers under 21 and in their early 20’s are the heaviest purchasers of both singles and LP’s * * *” (see RPFs 398–401).

Even the quotations reproduced in CPF 370 from the transcript show the unwarranted sweep of the Government’s contention. For example, the statement that “The 45s will tend toward a teen market, while the LPs will tend towards a general market” (Stolon 1264) obviously permits no inference of a sharp line of leavage. Many of the answers also were qualified by such terms as “generally,” “generally speaking,” “primarily,” etc.

The evidence concerning age as a differentiating factor between the 45 and the LP is not too persuasive.

The complete overlap of buying habits among the different age groups was dramatically illustrated by one of the industry’s most successful singles, “The Twist” by Chubby Checker. According to the Government’s marketing expert, that single was originally purchased primarily by young record buyers, but adults then revived its popularity by even heavier purchases (Noonan 645–46).

The type of consumer to whom a particular record appeals depends on the artist and his material, not on the size of the record or the speed at which it spins on a phonograph turntable. For example, Mitch Miller, who was Columbia’s A&R director for many years, testified that the audience for a particular record depends on what is “in the groove”—“what comes out”—when the record is played and “not how fast it is played” (Tr. 7166).

While the singles and LPs of some young or so-called rock-and-roll artists, like RCA's Elvis Presley, appeal primarily to record buyers with youthful tastes, most successful artists attract a wide audience made up of diverse individuals of all levels of maturity.

Government witness Wood testified that "Dot's singles are directed at all age groups"—"the youngest buyer and the oldest" (Tr. 4159)—and that Dot's hit singles of "champagne music" by Lawrence Welk have universal attraction for kids and adults (Tr. 4142-43).

Percy Faith testified that his LPs and singles are directed to age groups from 16 to 60 (Tr. 6479).

Jimmy Dean testified that his LPs and singles appeal both to a "grandma in Dubuque and a six-year old from Brooklyn" and that his fan mail comes from all age groups (Tr. 7586).

Martin Denny's manager testified that his LPs and singles are purchased by all age groups (Mills 6445-46).

And Mitch Miller testified that in making singles and LPs he seeks "as broad a base as possible"; that it would be "ridiculous" to limit the field to any narrow segment of the public (Tr. 7160-61, 7185-86).

There is, of course, a price differential between LPs and singles. The basic price structure for LPs, as summarized in CPF 371, is approximately as follows:

Suggested list	Basic price to retailer	Basic price to wholesaler
\$3.98	\$2.47	\$1.89-\$1.92
4.98	3.09	2.36- 2.45
5.98	3.70-3.72	2.83- 2.98

The basic price structure for singles is substantially as follows:

Suggested list	Basic price to retailer	Basic price to wholesaler
\$.98	\$.60	\$.46-\$.48

(The basic prices to retailers and wholesalers are subject to further discount.)

It is obvious that because of the variation in size and speed, LPs and singles do not contain the same amount of musical material. If you buy two songs, you obviously pay less than if you buy 12.

There is no definitive evidence that changes in the price of one type of record affect the other.

Columbia's marketing director testified in effect that list prices for singles had remained fairly constant for 10 years but did state that such prices had gone up from 89¢ to 99¢ (Gallagher 9139-40). During this same period of time, the price of the LP had gone down (Gallagher 8800-01, 8803-04). Gallagher further testified (Tr. 9141) that on sales by distributors to dealers (as contrasted with suggested list prices), prices for singles have gone down in recent years to meet competition.

Respondents further contend that prices charged on one speed do affect the other speed. As LP prices have come down, consumers have switched from singles to LPs. Thus, as Noonan testified, teenagers can now afford to buy LPs "out of their allowance" (Noonan 6919).

Most established record companies now market both types of record. Of the 24 record firms which furnished witnesses for this proceeding, all but 4 produce both speeds. Some companies started in business by producing both 33 $\frac{1}{3}$ s and 45s; others began with 45s and then developed 33 $\frac{1}{3}$ catalogs; and still others began with 33 $\frac{1}{3}$ s and later branched out into 45s.

Individual companies, moreover, often experience great fluctuations in product mix between the two speeds. For example, Cadence, with 10 times more singles than LPs in its catalog, nevertheless issued the best-selling LP in the history of the industry, while Vanguard, which primarily releases LPs, recently issued one of the industry's best-selling folk singles (see RPF 405).

There is no substantial evidence as to any significant difference between the investment of an LP manufacturer as compared to that of a singles manufacturer. It takes relatively little capital to enter either field. (See RPFs 32, 405; *cf.* CPF 376.)

There are both differences and similarities in manufacturers' policies and practices respecting distribution of LPs and singles, but the record does not support the broad claim (CPF 377) that manufacturers have "separate and distinct policies" for distribution of each type of product. The Government's claim (CPF 377) that "Separate LP catalogs are maintained" is rejected as contrary to the record. (See Exceptions, page 320.)

While there are differences, the respective periods of commercial acceptance of LPs and singles are not so different as to constitute a significant distinguishing characteristic. Generally speaking, it might be said that LP records, typically, have a longer span of commercial acceptance than singles, and there is

authority for the proposition that the perishability of LPs and singles is "completely different." Columbia's Gallagher so testified (Tr. 9167-68); however, that testimony was taken out of context by Government counsel, and his general statement is put in perspective by the full colloquy. Among other things, Gallagher said that "the life of the single, particularly if an album is released with that same title, is short-lived." (See also CPF 363 and Exceptions.)

The reason singles are not sold through the Columbia Record Club is "the basic economic ground that it would not be profitable to do so, and on the secondary ground that the volatility of single records did not allow the lead time required by the club in printing magazines and brochures and preparing ads for a six-month period of time" (Keating 725-26).

Keating also said that "there is a much bigger market for LPs and we would have more product available to us in the LP market" (Tr. 727).

(For clubs and mail order vendors who do sell singles as well as LPs, see RPF 403.)

Finally, the only economic expert to testify in the case gave as his opinion that, in any meaningful economic analysis of the effectiveness of competition in the record industry, LPs and singles should be included in the same product market (Max 9698-703; RPFs 457-60).

Individual Records Not Separate Markets

An artist's performance embodied in a phonograph record is "unique" (Liebersohn 77-78). It also is true that particular recorded performances are available only on particular labels (Liebersohn 145, 4870). The record also supports a finding that dealers, on occasion, find it essential to buy particular performances on particular labels in order to satisfy customer demand (Stolon 1263; Rubinstein 2194-97; Wilf 2699; Stone 8571).

Thus, the complaint's allegation (Par. Four) that each phonograph record is "unique, distinctive and nonsubstitutable" is not merely a "fanciful suggestion," as claimed by respondents (RPF 406). However, this is not to say that individual records constitute a separate market for antitrust purposes or that a record is a "monopoly" in the legal sense. The record may be a "little monopoly * * * in the sense that there is only one like it, it is made by a particular artist, it is made in a particular arrangement" (Rubinstein 2194, 2239).

However, the fact that a particular performance by a particular artist is not identical to a rendition by another artist does not mean that different artists and different records do not compete.

While records may sometimes be artistically distinctive, Mr. Lieberman and other witnesses testified that they compete with each other for the consumer's dollar (RPFs 406-11).

"To illustrate the monopoly enjoyed by a major label," according to CPF 265, Columbia's original cast version of "My Fair Lady is not interchangeable with other versions of the same score."

There is no basis for the reference to "the monopoly enjoyed by a major label." To the extent that a particular performance is artistically distinctive, that is true whether the label be "major" or minor.

Moreover, the record references (Previn 6047-48; Levin 457) do not wholly support the findings with respect to "My Fair Lady." The two witnesses cited merely testified that the original cast version of the play is not interchangeable with an Andre Previn "purely instrumental improvisation jazz version" that was "made with a different goal in mind" (Previn 6047), or a Billy Taylor jazz recording of the score that the witness recognized as "an entirely different version" (Levin 457).

Interestingly enough, when Government counsel sought to show the uniqueness and nonsubstitutability of the Verve LP of the Stan Getz record of the bossa nova, the witness Levin indicated that when he was temporarily out of that particular album, he attempted to switch customers to another bossa nova but that he was "not always" successful in so doing (Tr. 456). The inference to be drawn from that answer is obvious.

Although Columbia's contracts with its artists also attest to the uniqueness of their performances (for example, CX 172a), that does not add up to a monopoly in the legal sense of the word.

The record shows that a performer competes with other artists in the same field who have recorded the same or similar repertoire—and that even recordings in different fields often vie with each other for public acceptance (Lieberman 4816-17; Previn 6036-37). Andre Previn, for example, testified that when he makes a jazz record, he competes with every other jazz pianist; that when he makes a classical record as a pianist, he competes with every other classical pianist; and that when he records as a classical conductor, he competes with every other conductor (Tr. 6037).

The practice of imitation and copying also creates competition between different records. A fad introduced by one company, such as the twist, the bossa nova or so-called surfing music, spawns

many similar recordings by other firms seeking to jump on the bandwagon. A hit single or LP is invariably "covered" by many recordings of the identical musical material by other companies. There were, for example, many different recordings of "Moon River," "Cleopatra" and "What Kind Of Fool Am I." The original recording and its "cover" records frequently compete neck-and-neck, and sometimes the later versions actually enjoy the greater popularity. (See, generally, RPFs 406-411.)

The evidence supports a finding that Columbia is a major label, and that it is important that dealers stock Columbia records. The references cited by the Government in CPF 266 do not support a finding that Columbia is included among the "essential labels" referred to in CPF 265.

Nevertheless, on the basis of the record as a whole, it may be inferred that consumer demand would require a dealer to stock for sale some records bearing the Columbia label. It would be a rare dealer indeed who could afford to refuse to sell Columbia records. (See, for example, RXs 25, 26a, 26b, 31b; March 2566-67; Metcalfe 2901.)

Record Clubs Not a Separate Line of Commerce

In the Government's proposed findings (CPFs 420-48) is a section entitled "Clubs as a relevant market." The evidence establishes, however, that clubs are not a separate market or line of commerce, but constitute a segment of a broader retail market that includes clubs, other mail-order sellers, record stores, racked outlets and other retail establishments. Each of those methods of selling records to consumers is in the same line of commerce.

In its insistence on considering clubs as a separate market for retail purposes, the Government overlooks its earlier position (CPFs 249-64) that "The Club competes directly with retail dealers," and its description (RPF 10; brief, page 347) of the Columbia Record Club as "a retailer."

CPFs 420-48 constitute primarily an effort to show differences, actual and fanciful, between the sale of phonograph records through clubs and through other mail-order channels, primarily Reader's Digest-RCA. The fact is that even if record clubs should be held to constitute a market separate from other retail outlets, economic reality would require that they be grouped with other mail-order sellers.

Although in the licensing agreements Columbia and the licensors recognize that there is a "club" method of distribution, that is not, in fact or in law, an admission that clubs constitute a "rel-

evant sub-market" for antitrust purposes, as urged in CPF 420. It is evidence to be considered, but in the very quotation cited by the Government the parties refer to the "subscription" or "club" plan as being a "merchandising method known and understood *in the mail order business*" (emphasis added).

As the complaint alleges (*e.g.*, Pars. Two, Five and Seven), Columbia and the other record clubs offer consumers the same records that are sold by dealers and other retail outlets. The complaint further alleges that record clubs compete with, and take sales away from, over-the-counter outlets (*e.g.*, Pars. Three, Ten, Eleven and Twelve). On the other hand, respondents introduced evidence indicating that record clubs actually stimulate consumer interest in record buying through all outlets and, therefore, have a beneficial effect on dealers. In light of those positions, it can hardly be maintained that, on the one hand, record clubs compete with and affect dealers and that, on the other hand, record clubs are in a line of commerce wholly separate from dealers and other retail outlets.

Whether or not clubs are "beneficial" to dealers, the fact is that consumers simultaneously use clubs and other outlets as sources of supply for records. That was established, not only by the testimony of various dealer and consumer witnesses (*e.g.*, Del Padre 5649; Blincoe 5690; Dunlap 5906-07; Schlang 6716-22; Karol 5590-92; Zenger 6311-14; Dreyer 6415-16; Anderson 6458-59; Jackson 7197-98; Miller 7190), but also by a series of market research studies undertaken from time to time from 1957 to 1962. Data collected by Alfred Politz, Inc., Stewart-Dougall & Associates, National Family Opinion Inc. (NFO) and Eldridge Foscett show that the vast majority of record club members purchase records in retail stores during the term of their membership; that they purchase more records in such stores than through clubs; and that they purchase more records in such stores than persons who do not belong to record clubs (RXs 338, 444-45; Foscett 7104-07, 7113-20). A survey conducted by rack-jobber Schlang also revealed that the great majority of record purchasers at locations which he services were members or ex-members of record clubs (Tr. 6716-21). The record also shows the extremely high turnover rate of Club membership, with 50% or more drop-outs each year.

The inter-relationship between stores and clubs as sources of supply is further demonstrated by an analysis of consumer buying habits and store locations. The evidence indicates that where record stores are plentiful, consumers tend to rely more

on such outlets and less on clubs; and that where record stores are relatively scarce, consumers (although still purchasing primarily through stores) significantly increase their purchases through clubs (see RPF 415). There is no doubt that many consumers rely on clubs and non-club outlets as inter-related sources of supply.

Market research reports further demonstrate that consumers regard clubs and stores as comparable distribution channels. Thus, in expressing opinions concerning the advantages and disadvantages of record club membership, consumers compare clubs with retail stores (RXs 341-42, 482, 493; Skelley 8260-67, 8284-86, 8319).

The inter-relationship between dealers and clubs is also shown by the very activities relied on by the Government in CPFs 233-64. Columbia has paid over \$1,240,000 to dealers since 1955 as commissions on purchases by Club members. In addition, under the dealer redemption center plan, members redeem bonus certificates in dealers' stores, thereby creating store traffic (*e.g.*, Karol 5590-92; Zenger 6311-15; Blincoe 5689; Dunlap 5906-07). Those cross-merchandising techniques further demonstrate the close inter-relationship between clubs and over-the-counter outlets.

Industry research undertakes to measure record sales through various retail stores and clubs as channels of distribution through which the goods moved. Again, this is an element to be taken into account in determining the existence of relevant markets or submarkets, but the mere fact that there is separate statistical research on the results of a given method of distribution is not conclusive evidence of the existence of a separate "market."

Record clubs and over-the-counter retailers employ different merchandising techniques, but this does not mean that they operate in separate markets. The key factor is not differences in "special techniques" of selling; the crucial element is that clubs and all other outlets offer the same products to consumers.

Contrary to the proposed findings of the Government (CPF 423), record dealers do not necessarily make sales in a "circumscribed geographic area," and all club operations are not necessarily national or regional in scope. Some dealers sell throughout the Nation by mail order, and many dealers operate local record clubs.

Although at any given time, the membership of record clubs may have special characteristics, it is too much to say, as does the Government (CPF 435), that record club members "constitute

a special segment of the buying public that can be approached, solicited, sold and retained on a special basis." The fact that the negative option method of selling is the cornerstone of the club plan (Adler 4960-61; see CPF 13) does not build a wall around record club members; in fact there is evidence indicating that club members buy more records from non-club outlets than do non-members (see RPF 293).

The fact that on occasion club members are given or sold records not available to the general public does not constitute them "a special segment of the buying public," as urged in CPF 436. This proposed finding by the Government is inconsistent with the insistence in other proposed findings that the Columbia Record Club concentrates on "hit" records.

The guidance offered to consumers is not unique to the club operation. Both over-the-counter sellers and mail-order sellers utilize guidance as a sales tool (RXs 515b-517c; Prince 5506-07; Karol 5578).

The promotional methods used by the club to get new members, including the encouragement of existing customers to interest their friends, do not convert club members into a "special segment of the buying public" or a "peculiar market."

As already indicated, record clubs are in the same line of commerce as other mail-order sellers of records, including package-sellers like Reader's Digest-RCA, BOMC and Life, as well as record stores, department stores and mail-order houses which sell records via mail. Both record clubs and other types of mail-order vendors offer consumers the convenience of purchasing through the mail, usually on credit. They both rely on media advertising and direct mail solicitations, frequently using identical media and mailing lists. They offer consumers identical, or highly similar, products. Club members are especially singled out for, and are particularly receptive to, solicitations for mail-order record packages.

Respondents' economic expert was of the opinion that record clubs are not a separate market but merely a part of a single retail market that embraces all types of retail outlets selling records to the consumer (Max 9703-09; RPFs 461-66).

In summary, the record does not support the allegation that record clubs are a separate line of commerce, nor the claims that LPs or individual records are separate markets.

On the contrary, it shows that phonograph records of all types sold through all channels of distribution constitute the only relevant market in this proceeding.

Thus, in weighing the charges of monopolization, attempted monopolization, and also a claimed "dangerous tendency to create in respondents a monopoly," the examiner will look primarily to the structure of the total record industry, not just the segments (LPs and clubs) urged by the Government.

(Note: In view of the findings respecting the relevant market, it is unnecessary for the examiner to make further findings respecting the so-called LP and record club markets.

(However, against the possibility that the Commission may take a different view, he has incorporated certain findings on those subjects in an appendix.)

Monopoly Charges

The Government failed to prove its sweeping allegations that Columbia had monopolized or attempted or tended to monopolize either the phonograph record industry, the so-called LP market or the so-called club market.

The record indicates that the industry is dynamic and competitive at all levels. The Government failed to prove that Columbia possesses either the purpose or power to monopolize. There was no evidence of any unlawful intent on the part of Columbia.

(Despite the finding that the record industry is the relevant market for testing the monopoly charges, and the corollary finding that neither LPs nor clubs constitute appropriate separate markets, this section includes some references to those segments of the industry. Detailed findings regarding those so-called submarkets have been relegated to an appendix.)

Industry Growth

Total sales of the record industry have increased more than 20 times since Columbia's entry into the field in 1938 (CX 199b). It does not appear that the formation of the Columbia Record Club in 1955 and its distribution of outside labels have retarded that growth.

On the contrary, since 1955, the industry's rate of growth has accelerated sharply. Industry sales were relatively stable from 1946 to 1955, but they grew at a phenomenal rate thereafter (RX 434). That rapid expansion occurred, not only on an absolute dollar basis (RX 434), but also in comparison to other yardsticks of economic growth, such as gross national product and personal disposable income (RX 435).

While the industry's expansion generally failed to keep pace with the growth of the Nation's population from 1946 to 1955, it subsequently expanded far more rapidly (RX 436).

Per capita record sales had been on a 10-year downward trend, but increased almost two and one-half times between 1955 and 1961 (RX 436).

Dynamic growth of that kind is hardly consistent with the sluggish performance typically found in an industry dominated by a monopolist or oligopolists (Max 9727-28, 9749).

Ease of Entry

The record reveals an industry characterized by a high and effective rate of entry at every level. The evidence does not establish that Columbia has excluded, has the power to exclude, or has displayed any intent to exclude new entrants. Without such a showing, the complaint's allegations of monopolization and attempt or tendency to monopolize must fail.

When Columbia entered the record industry in 1938, there were only a few record companies. Today, there are many hundreds of firms in the United States; and many more firms throughout the world whose records are distributed in the United States. The increase in the number of competitors indicates the absence of any significant barriers to entry.

The influx of new competitors has led to a significant dispersal of economic concentration. In 1938, two companies, RCA and Decca, controlled 75% of the industry's sales (Liebersohn 4775, 4778-79). By 1951, they were sharing that percentage of total sales with two newcomers, Columbia and Capitol (RX 427; also see RX 437).

Thereafter, as additional new firms became successful entrants into the industry (see, *e.g.*, RX 437), the market share accounted for by those four companies steadily declined as the relative position of all other firms improved (RX 427).

The aggregate market shares of Columbia, RCA, Capitol and Decca fell markedly between 1951 and mid-1961, from 75% to about 51%; and the share of their rivals virtually doubled, increasing from 25% to almost 49% (RX 427). That growth of the smaller firms occurred during a period when the industry's total sales more than tripled (CX 199b). Accordingly, in that ten-year period, those smaller companies obtained twice as great a slice of a pie that was three times larger.

Such a pattern is contrary to the behavior of an industry controlled by a monopolist or oligopolists.

The dynamic growth of the smaller companies is also reflected by the *Billboard* store survey, which measures sales of records in nonrack retail stores. A series of *in camera* tables and graphs

(RXs 428-29, 431, 433), based on the *Billboard* survey, shows that from the commencement of that study in mid-1957 through 1962, the aggregate share of retail sales of all records accounted for by companies other than Columbia, RCA and Capitol rose substantially and, conversely, that the combined share of those three companies declined. (In the alleged LP market, the smaller companies grew, and the aggregate share of those three companies fell by an even greater amount).

Regarding sales of all records in the stores measured by the *Billboard* survey, the results for 1961 (CXs 244s-v *in camera*) and 1962 (RX 311 *in camera*, pages 1a-1d) were as follows:

	1961	1962
Columbia	14.5	15.0
RCA Victor	14.2	12.1
Capitol	10.9	10.7
Decca	4.7	4.5
Total	44.3	42.3

[Each of the above totals includes a subsidiary label: Epic (Columbia); Camden (RCA Victor); Angel (Capitol); and Coral (Decca).]

Another series of *in camera* graphs (RXs 430, 432), based on the *Billboard* store survey, shows the competition that exists between Columbia, RCA and Capitol. There have been sharp fluctuations in the relative sales of the records of those companies since mid-1957 by nonrack retail outlets, with constant "ups" and "downs" in their respective shares. Not one of those three companies has been able to maintain leadership over the other two for any protracted period of time. This constant competitive battle and volatility is inconsistent with oligopolistic behavior (Max 9726-28).

The distributional level of the record industry also has been characterized by a high and effective rate of entry. There has been a ten-fold increase in the number of over-the-counter retailers since 1955.

The mail-order channel of distribution likewise has experienced substantial entry. Ten years ago, there were only a few record clubs. Today, there are many.

The new entrants in the club and nonclub mail-order field, besides Columbia, RCA and Capitol, includes Reader's Digest, BOMC, Life, Pickwick, Golden Records, and Disneyland. In addition, the

outside labels have, in effect, entered the mail-order field as a result of their licensing agreements with Columbia.

Entry into the record club field requires relatively large financial resources, substantial advertising, a complex organization and a high degree of expertise. The licensing agreements have given the outside labels an opportunity to participate in that channel of distribution.

There are, moreover, many substantial record companies with adequate financial resources to organize record clubs (*e.g.*, RX 487; Max 9789-90). There also are many companies now engaged in nonclub mail-order selling of records which possess the know-how and finances to expand into club activities on their own—including such firms as Doubleday, BOMC, Montgomery Ward, Aldens, and Sears, Roebuck, not to mention Reader's Digest (if it were not tied to a long-term contract with the RCA Club) (Adler 4919-21). There are also hundreds of smaller record companies not now directly engaged in selling records through the mail which could enter the club or nonclub mail-order channel of distribution through licensing agreements with present mail-order vendors or potential new entrants into the mail-order field.

Columbia's Share of Sales

The influx of new competitors into the record industry has led to a substantial long-range decline in Columbia's share of the market. In 1962, Columbia's share of total industry sales of records of all types distributed through all channels of distribution was at a level more than 25% below its 1945 level (RX 418 *in camera*).

Between 1951 and mid-1961, Columbia's share of *total* record sales, despite some intervening fluctuations, remained virtually unchanged at 20%; RCA's share fell from 30% to 17.5%; Capitol's share remained virtually unchanged at about 11%; and Decca had fallen from 14% to less than 4%.

Meanwhile, the share of sales of "all other" companies virtually doubled, rising from 25% to more than 48% (RXs 349-51, 417, 427).

RCA was the leading label in eight of the eleven years reported; Decca led Capitol through 1956; and the "all other" group increased its market share in nine of the eleven years reported (RXs 349-51).

Between 1957 and 1962, Columbia's share of sales in the stores measured by the *Billboard* survey has remained fairly stable. It was just shy of 13% in 1957; it registered 15% in 1962 (RX 420 *in camera*).

During the same period, all companies other than the so-called "Big Three" (Columbia, RCA and Capitol) increased their aggregate share of such sales in those stores from 56.7% to 62.2% (RX 428 *in camera*).

The percentage of sales of all records and of LP records through all channels of distribution accounted for by sales of the Columbia Record Club rose in the early years of the Club's operation between 1955 and 1958 (RXs 422, 424 *in camera*). Thereafter, as competitors successfully entered the field, the percentage of total record sales and of LP sales accounted for by the Club grew at a much slower rate and, in 1961 (the last year of available data), remained static (RXs 422, 424 *in camera*).

That pattern occurred even though the Club had taken on outside labels. The Club's sales of records of outside labels began to grow in 1959 (RX 425 *in camera*). Despite that growth, Columbia's share of the claimed LP market did not show any perceptible change (RX 419). In 1959 the percentage of total record sales and of LP sales through all channels accounted for by the Columbia Record Club began to grow at a slower rate than in the past; and in 1961 actually remained static (RXs 422, 424 *in camera*).

According to RXs 425-26 *in camera*, the sales of the licensors' records through the Club—the primary issue in this case—have never amounted to more than a small fraction of total retail sales of records of all types or of total LP sales.

The record shows a decline in Columbia's over-all market position. The initial growth in Columbia's percentage of club and mail-order sales during its head start in that field was followed by a period of decline, despite the addition of outside labels.

None of this adds up to monopoly or attempt or tendency to monopolize. In fact, the pattern is contrary to the existence of monopolistic power or intent. No matter how the market is defined, there has been a failure to show monopoly size or power vested in Columbia.

Price and Other Competition

With the entry of many new manufacturers and retail outlets, the record industry reflects price competition at all levels, with lower prices to consumers as the result. There is not the type of high, rigid price structure found in an industry dominated by a monopolist or oligopolists.

Manufacturers generally establish "base" prices to distributors, who in turn set base prices on sales to dealers and other accounts. Base prices are subject to reductions by so-called "programs"

offered by manufacturers to distributors, and generally passed on by distributors to dealers.

There is evidence of restocking plans two or three times a year offering all or substantial portions of entire catalogs at discounts of 10% to 25% or more; special discounts on new releases; extra discounts on older releases; additional discounts on stereophonic records; quantity discounts; special discounts on the records of particular artists; distribution of free records; cash discounts for timely payment; extended credit; a variety of plans for the exchange and return of records, ranging from 10% up to 100% exchange rights; discounts in lieu of the exercise of some of those privileges; many different programs for cooperative advertising; and free merchandising aids.

The evidence in the record on these different programs is voluminous. (See record citations in RPF 442.)

Such evidence confirms, the testimony of William Gallagher, Columbia's vice president for sales (Tr. 9172-75), and Peter Max, an economist who reviewed trade-paper announcements of such programs over a three-year period (Tr. 9758, 9761, 9767-68), that there are generally wide and substantial variations among the different programs being offered at any one time by different manufacturers and distributors.

The pattern was summarized by record producer Dave Kapp, who testified (Tr. 5863, 5866): "The whole record industry today is programs * * * there is a program on practically every record sold." Government witness Shocket, a distributor, could not even give his price for a particular type of LP because he had "so many prices in my mind and so many deals going on" (Tr. 202). (See RPFs 497-512.)

The prices Columbia charges distributors, and the prices Columbia's branch distributors charge dealers, have declined in the past three or four years in order to meet competition—during a period when Columbia's costs have been going up (Gallagher 8791, 8801-02; also see Lorenz 8733). Since 1958, Columbia's branches have substantially expanded and liberalized restocking programs, thereby offering distributors and dealers more favorable opportunities to buy at lower prices (Gallagher 8791-93; Max 9755-56).

Additional price competition has been interjected into the industry by one-stops and rack jobbers who sometimes sell to dealers in competition with their distributors, and by distributors and subdistributors who transship outside of their territories at low prices. Dealers often purchase Columbia, outside label and other records from out-of-town "connections" (*e.g.*, Levin 487, 496, 498)

at substantially lower prices than are offered by local distributors. (See RPF 445 for record citations.)

Prices to consumers have declined over the past 15 years. The introduction of long-playing records virtually reduced by one-half the suggested list price for records.

Dealers in many areas sell at list price. On the other hand, many stores sell records at discount. Such retailers frequently under-sell, not only nearby stores, but record clubs and other mail-order vendors. For example, in 1962, while a new member of the Columbia Record Club paid an average price for a \$3.98 record of approximately \$2.37 and a member in his second year paid \$2.88, retail stores frequently sold at far lower prices (RPF 337).

The existence of price competition among different record clubs and other mail-order sellers is indicated by the variety of offers being made to the public. In 1962, for example, Columbia was offering new members six records for \$1.89, plus mailing and handling charges, with a commitment to purchase six additional records at list price, plus mailing and handling charges (Keating 691-93).

Capitol was offering seven records for 97¢, with a commitment to purchase six at list price (RX 179). RCA was offering one record for 10¢, four more which could be purchased for \$1 after a 10-day trial, with a commitment to buy an additional five records at list price (RX 157). The Jazz Club of America was offering the RCA-Victor Encyclopedia of Recorded Jazz at 99¢ per record (RX 203). The Living Shakespeare Club was offering a "free gift" of Hamlet, without any obligation to purchase the other complete Shakespeare plays (featuring performances by well-known actors like John Gielgud) that were available for \$2.98 (RX 204).

The Citadel Record Club was offering singles and LPs at 40% or more off list and claimed to have available virtually any artist on any label (RXs 205, 206, 568, 691). Music Treasures of the World offered classical music with an introductory offer of 10¢ for one classical LP, with no obligation to purchase further records (RX 571). The Family Record Club was offering inspirational records at five for \$2.67 (RX 570). The 99¢ Record Club was offering all labels at 99¢ each (RX 194b). The Universal Record Club offered all labels at 50% off manufacturer's list price (RX 195). The Music Appreciation Record Club was offering records at \$1 each (RXs 197, 192).

Mail-order package sellers, like Reader's Digest-RCA, were generally charging \$2 or less per LP, plus mailing and handling, with prices sometimes as low as \$1.33.

Prices to consumers through record clubs have declined steadily over the years. When the Columbia Record Club was started in 1955, a member who joined and fulfilled his commitment in the first year of membership paid an average price (including mailing and handling charges) of \$2.89 for records with suggested list prices of \$3.98 (Max 9756-57). On the other hand, a member fulfilling his initial commitment in 1962, paid an average price of \$2.37 (including mailing and handling charges) for the same type of records.

In the area of nonprice competition, Columbia developed the LP, and RCA introduced the single, thereby precipitating the competitive "battle of the speeds" and bringing consumers a superior product at lower prices.

Various members of the industry, including certain smaller companies, have played an important role in the development of stereophonic records, which provide still better sound reproduction. As a result of competition, consumers have a wider selection of repertoire in every field of music.

Competition also has led to major marketing innovations redounding to the public's benefit. The relatively recent development of record clubs and other direct mail-order sellers of records, as well as rack jobbing, has made record-buying far more convenient and outlets more accessible for consumers.

Record clubs, in effect, introduced consumer advertising to the record industry, and thereby awakened consumer interest in that field of home entertainment.

Other Competitive Effects

In addition to the monopoly charges, the complaint also contains allegations that respondents' practices hinder, lessen or suppress competition, or have a "dangerous tendency" to bring about such a result. The competition allegedly threatened is between Columbia and: (1) dealers, (2) manufacturers and (3) mail-orders sellers, including clubs. We shall consider each field *seriatim*.

Dealers

The dubious evidentiary support for the Government's sweeping claims that the effect of the licensing agreements has been substantially to lessen the ability of retail dealers to compete, is perhaps illustrated by the fact that the claim of dealer injury covers only a few pages in the Government's proposed findings. Even the presumed "star" witnesses referred to there, do not pro-

vide substantial evidence of injury to competition. The bulk of the dealer testimony has been relegated to an appendix in what the Government calls "summary" form; however, see respondents' appendix in its Exceptions.

The examiner is inclined to agree with respondents that the Government's so-called summary is more in the nature of a series of excerpts of testimony and does not represent a well-rounded condensation of the record in that regard.

Regardless of the Government's theory of the case, it is apparent that to most of the Government's dealer and distributor witnesses, the outside label question is only an incidental matter. That is virtually conceded by the Government when in CPF 328, counsel refers to testimony that long-established record dealers "are unable, profitably, to match the Club price of Columbia and Epic records," and that the disadvantage to such a dealer "is extended by his inability to match, profitably, the Club price of the Licensors' records."

That concession is made even more plain in the Government's Appendix A when licensing is identified as an "Aggravated Effect Of Club."

Generalization is always risky, but it is a fair generalization that most of the Government's dealer-witnesses are opposed to record clubs in general, regardless of the outside label issue, and that Government counsel have been frank, if not consistent, in identifying the matter of licensing as a secondary "aggravating" effect of Club competition.

The Government's claim that there was a cause-and-effect relationship between the licensing agreements and asserted instances of dealer injury may be tested by checking out the testimony of six witnesses featured in the Government's Proposed Findings (CPF 329). Since their testimony was not relegated to Appendix A (Vol. II of the Government's submittals), they presumably are "star" witnesses—supplying the best available evidence of the actuality or potentiality of competitive injury *resulting from the outside label arrangements*. (Presumably, Government counsel were not making an invidious comparison when they referred to "relevant" dealer testimony as appearing in Appendix A at the same time they titled that in the text (CPF 329) as "*Other dealer testimony*" (emphasis added).)

Here we shall quote the Government's summary of each witness and follow it with a "comment" providing additional evidentiary facts that destroy, or materially weaken, the point sought to be

made. (These comments are quoted or adapted from respondents' Exceptions.)

(1) A dealer from Flint, Michigan, whose profit in 1962 on sales of \$18,000 (Liepmann 3387) was \$504 (Liepmann 3389), testified about the adverse effect of the Club on his business (Liepmann 3388-89), and how this was compounded by the offer of Licensors' records (Liepmann 3403-04).

Comment—Liepmann, a full-time fireman, entered the record business about two years ago, long after the advent of clubs and outside labels. His 12' x 27' store sells at list in competition with 30 discounters in Flint. He objects to discounters and to record clubs and wants "retail prices in the area stabilized" (Liepmann 3384-87, 3394-96, 3402, 3406-09).

(2) A dealer whose volume of business had increased by \$2,000 in 1962 (Morlitz 2315) testified about the difficulty of competing against the Club in price (Morlitz 2304). This dealer illustrated a recurring problem of record dealers: that the effect of the Club is to reduce the sales volume of popular artists who are expected to sell in even larger quantities (Morlitz 2300 * * *).

Comment—This finding refers to Morlitz's sales for one year, although he testified to a five-year period (Morlitz 2315-16):

1958	.....	\$38,000
1959	.....	45,000
1960	.....	46,000
1961	.....	52,000
1962	.....	54,000

Morlitz achieved that steady growth since the Club's addition of outside labels, despite the fact he did no advertising; his store was in a deteriorating neighborhood; he faced competition from many new discounters in Philadelphia who sold at lower prices; Korvette and Gimbels often sold at below cost; and his distributor of Kapp records, Government witness Rosen, discriminated against him, prompting Morlitz to "hide" Kapp records behind the counter. Records offered by the Club have remained successful sellers in his store (Morlitz 2301, 2304, 2316-17, 2320, 2322, 2326-33).

(3) An Ardmore, Pennsylvania, dealer testified that a sales increase in 1962 can be attributed to the fact that certain albums including Warner Bros.' "Peter, Paul and Mary" had not been used as part of initial offers of the Columbia Record Club (Balaity 2800-01).

Comment—This is a particularly curious example for the Government to cite. Its use indicates a lack of probative evidence in support of the allegations of dealer injury.

Balaity, who has enjoyed rising sales since his entry into the record business in Philadelphia in 1960 (Balaity 2795), did not testify, as implied in CPF 329, that sales increased *because of*

records not offered by the Club. For example, he named various outside labels and artists that sold well in his store (Balaity 2803). He listed "Peter, Paul & Mary" as among records that "are good in [his] store" when he testified on February 12, 1963 (Balaity 2800-01). The Club had offered that record in January 1963 (CX 790, RX 642).

(Government counsel, apparently seeking to soften the impact of Balaity's satisfaction with sales of "Peter, Paul & Mary" in mid-February 1963, imply in footnote 133 to this finding that the Club did not offer that record as part of an initial offer of six for \$1.99 *until* February 1963. But in footnote 8 on page 10, in order to prove a different point, they state that it was offered as early as January 1963. It was, in fact, offered in January (CX 790, RX 642). In the two months prior to Club use, Warner Bros. sold only about 2,000 copies per month; thereafter, in the month of Club use and the following three months (the latest data in the record), sales were between 15,000 and 46,000 per month (CX 790).)

While Balaity had "an opinion" about the Club, he "had no knowledge * * * no basis to say that this is true" (Balaity 2803). Indeed, he did not even know what records had been offered by the Club (Balaity 2802, 2804). (Cf. RPF 335(g).)

(4) One Philadelphia dealer testified that his record business had declined by 30% in 1962 and the Columbia Record Club was a major factor responsible for this decline (J. Rosen 2770-71).

Comment—While Rosen said on direct examination that the Club was a major factor for the decline in his 1962 sales (Tr. 2770-71), he admitted on cross-examination that his sales rose from \$60,000 in 1959 to \$71,000 in 1961 (Tr. 2781-84); that he could not "say" what the Club had done differently in 1962 to cause a reversal in his growth (Tr. 2784); and that the drop-off may have been caused by competition from Korvette and Gimbels, which provided particularly rugged price competition in Philadelphia in 1962 (Tr. 2784-85). On the outside label issue, Rosen could not say that it made any difference to him that the Club took on such labels (Tr. 2773).

(5) [A]nother Philadelphia dealer whose volume of business had declined from \$70,000 in 1961 to \$60,000 in 1962 testified that the offer of certain Licensors' records was responsible for the decline in sales (March 2557-61).

Comment—Contrary to that proposed finding, March did not attribute the alleged \$10,000 drop in sales to outside label offers by the Club. At Tr. 2554, he referred to his 1961 and 1962 sales.

Seven pages later, in a completely different context, he replied, in response to two leading questions, that he thought that his sales of two particular outside label records may have declined partially because of Club sales. One of the records he cited was Kapp's "Music for Trumpet." The Club sold a grand total of 123 copies. (See RPF 335(e).) The other record he mentioned was Roger Williams' "Greatest Hits." The Philadelphia distributor from whom March purchased Kapp records (March 2568) testified that Roger Williams is a "big seller" in Philadelphia and "has been a continuous seller right down the line with everything he has ever come out with" (Rosen 2259).

On cross-examination, March testified that his business "is largely esoteric, off-the-beat" and unlike most material sold by record clubs (March 2574-75). March complained about a host of business problems: His partner and Government witness Bialek conspired to throw his record shop into bankruptcy (March 2567); he carried very few Columbia records because the local branch, to whom he refused a financial statement, regarded him as a credit problem (March 2555, 2566-68); he was surrounded by record dealers, some selling at lower prices (March 2556-57, 2569); and Korvette was "generally" selling at lower prices than his costs (March 2569).

(6) And a New York dealer testified that the offer of "war horses" on the Columbia and Licensors' labels had reduced his sales on this important classical product (Kutscher 1162-63, see also Prince 5511-12, Rubinstein 2199, Morlitz 2300, Jolley 2366-68, Fischer 2446, Rubin 1904-07, Fink 1441-42).

In a footnote, it was stated:

Club ads (*e.g.*, CX 100, 105) emphasized "war horse" material, *i.e.*, standard classical repertoire that dealer must sell in large volume to sustain purchases of low volume "esoteric" records (Kutscher 1159-62, F. Hartstone 1775). In the classical "war horse" field, even an excellent seller ranges between 10,000 and 20,000 units nationally over two or three years while a non-war horse item can be expected to do half as well (Chapin 7396-97). The major early emphasis of the Club was classical music (Lieberson 4854-55) and this was the source of its earliest successes (CPF 245).

Comment—Government counsel showed Kutscher three Club advertisements featuring classical material (CXs 99, 100, 105). After looking at those advertisements, Kutscher testified that classical war horses are "the main part" of offers by "record clubs." All those ads were tests, some running as long as four years ago (Raybar 6807; also see the ads themselves). Kutscher did not refer to the offer of war horses on "Licensors' labels." He referred only to records in the advertisements shown to him,

picking out about a dozen on the Columbia and Epic labels (Kutscher 1159-60).

As a matter of fact, the ads contain only four outside label records out of almost 90 depicted. The four are Kapp's "Music for Trumpet" (Vol. I), and Mercury's "1812 Overture," "Strauss Family," and "Schuman Symphony No. 3." No Club injury to retail sales of those records is shown (see RPFs 301-02, 335(e); Exceptions, pages 265-66).

Kutscher's testimony is followed by "see also" citations to the testimony of seven other witnesses. None of the cited transcript references for those witnesses support the finding that the "offer of 'war horses' on the Columbia and Licensor's labels had reduced * * * sales on this important classical product."

Dealers "Driven Out of Business"—CPF's 330-32 purport to show three dealers "driven out of business" by the licensing agreements. The record does not support a finding that the Club or its sale of outside labels drove those three dealers or any other dealers out of business.

Even ignoring the facts respecting the huge increase in the number of retailers, the new store openings of retailers who testified in this case constitute facts helping to put in perspective the dealer failures cited in CPF's 330-32. (See Exceptions, pages 266-69.)

The testimony of the three dealers referred to in CPF's 330-32, moreover, does not stand for the proposition that the Club drove them out of business.

The store of Huntington, one of those cited, was not "driven out of business." It is still in operation. Huntington sold the store to his manager and joined the family's oil business which "wanted some new blood" (Huntington 3155, 3160, 3167, 3176). Huntington testified that "there has been a large increase in the number of retailers in town" since 1956 (Huntington 3171).

The two other dealers referred to in these findings, Barwis and Sonnheim, left the record business in Philadelphia in 1961, after Korvette, Goody, Gimbels and others invaded that city and launched price wars which drove prices as low as \$1.39 and \$1.59 (see RPFs 337-38; Barwis 2452, 2454, 2462, 2468-71; Sonnheim 2666-67, 2672-74, 2683-84). The new wave of discount stores influenced their decisions to close shop (Sonnheim 2684; Barwis 2480).

While Barwis and Sonnheim claimed that their volume was declining, sales of outside labels and other records by one of their distributors to other dealers in Philadelphia were rising (Rosen

2251, 2256, 2259). The fact that this distributor gave "better prices" to Korvette, Gimbels, Goody and to everybody "except the poor, small retailer" (Rosen 2257-58) also may have influenced their decision to leave the record business.

While Barwis and Sonnheim are pictured in the Government's proposed findings as centering their attack on the outside label issue, they in fact expressed blanket opposition to all record clubs (Barwis 2452, 2455, 2472-73; Sonnheim 2664, 2681). Sonnheim opposed "record clubs right from the beginning" (Tr. 2676)—long before Columbia took on outside labels.

Sonnheim's testimony about Club prices should be evaluated in light of the fact that he began discounting, not in 1955 when the Club began, but in 1958 after Korvette opened its first store in Philadelphia (Sonnheim 2667-68). Sonnheim's testimony that the Club was the first discounter in Philadelphia (Sonnheim 2668) was contradicted both by Government witnesses Barwis, who began discounting in about 1950 (Barwis 2453, 2467), and Fischer who began even earlier (Fischer 2438).

"*Views versus Facts*—Considering the record as a whole, we find that Government counsel presented nearly 50 record dealers who testified, in the main, that record clubs in general, and the Columbia Record Club in particular, hurt dealers.

Despite the volume of such testimony, however, it failed to establish that record clubs have injured retailers, or that such injury is probable. Contrary to the largely uncorroborated "views" of Government counsel's dealer witnesses, there were uncontradicted statistical and scientific data—much of it from evidence introduced or supported by Government counsel.

The claim that clubs eliminated retailers was demolished by Government counsel's chief industry expert, Thomas Noonan. He testified that in 1955 (when the Columbia Record Club started in business) there were approximately 15,000 outlets in the United States selling records at retail—and that by 1962 there were 150,000 (Noonan 6867).

The "view" that record clubs in general, or the Columbia Record Club in particular, had brought about a substantial decrease in the sale of records at retail was also refuted statistically. Sales of records by dealers, far from decreasing, have boomed. Noonan testified that sales by dealers have increased substantially since 1955 (Noonan 6867, 6952)—a fact fully corroborated by the *Billboard* store survey, upon which Government counsel relied. That survey shows that, since mid-1957, record sales in nonrack outlets have increased at a tremendous rate (RX 311 *in camera*,

page VII); and that LP sales, in particular, have grown rapidly (RX 311 *in camera*, page VIII).

Similarly, sales in outlets serviced by rack jobbers have zoomed since the formation of the Columbia Record Club in 1955. Such sales increased from virtually zero in 1955 to \$200,000,000 by 1962 (CX 199d; Noonan 6865-68).

Such uncontradicted statistics fully confirmed the testimony of William Gallagher, head of marketing at Columbia, concerning the growth of Columbia's retail sales. The bulk of the records distributed by the Club have been Columbia records; and if the contentions made in the case-in-chief were correct, Columbia's non-Club sales should have been adversely affected. Instead, Columbia's non-Club LP sales to distributors increased 230% between 1955 and 1962 (Gallagher 8895-98).

A series of exhibits (RXs 454-69 *in camera*), based on the *Billboard* store survey, further refutes the "views" of dealer witnesses about retail injury, and generally supports testimony and statistics by outside labels that the Club had not hurt their store sales (see RPF 286).

Other uncontradicted statistics dispute the "views" of the anti-Club dealers in still another exhibit (RX 470 *in camera*), based on the *Billboard* store survey. That exhibit measures the changes which took place in the share of LP sales of each of the outside labels, since the date of its licensing agreement, in nonracked retail stores located in two markets, New York and Philadelphia. The exhibit shows ten instances of increase, two of no change, and only four of decrease (RX 470 *in camera*; see RPF 287).

Columbia Records also registered substantial increases in sales in the very areas of the country where Government counsel's dealer witnesses were claiming that there had been a diminution of sales. According to Gallagher (Tr. 8895-98), Columbia's non-Club LP sales had grown as follows since 1955:

- New York, up 218%.
- Hartford-Albany area, up 193%.
- Washington, D.C., up 288%.
- Boston area, up 438%.
- Chicago area, up 205%.
- Los Angeles area, up 435%.

The record does not show fully comparable figures limited to LP sales in the Philadelphia area. However, it does show that Columbia's branch sales of all types of records to retail outlets rose substantially in Philadelphia in recent years (RX 472 *in camera*; RPF 288).

The sales experience of the outside label companies in those geographical areas since the distribution of their records through the Columbia Record Club was similar to that of Columbia Records. The pattern is inconsistent with any claim of dealer injury (see RPF 289).

Further refutation of the claim of dealer injury comes from statistical evidence and related testimony on the subject of the long time-gap between the retail release of a record and its use in the Club—a lag frequently referred to in the testimony as “lead time.” The evidence shows that while there are some records which have healthy sales lives for long periods, the vast majority of records have their maximum sale at retail shortly after their release.

Columbia and Epic records generally reach their peak sale at retail within two months after release (Gallagher 8896). The average “lead time” of records offered by the Club is between six months and a year; and in many instances, some of the best and most attractive records on the introductory offer list have been available at retail for from five to eight years (Keating 5150). The Club’s advertising schedule virtually insures in most instances a minimum of six months from retail release because the records appearing in an advertisement have to be selected six months in advance.

In the case of the outside labels, the “lead time” exhibits and related testimony also tended to rebut the claim of dealer injury (see RPF 292).

Basic to the claim of dealer injury was the contention that the Columbia Record Club, and other record clubs, took purchasers out of record stores. But no Government witness even purported to have conducted a scientific survey of any kind to establish what had really happened.

Generally, the witnesses made no effort to, or were unable to, name allegedly “lost” customers. One witness, Hollander, gave the names of six specific customers whom he thought he had lost permanently as customers. Of the three who could be located, two were no longer members of the Columbia Record Club at the time of the trial (Gartenberg 10,359); and all three had moved out of Hollander’s neighborhood (Stipulation 10,489–90).

The evidence submitted by respondents, however, established that the clubs did not take purchasers out of the stores permanently, or even temporarily, and this evidence was offered generally in the form of scientific surveys or otherwise uncontradicted statistical data:

(a) National Family Opinion (NFO) keeps track of record purchasers by a consumer panel representing a cross-section of the nation's families. In 1962, NFO found that club families, on the average, purchased 60% more LPs from record dealers and other non-club sources than did non-club families (RXs 347a, 444).

(b) Eldridge Foskett, a marketing expert who originally designed the *Billboard* store survey, made a survey for the RCA clubs which showed that 73% of RCA club members bought records at retail during the tenure of their club membership; and that they bought more records in retail stores than did the non-club members (Foskett 7118-20).

(c) As early as 1957, Politz had found that Club members, during their last year of membership, purchased more records from dealers than they bought from the Club (RX 445). Moreover, Club members in the six months preceding the survey had bought as many records from retailers as they had purchased from the Club during the last year of their membership (RXs 445, 446).

(d) In 1960 Stewart-Dougall found that 74.8% of the Club members were simultaneously buying records from non-Club sources (RX 338). In 1963, this was confirmed at the trial. Each of the Club member witnesses called by respondents with respect to the Count II issues was familiar with prices at the discount stores because he or she was also purchasing records simultaneously from retailers (Anderson 6458-59; Dreyer 6416-17; Bien 7418-21; Miller 7190-93; Riley 7098-99, 7102-03; Halderman 7476-79; Jackson 7197-7200; Barlow 7671-75; Lutz 7882-83).

(e) As a result of the high rate of drop-outs among Club members, many record buyers, accustomed to regular and systematic record purchasing, become available to retail outlets each year upon the termination of their membership, assuming *arguendo* that they had not been so available previously.

Classics and "Cream"—One of the most repeated lines of attack at the trial was that the Columbia Record Club had a detrimental effect on the sale of classical records by dealers. As it turned out, that line of testimony had no relevance to the supposedly central issue in this case—the sale of outside labels. The Club's offer of classical records has consisted almost exclusively of Columbia and Epic material, with very little representation of outside label material (Keating 5257; CX 780). Relatively few classical records on outside labels were even referred to at the trial.

The anti-Club testimony on classical sales was contradicted by an exhibit based on the *Billboard* store survey—a survey vouched

for by complaint counsel. That exhibit (RX 483 *in camera*) shows that the sale of classical records in retail stores almost tripled between 1958 and 1962; and that, indeed, classical sales grew at a faster rate than popular sales.

Columbia's classical sales at retail, far from declining, increased 11 times between 1955 and 1962 (Chapin 7322, 7393). This occurred at the same time that the Club was offering Columbia classical records to its members. (See also RPFs 299-305.)

Still another claim of dealer injury was that the Club sold only "hits" or "cream" (see, *e.g.*, Hurst 3189; F. Hartstone 1773-74). That charge likewise was refuted by statistics and live testimony.

The lead-time studies definitely show that the Club offers records after their peak sales in record stores—after the "cream" has been skimmed off (RPFs 290-92).

Moreover, Keating and Gallagher cited numerous specific examples of records offered through the Club which were never hits at retail, or which had ceased to sell at retail and resumed selling at retail only after they were offered through the Club (Gallagher 8920-24; Keating 5256-57). Such testimony was fully corroborated with respect to outside label records sold in the Club by Dave Kapp of Kapp Records (Kapp 5780-85, 5798), Julie London's business manager (Ginter 6062-67), Irving Green of Mercury (Green 10207, 10209, 10210-11), Art Talmadge of United Artists (Talmadge 7823-25) and Bohanan of Liberty (Bohanan 6360-62), among others. Those witnesses testified that the outside label records offered in the Club included many old records which had never been successful at retail, or whose success had come years ago.

Statistics as to the location of Club members and their buying habits further undercut the claim of dealer injury. Record retailers are primarily clustered in the large cities and their environs (Adler 4927, 5103-04; Pierce 6749; Max 9557-61; RXs 447-49). For the most part, the Government's dealer witnesses came from the large metropolitan areas, primarily Philadelphia.

Nearly 21% of the Club's membership lived in areas not serviced by dealers (Gartenberg 8496). Similarly, the percentage of dollars spent by members of record clubs for club purchases, as contrasted with non-club purchases, is highest in the rural areas and smaller population centers, and lowest in the very areas from which the Government's witnesses came (RPF 415).

In the light of the claims by certain Government witnesses that they lost sales on particular Columbia records, a statistical analysis was made of the cumulative growth-rate of 17 Columbia classical

and popular records. The study was designed to measure the effect, if any, of Club use on the cumulative growth-rate of the records at retail. Certain of the records demonstrated an impressive increase in their cumulative growth-rate after Club use. The charts of the other records showed that their cumulative growth-rate at retail had been consistent, thus establishing statistically that Club usage had not had an adverse effect on retail sales. Gallagher corroborated that the charts and sales patterns set forth in the exhibits established that the Club offer had no adverse effect on the retail sales of the records involved (Gallagher 8112-13). Earlier, Gallagher had testified that Club sales had had "no effect" on retail sales; but the apparent inconsistency is understandable when viewed in context (see RPFs 309-12).

In mid-trial, respondents went out into the field to test the testimony of Government counsel's dealer witnesses that the Club deprived them of consumer sales of records of the outside labels that were distributed by the Club. Respondents sent shoppers to the stores of those witnesses to shop for outside label records, not theretofore used by the Club, which were to be offered for the first time by the Club in the next several months. The stores shopped were those of dealer witnesses in Philadelphia and the Mid-West. The proof in the City of Brotherly Love showed that 61% of the records were not even stocked in the dealer's place of business. In the Chicago stores, 72% of the records were not available (RXs 327, 328).

There also was opinion testimony by Goddard Lieberman of Columbia Records, George Marek of RCA Victor, Daniel Bonbright of Capitol and Walter Hitesman of the Reader's Digest that record clubs have affirmatively assisted retailers and have not adversely affected retail sales (Lieberman 4845-47; Marek 1885; Bonbright 3526-27; Hitesman 10,139).

It is not without significance that this was also the official view of *Billboard*, whose subscribers are primarily retailers. *Billboard* has consistently supported the Columbia Club and other record clubs in its editorials. In 1955, a *Billboard* editorial predicted that the Club would benefit record dealers (RX 113). Again in late 1957, *Billboard* hailed the proposed entry of RCA and Capitol into the record club business, correctly predicting that this would broaden the base of record purchasing, bring long-range benefits to all, and specifically benefit retailers (RX 114). In 1958, *Billboard* frankly advised its dealer readers that "no information has come to our attention to support the claim that clubs are harmful to dealers."

At the time of the trial, there was still available "no information" which supports the claim of dealer injury. Noonan, *Billboard's* chief researcher, when he appeared as Government counsel's marketing expert, admitted on cross-examination that he did not believe that record clubs had an adverse effect on retail sales (Noonan 590). By way of contrast, Noonan was of the view that the growth of rack jobbers and large discount department stores did have an adverse effect on many retailers (Noonan 591).

Respondents called as witnesses a number of record retailers with stores of varying sizes and locations. Their testimony directly contradicted the testimony of those dealers called by Government counsel who claimed injury. In evaluating the conflicting opinion evidence offered by dealer witnesses called by both sides, it is highly significant that in general, the statistical evidence supports respondents' witnesses and contradicts Government counsel's witnesses.

Respondents also called two rack jobbers as witnesses. It is significant that complaint counsel refrained from calling any rack jobber on the issue of retail injury, despite the fact that 25% of all retail sales are accounted for by outlets serviced by racks, which represent the fastest growing means of distribution in the industry. Testimony of the rack jobbers directly contradicted the testimony elicited by Government counsel from many dealers.

Respondents presented a wide variety of dealer witnesses. Some were small retailers operating single stores (*e.g.*, Blincoe (5681), Zenger (6294), Dunlap (5895)); others were operating several retail stores (*e.g.*, Karol (5572), Inden (5541), Del Padre (5629)); one represented a well-known chain of 31 stores in major cities throughout the United States (Prince (5502)); one serviced 4,000 accounts in at least 500 cities (Schlang (6702)); another, previously called as a witness by the Government, sold to 90 stores throughout the nation (Arlen (762, 5717)).

Those dealers and rack jobbers showed a substantial increase in sales and were expanding their operations. They were doing this in the face of competition from the Korvettes, the Goodys, the other discount houses and presumably from anyone else selling records. (See, *e.g.*, sellers listed in RPF 320.) The witnesses called by Columbia testified that the record clubs affirmatively assisted retailers and had not adversely affected sales; that intensive Club advertising and promotion introduced the consuming public to records and stimulated their store traffic; and that the Club's dealer-redemption-center plan also stimulated store traffic and led to extra sales (RPF 321).

Finally, specific Columbia and outside label records that the Club had sold in large quantities—and one or more of which were alleged by Commission dealer witnesses to be poor retail sellers due to the Club—were found by these witnesses to be excellent sellers in their stores (RPF 322).

Statistical evidence from the Government's own witnesses, and Government counsel's failure to elicit financial data from other witnesses, further deflated the already punctured contention that dealers were financially injured by record clubs generally, or by the Columbia Club in particular. RPF 327 shows the following:

(a) Of more than 40 dealer witnesses presented by the Government, 25 clearly admitted a positive increase in sales or (in a few instances) no significant decline in a comfortable sales volume.

(b) Eight other witnesses who offered some statistics on sales provided no comparative figures for other years which would establish any decline in volume. It may be inferred from the failure of Government counsel to establish such data that those witnesses had suffered no decline.

(c) Only approximately 12 dealer witnesses—eight of them from Philadelphia—could claim, on the basis of their own unaudited statistics, any real decline in retail sales volume. Even accepting those figures at face value, the statistical evidence as to all dealers throughout the nation showed how atypical the experience of those few dealers really was.

(d) Government counsel called as witnesses many representatives of long-established New York department stores, many of which sold records in large volume. Those witnesses represented no less than a total of 123 important retail outlets for records (including Arlen, who serviced rack locations in various areas of the nation). They testified, generally, that record sales had either increased or had remained at a constant respectable level. Significantly, not a single one of those witnesses was questioned on the issue of alleged dealer injury.

The testimony of many Government dealer witnesses had no real relevance at all to the question of the propriety of the sale by the Club of outside labels—which was described in the prehearing conference as the central issue in this case (Prehearing conference, September 12, 1962, Tr. 8). To the contrary, witness after witness frankly admitted that he had formed his adverse "views" about clubs long before the sale of outside labels by Columbia (see *e.g.*, Metcalfe 2928; Hollander 3132-33; Schaps 3338-39; Fischer 2435; Morlitz 2323-24; Sonnheim 2681).

Those witnesses were exemplified by Metcalfe of Arkansas who,

until his expulsion from the Society of Record Dealers (SORD), led a boycott to eliminate the Columbia Record Club from the record business, to destroy the other clubs as well, and to make them "vanish from the scene" (Metcalf 2928; RXs 25-31, 34). Metcalf saw nothing wrong in a little "collusion among the dealers" to achieve this goal (RX 33).

That the outside label issue was extraneous to key Government witnesses, is illustrated by the actions taken by SORD, a group of Chicago dealers, some of whom testified as Government witnesses at the Chicago hearings. SORD in 1961 represented 250 retail outlets (Winograd 3065).

In 1959, SORD financed a lawsuit against the RCA, Columbia and Capitol record clubs in the United States District Court for the Northern District of Illinois. That action did not single out Columbia for separate treatment. Instead, SORD sought to have the Court declare illegal the basic operations of all three record clubs. There was no mention in the complaint of the sale of outside labels by the Club (Winograd 3066-67) and the complaint was never at any time amended to include it. Indeed, as late as 1961, while the case was still pending, the president of SORD still regarded the problem as one of record clubs in general (RX 32).

It may be reasonably inferred that if the sale of outside labels had in fact been an important factor to the SORD group financing the lawsuit—as it was in their testimony—it would have been included in the original complaint or in some amendment that could have been made during the three-year pendency of the suit (which proceeded simultaneously with the investigation herein). The SORD case was dismissed with prejudice in 1962.

Further persuasive evidence that it was not the sale of outside labels by the Club that engendered dealer opposition appears from the grudging admission of many witnesses, usually on cross-examination, that the RCA, Capitol and Angel clubs had an "identical" adverse effect or "some" adverse affect (see RPF 330).

Since RCA and Capitol did not regularly sell outside labels, the testimony of those witnesses obviously rests on the premise that the very existence of record clubs is undesirable to their own operations. Their real objective was to see that all record clubs were "dissolved" (Metcalf 2933, 2938).

The bulk of the records which have been offered through the Club consists of Columbia records. Accordingly, if the dealers' general claim of injury as a result of Club sales were correct, they should have been able to establish statistically that those Columbia

records were not successful in their stores. Yet, witness after witness conceded on cross-examination that Columbia records that had been distributed in large quantities through the Club remained among their best sellers (RPF 331).

Along the same line, despite claims of injury on the outside label issue expressed by some Government witnesses, cross-examination developed that the various outside label artists and records offered by the Club remained large sellers in their stores (see RPF 332).

For facts and circumstances tending to discredit the claims of Government dealer witnesses that the sale of specific records had been adversely affected by the Club, see RPFs 333-35.

Some dealers claimed that specific records were not good sellers due to the Club, whereas, others named the same records as among their best sellers.

The evidence relating to Kapp's "Music for Trumpet" (RPF 335(e)) is particularly instructive. (See also RPF 335(f).)

On direct examination, the dealers and distributors called by the Government were asked about the effects on their business of the Columbia Record Club. Frequently, the implication was left that that was the only or principal source of their grievances. But most of the dealers and distributors stated, on cross-examination, that their businesses had been adversely affected by discounters (including particularly Korvette and Sam Goody) and rack jobbers (see RPF 336). It is not without significance that while some small retailers in Philadelphia complained that their volume was reduced, Korvette's sales in Philadelphia were increasing (Rothfeld 3981).

In those circumstances, there is no solid basis for findings that the principal fault lay at the doorstep of the Columbia Record Club.

Other Competitive Problems—The impact of the discount houses is highlighted by the advertisements in the record. Whereas Club members paid an average price of \$2.41 in 1961 and \$2.37 in 1962 for a \$3.98 LP in their first year of Club membership, and \$2.88 per record during their second year of Club membership, they could have purchased at least some of the same records from Sam Goody, Korvette and other discounters at lower prices. The discounters offered regular programs of discounts, sometimes euphemistically referred to as sales, lasting four or five consecutive months, week in and week out (see RPF 337).

Thus, Korvette was offering current best-selling catalog material like "The First Family" and "My Son, the Folksinger" at regular intervals at prices ranging from \$1.39 to \$1.97 (see RXs 4, 5, 143,

146, 284, 286; Freedman 2596-97; Smith 2171). Sam Goody was regularly offering catalog material to customers at a price per record usually below \$2 (RXs 1, 9, 12, 13b, 14, 6, 285, 287, 144). Gimbels sold at comparably low prices (Doctor 784-88; Freedman 2596-97; R. Smith 2171; Sonnheim 2674). Other retailers were offering records at such prices as four for \$6 and three for \$4.29 (RXs 267, 268). Abraham & Straus sold at prices ranging from \$1.29 to \$1.93 (Goldfinger 1135). Klein's sold at prices as low as \$1.87 (Germain 992). Alexander's sold at prices as low as \$1.66 (Rosner 812).

Outside New York, variety stores and large discount houses were selling at even lower prices ranging from 77¢ per record up to \$2.17 per record (Schaps 3357-60, 3367-68; F. Hartstone 1795-97; RXs 141-42, 147, 266).

There was even a certain element of the "pot calling the kettle black." Korvette, which had ringed Philadelphia with discount stores and triggered off a "price war" with Gimbels—and had thereby become the subject of vigorous dealer complaint—professed to have been adversely affected by the Columbia Record Club and by rack jobbers (Rothfeld 3968, 3980). Sam Goody, on the other hand, complained that the Columbia Record Club and Korvette had adversely affected his business (Stolon 1276-77, 1287). (Compare CPFs 340-41 with respondents' Exceptions, pages 275-79.)

In assessing the Philadelphia dealer picture, it is fair to note that this was the home of an aggressive dealer organization compelled to dissolve in 1951 by virtue of Department of Justice anti-trust prosecution (Fischer 2430; RXs 22a-b, 36, 38). Moreover, there had been a huge increase in the past few years in the number of large discounters in Philadelphia. Korvette in that period had ringed the city with five stores. Gimbels opened four stores. And, Sam Goody and Litt Brothers, among others, opened discount operations. All were using records as loss-leaders on some occasions. Gimbels and Korvette's climaxed this competition with a vigorous price war which had its effect on all retailers (see RPF 338).

There were other incidents that undoubtedly induced some dealers to feel competitive problems. Thus, there were charges of "unexplainable purchases" by large-sized dealers at more favorable prices than those given to small dealers (Collins 3005-06, 3013, 3018-19; Rubinstein 2217). Government counsel unexplainably produced the witnesses who could explain the "unexplainable." In Philadelphia, distributor Harry Rosen, an important supplier

to all the Government's Philadelphia witnesses, testified on cross-examination that he gave all of the large discount houses and dealers better prices than their smaller competitors (Rosen 2257).

Meanwhile, back in New York, Fink, a supplier of all the Government's New York witnesses, conceded on cross-examination that he sold records to large retailers at lower prices than he sold to smaller retailers (Fink 1460-61). Other distributors had similar pricing programs.

With such testimony available, there is no foundation for attributing alleged dealer injury to the Club.

Distributor Witnesses—Although some of the Government's distributor witnesses indicated that their dealers suffered injury from Club competition, two of them—one billed as "typical" (Tr. 174)—made no claim of injury due to record clubs (Keenholtz 1423 and Shocket 166). All of them, moreover, conceded that their competitive problems arose from sources other than record clubs, and also that their businesses were growing. They complained bitterly about the alleged effects on their business of the large discount houses and rack jobbers (Hartstone 3467-71; L. Smith 1408-09; Fink 1467-68; Roskin 2106; Rosen 2258; Shocket 254). At the same time, some of them simultaneously operated as rack jobbers on the side and serviced locations that undersold their regular dealer customers (e.g., L. Smith 1406, 1415).

Distributors also complained about the effects of transshipping into their area by outside distributors and others at lower prices than they were charging, to the point where they were not even the largest suppliers of records to retailers in their areas (Shocket 206, 211-12, 217, 235-36; Keenholtz 1425-26; 1430-33; L. Smith 1407, 1418-20; Roskin 2118-19, 2121; Fink 1455-60; Rosen 2260; Winograd 3074). On cross-examination, distributor Smith also admitted that it was detrimental to his business that his manager embezzled his funds while his warehousemen stole his records (Tr. 1418).

On the other hand, many of the distributor witnesses were themselves expert in the practice of transshipping (Smith 1405-08; Keenholtz 1426, 1430-33; Roskin 2118-19, 2121). For example, Sam Keenholtz, who acts as both a distributor and "one-stop" in the New York area, was facile enough also to function simultaneously as both a transshipper and transshippee—he transships to "anybody and anyone" and buys from most transshippers into his area (Tr. 1426, 1423). He testified that "the 49 states are shipping to the 50th, and New York is the 50th" (Keenholtz 1431-32). Government witness Shocket, a neighboring distributor in "the

50th" state, takes a different view about transshipping. He instituted legal action to prevent transshipping and in fact "inhibited" some transshippers (Shocket 236).

Despite the problems, distributor Hartstone's business in Los Angeles, Boston and San Francisco was shown to be increasing each year, including particularly his sales at retail of Liberty records (G. Hartstone 3463, 3474); his accounts had not decreased in four years (G. Hartstone 3463); and the Hartstones had just opened a new distributorship in Cleveland (Gallagher 8791-94). Distributor Fink's sale of outside label records, particularly Kapp and United Artists, were higher in 1962 than 1961 (Fink 1464-65). Distributor Roskin's dollar sales to retailers also had increased from 1955 to 1962 (Roskin 2104-17). Distributor Rosen's business increased \$1 million in 1962 (Rosen 2251). And, distributor Shocket's sales rose \$100,000 in 1962 (Shocket 216). As far as the injury testimony given by Roskin and Smith is concerned, it must be considered against their background as apparently disgruntled exdistributors for Columbia. (See also respondents' Exceptions, pages 269-75.)

The record thus supports no claim of distributor injury, and certainly no claim that the Club caused whatever injury there might have been.

According to CPF 342, "The adverse effect on retail dealers of the Licensing Agreements was anticipated by the Licensors' themselves."

The fact is that a number of record manufacturers, for different reasons, and at different times, have published advertisements or brochures in which reference has been made to clubs.

Although respondents argue (Exceptions, page 279) that "None of these advertisements or brochures, and none of the testimony establishes that these manufacturers anticipated that club distribution would have an 'adverse effect' on retail dealers," it is clear that the ads were designed to suggest that clubs were injurious to dealers.

At any rate, even if the licensors or others did anticipate that clubs would have an adverse effect, such advance speculation would be immaterial. The evidence (statistical and other) showed that Club distribution had no adverse effect on actual retail sales (see CPFs 342-46 and Exceptions thereto).

Manufacturers

According to the complaint (Par. Ten (5)), the licensing agreements, individually and collectively, not only threaten generally

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to hinder competition or tend to monopoly, but they also "are being engaged in for the purpose, or with the effect, of creating in respondents the undue power, and respondents have in fact regularly exercised the power, to:

* * * * *

Hinder, lessen or suppress competition between respondents and the Licensees and between respondents and other manufacturers of phonograph records.

The examiner already has determined, in effect, that the licensing agreements do not *per se* constitute agreements in unlawful restraint of trade. Here we consider further their competitive impact on the outside labels and on other record manufacturers.

The agreements neither had the purpose, nor have they had the effect, of creating in respondents the "undue power" alleged in the complaint. Assuming *arguendo* the existence of such power, the examiner finds no substantial evidence of its exercise, "regularly" or otherwise.

Outside Labels—Looking first at competition between Columbia and the outside labels, the examiner finds that the evidence fails to prove that the agreements hindered, lessened or suppressed such competition.

In fact, the contracts stimulated competition. The manufacturers of outside labels obtained access to club distribution and advertising, with the result that they became stronger competitors at retail.

In addition, between 1958 and June 30, 1962, the Club paid large royalties to the outside labels (CX 660 *in camera*). Each of the outside labels, of course, benefited directly by the receipt of such additional revenues.

Representatives of the outside labels were called as witnesses, both by Government counsel and by respondents. They testified to the business reasons which had motivated them to enter into the contracts. None indicated any disappointment with the results.

They also testified as to the extraordinary benefits that Club distribution had brought to them. They stressed the obvious advantage of additional income which they would not otherwise have earned. They uniformly praised the Club's introductory offer, advertising and promotion of their artists, records and trade names, all of which improved their label image in the minds of the consumer and thus stimulated demand for the records in all distribution channels. They stressed that the Club had broadened the audience for their records.

They testified that Club distribution was important to and desired by their artists. They testified that Club distribution

helped them both to retain their existing artists and to bid competitively for new artists. They regarded the shipment of Club records in jackets which referred to other of their records which were available only at retail as an additional sales tool.

Club distribution had enabled them to expand the scope of their recording activities and to take risks and gambles which they would ordinarily shirk. They testified that they had become stronger competitors at retail as a result of Club distribution. (With respect to Caedmon—see Mantell 6687-89; Verve—see Osten 3552, 3541-42, 3556 and CX 638; Mercury—see Green 10,183-85, 10,206-16, RXs 536, 537; Kapp—see Kapp 5780-98, 5801-03; United Artists—see Talmadge 7823-28, 7830; Liberty—see Bennett 6509-12, CXs 503, 504, Bohanan 6362, 6367-74, 6411, RX 252; Warner Bros.—see Freidman 6090-6100, Maitland 3754-55, Conkling 6187-90, 6197-99; Cameo-Parkway—see Cohen 6750-52.)

The outside label manufacturers were also vitally interested in their retail sales, since by far the bulk of their revenues came from that source. They unanimously testified that Club distribution had not adversely affected these retail sales. Indeed, many gave specific examples of how Club distribution had in fact specifically stimulated store sales (see RPFs 219-22).

Other Manufacturers—Concerning the charges relating to “other manufacturers,” the record fails to show that either the agreements with outside labels or respondents’ activities in connection therewith have hindered, lessened or suppressed competition between respondents and other manufacturers of records.

The “proof” offered on this issue amounted to nothing more than attack by indirection and innuendo. Thus, it consisted mainly of generalized opinion testimony that record clubs hurt manufacturers by eliminating retailers or by causing retailers to lose sales—claims refuted by the statistical evidence.

The significance of the manufacturers’ testimony elicited by Government counsel can best be tested in the light of the history of the industry and the statistics. As already discussed, the record industry has grown from a handful of manufacturers to many hundreds. Newcomers have entered the industry, and many have achieved success overnight. Moreover, the market shares of these small companies have been steadily rising at the expense of the larger companies. But the principal Government witnesses were not the newcomers; they were mainly old line manufacturers, who, according to respondents, had “esoteric catalogs and antiquated conceptions of the meaning of competition” (RPF 343).

Among the record companies from which the Government called no witnesses was Am-Par, an important company owned by American Broadcasting-Paramount Theatres, Inc., which controls a television network, television stations, radio networks, radio stations, and theatres. In 1960, ABC's revenues exceeded \$334,000,000, and Am-Par had its best year in the record industry (RX 292, pages 2, 4). Nor did Government counsel call Decca, a leading company which was recently purchased by the powerful Music Corporation of America (MCA) (Lieberson 4813-14). Another example was MGM, called by the Government for limited purposes only. By 1962, MGM had achieved strength and stability, and through acquisitions and distribution arrangements, had achieved "major status in classical and popular music, jazz and comedy" (RX 293, page 11).

In 1961, before this complaint was issued, Government counsel circulated questionnaires to more than 100 companies seeking statistical evidence relating to any claim of damage due to record clubs (Prehearing Conference, pages 163-66). From this group they called 14 manufacturer witnesses (exclusive of Columbia and the outside labels). The companies represented by witnesses were Folkways, Pacific Enterprises, Capitol, Carlton, Artia-Parliament, Audio Fidelity, London, Contemporary, RCA, MGM, Reprise, Monitor, Everest and Dot.

Artia-Parliament was in bankruptcy due to undercapitalization and the high cost of financing (Frankel 2092). Otherwise, the only manufacturer whose statistics showed a decline in sales was Contemporary (Lester Koenig).

Large manufacturers like RCA, Capitol and MGM made no claim of competitive injury. Representatives of smaller companies like Reprise and Pacific Enterprises merely testified that outside labels obtained advantages through Club distribution (Ostin 3542, 3556) or that record clubs were a factor in the changing methods of merchandising in the industry (Bock 3598-99). Reprise had enjoyed a huge financial success in a very brief period (Ostin 3563-64). Dot's sales had risen from approximately \$6,000,000 in 1957 to over \$16,000,000 in 1961 (Wood 4133; RX 110). Folkways' sales in 1962 were more than ten times higher than in 1947 (Asch 2083, 2069).

If a few of the group of 14 manufacturers selected by Government counsel had not done as well as they perhaps hoped, their problems appeared explainable, at least in part, by their catalogs and merchandising methods:

Rose Rubin, specializing in Russian, Polish, Philippine, Romanian and Icelandic music, was, understandably, one of the smallest American record manufacturers (Rubin 1904, 1913; CX 310).

Asch was very strong in ethnic mountain music (Asch 2054, 2069).

Koenig was a specialist in "far-out" jazz, which had simply gone out of style (Previn 6035; Noonan 6879).

Moreover, these manufacturer witnesses turned out to be the ones who, as Mrs. Rubin put it, did not "like to break [their] price" (Rubin 1908). Similar views were held by Asch and Koenig, who testified that they "had" to get their "full price" from retailers and consumers—a price which was higher than that of their competitors (Asch 2059, 2068–69; Koenig 3619–21; Hammond 7234).

One of the Government's witnesses, Sidney Frey, seemed particularly sensitive about reduced prices. He used the phrase "malicious price cutting" and leveled this charge at the Columbia Record Club. Several years previously, Frey had published a series of advertisements condemning "malicious price cutting" by discount houses. Frey was promptly sued by the Department of Justice for price fixing, and he and his company accepted a decree prohibiting the enforcement or establishing of resale prices (Frey 2039–42; RXs 17, 18; *United States v. Audio Fidelity, Inc. and Sidney Frey*, 1960 Trade Cases §69,760 (S.D. N.Y.) 1960).

Some of the Government's manufacturer witnesses, far from eschewing club distribution, had in fact sought it and in many cases obtained it. The list included Carlton, London, MGM, Monitor, Everest, Dot, Reprise, not to mention RCA and Capitol (see, e.g., Wood 4145–52; Keating 5228–34; Rubin 1926–30; RXs 77, 79).

The Hartstone family contributed three witnesses to this litigation—a dealer, a distributor and a manufacturer. Leon Hartstone, the manufacturer, had a short-lived term as president of London Records (L. Hartstone 1175). London had negotiated with several record clubs (L. Hartstone 1073, 1078–79, 1175–80). Hartstone blamed poor sales of imported records of foreign classical artists on the fact that the classical market had been "saturated." Hartstone's theory of "saturation" assumed that sales of classical records at retail were going down, when the uncontradicted *Billboard* statistical evidence showed that they were booming (RPF 296).

The Hartstone family's complaints regarding "saturation" may be weighed against their contemporaneous business expansion. In

California, they expanded their distributorship by buying out the London branches in Los Angeles and San Francisco and by acquiring an interest in another San Francisco distributor (G. Hartstone 3460-62). In the Boston area, they opened two new retail stores in 1961 (F. Hartstone 1791). Most recently, they opened a new distributorship in Cleveland (Gallagher 8791).

Some of the "outside labels" illustrated how small companies could successfully create, merchandise and compete. Respondents also called two small record manufacturers, Don Pierce of Starday Records and Archie Bleyer of Cadence Records. Starday was originated by Pierce in 1952. In a few years, Pierce succeeded in assembling a significant catalog of country and western music (Pierce 5741, 5746). Although he found it difficult to get retailers to merchandise his products, Starday's sales rose from approximately \$100,000 in 1959 to about \$600,000 in 1962 (Pierce 5744, 5748).

Pierce recognized that the record industry, as a competitive industry, was undergoing change with the creation of new means of distributing records to the consumer. Accordingly, when distribution arrangements proved unsatisfactory, he changed them (Pierce 5742-47). He did not rely on old-fashioned methods of selling, but, instead, pioneered in the selling of records by radio mail order and was highly successful, substantially increasing this segment of his business in 1962 (Pierce 5747-49). Pierce made no claim of competitive injury of any kind. He strongly believed that record clubs broadened the base of record purchasers, helped to make the record industry larger and enabled more people to participate in this field (Pierce 5749-51).

Archie Bleyer of Cadence organized his own record company in 1952 and assembled a catalog of 40 LPs and 400 singles. Cadence, although a small company, had been successful and profitable. Bleyer, however, recognized that past successes in the record industry did not assure continued growth, and that there can be no certainty in the record business because success is dependent upon the creative elements fusing into something which will be acceptable to the public.

Bleyer made no claim of any competitive injury to his company. Indeed, as shown elsewhere, Bleyer's company recorded and, with a sales staff consisting solely of a sales manager and a secretary, sold four million copies of the record, "The First Family," the best-selling LP in the industry's history (Bleyer 6959-62).

Based upon his extensive experience as a record manufacturer and as a record retailer, Bleyer testified that the record clubs, with their advertising and promotion, had not hurt retailers or

manufacturers but had a helpful effect on the entire record business (Bleyer 6972-73).

CPF 393 as to the purpose of the licensing agreements is rejected insofar as it implies any predatory purpose. The internal memorandum relied on (CX 81a,d) reflects the concern of Columbia's Adler over lack of variety of both artists and repertoire as the major weakness of any single label club. Adler felt that "judicious and selective use of minor labels" would "strengthen the Club's over-all position." However, in context, the examiner finds no predatory motivation reflected in this communication.

The same memorandum is relied on by the Government to support a finding (CPF 394) that "The growth of the Club through Licensing Agreements, is welcomed by officials of CBS as a method of obtaining more artists for CBS, *even artists of the Licensors.*"

In the excerpt quoted by the Government, Adler undertook to counter the suggestion, made by other Columbia officials, that it would be the outside labels who would most benefit from their Club contract and would thus be in a stronger position to hold or attract artists. Adler conceded this was a possibility but that exactly the opposite consequence was also possible. The text does not support the proposed finding in its reference to the "growth" of the Club through licensing agreements nor does it indicate that CBS "welcomed" either of the possible effects described by Adler.

It is worthy of note that the Government here pictures the licensing agreements as a device to raid outside label artists, while in CPFs 151-54 the agreements are painted as preventing Columbia from bidding for those same artists.

Although one record manufacturer expressed the opinion that the licensing agreements were advantageous to Columbia, he did not testify that the addition of outside labels "made the Club stronger" or "added to the power of CBS" (Ostin 3542).

Ostin, representing Reprise Records, also expressed the opinion that the outside labels gained many advantages as a result of the licensing agreements (Ostin 3541-42).

It is relevant to note also that since its organization two years previously, Reprise had "enjoyed considerable success" and had "become one of the more important record companies in the industry" (Ostin 3563). (See CPF 395 and Exceptions.)

Copyright Royalties—One of the costs of producing a record is the royalty payable to the copyright owner of the published songs that are to be recorded. The owner of a copyright on a musical composition may license the right to reproduce mechanical performances embodying that composition. There is evidence that the

customary or "statutory" rate charged by music publishers is 2¢ per selection. However, there are exceptions when lower rates for particular compositions may be negotiated between the copyright owner and a record club. There is evidence of a tradition that record manufacturers pay no royalties at all on free records, but this is a tradition that publishers apparently have undertaken to oppose.

The dollar amount of copyright-royalty payments made each year for the right to make mechanical reproductions of musical compositions is substantial.

The Columbia Record Club, in common with other record clubs and mail-order sellers, pays a rate of 75% of the full rate on all records they distribute, whether sold or given away. It is hardly accurate for Government counsel to contend (CPF 397) that "CBS does receive a preferential rate for Club records."

The Club royalty rate was given by music publishers because they believed the Club would be a stimulant to the record industry (Starr 1690); because they believed the Club would reach sales not touched before without adversely affecting retail sales (Scopp 1674); because the Club represents more sales and increases the sale of music (Brown 1832-33); and because it was necessary to compromise between the view that traditionally no royalties were payable on free and bonus sales (Ackerman 4231; Wood 4138); and the publishers' position that they should be.

Under the compromise, the Club agreed to pay royalties on all records whether sold or given away. Since the average price at which the records were sold, taking into account the "mix" and free and bonus records, was less than list price on each record, the rate was set at 75% of the regular rate (Adler 4931-36; Berman 8378-81).

All record clubs and mail-order sellers receive the same rate (Starr 1687-88; Berman 8380).

Although Government counsel propose a finding (CPF 397) that Columbia "refuses to include records in the Club for which they cannot obtain a special copyright rate," the only record reference cited (CX 547) does not provide reliable proof of that statement (see respondents' Exceptions, page 335; CXs 527b, 523a).

There is no substantial or reliable proof of any competitive injury, actual or potential, based on the so-called preferential copyright rate allegedly received by the record clubs. The evidence presented by the Government in that regard is simply suggestive and speculative.

Additionally, there may be a question whether or not such a charge is embraced within the confines of the complaint. Presumably, a preferential rate might be viewed as "an unfair competitive advantage" enjoyed by Columbia "that is not the natural result of free and open competition," as alleged in Paragraph Nine of the complaint. In any event, the allegation remains unproved.

Government counsel propose a finding (CPF 398) that "The power of CBS and the Club is such that music publishers are merely informed of the Club's 'usual rate' and this preferential fee is *assumed* without prior consultation with the purchasers."

That sweeping statement is not supported either by the cited record references or any other evidence in the record. As previously noted, the evidence indicates that Columbia conducted extensive negotiations with publishers and that it received the same rate as other club and other mail-order sellers.

The letter relied on by the Government (CX 237) told a questioning publisher:

This adjustment [75% of the rate] was made by us on the basis of an agreement reached with the major music publishers, and is applied uniformly in respect of all records issued through our Record Club.

That was in response to an inquiry from the publisher asking the Club to check into royalties paid to it.

The Government did not introduce any evidence to illuminate this matter, did not produce the license agreement on the song involved, and did not present any information as to the publisher's agreement, disagreement or any other reaction to the reply it received. It appears that the Government would have introduced such evidence if it were available, since it was Bernard Solomon, an officer of the publishing company, who furnished the letters. Solomon testified, but was merely asked to identify the documents.

"Cumulative" Effects—It is doubtless true that the sale of outside labels to the Club has prompted some other manufacturers to give consideration to seeking such distribution themselves as a means of increasing sales. However, such an exercise of business judgment on the part of a variety of record manufacturers does not, in the examiner's opinion, add up to any kind of "cumulative effect" significant from an antitrust standpoint.

The Government proposes an inference that the cumulative effect of the licensing agreements is to encourage many independent record manufacturers to seek affiliation with the Columbia Record Club. The facts relied on are open also to the inference

that the cumulative effect may be to encourage such manufacturers to take other steps in response to the competitive situation presented.

It may be noted in passing that the record references relied on by the Government in CPFs 401-02 lend scant support, if any, to the contentions made, and some of them are wholly irrelevant.

Oddly enough, the Government proposes a finding here (CPF 402) that "Independents have begun to view Club affiliation as an advantage enjoyed by the Licensors in acquiring properties and new artists." If such a "view" is to be relied on—and that is what the Government seeks here—it suggests that the licensing agreements, instead of injuriously affecting competition, have had the effect of strengthening the competitive position of those manufacturers who have entered into such agreements. To that extent the Government has adopted the views urged by respondents.

The Government proposes a finding (CPF 403) that because the licensing agreements have impaired the vitality of record dealers as a channel of distribution, there has been a corresponding adverse effect on manufacturers dependent on dealer distribution.

That proposed finding is rejected, first, on the basis that the record does not support the claim that the vitality of the dealer as a channel of distribution has been impaired; and second, that even assuming an adverse effect on the dealer, there has been no showing that it results from the operation of the licensing agreements.

The testimony of only one witness (Winograd 3047-48) is cited in support of CPF 403, but it hardly measures up to proof of the facts alleged.

CPF 404 is revealing in its contention that manufacturer testimony, confirming and supporting dealer testimony, "showed how the effect of the Club and the aggravating effect of the Licensing Agreements on the dealer level works its way up to manufacturing level * * *."

As previously noted, that is a curious position for the Government to take. In view of the fact that the Club method of distribution is not challenged by the complaint (and this was conceded by the Government at the Prehearing Conference of September 12, 1962, Tr. 38), it is difficult to predicate a finding of illegality with respect to something alleged to aggravate the effect of something that is completely lawful.

It must be said that that was indeed the purport of the manufacturer testimony relied on by the Government. To the

extent that manufacturers complained, their testimony was directed primarily to the principle, operation and functioning of all record clubs. Moreover, such testimony of Messrs. Wood, Hartstone and Asch was more in the nature of opinions and views than it was, or even purported to be, factual. The claim of manufacturer injury, actual or potential, is hardly supported by the testimony relied on by the Government. (See respondents' Exceptions, pages 340-48.)

In the first three sentences of CPF 405, the Government synthesizes the theory of its case against the licensing agreements. It proposes an ultimate finding that the licensing agreements "have a cyclical effect," with the "adverse effect on the dealer" affecting in turn the manufacturer who then must "contemplate Licensing which must inevitably further affect dealers."

That proposed finding is not supported by the record citations given or by the record as a whole. The expression of beliefs and opinions as to possibilities by one record manufacturer does not constitute reliable, probative or substantial evidence of the claim here made. Actually, the purport of Wood's testimony did not concern the licensing agreements but the operation of record clubs.

Another proposed finding (CPF 406) crucial to the Government's position in this case is to the effect that Columbia's use of outside labels "encourages" the other two members of the "Big Three" to "engage in the same practices." Both RCA Victor and Capitol Records have made some limited use in their clubs of records produced by others, but this has been on a different basis from that utilized by Columbia. The records were distributed under the RCA and Capitol labels, respectively.

Both RCA and Capitol have had discussions or negotiations concerning the possibility of distributing outside labels through their Clubs.

The record fails to support the claim of the Government that RCA Victor "is poised and ready to enter into Licensing Agreements with several important labels * * *." That is too broad an inference to be drawn from the testimony cited, although there was recognition by an RCA official that the distribution of outside labels by the RCA Victor Record Club would "help" that Club and make it "more successful."

With respect to Capitol, the Government concedes that the vice chairman of the Board of Capitol, who is also president of the Capitol Record Club, testified that the offering of outside labels is not "essential" for the Capitol Record Club. It probably is not

too much to say that the idea of distributing outside labels interests the Capitol Record Club. (Compare CPFs 406-07 and Exceptions; see also RPFs 191-196a.)

On the basis of the record, it is possible, perhaps even likely, that RCA or Capitol, or both, might engage in the record club distribution of outside labels, at such time as the legal status of such arrangements has been clarified. The effect on the competitive picture stemming from such a development is wholly speculative and conjectural.

CPFs 408-14 represent an effort by the Government to paint a picture of the "Big Three"—Columbia, RCA and Capitol—as "dominant forces in all aspects of the record industry," with Big Three "unanimity" and with the rest of the industry accepting "Big Three decisions as the standard." The only record support advanced for the proposed finding that those three companies are "dominant," is a Capitol Records annual report stating that the Capitol and Angel labels continue to rank in the industry's "Big Three" (RX 290).

It would unduly extend this initial decision to discuss fully the opposing contentions of the parties in this regard and to put all the evidence of record in perspective. Whether or not the industry is competitive or oligopolistic is a relevant matter, but the Government claims too much in CPFs 408-14.

Without rehashing the detailed evidence, it is fair to say that each of the so-called Big Three is a part of a larger corporate complex engaged in diversified activities. Each is a major factor in the record industry, but it cannot be found that they are "dominant" in all aspects of the record industry, separately or collectively.

The record catalogs of RCA, Columbia and Capitol are among the largest in the United States. That is not firmly or specifically supported by the record but probably is a fair estimate (see Bonbright 3536).

RCA Victor is a part of Radio Corporation of America. The parent corporation is an important factor in radio and television, data processing, consumer goods, defense and space electronics, as well as phonograph records and other products. Current assets in 1961 were \$618 million, and aggregate sales were more than \$1.5 billion (CX 308), more than triple those of CBS. RCA Victor is a major factor in classical, popular, original Broadway cast, and jazz albums, as well as in singles (CX 308). (See CPF 410 and Exceptions.)

Capitol is owned by Electrical and Music Industries, Ltd. (EMI) (Bonbright 3484), which boasts that one out of every four records sold in the world is on an EMI label (RX 39a). EMI is a large, diversified, internationally active corporation, whose aggregate sales in 1961 amounted to £82,440,000. This company is active in radio and television, scientific research, household appliances, industrial manufacture and computers, as well as phonograph records and other products. EMI and Capitol have been active in virtually all subject areas of the record industry, with success in all these fields, including LPs and singles. (See RXs 39-44; Bonbright 3847-89, 3517-18; CPF 411 and Exceptions.)

The examiner rejects CPF 413 as unsupported by the record. To the extent that the allegation that "Big Three unanimity is predictable" constitutes a charge of combination, conspiracy or conscious parallelism, it will be noted that Government counsel have stated (Brief, page 303, footnote 167) that they "did not undertake to prove" a conspiracy. Likewise, at page 325 of their Brief (footnote 179), they say of the so-called Big Three that "each, at this time, competes vigorously with the other two."

Other factual aspects of CPF 413 are treated elsewhere in the examiner's findings.

CX 81d does not support CPF 414 to the effect that Columbia "anticipated from almost the inception of the Licensing Agreements that the Big Three would align other labels." The memorandum cited recognizes that RCA or Capitol might "seek to acquire material from other minor labels" and notes that Columbia had "a monopoly neither on the Club concept nor on the idea of distributing minor label repertoire through a club plan" (CX 81c).

Reciprocity—The examiner rejects CPFs 415-19, alleging "reciprocity" to be an effect of the licensing agreements, as being outside the scope of the complaint. Moreover, the examiner declines to find or infer (CPF 417) that "the Licensing Agreements are, minimally, conducive to a kind of reciprocal arrangement whereby CBS puts Licensors' records in the Club, and CBS also gets a larger share of the Licensors' non-Club pressings."

Of the nine "licensors" listed on CX 668c, three (Verve, Caedmon and Mercury) did no pressing business at all with Columbia, while three (Cameo, Kapp and Vanguard) did more pressing business with Columbia before entering into their licensing agreements than they did subsequently.

The Government relies in large measure for its claim of reciprocity on a proposed contract provision never agreed upon

by the parties and relating to a record company (Caedmon) which has never pressed its non-Club records with Columbia. (Compare CPFs 415-19 with respondents' Exceptions.)

Clubs and Other Mail-Order Sellers

The record does not support the complaint's charges (Par. Ten (6)) that the Club's arrangements with outside labels were engaged in for the purpose or with the effect of empowering respondents to "[h]inder, lessen or suppress competition between respondents and other companies engaged in the subscription method of selling phonograph records," and that respondents have "regularly exercised" such "undue power."

There are many hundreds of record manufacturers not affiliated with any major record club, among them Decca, MGM, Verve, London, Dot, Reprise, Atlantic, Am-Par, Twentieth Century Fox, Cadence (Adler 4920; Bonbright 3490, 3517; Marek 1863-69). Most of the 57 companies listed on CX 246 had no club arrangements. Virtually all the record manufacturers listed by *Billboard* (RX 310) are available for club distribution.

At the time of trial, Columbia had catalog arrangements with six record companies; arrangements on six individual records with another company; and a nonexclusive contract on twelve records with another. Each licensor is a relatively small company with a small share of retail sales (RX 453 *in camera*). The contracts are short-term agreements. Four contracts permit the outside labels to offer particular records to competitors of the Club when the Club does not use them. Three of those contracts give the outside labels the power to take their entire catalogs to any competitive record club making a better offer even during the limited period of exclusivity—and Columbia does not even have the right to match that better offer.

Neither George Marek of RCA Victor nor Daniel Bonbright of Capitol made any claim that Columbia had hindered, lessened or suppressed competition. It was, of course, natural that the Columbia Record Club would enjoy a considerable competitive advantage over RCA and Capitol, since it had almost three years of experience in the record club business before RCA and Capitol moved into that method of distribution. By that time, the Columbia Record Club already had almost 700,000 members (CX 8).

The examiner sees no necessity to make findings on the comparative merits of the Columbia, RCA and Capitol Record Clubs, as proposed in RPFs 359-64. At the least, however, it can be said

that counsel for respondents display a competitive spirit *vis-a-vis* RCA and Capitol.

In any event, despite what Columbia views as "self-imposed handicaps," the RCA clubs showed enormous growth. The initial Toscanini offer attracted 324,000 new members in 1958 (RX 649). By the end of that year, RCA had 575,000 club members (RX 648a). Thus, the record establishes that RCA's club sales have grown rapidly and have reached substantial proportions (RXs 645a; 645b *in camera*)—just like its package sales with Reader's Digest. RCA showed a huge increase in royalties payable to publishers during the year 1962, almost \$1 million higher than in 1961 (CX 231, RX 363). This was confirmed by Herman Starr, who believed that the largest single source of royalty payments to him in 1962 came from RCA Victor (Starr 7721-22).

In light of those 1962 figures *in camera*, it is hardly surprising that Mr. Marek made no claim that his company was injured by any of the activities of the Columbia Record Club. He also conceded that there were many companies not under contract to the Club whose catalogs would be "appropriate" for club distribution (Marek 1863-70). The lengthy negotiations that RCA had had with various prospective outside labels indicated that the catalogs of such companies were not merely "appropriate," but also "available."

Having available the vast repertoire of the EMI-owned or -controlled foreign catalogs, Bonbright of Capitol felt it was not "essential" for Capitol to handle "other labels" (Bonbright 3492). He felt, however, that it would be desirable to offer "artists" whom the club members wanted whether or not they recorded for other "labels" (Bonbright 3491). Shortly before the date of Mr. Bonbright's appearance, Capitol had concluded a contract to sell the Warner Bros. LP of the "Gypsy" soundtrack through the Capitol Record Club on the Capitol label (Friedman 6103-04).

As with RCA, Capitol was at some competitive disadvantage initially in the club field since it made a belated entry. But limited data furnished by Capitol show that net sales of the Capitol and Angel Record Clubs are substantial. Capitol furnished only sales data in broad ranges, with the low and high figures about 30% apart, to show an "approximate area of sales" (Tr. 3499). Those figures reflect a substantial "range" of sales (CX 465 *in camera*)—a "range" that has not grown smaller.

Both RCA and Capitol have distributed some outside label merchandise without identifying it as such (see RPFs 191-95).

RCA has conducted discussions and conversations concerning record club distribution with Dot Records (Wood 4109, 4124, 4154, 4148; Marek 1866), MGM (Marek 1861), London (Marek 1866), Caedmon (Montell 6692) and Vanguard (Solomon 1945-46).

Capitol conducted conversations about possible club distribution with Atlantic, Cadence, World Pacific, MGM, Dot, Warner Bros., Carlton and Vanguard (Bonbright 3490, 3517; Conkling 6189; Carlton 1334; Maynard Solomon 1946).

Numerous other clubs were identified in the record. Their advertising and promotion indicate that they were offering to the public Columbia's records, licensors' records and many other labels. The Citadel Record Club, for example, represented that it could offer to the public "virtually any record or album, by any artist on any label" (RX 205c); its direct mail solicitations depicted current RCA, Capitol, Angel, 20th Century Fox and Mercury material (RXs 568b, 206, 205d). The Universal Record Club in advertisements offered "every record on every label" including particularly Columbia, Capitol, RCA, Verve, Angel, United Artists, Liberty, Mercury, London, Vanguard, Dot, Monitor and Audio Fidelity records (RX 195). Music of the Month Club offered in advertisements Columbia, Capitol, Mercury, MGM and London material (RX 196). The 99¢ Record Club offered, among others, Columbia and RCA Victor material (RX 194b).

Diners' Record Club—Against that background, Government counsel produced only one record club or mail-order seller who even "claimed" injury—Bernard Solomon and his Diners' Record Club. Solomon's testimony can hardly be credited. He was contradicted by contemporaneous documents from his own files and by virtually every witness who had crossed his path. The real reasons for his problems, apparent from the record, were far different from those he advanced from the witness stand.

Solomon had attempted to launch a nationwide mail-order business with a smaller cash investment than is normally made by someone who wishes to open a small record shop in a quiet suburb, and his operation reflected it. Thus, in 1958, Solomon and five friends invested \$5,000 to start a multi-label record club designed to purchase finished records from manufacturers, distributors and other suppliers (Solomon 3783, 3904-05; Bennett 6524-26; RX 50). His membership never ran much above 10,000 (RX 54d). His staff never exceeded 20 employees (Solomon 3907). Solomon was the operating head of the club and, at the same time, he was running four or five other business enterprises (Solomon

3781-83, 3793, 3806, 3906). Total sales were less than the mail-order sales of some record dealers (RXs 49, 51-53; Stolon 1260).

For the right to use the name "Diners'," Solomon had to agree, among other things, to limit his membership to the approximately 1 million credit-card holders of the Diners' Club (RX 46a; Solomon 3889, 3905)—a restriction he acknowledged meant that he would not "be in competition" with other record clubs (RXs 68-69).

In addition, Solomon was required to spend most of his advertising funds in the Diners' Club magazine sent to those credit-card holders (RXs 46a-c, 54a; Solomon 3889; Bennett 6524-25). Although at some later date he opened his membership to the general public, Solomon had to continue to spend most of his advertising funds in that magazine (Bennett 6524-25; Solomon 3889; RX 54a). There was testimony that the Diners' Club magazine was an ineffective medium for attracting new members (Wunderman 6577-79).

Since it was understandably difficult to operate a national mail-order business with only \$5,000, Solomon set out to raise additional capital. In the first year of operations, he induced a group of record manufacturers to contribute more than \$30,000 to an advertising fund in return for having their records selected as the club's records-of-the-month by a panel of "leading musical experts" (RXs 46, 65a; Solomon 3905).

The contributors soon began to complain to Solomon about "negligible sales," "little or no progress," failure to receive "record-of-the-month picks," improper advertising, failure to pay his bills or send IOU's, "fantastic misuse of the term defective" in excessive returns of merchandise, failure to return phone calls and to answer letters, sloppy management, and a whole string of unkept promises (RXs 74-105).

Although Solomon's agreements with his outside labels gave him the right to demand additional advertising contributions in future years (RX 46c), he was understandably reluctant to do so (Solomon 3905).

In February 1960, after about only six months of actual operations, four of the six founders of the Diners' Record Club disposed of their investment in the venture by selling their holdings to Solomon (Bennett 6525; RX 50). One of them, Alvin Bennett of Liberty, testified that he had originally conceived the idea for the club and brought Solomon in to run it; but that Bennett and the three other selling stockholders soon concluded that the club could

not succeed because it was under-capitalized and lacked sufficient funds for advertising (Bennett 6523-26).

No claim was made that Bennett and the other investors pulled out because of any repertoire problems or because of the Columbia Record Club's contracts with outside labels. Indeed, at the time of the departure of those investors in February 1960 (RX 50b), Columbia had agreements with only two outside labels, Caedmon and Verve. Solomon had refused to deal with Caedmon and made no claim at the trial that he ever sought to deal with Verve. Bennett's disposition of his interest in the Diners' Record Club was more than 1 year and 8 months before Liberty's contract with Columbia (CX 45).

Solomon's hearsay testimony (Tr. 3937) that Bennett and another Liberty executive sold their stock holdings in the Diners' Record Club because Liberty was about to go public and the underwriters required them "to divest themselves of all outside interests in the record business," was flatly denied by Bennett (Tr. 6531-34). Moreover, Solomon did not attempt to find an excuse for the disposition of the stock in his record club by the other two resigning investors, who were officials of Challenge Records, a company which Solomon represented as accountant and business manager (CX 506; Tr. 3793, 3905, 6523-25).

Early in 1961, Solomon set out to find capital for advertising. He approached Decca and stated that, due to "limited capital," his club had always been short of advertising funds and that a mere investment of \$85,000 for that purpose would generate sales of \$5 million and net profits up to \$500,000 (RXs 54-55). That modest investment, according to Solomon, would have multiplied his club's sales 10 to 15 times (RXs 49a, 52a, 55b). Decca did not make the investment (Solomon 3931).

Bennett, who reviewed the business problems of the Diners' Record Club with Solomon, testified that Solomon never once attributed any of his difficulties to the Columbia Record Club (Tr. 6526-27). And Government counsel did not produce any witnesses to such complaints or even corroborating documentation from Solomon's files.

Solomon's attempt to put part of the blame for his difficulties on Columbia must be weighed in the light of other circumstances shown by this record.

In the spring of 1962, Solomon had made an indirect attempt to interest the Columbia Record Club in distributing the catalog of Everest, his own record company (Keating 5161-63, 5421-29;

CXs 786-87; see also Solomon 3781-82, 3916). The Club replied that it was not interested.

Shortly after the filing of the complaint in this proceeding, the corporation operating the Diners' Record Club brought an anti-trust treble-damage action against CBS and certain of its licensees (Solomon 3843), which respondents say is almost a word-for-word copy of the Commission's complaint [*The Record Club Inc. v. Columbia Broadcasting System, Inc.* (S.D. Cal., No. 62-1238)]; also see Prehearing Conference, September 12, 1962, Tr. 22-23]. Solomon furnished a copy of his pretrial deposition in that case to complaint counsel many months before the trial of this action (Solomon 3808-10).

Even if Solomon's credibility had not already been called into question, his complaints about lack of repertoire could not be taken seriously in view of the evidence to the contrary. He had complete access to the catalog of his own record company (Solomon 3781-82, 3916-17), plus many outside labels. He made heavy purchases directly from Decca, one of the oldest and largest companies in the industry with an enormous catalog (Solomon 3859-61; RX 54c). He also had formal agreements or other direct arrangements with more than 20 other outside labels (Solomon 3811-16, 3857-68), which he described as "top independent record companies" (RXs 68-69). His advertisements and literature stated that he offered the "widest selection of albums from more record companies than all the other record clubs combined" (RX 65a); "thousands of records of every kind by all the finest record companies" (RX 586); the "great performers of our time on the top labels of all time" (RX 63a-b); and the "newest recording * * * top selling labels * * * favorite recording artists" (RXs 56-57, 66-67). Indeed, Solomon told Decca that he felt "very strongly about the future of the Club"; and that "average annual sales per member is over twice as high as any other record club" (RXs 54d, 55a-b).

To the extent, however, that apparently he could not buy direct from Columbia, RCA or Capitol, he suffered some hardship. But that is not a charge in this proceeding.

Any claim that Columbia's agreements with a half-dozen or so outside labels could have created a product shortage for Solomon is contradicted by his own contemporaneous statements. Such a claim is also absurd in view of the hundreds of record companies, including many important firms that were not affiliated with any record club, and, most significantly, in light of Solomon's own experience with Columbia's outside labels:

While Solomon could not recall refusing to distribute Caedmon records (Tr. 3869), Marianne Mantell, president of that company, could (Tr. 6911).

Solomon had a master licensing agreement with Vanguard, but never pressed any records under it (Solomon 3867).

He did not claim at the trial that he wanted or was unable to obtain records of Cameo-Parkway.

He did not claim at the trial that he sought to deal with Verve before, during or after the cancellation of its agreement with Columbia.

Kapp had refused to deal with Solomon early in 1959 (Solomon 3845-47; Kapp 5774-75)—more than a year-and-a-half before its contract with Columbia.

Warner Bros. refused to enter into any agreement with Solomon early in 1959 (Solomon 3855), long before its first contract with Columbia, but was willing to sell records to his club on an individual basis (Friedman 6107; Conkling 6199; Solomon 3792). But, over the next few years, he ordered only a few records, some of which he improperly returned, and became a credit problem (Friedman 6107-08; Solomon 3945-47).

Solomon's hearsay testimony (Tr. 3796) that Warner Bros. stopped selling to him early in 1961 because of "an exclusive arrangement" with Columbia was flatly denied by Joel Friedman, merchandising director of that company, and James Conkling, former president of Warners Records and now head of the Mormon Church's short-wave radio network (Friedman 6107-08; Conkling 6199-200). Solomon's claim, moreover, is dubious on its face since, at the date of the alleged cutoff, Warner had granted Columbia rights with respect to only three records.

While Solomon claimed that he did not even bother to offer UA a contract in 1959 because they "weren't a factor in the record business at that time" (Tr. 3848), Mael of UA recalled that a contract had been offered, and rejected (Tr. 7458-59). In any event, UA was willing to sell individual records to Solomon. But, over the next two years, he ordered small quantities of only two records (Mael 7459-60; Solomon 3848). And UA finally had to sue the Diners' Record Club in order to collect its bill (Mael 7460)—a lawsuit Solomon had difficulty recalling on cross-examination (Tr. 3850-51).

Although Government counsel did not question Solomon on direct examination about his ability to obtain Mercury and Liberty merchandise, it was shown on cross-examination that, after Liberty's contract with Columbia, the Diners' Record Club had in

fact offered more Liberty merchandise than ever before (RX 48; Solomon 3829-33).

When confronted with that fact, Solomon explained that some Liberty records "might have filtered" into his record club because he obtained a supply of such records in his role as a fulfillment agent for "various" Liberty mail-order and premium programs (Solomon 3829-33). But the fact, later developed through Bohanan of Liberty, was that Solomon had acted as a fulfillment agent for only one Liberty program involving a single Liberty LP (Bohanan 6385)—an LP not used in the Diners' Record Club (RX 48). It finally was disclosed that Solomon had an interest in a distributorship that purchased records from Liberty (Solomon 3841-42); that the entire Liberty catalog was available to that distributorship (Bohanan 6383; also see Bennett 6529); and that the distributorship did not pay higher prices as Solomon belatedly claimed (Bohanan 6383-84).

Cross-examination also disclosed that, after Mercury's agreement with Columbia, Solomon offered more Mercury records than ever before (RX 47; Solomon 3819). Solomon reluctantly conceded that in November 1961—about 1½ years after Mercury's licensing arrangement with Columbia—he purchased at one clip more than 100,000 Mercury LPs covering 27 different titles at approximately 50¢ per record—a rather "favorable" price and quite a "substantial" quantity for a club with only about 10,000 members (Solomon 3816-19, 3942-43).

Solomon then "explained" that only 4 of the 27 titles were current (including Mercury's "1812 Overture" and records by Brook Benton, the Piatters and the late Dinah Washington) and that the other 23 were cutouts (Solomon 3816-27, 3952). But he did not advertise the 23 records as cutouts.

Following Solomon's testimony, a Mercury employee checked the company's inventory control cards as to when records were cutout. Based on her testimony, the fact is that 23 of the records were current and only 4 were cutouts at the date of Solomon's purchase (Broun 10,491-93; RX 47). Solomon (a CPA) thus had simply reversed the numbers (Solomon 3871). Indeed, the Mercury order form in use almost a year later still listed 20 of those 27 records as current (CX 398; also see Broun 10,498). It is difficult to believe Solomon bought 100,000 LPs without knowing what he was buying. (See RPF 387 and footnotes.)

(For more detail concerning the Diners' Record Club, compare CPFs 63-64, RPFs 367-87; respondents Exceptions, pages 41-49; Government counsel's Reply, pages 71-77.)

In a field where there are many clubs and other direct mail-order sellers of phonograph records, the fact that the Government must rely solely on the Diners' Record Club as illustrative of a club that allegedly suffered competitive injury underlines the weakness of its proof in that regard.

Comparison of Introductory Offers—Any study of the state of competition among record clubs must take pricing into account. Here the position of the Government shows some ambivalence.

Contrary to the position they take elsewhere in their proposed findings (CPF 413), Government counsel, in their zeal to prove a separate club market, assert (CPF 440) that Columbia "responds in pricing and in other ways to other record clubs—which are the *Club's major competitors*," and that in their advertisements, respondents "compare *their* offers to offers of *other* clubs." That proposed finding, taken together with the evidence, is hardly consistent with the Government's contention of an oligopolistic, non-competitive industry.

A comparison of the various club offers is illuminating.

The Government's proposed finding (CPF 440) that the RCA Victor Record Club "sells its records on the basis of 5 for \$1.87 with the commitment to purchase an additional 5 at \$3.98 and \$4.98" is an oversimplification that does violence to the record. That particular offer (RX 154) was in effect during part of 1961 and the first few months of 1962. It resulted in a total price of \$21.77 for 10 \$3.98 LPs over the first year—or an average price of about \$2.18 per LP (exclusive of mailing and handling charges, the amount of which is not reflected in the record).

The record indicates that throughout most of 1962, the RCA Record Club used a variety of different offers, generally resulting in lower average prices. It appears that the most common offer was one record for 10¢ to keep, plus four records on a trial basis that could be purchased for \$1 upon a commitment to buy five additional records at list (RXs 15, 157, 162, 176, 178, 592). That offer resulted in a total price of \$21 for 10 \$3.98 LPs over the first year of membership—or an average price of \$2.10 per LP, exclusive of mailing and handling charges. (See also RXs 613 and 631 for closely similar variations; cf. RX 630.)

Under another 1962 offer, the RCA Club advertised one record free with no obligation to purchase any additional records at all, and an additional four free records if the consumer accepted a trial membership and purchased four additional records (RXs 606, 612). If the full offer were accepted, the result was a total purchase

price of \$15.92 for nine LPs over the first year, or an average price of \$1.77, again excluding mailing and handling charges.

Special offers extended by the RCA Club in 1962 to members of the Reader's Digest Family (RXs 189, 632) resulted in average prices of \$2 and \$1.78, respectively, for \$3.98 list LPs.

Thus, the RCA Club had prices lower than indicated by CPF 440—and lower than average prices of the Columbia Club.

CPF 440 takes a curious twist in its proposed finding that Capitol Record Club prices are "identical" with those of the RCA Club "except for the introductory offer."

It is the introductory offer that establishes the average price per record for the first year of membership. And the Government has stressed the importance of the introductory offer as a competitive weapon (CPF's 325-27). Thus, Government counsel include the introductory offer in their computation of the average prices of the Columbia Record Club, and no reason appears for ignoring the same factor in referring to the prices of the Capitol Record Club.

In considering the competitive picture, and also in connection with allegations made elsewhere by the Government, it is worth noting that the Capitol Record Club advertisement (RX 179) cited in CPF 440 contains an introductory offer markedly different from that of either the RCA or the Columbia Club.

The Capitol ad offers up to seven records for 97¢, with a commitment to purchase five additional records. This results in a total purchase price of \$20.87 for 12 records over the first year, or an average price of \$1.74 per record, exclusive of mailing and handling charges. This is lower than Columbia's average price.

Other Mail-Order Sellers—The discussion of club competition would be incomplete without some reference to the growth of numerous other companies selling a great variety of recorded material through the mails on a nonclub basis, including various outside labels and outside artists. The evidence indicates the great success enjoyed by many new entrants into that type of merchandising.

Records are sold to consumers through the mail, not only by record clubs, but by a whole host of record dealers, department stores, mail-order houses, book clubs, magazines, record companies and others. As shown in detail by respondents (RPFs 246-79), all those mail-order sellers compete with record clubs and other channels of distribution.

Like clubs, they generally stress the convenience of armchair buying, assistance in record collecting and convenient credit installment arrangements. Like Clubs, they seek to cater to a broad

consuming public by media advertising and direct-mail solicitation. They offer consumers the same records that are available over-the-counter and through clubs or, sometimes, specially prepared records similar to those distributed at retail and by clubs. Those mail-order vendors sometimes offer consumers individual records. In other cases they offer "packages" containing a collection of records programmed with a repertoire in a particular musical category.

The evidence establishes that many record dealers, department stores and other retail outlets sell records both over-the-counter and through the mail (*e.g.*, Adler 4919; Stolon 1260; Maggid 859-60; Leonard 5960-61; Prince 5502-07; Brigati 890-92; Bialek 1377; Collins 3003-04; RXs 6, 9-14, 144, 264, 268, 285, 287, 546).

Government witness Sam Goody initiated large-scale mail-order selling of records at discount prices in about 1950. He was soon joined by certain other retailers, including The Record Hunter, which, along with Goody, was circulating low-price ads in Chicago as early as 1953 (Gallagher 8856; Stolon 1290-91; Inden 5544; also see Ackerman 4222, 4240). In August 1955, before the Columbia Record Club began operations, *Billboard* noted "the competition of large mail-order discount houses at local levels thruout the country" (RX 113a).

Goody, with mail-order operations all over the world, runs daily and weekly advertisements soliciting mail-order sales of individual records and packages. Goody derives between \$500,000 and \$750,000, or 10% to 15% of his sales, from mail-order sales (Stolon 1255-61; RXs 6, 9-14, 144, 264, 285, 287, 546). Others with fairly substantial mail-order business include The Record Hunter (Maggid 859-60; also see RX 268); the Harvard Co-op, which circularizes as many as 150,000 alumni located all over the nation (Leonard 5960-61, 5974-75); the Yale Co-op, distributing holiday catalogs containing as many as 200 selections at \$1.98 per LP (RX 266); and Doubleday, selling at list price and featuring mail-order record buying in 25,000 monthly mailings and 100,000 special mailings (Prince 5502-07).

Unlike record clubs, dealers generally do not obligate their mail-order customers to buy a definite quantity of records (*e.g.*, Brigati 892). But, like clubs, they rely heavily on media advertising and direct-mail solicitations; they use this method of promotion to create consumer interest in records (Leonard 5973-74) and to satisfy the preferences of some consumers for the convenience of mail-order buying (Collins 3004; Bialek 1377; Brigati 890); they generally charge for mailing and handling (*e.g.*, RXs 266-67, 264, 285; Brigati 891); often sell on credit (*e.g.*, RXs 266-67); and

sometimes even have organized fulfillment operations (Stolon 1260-61).

In addition, mail-order sales of records are made by large general catalog companies like Montgomery Ward, Spiegel, Aldens and Sears, Roebuck (Adler 4919; Hitesman 10157; Pierce 5747-49; RX 54c). Specialty mail-order houses, such as Spencer Gifts (with a mailing list of over 1,500,000), and others also sell through the mails the same records that are available at retail and through record clubs (*e.g.*, RXs 54b,c, 66, 67; Solomon 3830, 3902, 3915-16).

Hi Fi, a magazine in which the Columbia and RCA record clubs advertise (CX 47a; RX 386b), reviews new record releases and selects top records of the month, which it then sells at list price to readers "who have told us of difficulties experienced in securing new releases" (RX 693, pages 55-98).

Other companies advertise mail-order sales of individual records, either at list price or discount, sometimes with bonus records for every two or three records purchased (*e.g.*, RXs 256-57).

Records are also sold through the mail as premiums in conjunction with the sales of other consumer goods (*e.g.*, RXs 259-61).

Some record manufacturers sell by direct mail. Witness Pierce of Starday, for example, has been successful in selling both 45 r.p.m. and 33 $\frac{1}{3}$ r.p.m. records, individually and in packages, by radio mail-order since 1950 (Pierce 5747-50).

The catalogs of record companies generally contain, in addition to individual records, "packages" containing a collection of anywhere from two to a half-dozen or more records featuring repertoire in a particular musical category (Kavan 10,623-28; *e.g.*, CX 307a, pages 48-49, 53, supplement page 8; CX 247, pages 9, 12, 13, 30, 34-36, 43; RX 297, pages 47, 49, 140, 142-43). Such packages are available at retail and often through record clubs (Kavan 10, 623-28; *e.g.*, RXs 121d, 150, 151; CXs 97, 99, 106, 115). Similar—and, in some cases, identical—packages are offered by direct-mail sellers on a non-club basis. RCA and Reader's Digest constitute the largest factor in that type of mail-order selling.

RCA presses packages of records for Reader's Digest and engages in joint marketing of those packages through the mail. Although Reader's Digest-RCA began selling such packages less than four years ago (Hitesman 10,111), they have achieved a substantial sales volume (RX 700 *in camera*) and are now the largest direct package mail-order sellers of records in the industry (Hitesman 10,145; also see RX 450). By 1962, the Reader's Digest-RCA non-club mail-order package sales accounted for almost 20%

of all records sold via mail, including the volume generated by both club and non-club sellers (RX 450).

In achieving this success in such a brief period of time, Reader's Digest-RCA had the benefit not only of the resources of RCA, but of subscriber lists of the Reader's Digest magazine, which has a circulation of almost 14 million, and a mailing list of the Reader's Digest Condensed Book Club, the largest book club in the world with about 3 million members (Adler 5008).

Like record clubs, Reader's Digest-RCA promotes direct package sales by media advertising and direct-mail solicitation (*e.g.*, RXs 386, 514-26, 535, 554-58; Hitesman 10,128-36). The package operation and the RCA Victor Record Club, which the Reader's Digest also operates, both advertise in some of the same consumer media and apparently take turns in the gate-fold position in the Reader's Digest magazine, from which the Columbia Club complains it was evicted (Hitesman 10,130-36; RX 535). They also exchange mailing lists (RXs 386, 647; Hitesman 10,079-80, 10,128-29, 10,156; also see RX 518). Thus, Reader's Digest-RCA solicits members and ex-members of the RCA Victor Record Club for package sales; and the RCA Victor Record Club, in turn, solicits present and former purchasers of Reader's Digest-RCA packages for club membership.

The two organizations rent almost identical mailing lists from outside sources for their mail-order selling activities (RXs 386, 647; Hitesman 10,079). The Columbia Record Club rents some of the same mailing lists (CX 48) and advertises in the magazines whose subscribers are included in such lists (CX 47).

From the inception of its package operation in 1959 until the end of 1962, Reader's Digest-RCA had "major mailings" of seven different packages (RX 386a). In addition, the record shows that during, and since that time, Reader's Digest-RCA has marketed at least two other direct-mail packages (Kavan 10,610-11; RXs 514, 516-20, 522-24, 535, 554-58).

Each of those nine packages—with such titles as "Music of the World's Great Composers," "Popular Music That Will Live Forever," "The Nine Symphonies of Beethoven," and "Music of Faith and Inspiration"—contains a collection of material in a particular musical category (RXs 514, 516-20, 522-24, 535, 554-58).

Three of the packages contain 3 LPs, and the other six packages contain anywhere from 7 to 12 LPs. The prices for the packages (exclusive of mailing and handling) run from about \$7.00 for the smallest packages up to about \$19.00 for the largest packages. On a per LP basis, the prices (exclusive of mailing and handling

charges, the amount of which is not shown by the record) range from \$1.33 up to \$2.40 with five of the nine packages selling for \$2 or less per record (RXs 514, 516-20, 522-24, 535, 554-58).

Most of the advertisements and mailing indicate that a consumer "might expect" to pay higher prices for each record, generally with references to prices of \$3.98 and \$4.98. Those references to higher prices are intended to refer to the suggested retail list prices of RCA records available over-the-counter and through the RCA Victor Record Club (RXs 514, 516-20, 522-24, 535, 554-58; Hitesman 10,151-55). The public is advised, for example, that the "huge" audience for good music and "the great resources of RCA" allowed "substantial economies" so that the records can be offered "at *far* below normal cost" (RX 514).

Reader's Digest-RCA sells the packages under a system of dual pricing. Reader's Digest generally charges those customers whom it refers to as members of the "Reader's Digest Family" about \$1 less per package than outsiders (RX 386b-c). The "Family" includes, not only about 14 million subscribers to the Reader's Digest Magazine and about 3 million members of the Reader's Digest Condensed Book Club, and cancelled members thereof, but also active and cancelled members of the RCA Victor Record Club (RX 386; Hitesman 10,079; Adler 5008).

Like a record club, Reader's Digest-RCA sells most package records on a credit basis—with monthly installments averaging about \$3.50 to \$5.00 (Hitesman 10,141), the range of the periodic payments made by a record club member when he orders through a club. Reader's Digest-RCA, like record clubs, sometimes offers "free" bonus records (Hitesman 10,142; Kavan 10,617; *e.g.*, RXs 557-58, 517, 535).

The records in the packages are equal in quality to regular \$3.98 and \$4.98 RCA records (Hitesman 10,146; RXs 516, 518, 523).

While the records are all pressed by RCA (RX 698), the repertoire is planned and the packages are created jointly by RCA and the Reader's Digest—a fact stressed in all the advertisements and direct-mail solicitations (RXs 514, 516-20, 522-24, 535, 554-58).

The packages feature prominent recording artists (see RPF 265). Many of the artists on the packages have records in the RCA catalog available at retail and/or through the RCA Victor Record Club. Other artists featured on the packages record for London, Capitol, Angel and other outside labels (see RPF 266).

The musical repertoire contained in the packages is virtually identical to works available on RCA records distributed at retail

and through the RCA Victor Record Club (Adler 4916-17, 5085-86; Kavan 10,610-17; RXs 518, 519).

Stanley Kavan, Director of Development for Columbia who has been testing mail-order packages (Kavan 10,606-10), compared the records appearing in seven of the Reader's Digest packages with records offered by the RCA Victor Record Club in its monthly magazines for January, February and March 1963. Of the 500 titles contained in those packages, over 200 appeared in those magazines during that period of only three months.

The similarity between the performances which appear on records in the Reader's Digest-RCA packages and on records distributed by the RCA Record Club was dramatically illustrated by a courtroom demonstration.

Thomas Shepard, a producer in the Masterworks Department of Columbia Records, examined a discography of the selections appearing in the Reader's Digest-RCA packages and in RCA Club albums and chose eight works which he believed represented examples of the most popular repertoire, including, for example, the "1812 Overture," "The Nutcracker Suite," "The Third Man Theme" and "Capriccio Italien." He then taped excerpts of the same passages in those compositions from records in the packages and from records distributed by the RCA Club and prepared a demonstration record (RX 697), about 20 minutes in length, that juxtaposed the two selections of each composition (Shepard 10,653-58). The record was played in the hearing room, and Mr. Shepard appeared as a witness (Tr. 10,643-75). The performances of the excerpts taken from the two different sources sounded strikingly similar.

Mr. Shepard also spliced together, and included in the demonstration record (RX 697), excerpts taken from a Rene Leibowitz performance of Beethoven's Fifth Symphony, which had been offered in a Reader's Digest-RCA package (RX 519), and excerpts taken from that work performed by Toscanini, contained in a record offered through the RCA Victor Record Club (RX 150). The small excerpts taken from the two different records were spliced one after the other to make a continuous, harmonious performance of a passage of that Symphony.

In addition to the nine packages specially created for the Reader's Digest-RCA program, Reader's Digest Music Inc. offered a package entitled "RCA-Victor Lifetime Treasury of the World's Best Loved Operas," which contains 10 complete recordings of "the most popular operas ever written" on 28 separate LPs at "the amazing bargain price of \$69.95"—or about \$2.50

per record (plus mailing and handling) (RX 521). Those records, featuring top operatic stars, are all RCA Victor Red Seal records, currently in the RCA catalog at suggested list price of \$4.98 per record as part of multiple record sets (CX 307, pages 50-52).

Walter Hitesman, Reader's Digest vice president, testified that Reader's Digest Music Inc. offered this package to the public in its role as sales agent for the RCA Victor Record Clubs (Tr. 10,089-90). But, as the offer shows on its face (RX 521), it was open to the general public and not limited to club members.

Against that background, although he testified to differences between club sales and mail-order sales of record packages, Walter Hitesman, vice president and director of the Book and Record Division of Reader's Digest, conceded that the record packages compete with every other form of distribution of records; that they are "competing with everybody else" for the amount of money that consumers are willing to spend for phonograph records (Tr. 10,140). Norman Adler had previously testified that the packages compete with the Columbia Record Club (Tr. 4915-20). Music publishers regard Reader's Digest (and *Life* which also sells RCA packages) in the same light as record clubs.

Because they sell records through the mail with extensive advertising, publishers charge them the same royalty rate as are charged on sales via clubs (Starr 1692-93; Berman 8377-88).

At one point, Government counsel contended that RCA was merely a "custom presser" for Reader's Digest and that there was "no proprietary connection" between the two companies (Tr. 8057-58). But the record shows more than a mere custom-presser relationship. It shows that RCA and Reader's Digest operate the package business jointly—and apparently do so without even a formal agreement (Hitesman 10,097; see RPF 272).

In 1962, RCA further expanded its activities in the mail-order package field by producing a 5-LP set for *Life Magazine* entitled "The Music of Life," containing 60 best-selling popular performances pressed by RCA from original masters that had originally appeared in singles and LPs released at retail (RXs 509a, b, 510a-d; Kavan 10,623-24). Many of the individual selections still appear in the active RCA catalog (Kavan 10,623-24).

The package features prominent artists such as Harry Belafonte, Benny Goodman, Vaughn Monroe, Peter Nero, Bing Crosby and Dinah Shore. The set sells for \$14.95—or less than \$3 per LP (plus mailing and handling)—"just about half what they would cost * * * through the usual channels" (RX 510c). The package was first marketed by regular mailings in November

1962 and achieved a very high sales volume by the end of the year (RX 508 *in camera*). *Life* has also sold records in conjunction with books and anthologies (RX 506; RX 507 *in camera*) and realized substantial record sales in such a program in 1963 (Schnetzler 10,035-36).

There also has been the entry—or, more properly the re-entry—of still another firm into the record-package mail-order business in recent years. BOMC, which had marketed mail-order record sets from 1955 to 1957, “retired” from this activity for almost four years when it became the operator of RCA’s record clubs (RPFs 59-62; RX 496; RX 502 *in camera*).

Once it stopped operating the RCA record clubs, BOMC began selling packages again in the latter part of 1961. It offered ten packages the following year at prices ranging from about \$6 to \$12 and achieved sizeable sales in that one-year period (RX 496; RX 502 *in camera*). The packages were primarily classical, including Handel’s “Messiah” and a waltz set by the Vienna State Opera Orchestra (RXs 498, 501). BOMC also offered a package of folk songs by well-known artists like Pete Seeger, Joan Baez, The Weavers and Odetta that was widely advertised and highly successful (Adler 5006; Kavan 10,624-25; RXs 591, 499, 501). BOMC has offered records on various outside labels, including Kapp, Caedmon, Vanguard, Vox, Westminster, Unicorn and Weston Woods (Stipulation, Tr. 9989-90), most or all of which are also available at retail (Adler 4919; Kavan 10,624-25; H. Brown 10,006-07; RXs 497-501, 591). When BOMC operated record clubs on its own account, prior to its association with RCA, it offered some of its packages to members of its record club as well as to the general public (H. Brown 10,006-07).

The Capitol Record Club has also offered a series of packages, generally 10-record sets selling for \$17.98—or less than \$1.80 per LP (plus shipping charges) (RXs 695-96; Kavan 10,618-23). Capitol offered those packages, not only to members and former members of its record club, but also to the general public, sometimes as enrollment offers to its club or with solicitations to join the club (Kavan 10,618-23; RXs 695-96). The Capitol packages are basically similar to those sold by Reader’s Digest-RCA (RXs 695-96; Kavan 10,618-23).

Others marketing mail-order packages include Golden Records (Miller 7136; Kavan 10,626; RX 513); Pickwick (RX 538; Kavan 10,626); Disneyland (Kavan 10,626); Artia-Parliament (RX 258); The Record Library (RX 540); Concert Hall Society (RX

541) ; Lexington Records (RX 545) ; and Sheraton Records (RXs 262-63). (See RPFs 276-78.)

Columbia has developed two direct-mail packages, entitled "The World's Most Beautiful Music" and "The World's Greatest Popular Music." The construction of the packages is similar to offerings by the Columbia Record Club; and comparable merchandising techniques were utilized, with installment payment arrangements and an emphasis on the factors of guidance and the convenience of armchair buying. Market tests showed that members of the Columbia Record Club were three to four times more interested in these packages than nonmembers. Columbia, thus far, has sold those packages only as part of limited market tests (Adler 4917-18; Kavan 10,608-10).

Benefits to Industry and Public

To the extent that record club operations would be hampered, the evidence indicates that the restrictions sought by the Government would adversely affect the record industry as a whole, particularly the smaller record manufacturers, songwriters, music publishers, musicians and artists. They also would adversely affect record buyers, especially record club members. All those groups have benefited as a result of club operations.

Since the advent of record clubs, new competition has been injected into the record industry and other important benefits to the entire industry have materialized. There is no convincing evidence that club operations, including the practices challenged in the complaint, have hampered the growth of any segment of the industry. Since the organization of the Columbia Record Club in 1955, every segment of the record industry has grown. As shown in more detail elsewhere in these findings,

1. There has been a marked increase in the sale of records through all channels of distribution.
2. The percentage of the population purchasing records has increased.
3. There has been an increase in the number of independent record manufacturers, and their share of the market has steadily risen.
4. There has been an increase in the variety of product offered to the public.
5. New artists, new publishers, new songwriters and new fads in music have appeared.
6. There has been a tenfold increase in the number of outlets selling records at retail to the public.

7. There have emerged many other competitive record clubs and mail-order sellers.

8. There has been an increase in the royalties payable to songwriters, music publishers, musicians, artists and to the outside labels distributed by the Club.

9. There has been an increase in consumer advertising, virtually nonexistent prior to 1955; this is important in making consumers aware of the thousands of new records becoming available each year.

The statistical data reflecting growth patterns of the record industry support the opinion testimony of Goddard Lieberman that the creation of the Club, followed by the organization of the other competitive clubs, has broadened the entire market for records and has interested more people in records and phonographs as a source of entertainment in the home (Lieberman 45-47).

Archie Bleyer, president of Cadence, testified that club advertising had a helpful effect on the entire record industry (Bleyer 6973). Herman Starr, who supervises one of the two largest representatives of music publishers, concluded, on the basis of the statistical evidence in his files, that the Club has been the single most important factor in increasing sales of records to the public in all forms; and that its advertising has revitalized consumer interest in records (Starr 7707-16). Record manufacturer Don Pierce, president of Starday, who has achieved great personal success in merchandising his records by mail, testified that the clubs have broadened the base of the record market, contributed heavily to the growth of the industry and enabled more people to participate in the record business (Pierce 5748-51).

To the same effect was the testimony of Samuel R. Rosenbaum, the trustee for the Musician's Trust Fund, who has seen payments to the trust fund for the benefit of 280,000 members of the American Federation of Musicians rise from approximately \$4,836,000 in 1958 to approximately \$6,000,000 in 1962 (Rosenbaum 7530-31, 7546-47).

The conclusion that record clubs have stimulated general consumer interest in records was also supported by other manufacturer and dealer witnesses (see, *e.g.*, Frankel 2091-92; Blincoe 5688-93; Karol 5587-93), and by the testimony of the outside labels, publishers, songwriters and artists.

Industry growth patterns were shown statistically by some 10 years of market research in the record industry conducted by Market Research Corporation of America (MRCA). MRCA de-

terminated that the percentage of population buying records in the early 1950's was relatively small, somewhere in the neighborhood of 10% to 15%. The percentage increased continuously thereafter. By the early 1960's, approximately 35-40% of the population was purchasing records (Kirkpatrick 8010-12).

The benefits of Club distribution realized by the outside labels have been discussed previously. It also has been shown that whatever the impact of Club competition on some individual dealers, the retail record trade, as a whole, has benefited from widened consumer interest in records resulting, at least in part, from Club and related advertising. The same is true with respect to manufacturers and other distributors.

Benefits to Artists—Thousands of recording artists would be adversely affected by curtailment of the Club's activities, as sought in the complaint.

Government counsel called no artists as witnesses. Respondents called Columbia artists Mitch Miller, Andre Previn, Percy Faith, Dave Brubeck, Jimmy Dean and a representative of Andre Kostelanetz, as well as U.A.'s Louis Teicher and the business managers for Liberty artists Martin Denny, Bobby Vee and Julie London. Their testimony stressed the importance of Club distribution to artists.

In addition, representatives of Mercury, Kapp, Liberty, Verve and Warner Bros. indicated that their artists strongly desired club promotion and distribution, and a U.A. representative explained that club advertising of artists "enhances the position of those artists to the general record buyer" (Green 10,230; Talmadge 7824; Kapp 1603-04; Linick 3668; Conkling 6187-88; and CX 88).

Each of those artists had a vital interest in the sales of records at retail because they received the bulk of their royalty income from that source (Miller 7148; Previn 6030; Faith 6474; Brubeck 7426; Dean 7583; Teicher 7021; Mills 6439). Each of them, or their representatives, testified that Club distribution had provided plus sales without adversely affecting retail sales (Miller 7150; Previn 6031-32; Faith 6474-75; Brubeck 7428; Dean 7581-82; Stone 8556; Teicher 7026; Mills 6440-44; Ginter 6066). Moreover, they demonstrated, specifically, how Club advertising and promotion had in fact stimulated the retail sale of their catalogs and of the very records offered by the Club (see RPFs 224-31).

Benefits to Publishers and Songwriters—Another segment of the record industry that would be adversely affected by the restrictions sought by the Government, is made up of the songwriters

and publishers whose music appears on records. There are many thousands of songwriters and publishers active in the United States (Berman 8388-89).

Government witness Berman of the Harry Fox office represented some 800 publishers, approximately 70% of the total active publishers (Berman 2126). Government witness Starr of the Music Publishers Holding Corp. represented many important publishers (Starr 1684), substantially the balance of the publishers.

Publishers grant copyright licenses to record companies for mechanical reproduction of musical works subject to copyright and derive royalties, generally calculated upon the basis of suggested retail prices, from the sale of records at retail, through clubs and other channels of distribution. The copyright royalties paid to the publishers by Columbia on Club sales include payment of all royalties due on the distribution of outside labels through the Club (Berman 8377-79).

Publishers and songwriters have obtained substantial benefits from the operations of the record clubs. The operations of the Club, including its sales of outside labels, have resulted in substantially increased total royalty payments to songwriters and to publishers. Thus, payments by Columbia Records to the Harry Fox agency and Herman Starr, including club royalties, have risen substantially since 1958 (CXs 229a, 231 and RX 363).

The total increase in royalty payments to publishers and songwriters was not accompanied by any diminution in royalties attributable to retail sales. On the contrary, Columbia's royalty payments to the publishers represented by Fox and Starr on non-club sales virtually tripled between 1955 and 1962 (Berman 8377; Lorenz 8679; Starr 7714-15). That is uncontradicted statistical evidence of the large growth in retail sales that accompanied the growth in Club sales.

Since publishers and songwriters derive their principal record royalties from the sale of phonograph records at retail (Starr 7712), they keep detailed statistical records of the sources of all royalty payments. Starr, who testified that the Club had been a great stimulant to the entire industry (Starr 1693), stated that his statistical records proved that the Club had not adversely affected retail sales. On the contrary, they showed that non-Club sales had increased tremendously and that the growth in his royalties was attributable chiefly to copyrights which had been in his catalog for many years (Starr 7712-16).

Government witness Brown, one of the publishers represented by Fox, who considered his catalog the most important one in the

business (Brown 1829), kept a close check on the impact of record club offers on retail sales. Under examination by Government counsel, Brown testified that he had observed record club offers after an album had run its course at retail, and that this had resulted in an increase in album sales, an increase in performance of those particular songs and an increase in music sales (Brown 1832-34).

Government witness Scopp was affiliated with the music publishers known in the trade as the "Big Three" (not to be confused with what Government counsel called the "Big Three" of the record industry). MGM is a principal stockholder (Scopp 1661). Scopp (another publisher represented by Fox) on his examination by Government counsel, testified that he had anticipated in 1955 that the Club would reach a broadened audience and that he had predicted that, if the Club were successful, his company's total revenues would be substantially increased without adversely affecting dealer sales (Scopp 1674).

On cross-examination, Scopp testified that his expectations had been fully realized. His company's income had in fact increased substantially. His company's statistical records, which he had reviewed only the day before he was called as a Government witness, confirmed that there had been no adverse effect on dealer sales; the ratio of dealer sales to total sales (*i.e.*, club, non-club and other sales) for the period 1959-61 was substantially the same as it had been in the past (Scopp 1679).

Copyright royalties are generally shared equally by the publishers and the songwriters (Scopp 1676). One of America's most prolific and best known songwriters is Richard Rodgers. Respondents' witness Norman J. Stone had been connected with the music industry for more than 25 years. During this time he acted as controller of the financial affairs for Rodgers & Hammerstein Enterprises. He also acted as accountant for Irving Berlin, another distinguished composer, and for Andre Kostelanetz, a prominent Columbia artist. Records containing the compositions of Rodgers and Berlin, and the performances of Kostelanetz, had been offered for sale both through non-club and club channels of distribution (Stone 8545-50, 8555-56).

The original Broadway cast recordings of Richard Rodgers' "South Pacific," "Flower Drum Song" and "Sound of Music" were offered through the Club. The movie soundtrack of "South Pacific" was offered through the RCA Record Club. The movie soundtrack of "Oklahoma" and the original Broadway cast album

of "No Strings" were offered through the Capitol Record Club (Stone 8551-53).

Recordings of Mr. Rodgers' Broadway shows were initially distributed through the Club upon the recommendation of Stone after he had carefully reviewed sales statistics that proved to him that the Club's distribution of Kostelanetz records had not adversely affected store sales (Stone 8555-56).

Stone, on the basis of the statistics available to him many years after his initial recommendation, testified that record club advertising and promotion had been extremely helpful to Rodgers, and to his other artist and songwriter clients. In addition to the substantial increase in their royalty income, the club advertising promoted their shows and moving pictures, and kept their names in front of the general public (Stone 8556, 8560-63).

Retail sales of any record are an important matter to songwriters because the bulk of their record royalties are derived from retail sales and not from club distribution (Stone 8550). The sales statistics proved that the offer of the records of Richard Rodgers musical shows through the Columbia, RCA and Capitol clubs had not adversely affected retail sales (Stone 8556-62; see RPFs 242-44).

Benefits to Consumers—It is obvious that record clubs offer many advantages to consumers, including convenience, guidance, quality and value (Keating 5321-22).

The needs and interests of Club members were for a greater variety of selection and for more repertoire to be offered for sale and as bonus selections. To the extent that the Club has been able to satisfy the demand of consumers for variety by the use of outside labels, the consuming public has benefited from its activities.

The fact that approximately one-third of the records sold by the Club are outside label records indicates that the offer of outside labels gave consumers what they wanted.

The Club's offer of outside labels meets especially the wants of members who live in areas not serviced by retailers (Gartenberg 8492-97). Even in large cities where record stores are plentiful, consumers are often not able to buy many records of the outside labels; Club distribution thus provides a useful service in that regard. (See Adler 5117-18; Marek 1885.)

In assessing whether the Club's prices to consumers are too low—prices which are comparable to those charged by many stores, RCA, Capitol, and other record clubs, and by direct-mail sellers—consideration must be given to the needs and interests of the

many millions who belong to all the various record clubs, or who buy records by mail at prices sought to be enjoined here. Club members demanded lower prices. To the extent that the Club met this demand, the public benefited.

Certain dealers complained that the Club sold too cheaply to consumers, or that they thought it was the "first discounter," or that it was "cheapening" records by offering them at low prices. Even if any or all of those charges were true, the consuming public would have been benefited thereby.

Such dealer testimony, however, was essentially contrary to fact, as well as to the Club members' understanding of the facts. Thus, in 1957, Politz found that a principal disadvantage cited by members and ex-members was the "higher cost" of Club records (RXs 482, 493).

By 1960, when the sale of records at discount record stores was increasing in certain areas, Stewart-Dougall reported that, next to lack of variety of selection, the principal reason cited by former Club members for discontinuing their membership was that the Club was not advantageous "from a cost point of view" (RX 341). The principal suggestion in that area was the admonition to "cut prices" (RX 342).

Many of the Government's witnesses, although frankly hostile to the Club, nevertheless conceded that the offering of outside labels through the Club, and the Club's pricing policies to members, benefited consumers. Such concessions were obtained, among others, from Mrs. Hurst (3237-38), Mrs. Rothstein (3333), Hollander (3123-24), Freedman (2594) and Winograd (3073). A few, like Schaps and Collins, would concede only "short range" benefits (Collins 3004-05; Schaps 3372-74). Metcalfe, although urging group boycotts against all manufacturers with record clubs, nevertheless conceded on cross-examination that the Club's activities and prices were not injurious to the public (Tr. 2920, 2969).

Opinion Testimony of Economic Expert

In making his findings and reaching his conclusions, the examiner not only took into account, but accorded considerable weight to, the careful and detailed economic analysis of the industry undertaken by Peter Max, an economist called as an expert witness by respondents.

The record shows the background and qualifications of Mr. Max. A graduate of Williams College with a B.A. Degree in Economics, Mr. Max studied at the Graduate School of Cornell University,

where he completed all requirements for a Ph. D. in Economics except his doctoral dissertation, which is in the process of preparation. He was a distinguished scholar, having been elected to the honorary societies of Phi Beta Kappa and Phi Kappa Phi and awarded a Ford Foundation Fellowship in economics in a national competition. Mr. Max taught economics and government regulation of business, with particular emphasis on antitrust, at Cornell and at Carnegie Institute of Technology. At the time of his appearance, Mr. Max was associated with National Economic Research Associates, a firm of economists with broad experience in economic analysis in various areas related to Government regulation of business. In the course of his work, Mr. Max has undertaken economic analysis on behalf of numerous governmental and private agencies covering a wide variety of different industries and has appeared as an economic expert witness in various forums (Max 9177-86, 9679-82).

In undertaking his analysis, Mr. Max studied the pleadings, all the lengthy transcripts (numbering over 9,000 pages at the beginning of his testimony), most of the exhibits and a massive amount of additional data from governmental and other sources (Max 9184-85). He supervised the preparation of 74 statistical exhibits (numbering 115 pages), all but one of which were received in evidence.

Before taking the witness stand, Mr. Max personally devoted more than 1,400 hours to his analysis of competitive conditions in the industry, and members of his staff spent an additional 3,000 hours assisting him in his research (Max 9186).

Mr. Max was on the witness stand for portions of 9 different days, often subject to extensive and intensive cross-examination. His demeanor and candor, the well presented and informative mass of statistical material that he prepared, and his careful attention to details, all entitle his testimony to great weight. His expert appraisal of the industry stands essentially uncontradicted and un rebutted.

Government counsel had ample advance notice of Mr. Max's appearance and actually had a Commission economist present in the courtroom for several days (Tr. 9677, 9847-48, 9972), but no economist appeared to contradict Mr. Max or to support the economic theory or theories underlying the complaint.

Although the examiner does not consider himself bound by opinion testimony regarding the existence or nonexistence of competition, or actual or potential threats to competition, nevertheless,

the uncontradicted analysis presented by a qualified economist is not to be lightly dismissed.

Having defined the relevant market as embracing all types of phonograph records sold through all channels of distribution (Tr. 9698, 9709), Mr. Max then proceeded to analyze the nature of competition in the record industry in terms of an analytical framework that he termed "workable" or "effective" competition (Tr. 9709, 9564-65).

That analytical approach requires consideration of the following major criteria: (1) the *structure* of the industry, including questions such as the number of companies, their financial resources and market shares and the degree of economic concentration in the industry; (2) the *performance* of the industry, including questions such as historical growth and evolution, the extent of entry of new companies, factors encouraging entry, product innovation and improvements, pricing patterns, reasons for growth of particular companies, and shifts in relative positions of competitors; and (3) *behavior* of the industry, including questions such as price competition, and also non-price competition—*e.g.*, product innovation and service to customers (Tr. 9564-72, 9709-10, 9737, 9754).

On the basis of those criteria, Mr. Max concluded that there was highly effective competition in the record industry (Tr. 9776-77, 9782-83, 9750).

In considering an analysis in terms of "workable competition," the examiner has not necessarily adopted all the theories that are considered to be embraced by that term. There are differences of opinion among economists as to which of the three criteria should receive the greatest emphasis in evaluating the forces of competition. That disagreement, however, is largely one of degree; economists generally agree on the nature of the questions that need to be asked (Tr. 9566); that is, after all, a matter of individual judgment. The labels are not important but the subjects embraced by them do provide a useful framework for analysis. Those criteria have been endorsed by a broad range of experts, including the Attorney General's National Committee to Study the Antitrust Laws (Tr. 9946-59; *cf.* Stocking, *Workable Competition and Antitrust Policy* (1961)).

VII. Price Representations

Count II of the complaint challenges as "false, misleading and deceptive" the price representations contained in Columbia Record Club advertising regarding Columbia, Epic and outside label

records. The complaint (Par. Two of Count II) cites these representations:

1. That the public may purchase "Any 6 of these superb \$3.98 to \$6.98 long-playing 12-inch records * * * for only \$1.89."
2. That certain combinations of six of the depicted LPs have a "retail value up to \$36.88" or a "retail value up to \$37.88."
3. That the subsequent purchase of "six selections from more than 400 to be offered during the coming 12 months," pursuant to the Club member's contractual obligation, will be made "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge."

Through such statements and the dollar amounts shown in connection with the terms "retail value," "regular list price" and "usual list price," according to the complaint, respondents have represented that those amounts "are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made." The complaint further alleges that "through the use of said amounts [\$3.98, \$6.98, \$36.88 and \$37.88] and the lesser amounts [\$1.89]," respondents have represented that "the difference between said amounts [\$3.98, \$6.98, \$36.88 and \$37.88, on the one hand, and \$1.89, on the other hand] represents a saving to the purchaser from the price at which such merchandise is usually and customarily sold in said trade areas."

Specifically, Paragraph Four of the complaint charges that the amounts set out in connection with the quoted statements and in connection with the terms "retail value," "regular list price" and "usual list price" [\$3.98, \$6.98, \$36.88 and \$37.88], "were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made * * *."

The complaint alleges that the advertised figures actually "are in excess of the price or prices at which the merchandise is generally sold" in those trade areas. Consequently, the complaint adds, "purchasers of respondents' merchandise would not realize a saving of the difference" between the higher and lower price amounts—presumably the difference between \$3.98, \$6.98, \$36.88 and \$37.88, respectively, and \$1.89.

The representations are alleged to have the "capacity and tendency" to mislead members of the public into buying substantial quantities of respondents' records, with consequent unfair diversion of trade.

Although Government counsel stated at the Prehearing Con-

ference of September 12, 1962, that Count II contained allegations of a "typical" deceptive advertising case (Tr. 31), the proof at the trial was all to the contrary. The witnesses called by the Government—record dealers—did not claim that Club members were *deceived* by Club advertising into thinking they were obtaining bargains. Rather, their complaint was that Club members in fact did receive bargains and that Club members in fact bought too cheaply.

The only consumers who testified were called by respondents, and they had no complaints against the Club.

A look at the facts in some detail is called for.

Club Advertising

In the course of operating the Club, respondents have placed advertisements which contain, among other things, references to and illustrations of various LPs of respondents and the licensors. Typical of the 1962 ads is one appearing in *McCall's* in March 1962 and in *Life* on February 16, 1962 (CX 120). That ad stated:

Any 6 of the \$3.98 to \$6.98 records described on these two pages—in your choice of REGULAR high fidelity or STEREO for only \$1.89. Retail value up to \$37.88.

tremendous savings on the records you want!

—up to a \$37.88 retail value—ALL SIX for only \$1.89.

Explaining that the offer was contingent on an agreement to purchase at least six additional records during the next 12 months, the text of the ad set forth:

The records you want are mailed and billed to you at the regular list price of \$3.98 (Classical \$4.98; occasional Original Cast recordings somewhat higher), plus a small mailing and handling charge. Stereo records are \$1 more.

If a consumer had utilized the reply postcard appended to the ad, he would have signed a commitment to purchase six additional records "at usual list price plus small mailing and handling charge."

Reference also was made in the text of the ad to the availability of "bonus" records if a member continued to purchase after fulfilling his initial commitment.

Similar representations have appeared in many other ads, including representations that the depicted records are \$3.98, \$4.98, \$5.98 and \$6.98 records (see Appendix B, Vol. II of the Government's Proposed Findings, etc.).

The representation of a retail value of \$37.88 was an aggregate figure representing possible selection by the member of certain \$3.98, \$4.98, \$5.98 or \$6.98 records. In 1961, respondents were advertising five \$3.98, \$4.98 and \$5.98 records for \$1.97, retail

value up to \$25.90 (*e.g.*, CX 708b). That was explained by respondents' counsel (not in an ad) in terms of an aggregate of suggested retail prices (CX 68b-c). Even though the term "retail value" was directly applied only to such aggregate figures, it may be, and is, inferred that consumers might reasonably be expected to interpret the "retail value" claim as applicable to the \$3.98 to \$6.98 records, referred to in the same ad, as components of the sum.

Respondents have advertised certain records as having a "Reg. Price" of \$3.98 and \$4.98 (CX 147) and a "regular retail price" of \$3.98 and \$4.98 (CX 148). Those prices were contrasted with a Club offer of "6 for only \$3.98" and the "money-saving program" of the Club offering records "at far less than usual cost" (CX 148).

Although respondents complain that CX 148 was not "typical," because it was an unprofitable "test" of an all-classical offer mailed to the public in 1959, it reached 700,000 persons (Klemes 7011-12). However, the term "regular retail prices" does not seem to have been used in other ads.

The reference to "Reg. Price" of \$3.98 and \$4.98 is not unique to CX 147. It appears in five other solicitations (CXs 680-83, 696). Mailed in early 1961, they represented the Club's Get-a-Friend mailings to old members.

(The complaint does not specifically challenge such terms as "regular retail" or "Reg. Price," unaccompanied by the word "list." However, they are, *a fortiori*, subject to the same charge and would be forbidden under any order phrased in terms of usual, customary or prevailing price.)

Other ads have referred to "records which regularly cost \$3.98, \$4.98 or \$5.98 each" (CX 612c), and have represented that "Each record has a regular retail value of \$3.98, \$4.98 or \$5.98" (CX 612b). The consumer has been told, "You pay only 39¢ each" (CX 612b). It appears that CX 612 was a 1961 test mailing of 40,000 copies (Klemes 7011).

Another representation, appearing in advertising text, has been that "The records you want are mailed and billed to you at the regular list price of \$3.98 (Classical \$4.98; occasional Original Cast recordings somewhat higher), plus a small mailing and handling charge * * *" (CX 707b; see also RXs 129b, 130b, 131b). Some coupons have used the words "usual list price" (CXs 760b, 762b).

Those representations, soliciting new membership, have appeared in close juxtaposition to the statement that, following fulfillment of his commitment, the member—

will receive—FREE—a Bonus record of your choice for every two additional selections you buy—a 50% dividend! (CX 707b).

“Get-a-Friend” direct mail solicitations—*i.e.*, mailings to old members inviting them to get their friends to join the Club—have depicted various Columbia, Epic and licensors’ records and have set forth, for each record, a “Reg. Price” followed by the prices of \$3.98 and \$4.98 (CXs 680–83). The same solicitations have represented for the old members’ reward a “retail value \$7.96 to \$11.98” and for the new enrollee a “value up to \$25.90” (CX 681, page 3; CX 683, page 3). They also have represented that the “New Member” will be “stretching [his] record dollar by more than 60%” (CX 680, page 5; CX 681, page 9; CX 682, page 3; CX 683, page 3). The “New Member” was told he was being introduced to a “money-saving program” (CX 680, page 5; CX 681, page 9; CX 682, page 3; CX 683, page 3).

For another variation of the price representation, see RXs 134–36, 298; CX 564. Those are allusions to the respective actual disparities between the Club’s “regular” prices and the “list prices” established by Verve and Caedmon for their records (RXs 134–36, 298; CX 564). For example, RX 134 advertised a “saving” of 97¢ on each Caedmon record, identified as selling through the Club at \$4.98, compared to a “regular list price” of \$5.95. The Caedmon catalog (RX 298) confirmed Caedmon’s higher list price.

The CBS radio network carried 113 spot (30-second) commercials of the Club during the period December 24, 1962, through December 31, 1962 (CX 670). In the areas of the CBS-owned stations (New York, Los Angeles, Chicago, Philadelphia, Boston, St. Louis and San Francisco—CX 264, page 8) and throughout the United States over the CBS Radio Network, representations were made substantially as follows:

- 6 records, a \$37.88 value, for only \$1.99 (CX 671a);
- 6 records, worth up to \$37.88, for only \$1.99 (CX 671b);
- \$35.89 could be saved by getting 6 records for \$1.99 (CX 671c);
- save nearly \$36 by getting 6 records for \$1.99 (CX 671e);
- any 6 records regularly selling for \$3.98 to \$6.98 each for only \$1.99 (CX 671f);
- save more than \$35 by getting six records for only \$1.99 (CX 671i).

It is accordingly found that, as alleged in the complaint, respondents have represented in advertising that the purchasing public may purchase six “\$3.98 to \$6.98” LP records “for only \$1.89.” They have further represented that certain combinations of six of such LPs have a “retail value up to \$36.88” or a “retail value up to \$37.88.”

Finally, respondents have advertised that the offer of six records for \$1.89 was contingent on the purchaser's agreement to buy at least six additional records during the next 12 months "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge." That "regular" or "usual" list price was referred to in the text of advertisements as "\$3.98 (Classical \$4.98; occasional Original Cast recordings somewhat higher) * * *", with stereo records \$1 more (CX 120).

It is further found that consumers indeed could purchase six records having list prices of \$3.98 to \$6.98 for only \$1.89, subject to the commitment. Also, by applying the list price figures to certain combinations of six of the advertised records, it was possible to arrive at a sum total of \$36.88 or \$37.88.

It is further found as a fact that Club members not only committed themselves to purchase six additional records during their first year of membership at "usual list price" or "at regular list price," plus mailing and handling charges, but actually did purchase on such a basis.

There is thus no question that respondents have represented that "list prices" have some relationship to actual retail selling prices. The issue drawn by the pleadings is whether or not respondents have represented list prices as usual or customary or prevailing retail prices—the prices at which records are "generally sold."

Under precedents previously established (e.g., *Gimbel Brothers, Inc.*, Docket 7834, July 26, 1962), the finding would have been that respondents had made such a representation. But since the closing of the record in this case, the Commission has taken a somewhat different view of the deceptive capacity of "list price" representations; has posed different questions to be resolved; and has indicated that the new standards were to be applicable to pending proceedings (*Guides Against Deceptive Pricing*, January 8, 1964; *Clinton Watch Company*, Docket 7434, Order on Petition to Reopen Proceeding, February 17, 1964; see Memorandum Opinion, *infra*).

Accordingly, we need to consider the background and significance of list price advertising in the record industry, particularly the Club's use of such claims, and the relation between list prices and actual retail selling prices. The question is not simply whether the list prices are usual, customary or prevailing prices, but whether they are the prices "at which substantial (that is, not isolated or insignificant) sales are made" in the area where the advertiser does business (*Guides*, page 4).

Meaning and Uses of "List Price"

The terms "suggested list" and "suggested retail" appear to be used interchangeably in the record industry (CX 94, page 1; CXs 268, 292c, 401a, 475; Koenig 3619; Metcalfe 2912-13; see also Ackerman 4195). Suggested list prices are established by the manufacturers, including respondents (CX 94, page 1; CXs 268, 292c, 401a, 475).

At the trial, dealer witnesses were consistently asked at what price they bought—or sold—" \$3.98 LPs" (e.g., J. Rosen 2774). It is evident that the \$3.98 figure, for instance, has a broader meaning to the trade than simply a selling price (see, e.g., Metcalfe 2893; Rothstein 3301; Wilf 2714; J. Rosen 2774-75).

The evidence suggests a finding that "\$3.98 records" are typically recordings of popular music, the industry's best selling product which accounts for some 80 to 90% of all LP sales (Bien 7418-21; Del Padre 5638-39; Keating 5316-17; Halderman 7479; R. Miller 7192-93; Barlow 7673-74; Lutz 7883); that "\$4.98 records" are primarily classical material, but also include records of a more specialized nature sold by such Government witnesses as Frey, Koenig, and Rubin (Del Padre 5638-39; Bien 7418-21; Halderman 7479; R. Miller 7192-93; Barlow 7673-74; Lutz 7883; CXs 321, 310; Koenig 3619-20); and that "\$5.98 and \$6.98 records" are special items such as original Broadway cast albums, or sets of albums (Bien 7418-21; Halderman 7479; R. Miller 7192-93; Barlow 7673-74; Lutz 7883; Del Padre 5638-39).

Those price categories are widely used in the industry for identification purposes. The *Schwann* catalog lists records by label, composer and by a serial number designated by the manufacturer. Such serial numbers fall within ranges corresponding to price categories identified in the rear of each catalog (Gallagher 8802-16; Keating 686; CXs 316-20; RXs 559-66). *Schwann* catalogs have been sold for many years to record stores which use them for reference purposes or distribute them, free or at a charge, to retail customers for record identification purposes (Bialek 1359; Press 1232; Zorek 752; Rosner 810; Reeves 1003; Sarkisian 1342-43; Goldfinger 1133-34; Germain 991; Mehling 1033; Prince 5539-40; Doctor 780; Kaplan 805).

In addition, some record stores for years have followed the practice of identifying the price categories for their customers by prominently displaying signs on the floors of their stores, or in advertisements and brochures, in which the list price is set forth or a corresponding identification number is used (Rosner

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820-21; Zorek 951-52; Reeves 1009-10; 1015; Kutscher 1154-55; RX 266a-b; Doctor 780; Kaplan 803-05; Goldfinger 1143-44).

A "\$3.98 record" is also a quality popular record which is regularly sold through the Club (Keating 5316-17; Gartenberg 8419-21). After the introductory offer, all records purchased by members are purchased at \$3.98, \$4.98, \$5.98 or \$6.98, plus mailing and handling charges. No record appears in the Club's introductory media advertising, until it has previously been offered for sale by the Club at the regular Club price. Accordingly, a "\$3.98 record" in the Club's introductory advertising is also a record which has been recently sold at that very price by the Club.

The term "\$3.98 to \$6.98 records" also serves to differentiate, in the industry and in the minds of some consumers, top quality records from budget-line records (Keating 5316-17; Dreyer 6417-18; R. Miller 7192-93) which generally sell at prices below \$3.98 (Keating 5316-17; Gallagher 8787-88; Schlang 6715-16). Finally, of course, "\$3.98" is also the "list price" of a particular class of records.

List prices appear to be used by every record company in the United States, whether or not they sell through record clubs. "List prices" of records are significant to many people on every level of the industry:

(a) Columbia and other companies determine their distributor and dealer prices for each record by discounting from list price (Shocket 181). Thus, the reference in the testimony to a dealer discount of 38% is a reference to the so-called "base" price of \$2.47, which in turn represents a discount of 38% off the "list price" of \$3.98 (Gallagher 8804-16; Prince 5539-40).

(b) List price is the basis for computing royalty payments throughout the industry. (See CXs 172b, 173f, 176g and i, 177b and d, 178g and h).

(c) Copyright royalties on records sold, both at retail and through record clubs, vary depending upon the list price of the record on which the selection appears (Starr 7710-11; Berman 8379-80).

(d) Payments to the recording industry's Music Performance Trust Fund are based upon a percentage of the manufacturer's suggested list price (Rosenbaum 7533-36).

Such internal industry uses of list prices, of course, do not require that the term be used in advertising disseminated to the public.

The examiner specifically rejects CPF 466. Respondents have not conceded that the *purpose* of the price representations in part

is to create the impression that they are the prices charged by retail dealers.

At the transcript page cited as supporting the finding, Keating was asked: "What a \$3.98 record?" His answer was as follows:

A 3.98 record has in our minds the meaning that it is the price that the club regularly sells this record to members in commitment.

* * * * *

It is also the suggested list price of a certain class of records. Thirdly, it is the price at which this type of record is available in many areas of the country. And fourth, it described the particular category of records, the 3.98 category of records which is the 12-inch monophonic long-playing record featuring a reasonably well known artist, as contrasted to a low-priced record which would sell for a dollar (Tr. 5316-17).

Keating's statement is consistent with other evidence about the meaning of the term "\$3.98 record" both to consumers and throughout the industry. His third definition, noting the prevalence of sales at \$3.98 in many stores throughout the country, is consistent with consumers' testimony that they knew records were often, although not always, sold at those prices.

Consumer Testimony

Generally, the consumer witnesses called by respondents were familiar with the fact that records are sold through regular record stores, and also through retail outlets that conduct their business wholly or principally on a discount basis.

None of the consumer witnesses called by respondents understood the language in Club advertising, "Any six of these superb \$3.98 to \$6.98 long-playing 12-inch records * * * for only \$1.89," to be a representation of the price at which phonograph records were being sold at record discount houses in their areas (Riley 7098-7101; Anderson 6461-62; Halderman 7479; Bien 7419-20; Lutz 7882-85; Dreyer 6416, 6420; R. Miller 7190-93).

Among consumer witnesses who appeared, four had joined the Club within two years of their appearance as witnesses at the trial. They came from New York, Los Angeles and New Jersey. Each knew of discount houses where records could be bought at less than list price. In fact, one of them had credited his Club membership to discounter Sam Goody when he joined (Riley 7098-99; Anderson 6458-59; Halderman 7476-78; Bien 7418-19).

Three other consumer witnesses, who had been Club members for a longer time, testified that the price references in the Club advertising were not representations of the prices available in discount stores (Lutz 7882-85; Dreyer 6416, 6420; R. Miller 7190-93). One witness usually bought records in a local store

which charged list prices, but knew that there were other stores in her vicinity charging discount prices (Dreyer 6416). Another Club member bought records from discounters Goody, Korvette and Chambers (R. Miller 7190-91). Despite this knowledge, each remained a member of the Club. Their continued membership is incompatible with the inference that the public was attracted or remained attracted to the Club by erroneous impressions concerning the price advantages of Club membership.

The consumer witnesses called by respondents were diverse in their educations and in their professional backgrounds. They included, among others, a butcher's employee (Lutz 7882), a research chemist who joined the Club to start his collection (Halderman 7476, 7483), a mechanic (Anderson 6458), a radio repairman (Riley 7097) and a lady who became interested in dance music after she took lessons at Arthur Murray (Dreyer 6423). They were not "sophisticated buyers" but they were not deceived.

The fact that they believed the 6 for \$1.89 deal to be a saving does not demonstrate deception, as contended by Government counsel (Reply, page 128)—it *was* a saving. It was not shown that Club ads constituted

sales "gimicks" which lure consumers into a mistaken belief that they are getting more for their money than is the fact (*Guides*, page 1).

There was no evidence that the use by the Club in 1961 and 1962 of the type of advertising here alleged to be deceptive in fact brought any economic advantage to the Club in terms of motivating the public to join the Club. There is evidence to the contrary (see RPF 541).

Discounting and List Prices

The knowledge that the consumer witnesses had concerning the existence of discount record stores was merely a reflection of what might be called common knowledge. Prior to the early 1950s virtually all retail dealers charged full list prices for records. Since that time there has been an increase in discounting in various areas of the country. But these regular record discounters are well known to the public. Sam Goody and Korvette have been advertising cut-rate prices for years (see, *e.g.*, RXs 12, 9a, 13a, 13b and 146; Ackerman 4222-23; Gallagher 8848-53, 8856-57; Inden 5544). Other New York dealer witnesses appearing in the case-in-chief admitted that they had advertised cut-rate prices in newspapers and that consumers in their area knew that they could buy records at many stores at discount prices (Kutscher 1154; Maggid 830-32).

Outside of New York, both in areas where discounting is prevalent and in areas where it is rare, most local advertising was done by the discount record stores, and not by the regular retailers (Hill 10,303; Farr 10,454-55; Hurst 3179-200; Block 10,445; *e.g.*, RXs 35, 147). In addition, the public has been apprised of the availability of records at discount through the nationally disseminated advertising of many mail-order sellers, including Goody and The Record Hunter (G. Hartstone 3439; Inden 5544; Ackerman 4222-23; RX 266).

The Columbia Record Club advertising is placed almost entirely in such national magazines as Life, Look, The Saturday Evening Post, McCall's and The Ladies' Home Journal (Rabar 6848-49; Keating 5148; *e.g.*, CXs 331, 322, 120, 737). The Club's direct-mail solicitations to members similarly go to Club members located all over the country.

The Club makes relatively little use of advertising in media that appeal primarily to a single trading area. For example, although the New York Times is, in a sense, a national newspaper, its circulation in cities other than New York is numerically small compared to that of local media (Rabar 6828-29; 6831-35). The Club has placed only a very small proportion of its advertising in the Times (Rabar 6848); and in 1961 spent only \$10,000 to \$15,000 for advertising in that newspaper (Rabar 6849). Club ads have appeared in Sunday newspaper magazine sections such as Parade and This Week.

The Government offered no evidence to establish that respondents had failed to make an honest estimate of prevailing retail prices in their nationwide trading area. Respondents, in their own behalf, sought to present evidence respecting the prevailing retail price situation throughout the Nation, but some of this testimony, offered through respondents' vice president for sales, was excluded, and an offer of proof was made (Gallagher 8977-94; 9005-07). (The Government's case was presented and the evidentiary rulings were made before the Commission issued its new "Guides Against Deceptive Pricing" (January 8, 1964).)

Evidence *was* admitted to the effect that substantial, and not isolated or insignificant sales, were being made at list prices throughout the country. In a substantial number of representative areas, the principal retailers who did not primarily conduct their business as discounters were, in fact, selling records at suggested list prices.

Respondents offered the testimony of five district sales managers in charge of distributing Columbia records. Their sales territories

covered all or parts of 30 of the 50 States, including some of the most populous. Their testimony showed that in most States, the majority of retail record dealers sold Columbia records at list prices. The few exceptions were states whose major cities were among the largest in the country. In those States too, the majority of retail dealers outside the major cities were selling at list prices. Outside the very large cities, list-price sales accounted by far for the substantial portion of total record volume.

Even in major cities where discounting had become most prevalent, substantial numbers of retail outlets did a substantial volume of business at list prices in competition with discounters. In many important population centers, moreover, discount operations had never gotten a foothold, and list prices prevailed in virtually all retail outlets. (See Block 10,426; Smith 10,400; Hill 10,301; Farr 10,453; Craig 10,566; RPF 544).

Many of the Government's dealer witnesses conceded that they or their competitors sold at list prices. Metcalfe and his principal competitor in Fayetteville, Arkansas, and Mrs. Rothstein and her principal competitor in St. Joseph, Missouri, sold at list prices (Metcalfe 2911-12; Rothstein 3307-08; 3316). So did Mrs. Hurst (Hurst 3203); she reported that department stores in Cleveland sold classical records at list prices (Hurst 3222-23). Bialek's nearest competitor in Washington, D.C., sold at list (Bialek 1374). Other Government witnesses selling at list included Liepmann, in Flint, Michigan; Anderson, Hollander and Winograd, Chicago; and Randy Wood, Gallatin, Tennessee (Liepmann 3386, 3398-99; Hollander 3141, 3117-18; Wood 4126-27).

Two dealer witnesses from Philadelphia, where price wars between Sam Goody, Korvette and Gimbel's had had a competitive impact on the entire market, were nevertheless still selling at list prices in 1962 (Rossi 2275; Scatchard 2810).

In New York, the home town of Goody, Korvette and a host of competing department stores, the four Liberty music stores, which did \$532,000 of business in records in 1961, were still charging list prices when the complaint in this proceeding was filed (Brigati 884). So were the Doubleday chain and G. Schirmer, Inc.; they were still selling at list prices at the time of trial (Brigati 885). Like Doubleday, Liberty did a mail-order business as well as selling records in its stores at list prices.

Similar testimony came from the Government's distributor witnesses. L. Smith conceded that among his three largest customers, two, located in Pittsfield, Massachusetts, and Albany, New York, were selling at list, while the third was his own

wholly owned rack (Smith 1407-08). The testimony of George Hartstone established that even in large cities where discount record houses proliferate, many important retail record dealers have continued to sell records at list prices. Among them was Los Angeles, where Wallich's Music City, identified as one of the principal record retailers, regularly sold at list. Hartstone also stated that in San Francisco, the other major city in the country's most populous state, a lot of dealers sold records at list prices (G. Hartstone 3464-66).

Respondents also produced a number of dealer witnesses who sold records at list prices in various parts of the country and testified to similar sales by others. Doubleday sold records at list prices in 1962 through 31 retail stores located in major cities throughout the country and through regular mailings of 90,000 to 100,000. Doubleday did over \$1 million worth of record business at those prices in the fiscal year ending April 30, 1963 (Prince 5502-07).

Blincoe sold records at suggested list prices in Louisville, Kentucky, where list prices prevailed in the sale of records generally (Tr. 5681-85). Blincoe testified that seven or eight retailers in Louisville sold records at list prices, including one retailer who also discounted records at another, less important retail outlet (Tr. 5703).

Zenger, who carried the largest selection of records of any dealer in Salt Lake City and the Utah area, sold records at full list prices. He testified that within the metropolitan area of Salt Lake City alone, where rack jobbers featured the cream of the catalog in drug stores, shopping areas and grocery stores, most dealers sold at list (Tr. 6314). Moreover, most retail dealers in the Rocky Mountain area, including Utah, Idaho, Wyoming, Nevada, and part of Montana, did likewise (Tr. 6314).

Dunlap, who sold \$50,000 worth of records in Oklahoma in 1962, also sold at list prices (Tr. 5898). He and two of three principal competitors, as well as other Oklahoma City retailers, sold at list prices throughout 1962 in competition with discount mail-order houses and the GEX discount chain which specialized in quick merchandising of noncatalog material (Gallagher 9096-97).

As late as August 1963, Hi-Fi Stereo Review, a 50 cent magazine of special appeal to music lovers throughout the United States (Rabar 6836), was selling records on a nationwide basis through a newly formed mail-order record service at list prices (RX 693, pages 55-98).

The examiner has reviewed the proposed findings submitted by

the parties concerning the pricing of records in various parts of the country (compare RPFs 544-552 with CPFs 467-89; and see respondents' Exceptions).

Without undertaking to resolve all the factual differences in those detailed proposed findings, the examiner can state in summary that:

There is a substantial basis for finding that in the metropolitan New York area, respondents' records and the records of the licensors are not usually sold at list prices of \$3.98, \$4.98, \$5.98, \$6.98.

There is evidence also to support a finding that there are many other areas throughout the country, particularly the larger metropolitan areas, where respondents' records and those of the licensors are sold below such list prices.

The evidence supports a finding also that a substantial number of sales of the records of respondents and the licensors *are* made at list prices.

In the record industry, there has been widespread failure to observe manufacturers' suggested or list prices. There has been the advent of retail discounting on a wide scale. In many areas, such retail discounting has seriously undermined the dependability of list prices as indicators of the exact prices at which records have been and are, in fact, generally sold at retail.

There are many areas, however, where records are sold at list prices in the principal retail outlets which do not conduct their business on a discount basis.

In a substantial number of representative communities, the principal retail outlets are selling records at list prices in the regular course of business and in substantial volume. In the country as a whole, and in many subordinate areas, substantial sales, as distinguished from isolated or insignificant sales, are made at list prices.

The Government's detailed retail price evidence related primarily to New York and Philadelphia—hardly representative or typical (Exceptions, pages 405-20, 423-26).

Another deficiency in the Government's proof under the standards of the new *Guides* is the failure (except in New York) to show actual prices in instances of below-list selling. In instances where such evidence is available, it appears that the list prices here involved are not significantly in excess of the highest prices at which substantial sales are made.

There is no evidence that Columbia advertised its list prices other than in good faith—as an honest estimate of the actual retail

prices. There *is* evidence from which it may be inferred that in describing records as \$3.98 or \$4.98 records, Columbia was reasonably certain that such prices did not appreciably exceed the price at which substantial sales of the article were being made throughout the country, and, indeed, in a substantial number of trading areas. As a matter of fact, the evidence does not show that the list prices advertised by respondents, whether so designated or not, were in excess of the highest prices at which substantial sales of records were being made in every area where the advertisements were disseminated. In fact the contrary is indicated.

There is no showing of any intention on the part of Columbia to establish a basis, or to create an instrumentality, for a deceptive comparison in any local or other trade area.

Not only are records sold at list prices by retailers, but it has been demonstrated that Columbia itself sells a substantial volume of records through the Club at the advertised list prices.

The discounting of records began in the early 1950's. In 1959, the Federal Trade Commission began an investigation of the Club's advertising (Keating 5303). Apparently a survey of actual prices was made at that time by the Commission (Prehearing Conference, pages 165-66; Wunderman 6590). Between 1959 and the filing of the complaint herein, however, mail-order distributors of all kinds, including retail discounters, the sellers of packages, and the RCA and Capitol Clubs, were widely disseminating advertisements that described records offered on special terms or at discount rates by references to their "list," "catalog," "regular retail prices," "retail value" or "nationally advertised prices" (see RPF 553).

Reader's Digest, which packaged "specially recorded" material unavailable in retail stores, referred to the list prices of RCA records in claiming that its prices were less than the public "might expect to pay" (Hitesman 1053-55). The prices to which they referred in each package were the usual list prices for records of the particular type—*i.e.*, popular or classical—which were offered. (See RXs 514b,d,e, 515b,d, 516b,c,f, 517a,c, 518b,c,d, 524b, 519b,c, 554, 555b; *cf. The Reader's Digest Association, Inc.*, Docket C-626, Decision and Order (Consent), December 10, 1963.)

Such advertising by competitive record clubs, sometimes expressly identifying list prices with dealer prices, persisted well after the complaint was filed in this proceeding, continuing even during the trial period (RXs 629, 568b, 691, 205, 206, 195, 570). In July and August 1962, for example, the RCA Club expressly identified the sum of the list prices of records in its introductory

offer as the totals of "prices charged by many dealers" (RXs 155, 626, 629, 630).

If list price references have any significance in attracting customers (but see RPF 541), Columbia alone could not have dropped such references in its advertising without sustaining a competitive disadvantage relative to the other clubs and mail-order sellers. However, before the present complaint was filed, Columbia decided it would change its format if other record clubs would change theirs as well. This decision was communicated to representatives of the Federal Trade Commission by counsel for the Columbia Record Club (Wunderman 6590-6600). Columbia's offer was not accepted.

The present complaint was filed against Columbia alone in June 1962. As respondents say (RPF 556), "The record does not reflect that any similar action was taken against any record club competitor of Columbia"; but see *The Reader's Digest Association, Inc.*, Docket C-626, Decision and Order (Consent), December 10, 1963. Beginning, apparently, in 1963, Columbia has generally omitted the references to "\$3.98 to \$6.98 records" and "retail value" in preparing new Club advertisements (Klemes 7015-16; see RXs 307, 308, 305, 547, 549).

The foregoing Findings, comprising Sections I through VII, set forth the facts as found by the examiner. The legal principles underlying some of the factual findings and the rationale and authority supporting the examiner's ultimate conclusions are set forth in the Memorandum Opinion that follows.

MEMORANDUM OPINION

A. Introduction

This case involves an industry where the semantics "are absolutely terrifying." For example:

Serious music is very often funny and popular music is very often unpopular, and * * * so-called classical music * * * is not classical * * *. (Liebersohn 116)

That testimony came on the very first day of hearing from an official of respondent Columbia Broadcasting System, Inc. The semantics *have* been "terrifying" ever since.

In such an industry—the phonograph record industry—it is not surprising that a searching antitrust inquiry would reveal other anomalies. It is not surprising that counsel were—and are—in violent disagreement as to the meaning of words, figures and conduct.

For example, Count I of the complaint accuses Columbia of selling records directly to consumers at such low prices as to be unfair to its record-dealer customers who compete with the Columbia Record Club. At the same time, Columbia is accused, in Count II, of falsely advertising the savings available to consumers. Regarding charges of price fixing the position of the Government emerges as equivocal, if not wholly self-contradictory.

Columbia, according to the Government, is one of the "Big Three" manufacturers that dominate the record industry. Yet the complaint challenges Columbia's activities in acting, in effect, as distributor, in the so-called "club market," for the records of some of its smaller competitors.

In that connection, a great many antitrust cases have involved requirements by a supplier that distributors deal exclusively in the supplier's product. Here we have a case where the distributor (Columbia) imposes exclusivity on its supplier.

Respondents can claim, with some justification, that Government counsel have centered their attack on practices that "aggravated" something that was not alleged to be illegal in the first place.

Although Government counsel strenuously argue (Argument, page 320; Reply, page 15) that the licensing agreements are "a series of acquisitions which may substantially lessen competition or tend to create a monopoly," thereby seeking to come under the "reasonable probability" standard of § 7 of the Clayton Act, the complaint actually alleges that the licensing agreements "have a *dangerous tendency unduly to hinder competition* or tend to create a monopoly" (Par. Ten); that dual pricing has a "*dangerous tendency unduly to hinder competition*" between respondents and dealers, as well as the purpose or effect of monopolizing or attempting to monopolize (Par. Eleven); and, finally (Par. Twelve), that all the practices have a "*dangerous tendency*" to lessen, restrain and eliminate competition and a "*dangerous tendency*" to create a monopoly in respondents (emphasis added).

The question arises, then, whether the complaint, under § 5 of the Federal Trade Commission Act, has imposed on Government counsel a heavier burden of proof than they would carry had the complaint been brought in terms of § 7 of the Clayton Act. If the Government should prove that the effect "may be substantially to lessen competition, or to tend to create a monopoly" (§ 7, Clayton Act), is that equivalent to proving a "*dangerous tendency unduly to hinder competition*" and a "*dangerous tendency to create in respondents a monopoly * * **"?

Finally, in the realm of anomaly, counsel for both parties demonstrate a certain amount of ambivalence.

Although attacking Columbia as a predatory monopolist, Government counsel point to its outstanding achievements in the record industry. Counsel for Columbia, on the other hand, are modest about those achievements and find it necessary to deprecate occasional boasts of pre-eminence found in corporate annual reports. At the same time that Columbia's counsel point to shortcomings on the part of competitors, they are constrained to emphasize the strength of those competitors.

So much for some of the less troublesome paradoxes.

Summary of the Facts

Despite the apparent prolixity of the Findings of Fact, the essential facts can be briefly outlined. The facts have been set forth in considerable detail because of certain conflicts in the evidence and, more particularly, because of conflicts between counsel as to the existence of certain facts and the interpretations to be placed on them. For example, Government counsel filed Proposed Findings of Fact numbering more than 300 pages (including Appendices), to which respondents filed Exceptions totaling more than 450 pages, in addition to their own Proposed Findings of 200 pages—all that plus briefs and reply briefs.

Additionally, as is true so often of legal controversies, many of the apparent legal issues have been resolved in whole or in part by virtue of the factual conclusions reached.

At any rate, before undertaking to apply the law to the facts of this case, a brief factual summary may be useful.

Columbia Broadcasting System, Inc., a vast communications complex, is, through its Columbia Records Division, a major factor in all phases of the phonograph record industry, from production to retailing. Since 1955, it has operated the Columbia Record Club, selling LP records directly to consumers in a mail-order operation. Columbia is engaged at the same time in selling records indirectly through ordinary retail channels: It sells to dealers and other resellers both directly, through wholly owned wholesale distributors, and indirectly, through independent wholesale distributors.

Beginning in 1958, Columbia entered into contractual arrangements with several other LP manufacturers whereby the Club began selling "outside labels" in addition to its own Columbia and Epic LPs. Briefly stated, the contracts were licensing agreements whereby Columbia was granted the exclusive use for up to 3½ years of the licensors' "master recordings" from which to

manufacture records on the licensors' labels for sale through the Club. Columbia does *not* sell outside labels through any other channel of distribution.

Most of the charges in the complaint revolve around those licensing agreements. It may be helpful to outline those allegations, as well as the allegations not directly related to the licensing agreements.

The Allegations of the Complaint

Licensing Agreements—The licensing agreements are attacked as unlawful because of the following circumstances:

1. The licensors are competitors of Columbia.
2. The records covered by the licensing agreements are "among the most popular * * * in the industry" and are included among the records that dealers are "obliged to stock."
3. The exclusivity provisions preclude the licensors from (a) offering or selling LPs by direct mail to consumers, and (b) offering or selling LPs, or licensing any of their masters to any third party for the purpose of selling by direct mail to consumers. (Note, however, that identical records may be sold, directly or indirectly, by the licensors to dealers for resale to consumers.)
4. It is agreed that Columbia shall pay no royalty on records included in the enrollment offer or distributed as "bonus" or "free" records.
5. It is agreed that the Club records produced from licensed masters shall bear the label or labels of each of the licensors.
6. The licensors "recognize" that it is Columbia's policy to pay only half the customary artist royalty on records sold by the Club and "agree in general to conform to this policy."
7. The license agreements impose restrictions on the parties with respect to release dates of records, prices and distribution channels, as follows:
 - (a) The licensor is restricted with respect to release dates of records distributed through dealers.
 - (b) The licensor may not offer records to distributors "at distress prices."
 - (c) Club records manufactured from licensed masters are required to be sold at prices "not less than the price at which a similar" Columbia record is being sold by the Club.
 - (d) The licensor may not reduce suggested list prices on LPs sold "through normal retail channels" without giving six months' written notice to Columbia.

(e) The licensor agrees not to sell to certain specified subscription-method sellers.

The complaint (Par. Ten) alleges that the licensing agreements, individually and collectively, "have a dangerous tendency unduly to hinder competition or tend to create a monopoly." It says further that the licensing agreements "are being engaged in for the purpose, or with the effect, of creating in respondents the undue power, and respondents have in fact regularly exercised the power," to:

1. Fix and maintain uniform prices of competitors' records at prices identical to those of Columbia's own records.

2. Cause the licensors to sell LPs to dealers at prices regularly higher than the prices charged for identical LPs sold through the Columbia Record Club directly to consumers.

3. Divide or allocate various markets and channels of distribution in connection with the sale of LPs produced under licensors' labels.

4. Establish, and compel the licensors to adhere to, a "fixed differential" in artist royalties payable on records sold through the Club and records sold through dealers.

5. Hinder, lessen or suppress competition between respondents and the licensors, as well as between respondents and other record manufacturers.

6. Hinder, lessen or suppress competition between respondents and other record clubs.

7. Hinder, lessen or suppress competition between respondents and dealers in the sale of all phonograph records.

8. Exclude from the market, or potentially to exclude, dealers as a result of "the competitive disadvantage to which they are subjected" by the acts and practices of Columbia engaged in pursuant to the licensing agreements.

9. "Monopolize or attempt to monopolize the manufacture, sale and distribution of LPs generally, and of LPs sold through the subscription method of distribution"—that is, through record clubs.

The complaint (Par. Nine) further alleges generally that the acts and practices of Columbia in connection with the licensing agreements, separately and cumulatively, "have had and now have the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition."

Other allegations are that:

The long-playing record market has been and is "dominated"

by Columbia, RCA Victor Record Division of Radio Corporation of America (RCA), and Capitol Records, Inc. (Capitol). Each has a record club.

The three major record clubs account for approximately 20% of the money spent by members of the purchasing public for records. Of that percentage figure, Columbia's share is approximately half.

Increases in net sales and membership of the Club are due to "respondents' extensive promotional campaign, together with the wide choice of recordings afforded the consumer by reason of respondents' control of the works of numerous artists pursuant to licensing arrangements."

Dual Pricing—The complaint (Par. Five) also challenges a practice that has come to be known as "dual pricing." The charge is to the effect that dealers are compelled to stock a substantial number of records produced from masters owned or controlled by Columbia, as well as from masters owned or controlled by competitors of Columbia but licensed to Columbia for Club use, so that dealers compete with the Club for consumer sales, but in buying records for such resale, they are "compelled" to pay higher prices than those paid by consumers purchasing through the Club.

That allegation is based in part on the price offered by the Club in its initial enrollment offer—for example, 6 LPs for \$1.89 (complaint, Par. Two). However, the complaint also alleges that a consumer who takes advantage of that initial offer *and* lives up to his commitment to purchase, during the next 12 months, 6 additional records "at regular list price" likewise pays prices that are lower per record than those paid by dealers.

The complaint says that a consumer obtaining 6 LPs for \$1.89, plus 6 additional LPs at \$3.98 each, pays an average of \$2.14 for each record, exclusive of mailing and handling charges. It alleges that dealers are obliged to pay from \$2.22 to \$2.47 for records of the same grade and quality.

The practice of selling LPs under Columbia's own labels to dealers at prices higher than those charged to consumer-customers of the Club is branded "unfair" by the complaint (Par. Eleven). Its effects are alleged to be as follows:

It has the capacity, tendency and purpose or effect of establishing and maintaining a competitive advantage to the Club over the dealer.

It has the dangerous tendency unduly to hinder competition

between respondents and dealers in the sale of phonograph records.

It has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally and the retail sale and distribution of LPs.

Finally, the acts, practices, methods and agreements of respondents, separately and cumulatively, as alleged in Count I of the complaint, are attacked on these grounds:

They are all to the prejudice of competitors of respondents.

They have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated, competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records.

They have resulted in an unfair competitive advantage to the Club over dealers and over subscription method competitors.

They have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs.

They have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-playing phonograph records and in the manufacture, sale and distribution of all phonograph records.

They constitute unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Price Representations—Count II of the complaint challenges as “false, misleading and deceptive” the price representations contained in Columbia Record Club advertising regarding Columbia, Epic and outside label records. The charges are outlined in detail in the Findings (Part VII).

Respondents’ representations and practices are alleged to have the “capacity and tendency to mislead” consumers into buying “substantial quantities” of records, with consequent unfair diversion of trade to Columbia.

Whether by design or oversight, the conclusions proposed by Government counsel (Argument, Vol. II, pages 298–99) are far less sweeping than the conclusions set forth in Paragraphs Ten, Eleven and Twelve of the complaint.

Unlike the complaint, the proposed conclusions do not view Columbia as having the power, purpose or effect of monopolizing or attempting to monopolize.

Now Government counsel apparently would have us conclude as to Count I that the licensing agreements “have a dangerous

tendency unduly to hinder competition"; that respondents' sale of LPs "to dealers at prices higher than those charged to consumer-customers of the Club" is "unfair"; and that those practices and agreements, separately and cumulatively, (1) are all to the prejudice of Columbia's competitors; (2) have a dangerous tendency to lessen, restrain and eliminate, and have actually lessened, restrained and eliminated, competition and opportunity to compete in the manufacture, sale and distribution of phonograph records; (3) have resulted in an unfair competitive advantage to the Columbia Record Club over dealers and over other record clubs; (4) have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; (5) have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of LPs and of all phonograph records.

Regardless of the Government's apparent abandonment—never explicitly stated (see Tr. 9695-96, 11,129; cf. Reply, pages 54-59)—of some of the more sweeping allegations, there still remained troublesome problems for the examiner.

The charges in this case reflect virtually the whole spectrum of antitrust jurisprudence. Government counsel have gone to the antitrust storehouse and have come up with a whole dormitory full of Procrustean beds bearing such familiar labels as price fixing, division of markets, leverage, monopolization, boycott, exclusive dealing and mergers, plus a few fairly new labels like dual distribution and reciprocity.

Where the facts do not fit the law, or where the law does not fit the facts, Government counsel have ingeniously emulated Procrustes and have either cut off the facts or the law or stretched them to fit the particular concept involved.

Thus, if the licensing agreements do not have the permanence associated with mergers, they "partake" of acquisitions.

Conspiracy is not really charged, but we can "borrow" from the law of conspiracy.

This is not a group boycott case, but we can pretend that it is.

And so it goes. In their brief, Government counsel have pulled together a tremendous amount of antitrust law and principles. They have dug into the cases and have shown commendable ingenuity.

The trouble is, the law does not fit the facts, or perhaps it's a case of the facts not fitting the molds fashioned by counsel.

With such a melange of charges, a plethora of evidence and a respondent denominated as belonging to the industry's "Big

Three," there is a strong temptation to say that there must be an antitrust violation here. But such an attitude is even less defensible than the fallacy of considering challenged practices completely *in vacuo*. The examiner has looked at the totality of respondents' practices, but at the same time, it was necessary to look at them *seriatim* for proper analysis.

We celebrate this year the fiftieth anniversary of the passage of the Federal Trade Commission Act, under which these charges are laid, and also of the Clayton Act, the spirit of which, if not the letter of which, has been invoked by Government counsel. We are referred also to the even more venerable Sherman Act, passed nearly 75 years ago. But despite all the case law and all the commentaries, the application of that law to the facts of this case presented the examiner with no easy task.

That suggests both the strength and the weakness of antitrust jurisprudence. Because it is economic freedom that those statutes are designed to preserve, they do not contain clear-cut or detailed rules and regulations. Except for certain industrial or commercial practices condemned as *per se* unlawful, the quest for certainty continues to be illusory. If we had such certainty, if the vast expanse of gray area were changed to black "and/or" white, we would no longer enjoy economic freedom.

Chief Justice Hughes wrote that the Sherman Antitrust Act, as "a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 359-60 (1933).

Let us measure respondents' practices against that essential standard.

B. Dual Pricing ("The Price Squeeze")

The "main thrust" of this case originally was said to deal with the licensing agreements, which were to be the central issue (Prehearing Conference, September 12, 1962, Tr. 8, 30). Most of the testimony, however, actually focused on a broader aspect of Columbia's operation—the practice of "dual distribution," which antedated the outside label contracts.

The term "dual distribution" refers, generally, to an arrangement whereby a manufacturer or other supplier competes with its own reseller-customers. Thus, as in the case of Columbia, a manufacturer may sell to wholesalers for resale to retailers, and, at

the same time, sell to retailers itself. Or, carrying the process a step farther—again, as in the case of Columbia—the manufacturer may also sell directly to consumers at the same time it sells to retailers.

Despite the attention the subject has been receiving in the press and in Congress in recent years, dual distribution is not a separate, identifiable antitrust problem. It is not prohibited by the antitrust laws or by the Federal Trade Commission Act.

The practice may involve or lead to activities or effects cognizable under those statutes, of course. It may be accompanied, as alleged here, by restrictive trade practices, price fixing, price discrimination, monopolization or attempted monopolization.

Dual distribution may or may not be anti-competitive, depending upon the context in which it appears. In this proceeding, it is alleged to be an antitrust problem in the context of a market in which integrated firms hold substantial market power. In the absence of demonstrated anti-competitive impact, or of such factors as those mentioned above, dual distribution is not subject to attack under existing antitrust laws.

The complaint's charges in the dual distribution area involve allegations of both price fixing and price discrimination.

Paragraph Ten of the complaint charges, in effect, that Columbia causes "the Licensors to sell LPs to dealers, directly or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers."

Paragraph Eleven brands as "unfair" Columbia's alleged practice of selling Columbia LPs to dealers at prices higher than those charged to consumer-customers of the Club.

Both Paragraphs Ten and Eleven apparently refer back to Paragraph Five of the complaint, where it is alleged that "dealers are compelled to pay higher prices than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors * * *."

The factual determinations made by the examiner respecting the dual pricing allegations make it unnecessary for him to discuss the complications of law and policy inherent in the Government's theory as to the so-called "Price Squeeze" (Argument, pages 346-52; Reply, pages 118-26; CPFs 265-82). Despite pretrial disclaimers (Prehearing Conference, January 3, 1963, Tr. 242), there are at least overtones, or perhaps undertones, of Robinson-Patman in the Government's position.

As shown by the examiners's Findings, however, Columbia has not discriminated against dealers by selling to Club members at lower prices; nor has it "caused" the licensors to sell to dealers at prices higher than Columbia sells to Club members.

The Government's proposed findings titled "Dual Pricing" (CPFs 265-82) refer only to Columbia records. No reference is made to outside labels. The dual pricing claim alleged in the complaint apparently has been abandoned with respect to outside labels. (See CPFs 314-27 and Exceptions; also Appendix, *infra*.)

Regarding Columbia's sales of its own records, the examiner has concluded that the Government failed to prove that Columbia charged dealers higher prices than it charged Club members. The charge of violation is based on an understatement of prices paid by Club members and an overstatement of prices paid by dealers.

Both the complaint and the Government's Proposed Findings improperly and unfairly compare the *average* price paid by Club members during their first year of membership (\$2.14) with the *range* of prices (\$2.22 to \$2.47) that dealers allegedly were "obliged to pay."

In computing the average price paid by Club members, Government counsel also omit mailing and handling charges, as well as the higher average prices paid by members after the first year of membership. Moreover, no attempt was made by the Government to establish the average price at which the Club sells records to *all* its members—its first year members as well as members who have completed their initial commitment—during a typical year.

The record also fails to support the allegations of the complaint concerning the prices paid by dealers. The record shows that dealers paid far lower *average* prices than the prices set forth in the complaint.

When *average* prices paid by Club members, adjusted to include mailing and handling charges are compared with *average prices* paid by dealers [as shown by the Government's own so-called "survey" (CX219)], the factual basis for the charge of discriminatory pricing is destroyed.

There remains only the necessity to justify the examiner's conclusion (1) that in any computation of prices paid by Club members, for comparison with prices paid by dealers, mailing and handling charges should be included, and (2) that for such comparison, average dealer prices should be "net"—reflecting all applicable discounts, rebates and allowances.

Regarding the elements of price, it is not necessary, fortunately,

for us to delve into the intricacies of the delivered-price controversy that raged before the Robinson-Patman Act was passed and was renewed in the wake of the Supreme Court's *Cement Institute* decision, 333 U.S. 683 (1948).

As a point of departure, pertinent Commission rulings on the subject indicate that price discrimination is to be measured by reference to "actual" prices charged by sellers. *Clay Products Ass'n*, 47 F.T.C. 1256, 1273 (1951); *National Lead Co.*, 49 F.T.C. 791, 881-82 (1953); *Chain Institute, Inc.*, 49 F.T.C. 1041, 1105 (1953).

Despite some ambiguous and confusing language (which apparently misled Government counsel), such a prevailing concept of "price" is also reflected in the 1956 Report of the Commission's Advisory Committee on Cost Justification:

* * * In general, the price * * * is measured by the value of the consideration which passes from buyer to seller in the exchange: it is the amount which the buyer agrees to pay and the seller agrees to take.

In all instances of "geographic" or "delivered" pricing the intent of the parties must be considered—what they mean the price to be. * * * In finding price it is reality that counts, not form * * * (pages 2-3).

The matter is made somewhat clearer in the Report of the Attorney General's National Committee to Study the Antitrust Laws. In the operation of business, as well as in the operation of the law, what counts is "the actual, laid down price" that the buyer must pay out when invoiced for the purchased goods (*Report*, pages 216-17).

Accordingly, under the Commission's "actual price" criterion, the measurement of alleged discrimination between two *competing* buyers in a Robinson-Patman case would be disparities in laid-down cost. In undertaking to determine the existence of "unfairness" in the prices charged by Columbia to Record Club members, on the one hand, and to retail dealers, on the other, it is reasonable to compare the "laid-down" cost to each class of customer.

Mailing and Handling Charges

Neither counsel has cited us to any case law or other clear-cut authority on the question of mailing and handling charges as such, and the examiner's limited research failed to yield any more definitive answer than that already indicated.

Black's Law Dictionary (4th Edition) defines price as "Something which one ordinarily accepts voluntarily in exchange for something else" and as "The consideration given for the purchase of a thing."

Black's goes on to explain price as the "Sum of money which an article is sold for"; the amount "which a prospective seller indicates as the sum for which he is willing to sell."

Black's further notes that "The term may be synonymous with cost * * *."

Finally, *Black's* points out that "price" under the ceiling price regulations of the Office of Price Administration was "the amount paid by the purchaser."

American Jurisprudence and *Corpus Juris Secundum* are somewhat more verbose, of course, but are in general agreement with the definition in *Black's*.

The purist may argue, of course, that Columbia itself recognizes that the mailing and handling charge is something other than price when it represents that the charge to the customers is \$1.89 "plus" small mailing and handling charge, or \$3.98 "plus" small mailing and handling charge. Nevertheless, if we look to reality and the intent of the parties, it is plain that Columbia intends to be paid an amount that includes not only the quoted "price," but also the mailing and handling charge. Likewise, the customer has been advised that in addition to the "price," his laid-down cost will include a mailing and handling charge. (Cf. *Fingerhut Manufacturing Company*, Docket 8565 (May 27, 1964).)

Under the Record Club arrangement, the price is the amount that the buyer agrees to pay Columbia for the goods, including as "goods" the transportation and handling that Columbia furnishes. The fact that the mailing and handling charge is separately stated does not warrant its exclusion in any meaningful comparison of Club prices with dealer prices.

"Net Prices"

Concerning other aspects of price, the price for measurement under Robinson-Patman criteria is computed *net* of any discounts or offsets which the buyer can deduct from the seller's invoice price. Again quoting the Commission's Advisory Committee on Cost Justification (Report, page 3) :

The price, in any instance, is net of all applicable allowances, discounts, and rebates which the buyer receives or is entitled to receive in view of the quantities and methods of his purchases.

(Cf. *Sano Petroleum Corp. v. American Oil Company*, 187 F. Supp. 345, 356 (E.D.N.Y. 1960).)

The net price concept has been frequently reflected in Commission orders to cease and desist in pricing cases. For example, the *Firestone Tire & Rubber* case, invalidating a variety of discrimi-

natory allowances and discounts, culminated in an order enjoining discriminations in net prices, broadly defined as taking "into account rebates, allowances, commission[s], discounts, terms and conditions of sale, and other forms of direct or indirect price reductions, by which net prices are affected" (55 F.T.C. 1759, 1764 (1959) ; see also *Morton Salt Company*, 45 F.T.C. 328, 329 (1948) ; *U.S. Rubber Company*, 28 F.T.C. 1489, 1504 (1939)).

Likewise, the Commission said in *Fruitvale Canning Company*, 52 F.T.C. 1504, 1520 (1956), "It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here."

Accordingly, the Government's failure to reflect discounts or rebates such as the "bonus-to-sell" and a "special program" at Christmas, resulted in a gross overstatement of average prices paid by dealers (see Appendix, *infra*).

The view that the examiner has taken of the dual pricing issue here makes it unnecessary for him to rule definitively on the appropriate handling of the cash discount in arriving at the net prices paid by dealers.

Again, there are no conclusive precedents, but it appears that the cash discount offered by Columbia was one which all dealers could claim as a practical matter and to that extent it is appropriate to deduct such discount from Columbia's dealer prices for purposes of measuring those prices against the prices charged consumer members of the Columbia Record Club. If the comparison were between prices of dealers, all of whom could theoretically qualify for the discount, that probably would justify disregarding it (see *National Lead Company*, 49 FTC 791, 852, 874 (1953) ; *U.S. Rubber Company*, 28 FTC 1489, 1504 (1939)). But here it was a price reduction available to dealers and *not* to Club members.

The charges of dual pricing, or what Government counsel call the "Price Squeeze," must be dismissed for failure of proof.

C. The Licensing Agreements

The Government's attack on the licensing agreements centers around allegations that (1) they operate to fix prices, (2) involve "other concerted activity" and (3) are unlawfully exclusionary. Each charge will be considered *seriatim*.

Preliminarily, however, it should be noted that despite the generality of the allegations in the fourth paragraph of Paragraph Seven of the complaint, the contract provisions cited in the subparagraphs numbered 1 through 5 on page 35 (summarized in the Introduction, *supra* (pages 257-58, Par. 7a-e)) were found only

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in the first two licensing contracts negotiated by Columbia in 1958 and 1959 (Verve and Caedmon). It appears that, for all practical purposes, the elimination of those provisions was under way before the Commission's investigation began. No contract executed since 1959 has contained such provisions.

Price Fixing

The examiner has found that except for the obsolete Verve and Caedmon contracts, the licensing agreements between Columbia and the outside labels were not intended to, and did not in fact, fix prices either in the club field or in the field of conventional distribution.

(It is important to note that the complaint does not charge, and there is no evidence to show, any price-fixing agreement independent of the contracts.)

Even in the case of the Verve and Caedmon agreements, the examiner ventures to suggest that in the circumstances shown by this record, it is a very long jump from those contract provisions, without more, to an inference that they resulted in

a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity * * *.

within the contemplation of the *Socony-Vacuum* case, 310 U.S. 150, 221-23 (1940). The evidence indicates—the very blatancy of the contracts suggests—that they were technical violations, sporadic and of questionable effect.

The much discussed “restriction” in the Verve contract was designed to discourage the sale of records from a handful of Verve masters to distributors at “distress prices.” It was, in terms, a price-fixing agreement, but there was no evidence that Verve ever issued the records or that the agreement was enforced. If Verve sold at “distress prices,” the contract provided that Columbia might offer the records to Club members on the Columbia label. Finally, the provisions were waived by contract amendment in February 1960—three years before trial.

In the case of the Verve contract, respondents are persuasive in their defense of the “most favored nations” clause, whereby Columbia simply agreed it would not sell Verve's \$4.98 records at a price lower than similar-type Columbia records were being sold through the Club. This did permit, however, Club sales at prices below Verve's \$4.98 list price.

In *U.S. v. Columbia Pictures*, 189 F. Supp. 153 (S.D. N.Y. 1960), a distribution contract between companies similarly situated was upheld against a Sherman Act charge. But other provisions of the

Verve contract are more troublesome, as shown in the findings, *supra*.

The original Caedmon contract fixed the Club price of Caedmon records at \$4.98 and required Caedmon to give the Club notice before lowering *its* suggested retail list price (\$5.95). That provision was removed in April 1961.

The record shows that the Columbia Club has, in fact, sold Caedmon \$5.95 list records at \$4.98, and Verve \$4.98 list records at \$3.98.

The findings set forth in some detail the circumstances surrounding the negotiation and precomplaint abandonment of the price-fixing aspects of the Verve and Caedmon contracts. On that basis, and in view of the disposition of the other charges, the examiner is of the opinion that the public interest does not require issuance of an order to cease and desist from price fixing. Under all the circumstances disclosed by the record, it is, in his opinion, unnecessary to issue an order predicated on practices long discontinued.

Such a determination, of course, is based on the further finding that none of the other contracts contained any provisions fixing either Club or retail prices. What the Government insisted was a price-fixing scheme in other contracts has been found to be simply a method governing royalty payments. The Club's royalties to outside labels are determined by applying an agreed percentage royalty rate to a base which was the Club's selling price, less certain complicated deductions. If the intent of the parties was to agree that Columbia would sell through the Club at licensors' list prices, such a complicated formula would hardly be required.

To Government counsel, the Caedmon and Verve contracts were somehow "precedents" for price fixing in all subsequent contracts (*e.g.*, CPF 111).

There may be some logic in the approach of Government counsel, but it is one of the anomalies marking this case that in support of their theory that Columbia and the licensors have agreed "that suggested list prices are to be maintained" (Argument, page 342), they point primarily to contracts specifically providing that Columbia need not maintain the list prices of Verve and Caedmon.

That is not the only anomaly. The position of the Government with respect to the price-fixing charges is otherwise equivocal, if not self-contradictory. The complaint (Par. Ten (1)) charges that, as the result of the licensing agreements, Columbia has exercised the power to fix and maintain uniform prices of competi-

tors' products at prices identical to those of respondents' own products. Plainly, that accuses Columbia of fixing the sales prices of competitors (the licensors) at a uniform level matching Columbia's own prices. But it still raises more questions than the evidence supplies answers.

In their Argument (page 341), Government counsel contend that the licensing agreements "consist of contracts and produce concomitant understandings affecting the *prices of the contracting competitors*" (emphasis added). They say that "Some of the contracts set prices in both club and non-club channels of distribution," and others "merely constitute agreements about the club price."

Aside from the fact that the only evidence tending to support those sweeping claims consists of the abandoned Verve and Caedmon provisions, there are other complications. Government counsel make it clear that the main thrust of their price-fixing contentions relates to parallel contracts whereby Columbia and the licensors "agree that suggested list prices of the Licensors are to be maintained" (Argument, page 342; see also page 343: "CBS has agreed to maintain the suggested list prices of a *group* of its competitors by parallel contracts").

So now, the agreement is for Columbia to adhere to the list prices of the licensors!

That is a curious departure from the allegation of the complaint that the agreements fix and maintain the prices of competitors' products to match Columbia's prices.

There is an inconsistency also in the charge in Paragraph Ten (2) that Columbia causes the licensors to sell LPs to dealers at prices higher than the prices charged by the Club in sales to consumers. If Columbia were, in fact, complying with an agreement to maintain, in Club sales, the suggested list prices of the licensors (\$3.98, \$4.98, etc.), it is obvious that Columbia was not at the same time causing the licensors to sell to dealers at prices higher than those suggested list prices!

Here, the semantics indeed get "terrifying"—or at least frustrating. The Government has failed to prove what price was being fixed and by whom. (See "The Curious Case of Allan Cohen", *supra*, page 125.)

It appears from the evidence that basically, the decision by the Columbia Record Club to sell at list price was a unilateral decision made in 1955, before the sale of outside labels. It was unilaterally followed thereafter, with such exceptions as Caedmon and Verve. The Club thus sells at the same prices as list price record dealers throughout the country. The RCA and Capitol clubs also sell at

list prices (without any claim by the Government of collusion), and they do not offer outside labels. The existing contracts do not set prices, and no price-fixing arrangements can be inferred from the mere sale of records by the Club at list prices.

Moreover, from time to time the Club unilaterally has changed the terms of the introductory offer which, in turn, establishes the average Club price to members. The Government concedes that this action has been unilateral. Each of the outside label manufacturers has unilaterally determined its own pricing system for conventional distribution, and Columbia has done the same. There is no evidence to the contrary (except for Caedmon and Verve).

Artists' Royalties—Although objecting to contract provisions regarding artists' royalties, neither the complaint nor the Government's posttrial submittals make clear the nature of the violation claimed. There is a vague suggestion—but no proof—of presumed injury to artists.

Government counsel cite no cases to establish that such an activity would be "price fixing" under the antitrust laws; indeed in the Government's Proposed Findings, the subject is treated separately from "Agreements Restricting Competition" and "Agreements Respecting Price."

At any rate, there is no showing that the royalty provisions constitute price fixing in purpose or effect. The character or effect of the conduct is equivocal, and further evidence is required before we can decide whether such behavior amounts to price fixing. There is no evidence of what effect, if any, the practice may have on price formation. (*Cf. Board of Trade v. U.S.*, 246 U.S. 231 (1918).) The record here is barren of any showing that the artists' royalty provisions contemplated or necessarily involved the control of market prices or that they otherwise unlawfully restrained trade or were injurious to competition.

Finally, it is noted that the challenged royalty provisions were waived by Columbia shortly after this complaint was issued (CPFs 107-10).

Other "Concerted Activity"

In its Argument (pages 339-41), the Government contends that:

The Licensing Agreements create other horizontal restraints on, and lessen competition among, manufacturers.

Government counsel rely on the matters set forth in CPFs 139-81. On the basis of his Findings of Fact on the subject of "Other

Concerted Activity" (page 134, *supra*), the examiner rejects the contentions of Government counsel that:

The Licensing Agreements create a relationship between competitors demanding exchange of intimate details of their businesses which must inevitably reduce their zeal for competition and that "Already this is evident" (Argument, page 341).

The facts do not support the claim.

The examiner's conclusions on this aspect of the case have been reached in the face of his recognition that the probability of competition being substantially lessened by conduct specified in the antitrust statutes need not be established by direct evidence; inferences that competitive restrictions will probably result are acceptable if supported by adequate evidence. However, as was stated by the District Court as to a similar aspect of the *Penn-Olin* case (not considered by the Supreme Court):

Here the proof shows only an opportunity for illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant. Presumption of probable wrongdoing cannot be a substitute for its proof. *U.S. v. Penn-Olin Chemical Co.*, 217 F. Supp. 110, 134 (D. Del. 1963), *rev'd on other grounds*, 378 U.S. 158 (1964).

Exclusionary Provisions

With the allegations of price fixing held to be unproved, the exclusive-dealing aspects of the agreements pose one of the most troublesome aspects from an antitrust standpoint. They do preclude the outside labels from competing with Columbia in the club or mail-order sales of records, and do set up a barrier to the use by other clubs and mail-order sellers of the records covered by the licensing agreements.

On the first reading, the baldly stated agreement of each licensor not to compete with Columbia in the club method of distribution or other mail-order sale of records looks like a sure basis for a cease-and-desist order. But research tempers such an instinctive reaction.

Statutory Tests

Exclusive dealing, in which a buyer is obligated to deal exclusively with a seller, is governed by Section 3 of the Clayton Act, and there is a wealth of literature, as well as case law, on the subject. This case falls into the category of an exclusive-selling arrangement, which is not such a familiar subject.

Typically, the restraint of a seller at the behest of a buyer takes

the form of an exclusive franchise or a "full output" contract. In either case, the seller is foreclosed from competing, directly or indirectly, with his customers. The licensing agreements do not fit squarely into either category, but partake of both.

In the absence of any exclusive-selling counterpart of Section 3, the legality of the seller's covenant is measured by the general prohibitions of the Sherman Act and is, a here, also subject to attack under Section 5 of the Federal Trade Commission Act (see *Hershey Chocolate Corp. v. F.T.C.*, 121 F. 2d 968 (3rd Cir. 1941)). Virtually all of the Federal cases involving exclusive-selling agreements have been brought under the Sherman Act. In any case, the statutory prohibitions derived their content from the antecedent common law. (For discussion regarding Section 7 of the Clayton Act, see *infra*.)

Superficially, it does appear that the purpose and effect of the exclusionary clause in the licensing agreements are the elimination of competition, at least on a temporary basis. On the face of it, that would appear to require condemnation without further inquiry.

Nevertheless, because such an arrangement is not specifically outlawed by the antitrust acts, nor clearly made a *per se* offense by the decisions, further inquiry is open to us, and it appears that such restrictive agreements may be permissible under the well-established doctrine of ancillary restraints.

However shocking such exclusionary provisions may be initially, they are familiar in the law of contracts and in antitrust jurisprudence. Contracts by which a business, a professional practice or some other property is sold or otherwise transferred are frequently accompanied by ancillary covenants which have involved a complete or partial elimination of the vendor as a competitor of the purchaser.

Agreements not to compete were generally regarded as unenforceable restraints of trade at early common law and void as against public policy. 17 C.J.S. Contracts, § 239. However, the leading English case of *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), qualified the doctrine by distinguishing between general and partial restraints of trade. Partial restraints of trade were enforceable if reasonably limited as to the time and area restricted. Ultimately, the courts came to reject any formal or fixed rules. The modern rule determines the validity of a covenant in restraint of trade by its reasonableness in the light of the particular circumstances.

An agreement imposing a restraint in trade or occupation must

be (1) ancillary to the sale of a business or similar arrangement, and (2) must be reasonable both as to the territorial extent of the restraint and the period for which it is imposed. 17 C.J.S. Contracts, § 246.

It is not necessary to the validity of a restrictive covenant that it be ancillary to the sale of a business only; it may be valid if ancillary to a sale or lease of property, to a contract of employment, to a pledge of corporate stock, to a license agreement, or to any other lawful contract. 17 C.J.S. Contracts, § 241.

It is essential that the covenant or contract by which the restraint is imposed be incidental to and in support of another lawful contract or sale by which the covenantee acquires some interest warranting protection. Although good motives will not save an unreasonable restraint, a contract merely for the purpose of removing a competitor is unlawful under all circumstances.

Because the general rule is one of reasonableness, and hence relative in character, the result of each case must rest upon the particular facts and circumstances of that case.

In considering what is reasonable, several basic concepts are generally applied: (1) the restraint must be necessary for the protection of some legitimate interest of the promisee; (2) the restraint must not impose undue hardship upon the person restrained; and (3) the restraint must not be injurious to the public as a whole. See Annot., 46 A.L.R. 2d 119, 149-51 (1956); 5 Williston, Contracts, § 1636.

The instant contracts may be held valid as meeting those specifications.

The leading American case on the subject is *Addyston Pipe & Steel Co. v. U.S.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), in which the lower court decision was written by Circuit Judge, later Chief Justice, William Howard Taft.

The pre-Sherman Act authorities were carefully reviewed by Judge Taft in the *Addyston* case. According to his synthesis, the common law sustained an agreement "by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold." (85 Fed., at 281; Accord.: Restatement Contracts, § 516(a) (1932).) The restriction was required to be limited; it could be "such only as to afford a fair protection to the interests of the party in favor of whom it * * * [was] given, and not so large as to interfere with the interests of the public" (at 282).

In applying this test, the public interest criterion has been equated with the absence of monopoly. The restriction is not

countenanced where the seller has a monopoly of the product or where the buyer is endeavoring to corner the market.

On the other hand, if there are other suppliers to whom competing buyers can turn, the rule is "virtually one of *per se* legality." *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418, 420 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957).

Taft's formulation of the rule of reason applicable to exclusive selling was applied to the sale of chattels: *U.S. v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398 (S.D.N.Y. 1942), *aff'd by an equally divided Court*, 321 U.S. 707 (1944); *Bascom Launder Corp. v. Telecoin Corp.*, 204 F. 2d 331, 335 (2nd Cir.), *cert. denied* 345 U.S. 994 (1953).

Of particular significance to the instant matter, the rule also was extended to the licensing of motion pictures in *U.S. v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 341 (S.D.N.Y. 1946), *aff'd in pertinent part*, 334 U.S. 131 (1948).

In the *Bascom* case, *supra*, it was held that "the Sherman Act was not violated, because the manufacturer had no monopoly of the product, and the 'restraint of trade' was (a) ancillary to a reasonable main purpose—a source of supply to the distributor—and (b) fairly protective of that distributor's interest but not so large as to interfere with the interests of the public."

Exclusive-selling arrangements have been sustained in numerous other cases under the Sherman Act (see respondents' Memorandum, page 11).

Restrictions on Columbia—By the terms of the licensing agreements, Columbia and each licensor have agreed that Columbia will sell the records manufactured from the licensed masters through one channel of distribution only, a record club. Government view these provisions as "restrictions on CBS."

Actually, the contracts contain no specific agreement by Columbia and the licensors that Columbia shall sell the records through one channel of distribution only—namely, a record club. The result may be the same, but there is more than a technical difference. Under the contracts, the sole rights licensed by the outside label manufacturers to the Club were for record club distribution, but there was no specific agreement by Columbia not to offer the records in other channels. (Compare CPF 66, where Government counsel appear to complain because Columbia did not feel that the contract prevented an offer by the Club through Encyclopedia Britannica, which is not a record club.)

The Verve contract, for example, licensed Columbia to manufacture records from Verve masters "solely for the purpose of

sale by direct mail in accordance with the merchandising method known and understood, in the mail order business, as the 'subscription' or 'club' plan * * * (CX 23c).

Even if this contractual arrangement be viewed as an agreement by Columbia to sell only through Club channels, there is respectable authority upholding that kind of restraint also.

Just as the common law authorized a seller to agree, ancillary to a sale of property, not to compete with the purchaser, so too it permitted an agreement "by the buyer of property not to use the same in competition with the business retained by the seller." *U.S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Accord: Restatement, Contracts § 516(b) (1932). See *Oregon Steam Nav. Co. v. Winsor*, 87 U.S. (20 Wall) 64 (1874); *Tri-Continental Financial Corp. v. Tropical Marine Enterprises Inc.*, 265 F. 2d 619 (5th Cir. 1959).

Two other precedents cited by respondents are especially persuasive. They are: *Doubleday, Inc.*, Docket 5897, 50 F.T.C. 263 (1953), 52 F.T.C. 169 (1955); *U.S. v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960). The parallels between those cases and the instant proceeding are so striking as to warrant calling them "bay horse cases." They are discussed at length in the briefs. One excerpt from *Doubleday*, involving book clubs, is quoted here:

The question for decision is whether this competitive situation results from practices which are violative of the law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail book seller has lost sales to a book club or can not successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission v. Paramount Famous-Lasky Corp.* (C.A. 2, 1932) 47 F. 2d 152, 157. "Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face." *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568, 582. 50 F.T.C. at 266.

* * * Disadvantage to retail book sellers may be perpetuated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs, and a large section of the reading public. On balance, the overriding public interest (as well as the law) seems to be with the views held by the Hearing Examiner. 50 F.T.C. at 267.

Government counsel now argue in their Brief that the licensing agreements constitute *per se* violations of the law. This viewpoint is hardly consistent with that taken at the trial, when the Govern-

ment paraded to the stand, as witnesses, numerous dealers and manufacturers in an effort to show adverse effect.

At that time, Government counsel evidently either did not espouse the *per se* theory or perhaps had little or no faith in it. Otherwise, there would have been no point to all the testimony and other evidence designed to show adverse effect stemming from the licensing agreements.

Ironically, the Government might have been in a stronger position if it had rested originally on the *per se* doctrine, or if, perhaps, it had left to inference the anti-competitive effects of patently restrictive agreements. Belated use of the *per se* rule at this stage makes it suspect, and, moreover, the very evidence adduced by the Government as a sort of safety measure tends to undermine acceptance of a presumed injury to competition in the face of facts indicating the contrary.

The *Motion Picture Advertising* case, 344 U.S. 392 (1953) is of substantial precedential value here. It is more often cited for what the Court said as to the broad sweep of Section 5 of the Federal Trade Commission Act than for what it held.

What is often overlooked is that the Court *held* that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore 'an unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act." 344 U.S. at 395. It is worth noting, however, that no *per se* rule was applied. Long-term exclusivity (as long as 5 years) was held bad, but such contracts were allowed for 1-year terms.

In the heading preceding CPF 30, Government counsel refer to the licensing contracts in this case as "long-term agreements." However, there was no testimony or other evidence offered regarding the reasonableness or unreasonableness of the terms. Certainly it is not established that the agreements may properly be denominated as "long-term." All the indications are to the contrary.

Brief comment should be made at this point respecting the position of the Government that the licensing agreement would be unlawful even absent the exclusive-dealing arrangements or so-called price-fixing arrangements.

Even assuming that it has been shown, or that we may properly infer, an adverse competitive effect stemming from those arrangements, the examiner is still of the view that there must be something "unfair" about the practice itself. As noted in *Doubleday, supra*, the fact that a practice has the effect of hindering compe-

tion, without more, does not make it an unfair method of competition.

It may be worth noting at this point also that there is no showing whatever of any oppression, coercion or threats on the part of Columbia in the negotiation or execution of the licensing agreements. There was no claim on the part of any of the licensors of any overreaching on the part of Columbia. The transactions eventuated as a result of arm's length bargaining.

Review of the authorities, therefore, shows that the legality of Columbia's licensing agreements with outside labels is governed by the Rule of Reason and long established antitrust principles with respect to ancillary restraints, and not by any rules prescribing *per se* illegality.

Finally, we reach the question whether the licensing agreements constitute violations of Section 7 of the Clayton Act. It is not necessary to make a definitive determination whether Section 7 applies to short-term distribution contracts of the type involved in this proceeding. There is authority for the proposition that an exclusive long-term license distribution arrangement such as was involved in the *Screen Gems* case (*U.S. v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D. N.Y. 1960)) would constitute an "asset" within the purview of Section 7 because it "had substantial economic value for a long term" (189 F. Supp. at 183). The instant case is distinguishable from *Screen Gems*.

From the legislative history, as well as the authoritative discussion in *Brown Shoe Co., Inc. v. U.S.*, 370 U.S. 294 (1962), respondents have extracted language indicating strongly that the amended Section 7 was never intended to cover distribution contracts of the type involved in this case (see respondents' Memorandum, pages 44-47).

However, it is not inappropriate, perhaps, to apply Section 7 standards to some degree in testing the legality of the licensing agreements. Thus, we have undertaken to determine whether the effect may be substantially to lessen competition or tend to monopoly. We are not requiring that the Government prove a "dangerous tendency" toward those results.

Before reviewing briefly the competitive picture in the wake of the licensing agreements, an explanation of the relevant market considerations is in order. To that subject we now turn.

Relevant Market

Whether the effects of the respondents' practices are to be tested as involving monopolizing, attempting to monopolize, tending

dangerously to monopolize or substantially lessening competition, the determination in any case must be made in terms of one or more relevant markets. That is true regardless of the statute under which a particular practice or the totality of respondents' practices may be considered.

The question whether a particular practice may substantially lessen competition or tend to create a monopoly can be answered only with respect to some line of commerce or some product market. The existence or non-existence of the prohibited competitive effect must be considered in connection with a market, which has both product and geographical boundaries.

Here there is no particular problem as to geographic boundaries. We are concerned essentially with a national market from the geographic standpoint. However, the parties violently disagree concerning product market or line of commerce.

Our first task, then, is to determine an appropriate market in which to measure the competitive effect. The determination of the relevant market is a necessary predicate to a finding of a violation. *U.S. v. E. I. du Pont de Nemours and Co.*, 353 U.S. 586 (1957).

The market to be considered, both with respect to product line and geographic area, is "the area of effective competition. *U.S. v. E. I. du Pont de Nemours and Co.*, *supra*. The "area of effective competition" includes the line or lines of commerce and the section or sections of the country in which the effects may be felt.

Although the market for testing a merger or acquisition under § 7 of the Clayton Act is not necessarily the same as the market concept for the purpose of other sections of the antitrust laws, nor is it necessarily the same as the economist's concept of market, *U.S. v. Bethlehem Steel Corporation*, 168 F. Supp. 576 (D.C. N.Y. 1958), any such distinctions are academic with respect to the relatively uncomplicated structure of the record industry. Also, with the monopoly charges out of the way, there is no reason for not relying basically on the § 7 criteria.

This already lengthy exposition might be even further extended by an erudite review of the many cases in which the Commission and the courts have discussed relevant markets.

Such a review does yield certain guiding principles, but the determination is essentially a pragmatic one. Extended discussion of the varying standards applied in other cases might be academically interesting, but would contribute little to the resolution of the problem in the instant case. The matter is authoritatively considered at some length in *U.S. v. Brown Shoe Co., Inc.*, 370 U.S.

294 (1962). It is interesting that both sides rely on that case to support their opposing contentions.

The factual basis for the examiner's determination that the appropriate market here consists of all phonograph records sold through all channels of distribution has been set out at length in the Findings. It remains only to indicate briefly the rationale of the rejection of LPs and record clubs as appropriate markets or lines of commerce.

The examiner has undertaken a pragmatic, factual approach to the definition of the relevant market rather than a formal, legalistic one. The all-records market corresponds to the commercial realities of the industry.

In the examiner's opinion, it is unrealistic to break the all-records market down according to the speed at which a record revolves, or the manner of its retail sale. The boundaries of the relevant market must be drawn with sufficient breadth to include *competing* products and to recognize competition where, in fact, competition exists. The determination of whether or not there is a reasonable probability of a substantial lessening of competition requires an examination into economic realities. All competition must be considered, including competition faced by the product in question from other products.

LPs and 45-r.p.m. singles do in fact compete. So do record dealers and record clubs.

Despite all the references to precedent and principle, the dispute between the parties is a pragmatic one. The Government wants the breakdown because the "sub-market" statistics tend to show greater concentration and give Columbia a greater market share. Conversely, respondents want to define the market broadly because the all-records statistics indicate a lower concentration index and a lesser market share for Columbia.

Further division of the record market does not really aid us in analyzing the effects of Columbia's practices. It would tend to distort the economic actualities.

Neither LPs, as a product market, nor record clubs, as a line of commerce, are sufficiently inclusive to be meaningful in terms of trade realities. They are not distinct and substantial markets. It cannot be said that LPs have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other phonograph records so as to make them a line of commerce within the meaning of the Clayton Act.

The boundaries of the product market are determined by reasonable interchangeability of use and cross-elasticity of demand be-

tween the LPs and singles. LPs and singles do not constitute well-defined submarkets that in themselves constitute appropriate product markets for antitrust purposes.

The basic facts are that, except for certain types of serious music which are lengthy, precisely the same music and the same artists appear on singles and LPs. Singles and LPs are made in the same factories, sold through the same conventional channels and to similar consumers. They operate on the same phonographs. Knowledgeable record people like Government witness Wood and respondents' witness Mitch Miller aim their singles for as broad a base as possible, and the artists they promote appeal broadly to all consumers. Small wonder that Mitch Miller properly characterized the LP as a "long single." The appeal of an artist depends upon the artist himself and his material, and not on the speed at which the record revolves. Such differences as there are between singles and LPs are not substantive.

A precedent especially pertinent to the instant case is *U.S. v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D. N.Y. 1960). There, all forms of television programming material (including syndicated films produced specifically for television, video-taped and live shows, cartoons and shorts), rather than feature motion films for television exhibition alone, constituted the relevant product market for the purpose of determining the legality of the acquisition of exclusive distribution rights to feature films for television exhibition.

Feature films faced a high degree of competition from other forms of television programming material; they did not have peculiar characteristics or uses that were significant for television purposes; and they were reasonably interchangeable with, and competed against, all other types of television programming material.

Just as short Westerns were found to compete with long Westerns, so here, an LP is a "long single."

Records are sold to consumers by many means including traditional retailers, discount houses, department stores, supermarkets, clubs and direct mail sellers. There obviously are certain differences in their merchandising techniques. But they are all offering the same product, and thus are in general competition for the favor, and the dollars, of consumers. Indeed, the whole theory on which Government counsel tried this case was that the clubs sold the identical product in competition with retailers and actively took customers and sales away from these competitors. In the face

of this, can it be seriously contended now that clubs are in a market separate from those retailers?

Just as supermarkets do not constitute a separate line of commerce, *The Grand Union Co.* (Docket 8458, Initial Decision, October 4, 1963), neither do record clubs. A line of commerce is not a store or a particular method of selling products, but consists of a product or group of products offered for sale and sold in the market place. Particular types of sellers do not constitute separate lines of commerce.

Government counsel have labored mightily to separate out LPs and record clubs from the manufacture and sale of records generally. They have made the most of what they have. But it is not enough. To the examiner, the differences the Government emphasizes do not warrant viewing LPs or clubs as separate submarkets.

Monopoly Charges

It is easy to inveigh against monopoly; it is not so easy to define it. This is a problem that continues to perplex the courts.

It was not quite twenty years ago that Judge Learned Hand laid down his oft-quoted dictum that ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *U.S. v. Aluminum Co. of America*, 148 F. 2d 416, 424 (2d Cir. 1945); cf. *U.S. v. Columbia Steel Co.* 334 U.S. 495, 527-28 (1948).

Under that kind of approach, monopoly cases became a baffling game of numbers. The test resolved itself into that degree of market control which, ultimately, the Supreme Court believed could properly be vested in a single enterprise.

Obviously, the percentage had to be something less than 100 if the prohibition was to mean anything. The question was—and still is—how much less.

Subsequent cases, together with a growing sophistication, both economic and legal, have provided a better frame of reference, but a satisfactory answer remains elusive.

The test currently being applied sounds deceptively simple. Monopoly is now judicially defined as the "power to control prices or exclude competition." *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (*Cellophane*).

Whether we apply the *Alcoa* test or the *Du Pont* test, and regardless of the product or functional market that we look at, the conclusion must be that Columbia does not have a monopoly and has not monopolized.

Despite some vacillation (*cf.* Tr. 9695-96, 11,129), it appears that Government counsel have abandoned the monopolization charges in the complaint and now rest their case essentially on the probability of a substantial lessening of competition or a tendency toward monopoly.

Even though the Government's Reply (pages 54-59) suggests continued reliance on the charge that Columbia attempted to monopolize the club distribution of LPs, there is no occasion for any extended discussion of that subject. There is no real claim that the Government proved the requisite specific intent to accomplish an unlawful result. *Swift & Co. v. U.S.*, 276 U.S. 311 (1928); *U.S. v. Columbia Steel*, 334 U.S. 495, 532 (1948).

The evidence does not begin to support any claim of monopoly, monopolization or attempted monopolization.

Competitive Effects

With monopoly, monopolization and attempt to monopolize out of the way, as well as price fixing and allegedly discriminatory "dual pricing," we come now to a consideration of the competitive effects of the licensing agreements as such, without extraneous factors.

The factual conclusions are set forth in Section VI of the Findings of Fact, *supra*, and there is no point in repetition here, except in the most general terms. Similarly, there is a vast body of case law on the subjects embraced herein. It would unduly extend this already lengthy opinion to discuss here even a small percentage of the cases cited in the briefs and reply briefs of the parties.

However, before concluding, there should be set forth some observations that may touch on both the facts and the law, but with a minimum of repetition.

Government counsel contend that all of the licensing contracts, whether exclusive or nonexclusive, are illegal. It is the position of the examiner that (aside from price fixing) the only real antitrust question stems from the exclusionary clauses barring each licensor from competing with Columbia, directly or indirectly, in the club or mail-order sale of records.

The recent inclusion of provisions for partial or complete release of exclusivity would not, in the opinion of this examiner, save the contracts (*Alles Corp. v. Senco Products Inc.*, 329 F. 2d 567 (6th Cir. 1964)) if in fact it had been shown that the effect of the contracts is actually or potentially injurious to competition.

No such showing was made in this record. It has been amply demonstrated that to whatever extent dealers may have been

suffering injuries as a result of club operation, there was no bridge of causation linking such injury with the exclusive-dealing clauses or, as a matter of fact, with the licensing agreements in general.

There was no showing that any existing record clubs or mail-order sellers, or any potential entrants into either of those fields, had suffered competitive injury as a result of the barriers, or that competition is otherwise threatened as a result of the outside label arrangements.

Whether or not exclusive selling arrangements of the kind in issue here enjoy "almost *per se* legality," there can be no doubt that there must be a showing that the exclusivity is likely to result in a substantial lessening of competition. The complaint recognizes that burden, but it is a burden that has not been met by Government counsel.

The failure of the prosecution was not due to any want of zeal on the part of Government counsel. They were earnest and diligent, but the facts simply fail to support the allegations of the complaint.

Similarly, it may be conceded that the record dealers and other witnesses who testified in support of the complaint were earnest and sincere in their belief that record clubs are injurious to their business. Some of the dealer witnesses espoused competition of a type inconsistent with the public policy enunciated by the anti-trust laws.

The flaw in the case as presented by the dealer witnesses is twofold: (1) their claims of injury generally fail to stand up under inquiry, and (2) in any event, whatever their injury, it was not shown to be properly attributable to the licensing agreements between Columbia and the outside labels.

A plausible argument can be made that the pricing policies and practices of the Club have had an adverse impact on some record dealers, but there has been shown no relationship between the licensing agreements and such competitive pricing.

No Pre-Emption—There is no charge, and no evidence, that Columbia pre-empted, or attempted to pre-empt, the field by signing up any large number of companies. Over a period of four years it entered into only a few contracts with a handful of the many hundreds of record companies in active operation. Competitive record clubs were free to make competitive bids.

The Club's sale of outside label records has never amounted to more than a small fraction of either total industry sales of records or of LP records (RX 425-26 *in camera*; RPF 100).

Although CPF 30 refers to 17 licensing agreements between Columbia and 12 different companies, there were in effect at the time of trial only six full catalog contracts (Caedmon, Mercury, Kapp, United Artists, Liberty and Cameo), the outside term of which varied from 1 year to approximately 3 years. Of these six full catalog contracts, four contained partial exclusivity release clauses pursuant to which the outside labels might sell individual records through other mail-order sellers; three of those four contained complete exclusivity-release clauses pursuant to which the outside labels could take their entire catalog to a competitive record club; one of the six was a one-year contract (Cameo—CX 453).

A distinction must be drawn between power to exclude competitors from a particular source of supply, or even a group of suppliers, for a short term, and power to exclude competitors from the *market*, even temporarily.

It is logical, of course, that such competitive injury as might develop would involve other record clubs or other mail-order sellers. Proof of that nature, however, was limited to the Diner's Record Club, and the facts concerning that operation do not add up to a showing of cause and effect or of injury to competition.

For the most part, the injury testimony came from dealers. It is apparent that the exclusivity provisions in the licensing agreements would be immaterial to them. As a matter of fact, they presumably would welcome any restrictions that limited club or mail-order competition.

It is a fair test of the legality of the exclusive arrangements to inquire where other prospective purchasers could practicably turn for supplies. Since the restriction applied only with respect to club and other mail-order sellers, our inquiry is narrowed accordingly.

The availability of other supplies is usually a question raised with respect to the geographic boundaries of the market, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963), but it is raised here without respect to any narrow geographic boundaries.

The fact is that to whatever extent prospective competitors of Columbia in the record club or mail-order field may be handicapped, that disadvantage is not attributable to the nonavailability of the records of the licensors.

Those records, as well as those of the so-called "Big Three," are actually available in the market. Despite the provisions in the contracts restricting the licensors from knowingly selling their records for resale through club or other mail-order channels, it is

apparent that there is no absolute barrier to prevent such records from finding their way into those channels of distribution. As a matter of fact, that is what happened.

Just as in the case of the records of the Big Three, the problem is the acquisition of those records bearing the labels of the licensors at a price permitting resale through club or mail-order channels at prices competitive with the major record clubs. The complaint here does not attack the root of that problem, and the proposed order against exclusivity would not solve it.

It is true that the blanket prohibition against Columbia's engaging in such licensing agreements would have some impact, but we have also seen that there is no valid basis provided by this record for such a sweeping prohibition.

Chain Reaction Theory—The argument of Government counsel that Columbia must be restrained here because its competitors might emulate its practices has some precedent in the *Revlon* case (*Revlon Products Corp.*, Docket 5685, 51 F.T.C. 260, 279 (1954), motion to reopen denied, 51 F.T.C. 466 (1953)). There, commissioner Mason intimated that the possibility that competitors might emulate the respondent in the future was a relevant consideration. This is the same "chain reaction" theory later articulated in *U.S. v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D. N.Y. 1958).

In some of the exclusive-dealing cases, there has been reference to the fact that the seller's competitors likewise adhered to exclusive-dealing policies. The significance of that is not altogether clear. The cumulative effect of such adherence has been mentioned by the courts and the Commission on numerous occasions—for example, *Standard Oil Co. of Cal. v. U.S.*, 337 U.S. 293 (1949); *Dictograph Products, Inc.*, Docket 5655, 50 F.T.C. 281 (1953), *aff'd*, 217 F. 2d 821 (2nd Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Beltone Hearing Aid Co.*, Docket 5825, 52 F.T.C. 830 (1956); *Signode Steel Strapping Co. v. F.T.C.*, 132 F. 2d 48, 54 (4th Cir. 1942); see also *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). Such cumulative effect, however, does not appear to have been made the basis for decision, except possibly in the *Signode* case.

To posit a finding of illegality on the basis of what a respondent's competitors independently *are doing* is dubious. To make the legality of his practices dependent on what competitors independently *might do* is even more questionable.

The examiner recognizes, of course, that a respondent's practices must be considered in the setting and context in which they exist. He recognizes also that in general, we are concerned with

probabilities and not certainties. Nevertheless, to predicate a finding of unlawful conduct on the basis of what competitors might independently do is offensive to one's sense of justice.

In that connection, let us consider, finally, the basic issue ultimately posed here—whether or not the agreements are anticompetitive because of undue industry concentration. On that issue, we have recent guidance from the Commission in the case of *The Procter & Gamble Co.*, Docket 6901, 63 F.T.C. 1465 (1963).

Section 7 and "First Principles"—The examiner has decided to apply to the licensing agreements the tests of legality applicable under Section 7, not because the contracts or their results really involve mergers or acquisitions, but because, in the words of *P&G* (p. 1549), "Section 7 deals with the fundamentals of a free competitive economic system." Instead of a lengthy review of other pertinent case authority, we shall limit the discussion to the "first principles" expounded in *P&G*.

Procter & Gamble involved a challenge by the Commission under Section 7 of the Clayton Act to the acquisition by P&G of the assets of Clorox Chemical Co. This was the first case involving a so-called conglomerate merger.

In its comprehensive discussion of the coverage of Section 7, the opinion by Commissioner Elman is instructive as to the proper disposition of the instant case, which has been analogized by the Government to a Section 7 proceeding.

To the extent that the licensing agreements we are concerned with might be considered to constitute an acquisition or a "temporary merger," the results may be viewed as those of a horizontal merger, because the arrangements are between firms that make and sell the same product.

In another sense, the licensing agreements might be viewed as in the nature of what the *Procter & Gamble* opinion called "a market extension merger" (p. 1543). That is on the basis that Columbia and the licensors are selling to different customer classes; cf. *Brillo Manufacturing Co.*, Docket 6557, 64 F.T.C. 245 (1964); see also *Foremost Dairies, Inc.*, Docket 6495, 60 F.T.C. 944 (1962). In the instant case, the licensor (viewed as the "acquired firm") sells the same product as Columbia ("the acquiring firm") and may be a prospective entrant into the so-called club market.

The analogy obviously is imperfect, but it does provide a conceptual framework in which to test the legality of the licensing agreements. It must be borne in mind that the "assets" are Columbia's only in part, and only temporarily. No assets disappeared;

nobody went out of business. As respondents say (Memorandum, page 47) :

To call these arrangements "acquisitions" (subject to Section 7) is to play a game of semantics in an ivory tower.

The *P&G* opinion lays down certain basic principles for the interpretation and application of Section 7—principles that may govern, at least to a degree, the instant case.

First, "All mergers are within the reach of the amended § 7, whether they be classified as horizontal, vertical, or conglomerate, and all are to be tested by the same standard. * * *.

"* * * The legal test of every merger, of whatever kind, is whether its effect may be to substantially lessen competition or tend to create a monopoly, in any line of commerce, in any section of the country."

Recognizing that "competition is our fundamental national policy," the opinion notes next that this policy "informs all the federal antitrust laws, but some more explicitly than others." Illegality is predicated specifically on the probability of a substantial anticompetitive effect.

The important point, for our purposes, is that like the other sections of the Clayton Act, Section 7 singles out a particular class of business practice—corporate acquisitions—for especially strict antitrust scrutiny. Thus, a very practical question arises concerning the Government's effort to force the licensing agreements into the merger mold.

In a proper Section 7 case, it is plain that if the adverse effects on competition specified in the statute are proved, respondents normally will not be heard to say that redeeming social or economic benefits will flow from the acquisition. *U.S. v. Philadelphia National Bank*, 374 U.S. 321, 371.

The Commission emphasized that "While a broad Rule of Reason may not be read into Section 7, it is clear that mergers are not to be judged according to a so-called *per se* standard." The Commission went on to explain:

In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probably anti-competitive effect. * * * In every case the determination of illegality, if made, must rest upon specific facts. * * *

The following excerpt 63 F.T.C. at 1548 is particularly pertinent:

The concept of competition which underlies the amended Section 7 has no simple or obvious meaning, and was defined by Congress neither in the statute itself nor in the course of the deliberations that led to its enactment.

That concept, however, involves a congressional "fear of what was considered to be a rising tide of economic concentration in the American economy." And Congress' emphasis on concentration reflected its deep concern with what economists would call the problem of oligopoly—a problem that centers on undue or excessive market concentration. Accordingly, the Commission, in *P&G*, stated:

Indeed, the relationship between concentration (and related market-structure characteristics) and lessened competition is clearly, we think, at the core of Section 7. For this reason, the specific issues of this case must be placed in a larger frame of reference. Section 7 deals with the fundamentals of a free competitive economic system, and it is in the context of first principles that we must approach this case. (*Id.*)

So, likewise, the instant case must be viewed "in the context of first principles."

After contrasting a market of 100 sellers of approximately equal size with a market of three sellers, each of equal size, the *P&G* opinion points out that in the former, "each seller is likely to establish his business policies in disregard of the actions of any individual competitor," whereas in the latter oligopolistic market, each seller "is likely tacitly to renounce price competition, and perhaps other forms of rivalry as well."

This description of so-called "perfect competition" and oligopoly appears to be in accord with classic economic theory.

In the instant case, although Government counsel have in effect alleged the presence of oligopoly, their proof does not show a renunciation of price competition and other rivalry. On the contrary, despite the superficial sameness of list prices, there appears to be price competition, together with other forms of rivalry.

According to *P&G*, "The consequence of each firm's refraining from price competition is likely to be an unnaturally high price level in the market and a general deadening of competition." That is not the picture of the record industry reflected by the evidence in this case.

Other "symptoms of oligopoly" are said to be price leadership, conscious parallelism, excess capacity, emphasis on heavy advertising in lieu of technological innovation, and administered prices.

Again, the record industry does not appear to be suffering from such symptoms as those, despite the belated, back-handed sug-

gestion of "administered prices" in the Government's Argument (page 316, n. 175).

Other symptoms of oligopoly discussed in *P&G* were not shown to be present in the record industry. The examiner has specifically found ease of entry. There appears to be vigorous competition; there was no evidence that smaller firms pursue the "quiet life."

Contrast conditions in the record industry with those the Commission found in the bleach industry—where Clorox was the only national seller of bleach, and the only other firm that could be regarded as a significant competitive factor (Purex) did not compete with Clorox at all in about half the country. In addition, there were "formidable barriers to new entry."

We cannot find here, as the Commission found in *P&G*, that the "market structure" of the industry is "significantly less conducive to competition" than it was before.

Discussing the size disparity between *P&G* and existing bleach companies, the Commission observed that the practical tendency of the instant merger was "to transform the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals" (*Id.* at 55).

The Commission pointed to the *Brown Shoe* decision as "holding unlawful a merger that did not itself create or aggravate an oligopolistic market structure, but, rather, was feared to be the first step in the transformation of a traditionally small-business, atomistic industry into one dominated by corporate giants" (*Id.* at 56).

The reverse of that situation is shown in the record industry. It is too much to say that this industry has been transformed from a big-business industry to a small-business industry, but the role and the dominance of the big-business factors have been eroded.

The picture of the phonograph record industry that emerges from a review of all the words and all the statistics can be highlighted as follows:

(1) The growth of new record companies, the decline in the market position of established firms, and the volatility of the relative market positions of the larger firms, are all inconsistent with any theory of monopoly or oligopoly at the manufacturing level of the industry.

(2) At the retail level, there is a high degree of dispersion in the number of outlets, with well in excess of 100,000, and no retailer or group of retailers dominates the market place. There has

been an exceedingly high rate of effective and successful entry into the record industry at the manufacturing level.

(3) Entry in over-the-counter retailing of records, as shown by the tremendous growth of new outlets, has also been at an exceedingly high rate and is relatively easy. The record club and mail-order fields have also witnessed a high degree of entry. And there are other potential entrants with adequate resources.

(4) The record industry is a growth industry, not a stagnant industry. There has been a significant growth in the diversity of product alternatives available to consumers.

(5) There has been product innovation, generally characteristic of a highly competitive industry, and also important marketing innovations, including the advent of rack jobbing, clubs and other mail-order outlets offering products to consumers with increased convenience.

(6) Columbia's growth has been internally generated and not the result of merger or acquisition. The competitive innovation of the LP gave Columbia a temporary jump on the industry, but that advantage did not last long. Columbia was the first full catalog company to start a record club and had a head start of several years. This is another factor responsible in part for its growth, but here again, it now faces vigorous competition.

(7) The charge of deceptive advertising of "list prices" in this very case points up the existence of a high degree of price rivalry.

(8) There is a significant degree of nonprice competition in the record industry, such as technical innovations (e.g., LPs and 45s), the development of new artists, the "covering" and imitation of successful records, the development of new musical styles or "sounds," and the creation of album covers. There is also significant nonprice competition at the retail level.

(9) Record clubs, including Columbia's Club, have had a favorable and positive impact on the effectiveness of competition in the record industry, stimulating sales through all channels of distribution, broadening the base of the record-buying public and giving consumers an additional source of supply. The over-all expansion of record sales has afforded greater opportunities for all rival firms.

(10) The distribution of the records of outside label manufacturers through the Columbia Record Club also has had a positive effect on competition in the record industry. Although we may emotionally resent the aura of paternalism displayed here and elsewhere by Columbia, we must recognize such an arrangement as constituting a form of entry, permitting smaller companies to

offer their records to consumers via a new channel of distribution, which might not otherwise have been open to them since club operations require substantial capital and expertise. Club distribution has given the outside labels additional income and advertising, thereby making them stronger competitors in all distributional channels.

Even considering Columbia as "dominant," or at least as one of the "dominant Big Three," and recognizing the jaundiced view that must be taken of restrictive agreements in such a setting, nevertheless, we must also be realistic and recognize that what may be good law when market agreements are used as an oppressive economic weapon may not be good law when such agreements are employed by a dominant seller in such a way as to grant smaller producers access to a channel of distribution otherwise closed to them.

Finally, a word on the subject of big business, small business and the antitrust laws. The examiner is not unsympathetic with the problems of small, independent businessmen in meeting the rigors of competition from other business, big and small. He is aware, too, of a general public policy designed "to perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other," *U.S. v. Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945) : and "to promote competition through the protection of viable, small, locally owned businesses," *Brown Shoe, supra*, 370 U.S. 294, 344.

However, he must be mindful that the Commission has said that there is no warrant "for subordinating the protection of *competition* to the protection of small-business *competitors*."

In applying the law to the facts of this case, the examiner has viewed the antitrust laws as a general charter of competition, with basic provisions designed to promote competitive practices, and with no special class of business singled out for favored treatment. The antitrust laws were intended not to promote the interests of any one group but to safeguard the health of the competitive process itself. If resources are allocated in response to consumer preference, as reflected in the operation of free markets, the rationale is that all business is spurred to operate in such manner that consumer wants are best satisfied.

To say that much thinking on the relation of bigness to competition is outdated and unrealistic, is hardly heretical today. Rapidly changing technology and the growing importance of

industrial research are among the factors that tend to increase in many industries the size that is needed to enable enterprises to compete—and to survive in competition.

Historically, it is doubtless true that some industrial giants were the outgrowth of competitive ruthlessness, but to carry over the emotional prejudices of the last century to today's industrial bigness is not only futile but harmful. It is unfortunate that Government counsel here have resorted to such obsolete emotionalism in their attack on Columbia.

The Supreme Court told us in 1920 that corporate bigness alone is not condemned by the antitrust law. *U.S. v. U.S. Steel Corp.*, 251 U.S. 417 (1920). It repeated the message at least as recently as 1948. *U.S. v. Griffith*, 334 U.S. 100 (1948). Only recently, as we have seen, the Commission, in its decision in *The Proctor & Gamble Company* case (Docket 6901, Final Order Nov. 26, 1963, at page 1574), was careful to point out that in its emphasis on the size of P&G as a pertinent consideration in the decision of that case, it was "most emphatically *not* adopting any view that bigness *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute."

It is natural, perhaps, to yearn for a bygone day, a day when business, labor and government all operated on a smaller scale than they do today, a day when we were, perhaps, a nation of small shopkeepers.

To be realistic about today's economy and the size it has achieved does not require any abandonment of our basic antitrust philosophy.

We still give lip service to the proposition that bigness is not bad *per se*, but there is a tendency to view smallness as good *per se*, and there is almost an unspoken corollary that bigness *is* bad *per se*.

Size does carry with it an opportunity for abuse, but we do not have to operate on the presumption that that opportunity always has been or always will be availed of. Yes, big business can restrain competition and often does. Perhaps it has a proclivity for collusion. But those can be dealt with under the antitrust laws. Large enterprises can also provide vigorous and dynamic competition.

It is necessary to keep in mind also that competition is a contest, and this means winners and losers. The fact that the winner is big and the loser is small does not necessarily mean that the contest was unfair.

All competitive effort is burdensome and harmful to those who cannot keep pace, but if we said it must stop short before it hurts anyone, we would completely abandon the policy of competition.

Although subject to some limitations, perhaps, there is much to be said for the observation of the late Mr. Justice Jackson, dissenting in *Standard Oil Co. of California v. U.S.*, 337 U.S. 293, 423 (1949) :

If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing. * * *

In that spirit, the hearing examiner has concluded that the Government has failed to prove that the effect of the challenged licensing agreements may be substantially to lessen competition, or to tend to monopoly.

Economic opportunity has not been foreclosed in the record industry. It has not been demonstrated that the practices challenged by the complaint have conferred on Columbia, or are likely to confer on Columbia, economic power that is incompatible with the maintenance of competitive conditions in the record industry or any substantial segment thereof.

D. Price Representations

The allegations of deceptive pricing contained in Count II of the complaint are essentially disposed of by comparing the Findings of Fact with the standards established by the Commission's revised "*Guides Against Deceptive Pricing*," adopted December 20, 1963, and effective January 8, 1964 (superseding *Guides Against Deceptive Pricing* adopted October 2, 1958).

Before the adoption of those new Guides, the examiner appropriately might have found, in the words of the complaint (Count II, Par. Three) that—

Through the use of the aforesaid statements and the amounts in connection with the terms "retail value," "regular list price" and "usual list price," respondents have represented and now represent that said amounts are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, and through the use of said amounts and the lesser amounts that the difference between said amounts represents a saving to the purchaser from the price at which said merchandise is usually and customarily sold in said trade areas. (*Coro, Inc.*, Docket 8346, Final Order, November 6, 1963, and cases there cited.)

A finding, likewise substantially in the words of the complaint (Par. Four), also could have been made on this record that:

In truth and in fact, the amounts set out in connection with the aforesaid statements and the terms "retail value," "regular list price" and "usual list price," were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in *many* of the trade areas where such representations are made, but *frequently* are in excess of the price or prices at which the merchandise is generally sold in said trade areas, and purchasers of respondents' merchandise would not *always* realize a saving of the difference between the said higher and lower price amounts. (Except for the italicized words the foregoing is the language of Count II, Par. Four. The italicized words have been inserted by the examiner in the complaint's allegation to reflect the facts shown by the evidence.)

Even without the complications introduced by the revised *Guides*, there would have been some problems of variance between pleading and proof. As indicated, consumers *could* buy from the Club six so-called \$3.98 to \$6.98 LPs for \$1.89 (plus commitment), and this did indeed represent a saving from the prices at which such records were usually and customarily sold—even by discounters.

The examiner is bound by the *Guides* as "administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices" (FTC *Organization, Procedures, Rules of Practice*, etc., August 1963 (§ 1.55, General Procedures); see also *Majestic Electric Supply Co., Inc.*, Docket 8449 (February 28, 1964); *Clinton Watch Company*, Docket 7434, Order Denying Petition to Reopen, (February 17, 1964); *Gimbel Brothers, Inc.*, Docket 7834, (July 26, 1962)).

No lengthy discussion is required. The facts concerning respondents' practices (as found in Part VII, *supra*) need only be measured against applicable standards set forth in the *Guides*. The Commission has determined, in the exercise of its expertise, that—

Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

* * * * *

* * * the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at

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which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare case are *all* sales of an article at the manufacturer's suggested retail or list price.

But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

This general principle applies whether the advertiser is a national or regional manufacturer (or other non-retail distributor), a mail-order or catalog distributor who deals directly with the consuming public, or a local retailer. But certain differences in the responsibility of these various types of businessmen should be noted. * * *

* * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. * * *

It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. * * * (Guide III)

The evidence as to certain of the matters adverted to is not so complete or clear-cut as it might have been if the new *Guides* had been in effect at the time of trial. Nevertheless, it is the conclusion of the hearing examiner that applying the law as interpreted in the new *Guides*, there has been failure of proof as to the violation charged in Court II of the complaint.

E. Conclusion

On the basis of the Findings of Fact and the application of the law to those facts, the examiner concludes that the allegations of the complaint have not been sustained so as to warrant any order to cease and desist. Appropriate Conclusions of Law and an Order dismissing the complaint accordingly follow:

CONCLUSIONS OF LAW

On the basis of the facts found after consideration of the whole record, and in the light of the legal principles expounded in the Memorandum Opinion, the examiner has concluded that the reliable, probative and substantial evidence fails to support the allegations that:

1. Respondents have fixed and maintained uniform prices of competitors' products at prices identical to those of respondents' own products.
2. Respondents have caused the licensors to sell LPs to dealers, directly or indirectly, at prices that are regularly higher than the prices charged by respondents for records sold through the club.
3. Respondents have divided or allocated various markets and channels of distribution in connection with the sale of records.
4. Respondents have established, or compelled licensors to adhere to, a fixed differential on royalty rates to artists.
5. Respondents have hindered, lessened or suppressed competition between themselves and the licensors and between themselves and other manufacturers of phonograph records.
6. Respondents have hindered, lessened or suppressed competition between themselves and other companies engaged in record club distribution.
7. Respondents have hindered, lessened or suppressed competition between themselves and dealers.
8. Respondents have excluded from the market, or potentially excluded, dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the licensors.
9. Respondents have monopolized or attempted or tended to monopolize the manufacture, sale and distribution of records, of long-playing records generally, or of long-playing records sold through record clubs.
10. The licensing agreements were engaged in with the purpose or effect of creating in respondents, the undue power to do the things set forth in paragraphs 1 through 9, above, and respondents have regularly exercised such power.
11. The practices of respondents in connection with the licensing agreements have had the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition.
12. The Club has sold phonograph records to consumers at prices lower than those paid by retailers.

13. The Club's advertising has the capacity and tendency to mislead members of the purchasing public.

14. The acts, practices, methods and agreements of respondents, separately and cumulatively, as alleged in the complaint are all to the prejudice of the public and of respondents' competitors; have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated, competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records; have resulted in an unfair competitive advantage to respondents' record Club over dealers and over respondents' subscription method competitors; have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-playing phonograph records and in the manufacture, sale and distribution of all phonograph records; and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

APPENDIX

SUPPLEMENTAL FINDINGS

As a result of conclusions of fact and law reached by the hearing examiner, it became unnecessary, for purposes of this initial decision, to make findings of fact as to certain matters treated as issues during the trial and also in the submittals of the parties. However, recognizing that the Commission, on review, may take a different view as to one or more of such questions, the examiner has here made supplemental findings concerning facts that would be relevant if a different ruling were to be made on a particular subject. If any of the examiner's rulings should be reversed, the inclusion of these supplemental findings in this appendix should avoid the necessity for a possible remand for further findings of fact by the hearing examiner.

The supplemental findings are included in this appendix under the headings of the main topics in the primary Findings of Fact to which they relate, and with appropriate subheads, as follows:

V. Dual Pricing

- Prices Paid by Dealers for Columbia Records
- Average Net Prices
- Prices Paid by Dealers for Outside Label Records
- Columbia's Alleged Cost Advantage

VI. Competitive Effects

- LPs Viewed as a Separate Market
- Concentration on Manufacturing Level
- Concentration in Retail Market
- Concentration in Club Market
- Record Clubs Treated as Separate Line of Commerce
- Club Sales and Mail-Order Sales

Accordingly, the examiner makes Supplemental Findings of Fact on those subjects as follows:

V. Dual Pricing

In Section V of his primary Findings of Fact, the examiner ruled that the dual pricing charge collapsed under the weight of the appropriate price comparisons—that is, when the average Club price to consumers, including mailing and handling charges, was compared to the average gross price paid by dealers, as shown by the Government's own exhibit (CX 219). Should the Commission disagree with the rationale of that determination by the examiner, the following findings would be pertinent:

*Prices Paid by Dealers for Columbia Records**Average Net Prices*

On the basis of the record as a whole, it is found that in 1961 dealers generally paid average net prices of about \$2.13, and often substantially less, for \$3.98 records which Club members allegedly were buying at an average price of \$2.14, exclusive of mailing and handling charges.

The average prices paid by the Government's 43 dealer witnesses for \$3.98 list price LPs purchased from Columbia branches are set forth on three separate pricing exhibits (RXs 388a, 389a and 390a). One of those exhibits (RX 390) covers New York dealers; another (RX 389) relates to all dealers listed on CX 219, except The Record Hunter, which was included with other New York dealers (RX 390); and a third exhibit (RX 388) covers all other Government dealer witnesses who bought from Columbia branches. While the three exhibits (RXs 388a, 389a and 390a) show average prices of \$2.13, \$2.17 and \$2.12, respectively, the average price for all pur-

chases reflected on the three exhibits is \$2.13. That is computed, not by averaging the foregoing three figures, but by tallying all of the sales reported on the exhibits.

Prices of many of the Government's dealer witnesses were under \$2.10—in one case, as low as \$2.04 (RXs 388a, 389a, 390a).

In 1961, the general base price for a \$3.98 list LP from a Columbia branch distributor to a dealer was \$2.47 (Lorenz 8640-41; RXs 388a, 389a, 390a). That base price was substantially reduced in practice, however, by an assortment of discounts and programs which were widely utilized by dealers. The 1961 programs and discounts reflected in the record are as follows:

(a) Dealers were offered restocking programs during different periods in 1961. Columbia has increased the number of such programs and liberalized their terms to meet competition (Gallagher 8792, 8801; Max 9755-56). In 1961, there were two regular restocking programs, each approximately two months in duration, one in the spring, the other in the fall. One restocking program offered a 10% discount off the base dealer price for both monaural and stereophonic LPs. The other program allowed 10% on monaural and 20% on stereophonic records (CX 666; Lorenz 8641; also see Max 9347, 9350). In addition, there were certain special programs at other times during 1961 (Lorenz 8641). One program, for example, offered a 10% discount on certain LPs of Broadway casts (CX 666a); another offered a 10% discount on all Mitch Miller LPs (CX 666b). Dealers took advantage of those programs (Gallagher 8809; Max 9380-82). The extent to which dealers, both large and small, purchased during such programs is shown on RXs 388-90, based on an analysis of all 1961 purchases by the Government's 43 dealer witnesses who purchased records from Columbia branches. Those exhibits show that of the more than 388,000 records included on the exhibits, over 77% were purchased during one of the various programs in effect in 1961. Indeed, during the two major restocking programs alone, Columbia branches made 70% of their annual sales (Gallagher 8809).

(b) Dealers were also offered throughout all of 1961 a "bonus-to-sell" program, which gave them an opportunity to exchange 10% of their purchases for other merchandise, or take a 5% cash discount based on the dollar volume of their total purchases in lieu of such exchanges, or to take part of both alternatives on a *pro rata* basis (Lorenz 8642; Gallagher 8792, 8801; Max 9347). The bonus-to-sell discount was computed in 1961 on the basis of total net dollar purchases of records and not separately broken down by records in particular price categories (Lorenz 8650, 8667,

8739-40). Delaers took advantage of that discount (RXs 388-90).

(c) In addition to the right to "exchange" one record for another record, a dealer had the right in 1961 to "return" for a cash credit records which were defective, shipped to him by mistake, etc. In 1961, upon such a "return," a dealer received a cash credit based on the prevailing price for the record at the time it was returned. There is some confusion regarding that adjustment, but it appears that the credit was sometimes higher than the price which the dealer had originally paid for the record (Lorenz 8666, 8670, 8772-73, 8729, 8731-32; also see Max 9363-64). "Returns" thus had the effect in some cases of reducing a dealer's average cost (RXs 388-90).

(d) Dealers were offered a special program at Christmas, their busiest season (Noonan 6943), which permitted them to return 25% of the Christmas LPs and new releases purchased in a period of approximately two months before Christmas, or to take a 12½% cash credit in lieu of such returns, or to take advantage of the return privilege on certain purchases and the cash credit on the balance (CX 666b-c; Lorenz 8641-42; also see Max 9363-66). Dealers took advantage of that program to a great extent (Gallagher 8809).

(e) Dealers were offered a 2% cash discount for timely payment (Lorenz 8642; Gallagher 8792). Columbia has found that the vast majority of dealers take advantage of this discount (Lorenz 8651-52; Gallagher 8808), and that virtually all of the dealer witnesses called by Government counsel did so (Lorenz 8651-53).

Based on over-all sales by Columbia branches to dealers, the average effective rate actually taken for the cash discount is 1.51% (Lorenz 8669). Most dealer witnesses who were questioned about the 2% cash discount testified that they generally took advantage of it on all or most of their purchases (see, *e.g.*, Barwis 2479; Bialek 1376; Freedman 2601; Levin 498-99; Rosen 2787; Winograd 3052; Balaity 2796; Maggid 834, 851; Press 1245; Kutscher 1166; Morlitz 2333-35; Pitkow 2403; Rossi 2292; Sarkisian 1346; Walsh 983; H. R. Smith 2167).

Respondents also refer to "free credit," cooperative advertising and various merchandising aids as having the effect of reducing dealer costs, but they propose no specific adjustment to average prices charged dealers by Columbia branches. For present purposes, such possible adjustments may be considered to "wash out" the possible adjustment of Club prices based on "free goods," etc., offered members (*Cf.* CPF 277).

Respondents introduced a series of carefully prepared and de-

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tailed exhibits establishing the average prices paid in 1961 by the Government's 43 dealer witnesses who purchased from Columbia's branches (RXs 388-90; Lorenz 8646-48). Preparation of those exhibits required approximately 1,000 man-hours and examination of 80,000 invoices (Lorenz 8647-48). Those exhibits compute the average dealer price for an LP in a series of steps, starting with average gross price; then taking into account the changes in that price resulting from returns of records; then taking into account the changes resulting from the extent to which a dealer took advantage of the 5% cash bonus-to-sell and the 12½% Christmas discount programs; and finally taking into account the 2% cash discount (RXs 388-90; Lorenz 8648-52). All of those factors must be taken into account to reflect the dealer's ultimate price (see, *e.g.*, Gallagher 8791-93; Lorenz 8736; Max 9380-82; Fink 1438-46; Maggid 850-53; Roskin 2102, 2115; Zenger 6322-23, 6331-32).

Respondents' study of the 1961 invoices (totaling 80,000) of all the Government's dealer witnesses, 43 in number, who purchased from Columbia branches shows average prices as follows (RXs 388-90):

Suggested retail list price	Wholesale list price (dealer cost subject to discount)	Average net price to dealer
\$3.98	\$2.47	\$2.13
4.98	3.09	2.64
5.98	3.71	3.15
6.98	4.33	3.72

These average prices are not determined by simply adding together the "average prices" appearing on RXs 388-90 for each price category and then dividing by three. They are determined by adding together for each price category the units purchased shown on RXs 388-90 and then determining an average price by means of the steps outlined in the testimony of Lorenz at Tr. 8649-51.

RXs 388a, 389a and 390a show that the Government's dealer witnesses paid average prices of \$2.13 in 1961 to Columbia's branches for \$3.98 list price records. Almost one quarter of the dealers paid \$2.10 or less, with average prices going as low as \$2.04 and \$2.06 (RXs 388a, 389a, 390a). Thus, the dealers paid less than the average prices paid by record club members in 1961, even when mailing and handling charges are ignored.

In 1962, the average price charged for a current \$3.98 list price

LP by Columbia branches, taking into account cash discounts, the bonus-to-sell, the Christmas program and the restocking programs, was \$2.12 (Gallagher 8809-17).

The evidence on dual pricing fails to support the allegations of the complaint.

The Government's pricing "survey" (CXs 218-19) purporting to show dealer costs for Columbia records in 1961 was unpersuasive. While the heading on that "survey" states that it analyzes prices charged by Columbia branches in "Philadelphia, Chicago and New York," the fact is that 16 of the 19 dealers on that exhibit come from the Philadelphia area, only 2 from Chicago, and only 1 from New York.

The "survey" failed to include four Philadelphia dealers included on RX 388. The four missing dealers paid average prices of \$2.04 to \$2.14 (RX 388)—prices lower than the prices generally paid by the sixteen Philadelphia witnesses who do appear on CX 219. (Compare the four Philadelphia witnesses on RX 388a with the sixteen on RX 389a.)

In the case of several dealers, the collection of invoices on which the study relied was obviously incomplete. The most significant, omission, however, was the failure to take into account the 2% cash discount, returns, and the 5% bonus-to-sell and 12½% Christmas bonus, although the 19 dealers listed took advantage of them (see footnotes, RPF 503).

In view of the basic reason for the examiner's dismissal of the dual pricing charge, it is neither necessary nor desirable to engage in any extended discussion of the possible alternative bases on which the same result might be reached—namely, the application of discounts and other adjustments ignored by the Government in CX 219.

The Government's objections to the application of those discounts and adjustments are set forth in footnote 113 to CPF 271. The following comments are applicable to those objections:

Returns—To the extent that returns did *not* affect prices, RXs 388-90 reflect that fact; and to the extent that they *did* sometimes affect prices, the exhibits also reflect that fact. On the other hand, CX 219 simply ignored returns, whether or not they happened to affect prices in particular instances.

Bonus-to-Sell—The claim that a "ratio" was "specially contrived" to reflect the bonus-to-sell discount on respondents' pricing exhibits is contrary to the record. In actual practice, the bonus-to-sell is given to dealers on the basis of their total dollar volume of purchases, with no separate breakdown being made as to pur-

chases of records in particular price categories (Lorenz 8650). Thus, in the words of footnote 113, the bonus-to-sell is actually granted "irrespective of actual purchases in [each] category." The bonus is an over-all credit based on total purchases—and thus, in effect, amounts to a proportionate reduction in the price of each record purchased in each price category. Accordingly, the application of the bonus-to-sell in respondents' pricing exhibits is an accurate reflection of the way it is applied in practice. It does not represent a "contrived" formula. Respondents simply divided the total dollar credit *actually* given to each of the Government's 43 dealer witnesses by each dealer's net purchases to arrive at an average effective rate of discount, and then applied that rate uniformly to all purchases made in each price category (Lorenz 8560). CX 219 simply ignored the bonus-to-sell discount.

Cash Discount—The claim that respondents deducted the cash discount "whether the dealer took it or not" is contrary to the entire record and to the testimony of Lorenz here cited for that proposition. Virtually every dealer witness took the discount (see RPF 497).

Industry members view the 2% cash discount and the bonus-to-sell pragmatically as forms of price reduction. They are so viewed by manufacturers (Gallagher 8791-93), accountants (Lorenz 8736), distributors (e.g., Fink 1438-46; Maggid 850-53).

Contrary to footnote 113 to CPF 271, Winograd did not testify that "what [he] earns in lieu of the exchange" is not a discount. He testified that when he exchanges one record for another record, no discount is involved (Tr. 3054); but that Columbia's bonus-to-sell is "a special discount deal" (Tr. 3052). Nor did Hollander testify that "what [he] earns in lieu of the exchange" is not a discount. He merely testified that he usually exchanges records (Tr. 3113). The fact is that he actually received an average discount of 3.6% in 1961 in lieu of exchanges (RX 389). Stolon of Goody was the only one of the three witnesses cited by Government counsel who claimed that the bonus-to-sell was not a discount—although Goody's effective rate was 5.17% in 1961 (RX 390).

Because a discount may benefit the giver as well as the recipient is no reason to disregard it as a price reduction.

Finally, even aside from the foregoing considerations, the cash discount and bonus-to-sell should be deducted in any comparison between prices paid by dealers and by Club members. If a dealer pays his bills on time and does not exchange certain records, he receives cash credit; on the other hand, if a Club member pays

promptly and fails to exchange records, he receives no monetary benefit. None of Government counsel's theoretical arguments provides a reason for disregarding the dollar saving realized by dealers.

Prices Paid by Dealers for Outside Label Records

There follow certain findings relating to "Prices Paid by Dealers for Outside Label Records" in the event the Commission rejects the primary findings on this subject in Section V.

As noted in the primary findings, the complaint alleges (Par. Ten (2)) that, as a result of the licensing agreements between the outside labels and the Columbia Record Club, respondents have the power to cause, and have caused, the outside label manufacturers to sell LPs to dealers at prices that are regularly higher than the prices charged by the Club for identical LPs sold to its members. No element of that charge was established at the trial.

Although the licensing agreements give Columbia certain rights with respect to Club distribution of the outside labels, they do not in any way affect the distribution of outside label records to dealers or other non-Club outlets.

The allegations of the complaint on this point are also defective because the outside labels, with few exceptions, do not sell records directly to dealers. They sell primarily to hundreds of independent distributors who, in turn, sell to record dealers (Gallagher 8780-82; Cohen 6745-49; Mantell 6685-86; Kapp 5772; Talmadge 7828-30, 7849; Green 2524; M. Solomon 1942; Maitland 3718).

Finally, the evidence does not establish that record dealers pay to distributors higher prices for records of outside labels than Club members pay for such records through the Club. In 1961 Club members paid an average of \$2.41 for a \$3.98 list LP in their first year of membership, and an average of \$2.88 thereafter, with mailing and handling charges added to the stated price.

In the case of outside label records, Government counsel did not even attempt to make a "survey" of average prices. Instead, they typically asked witnesses to state the "range" of prices charged for records of outside labels—the "high" and the "low" (see RPF 509). Evidence about a "range" obviously does not show the average price paid. It does not show how many records were purchased at the top of the range, how many at the bottom, or how many at intervals between the two extremes. There was, therefore, a complete failure of proof on this point.

Like Columbia and other manufacturers, the outside label companies offer their distributors a wide assortment of different dis-

counts and programs, which are passed on to dealers and which have the effect of substantially reducing the prices which dealers pay for records. Just as dealers took full advantage of the various programs offered by Columbia, the evidence shows that they also took full advantage of programs offered by the outside labels. To the extent that the record does reflect average prices paid by dealers for outside labels—as opposed to “ranges”—it shows that those dealers in fact pay less than the average price paid, or alleged to have been paid, by Club members.

The most informative evidence on this point comes from various of the Government’s distributor witnesses who service large numbers of dealers—including most of the Government’s dealer witnesses—in their respective trading areas (see Fink 1446, 1456–57, 1460–62; Rosen 2245–46, 2257–58, 2260; Leonard Smith 1401–06, 1419; Keenholtz 1424–33; Roskin 2102, 2115, 2118–19; Shocket 185–86, 229–35; their testimony is summarized in RPF 511).

Testimony from the few dealer witnesses who gave average prices—and not merely isolated “highs” and “lows”—confirmed that their actual prices for records of outside labels were below prices paid by Club members (*e.g.*, Sarkisian 1342; Maggid 837; Stolon 1273; Press 1240).

Despite the examiner’s opinion that CPF 314–17 are outside the scope of the complaint, it may be argued that such proposed findings are proper under subparagraph 2 of Paragraph Nine:

Respondents’ acts and practices, separately and cumulatively, set forth hereinbefore in connection with the Licensing Agreements, have had and now have the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition.

That such may be the position of Government counsel is suggested by the topic heading at CPF 319: “Unfair advantages obtained by CBS over record dealers in the acquisition of Licensors’ records.”

Considering the practices set forth in the complaint, the examiner rules that that allegation of Paragraph Nine still does not bring CPF 314–27 within the scope of the complaint. The complaint does not charge that Columbia has been the unlawful recipient of price discriminations from the licensors as a result of licensing agreements.

Nevertheless, it appears to be sound procedure for the examiner to make at least truncated findings of fact regarding this matter in the event the Commission should disagree with the examiner’s interpretation of the complaint.

In CPF 314, the Government contradicts its own charge (complaint, Par. Ten (2)) that Columbia sets the prices that dealers must pay for licensors' records. Here the Government says that "Prices paid by record dealers for Licensors' records are established in the first instance by the Licensors." Even here, the claim that the "price structure" set forth in CPF 314 is "established" by the licensors, does not find support in the record. Generally, it appears that the licensors do not sell records directly to dealers but through independent distributors (Gallagher 8780-82; Cohen 6745-49; Mantell 6685-86; Kapp 5772; Talmadge 7828-30, 7849; Green 2524; M. Solomon 1942; Maitland 3718).

The record does show that the outside labels do have suggested price schedules, but we are cited to no evidence that they "establish" the prices which their distributors actually charge dealers or that they seek to force compliance with those schedules. However, the following may be taken as illustrative of the basic dealer price structure of four of the licensors:

	Suggested list price	Dealer cost
Mercury	\$3.98 mono	\$2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71
Kapp	\$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71
Liberty	\$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.70
United Artists	\$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71

(CX 401a, CX 268a, CX 475, CX 292.)

Similarly, the basic dealer cost for Cameo-Parkway records is \$2.47, and for Warner Bros., \$2.47, \$3.09 and \$3.71 (Rothstein 3302). The cost to dealers of Caedmon records is \$3.69 (L Smith 1402).

The so-called "dealer cost" figures are base prices and do not reflect the lower prices actually paid by dealers much of the time

as a result of various discounts, restocking programs, etc. (see RPF 509-12).

Although the record contains exhibits (CX 218-19) purporting to show average prices paid by dealers for Columbia records, Government counsel did not introduce any tabulation or other evidence purporting to show average prices paid by dealers for records of outside labels. In fact, they propose no finding as to average prices.

The evidence does not warrant a finding that many dealers "actually paid prices of \$2.47, \$3.09, and \$3.71 for a substantial volume of purchases" (CPF 316). At most, it may be said that some dealers sometimes paid such prices. (Compare CPF 316 with Exceptions, pages 243-46.)

According to CPF 317, the "range" of prices paid by dealers is as follows:

Suggested list price	Dealer cost (range)
\$3.98	\$1.80-\$2.47
\$4.98	\$2.37-\$3.09
\$5.98	\$2.83-\$3.71

There are indications that average prices for many dealers would fall near the bottom of those ranges.

Columbia's Alleged Cost Advantage

The examiner rejects CPF 319 on the basis that not only is the subject matter of CPF 314-27 outside the scope of the complaint, but that this set of "facts," in particular, does violence to the theory of the complaint and to the facts contained in the record. The Government claims here that although the licensing agreements provide that Columbia shall be given a "master" from which to press records itself, it is also contemplated that licensors "shall sell 'substantial quantities' of finished product to the Club whenever the Club wants them." CPF 319 goes on to say that the transactions there cited "illustrate the price advantages contemplated by the Licensing Agreements." The Government's own exhibit (CX 659 *in camera*) shows that 99% of the outside label records used by the Club have been pressed by Columbia and not purchased from the outside labels. The amounts involved are *de minimis* and the facts and circumstances are not such as to warrant a finding of any violation of law (see respondents' Exceptions, pages 247-51). The price data cited in CPF 319 are not reliable for the purposes intended.

In support of its alternative or additional contention that Columbia "does not forfeit its cost advantage" when it obtains a master rather than finished product, the Government elicited testimony that records can be produced at a cost ranging from about 30¢ to 40¢ (CPF 320). One manufacturer testified that the cost of acquiring a finished record, including pressing, jacket, artist and copyright royalties and AFM fee is approximately 96¢ (L. Hartstone 1083-88). However, the information developed concerning those costs to other companies for producing other records for other than record club purposes is not such as to permit any definitive finding concerning the fairness of the licensing agreements *vis-a-vis* record dealers.

By stipulation of counsel, evidence was received that Columbia's average unit cost "per net record shipped" of an outside label is less than \$1, whereas its average unit cost "per net invoiced record" of an outside label is nearer \$2 (Tr. 10467-70; CX 821, RX 686 *in camera*).

The lower figure is, of course, espoused by the Government as properly reflecting the unit cost of all records of outside labels shipped by the Club, including net invoiced, enrollment and bonus records.

The higher figure is advocated by respondents as the proper unit cost for each record of an outside label sold by the Club at \$3.98, \$4.98, \$5.98, etc., less returns, and does not include enrollment and bonus records.

The dispute centers on which figure is the proper figure to use in comparing Columbia's alleged costs of producing outside label records, with prices paid by dealers for such records. Even assuming that this is a matter properly in issue in this proceeding, it is the finding of the examiner that neither figure, standing alone, may appropriately be used in comparison with prices paid by dealers.

As far as the accounting controversy between the parties is concerned, the Government failed to carry its burden. In opposition to the position taken by respondents' witnesses, the Government presented the stipulated testimony of Melbourne C. Steele, then the Commission's Assistant Chief Accountant. Such testimony was simply to the effect that in order to determine the unit cost of records shipped, it is necessary to divide the cost of units shipped by the actual number of units shipped (Tr. 10937, 10955). There is no dispute on that point. The dispute is whether or not

such a unit figure affords a proper basis for comparing Club costs and dealer costs to determine whether the pricing pattern involves actionable unfairness. Mr. Steele's stipulated testimony does not purport to resolve that question.

The propriety of determining unit costs on the basis of records shipped or on the basis of net invoiced records depends on a variety of factors, and particularly on the purpose for which the computation is to be used. The Government's purpose—that is, to show the claimed “Unfair advantages obtained by CBS over record dealers in the acquisition of Licensors' records” (CPF 319)—makes the “net invoiced” method mandatory.

When a dealer purchases a record, he ordinarily can sell that record without having to purchase additional products to be given away in connection with the sale. That record is a “net invoiced record” to the dealer; and the cost for the record ordinarily is the dealer's only product cost for that “net invoiced” record. On the other hand, when the Club sells a record at \$3.98, \$4.98, etc., it also, in effect, gives away other records—either enrollment records or bonus records. That has been basic to the Club plan. Thus, in the first year of membership, for every record bought at full price, there is generally one enrollment record; and thereafter, one record given free for every two purchased.

Accordingly, if costs to dealers are to be compared with costs to the Club, it is not unreasonable to add to the Club's cost of each “net invoiced record” its expenses for records and other products given away together with that “net invoiced record.”

To put it another way, since the cost to a dealer relates to an item which produces income—that is, an “invoiced record”—it is necessary to determine the actual cost to the Club of *its* income-producing items. That is what RX 686 does and what CX 821 does not do.

A meaningful comparison of Club and dealer costs would not necessarily even stop with RX 686. It appears that fairness would dictate consideration of other *special* costs incurred by the Club as a mail-order business, such as bad debts, returns, advertising, sales promotion and other operating and distribution costs.

The Government needs more and better evidence than is here presented in order to prevail on the theory underlying CPFs 319-27 (see Exceptions, pages 247-61). Such a concept should be more than an afterthought substitute for a different charge as to which there was also failure of proof.

VI. Competitive Effects

In Section VI of his primary findings, the examiner ruled that the appropriate market for measuring effects consisted of all phonograph records sold through all channels of distribution. He thereby ruled out LPs as a separate market and record clubs as a separate line of commerce. The following supplemental findings would be relevant if a contrary determination were to be made as to the appropriate market and line of commerce.

*LPs Viewed as a Separate Market**Concentration on Manufacturing Level*

As a share-of-market gauge of the LP market on the manufacturing level, Government counsel rely on a study (RX 354) of label (manufacturer) share of consumer dollar purchases of LPs through all channels of distribution. In 1960, the last year this was done for all channels of distribution, the breakdown was as follows:

Columbia	25.4
RCA Victor	17.5
Capitol	13.6
	56.5

On the basis of those and other data, the Government refers to those companies as the "Big Three." The company with the fourth largest share was Decca, with 3.3%.

Respondents object, of course, to limiting the statistics to the so-called LP market. They argue that all types of records constitute the only relevant market.

Even assuming *arguendo* a separate LP market, respondents properly call for the 1960 data to be put in perspective.

An examination of all the MRCA data of which RX 354 is a part shows a definite pattern of deconcentration in the LP market. Thus, between 1951 and mid-1961, Columbia's share of LP sales fell 9.5 percentage points (more than that of any other company) from 33% to 23.5%; RCA, from 29% to 20.2%; and Decca, from 12% to 3.9%. Capitol increased its share from 8% to 12.6%. The share of "all other companies," including many recent entrants, increased 21.8 percentage points, from 18% to 39.8% (see RXs 352-55, 419).

From 1956, the first full year of the Club's operation, until mid-1961, Columbia's share of the LP market fell 1.5 percentage points—from 25% to 23.5% (RXs 352, 355). Since the Club began

adding outside labels in 1958, its share of the LP market rose by 1 percentage point (RXs 353-55).

Government counsel object to the use of RX 355 showing cumulative sales for 1961 only through May 20, when the MRCA research project came to an end. They point out that the year-end figures, of course, may be different from the mid-year figures. They prefer to use figures as of the end of 1960, which give Columbia 25.4%, as against 23.5% in May 1961.

In 1961, no study was made of all channels of distribution for the full year, but, as noted, RXs 351 and 355 cover the period up to May 20, 1961.

The trade magazine, *Billboard*, did conduct a study, on a sampling basis, of manufacturers' share of sales through retail record stores. The *Billboard* survey, although relied on by both sides, gives only a partial picture of the retail market, since it omits club sales, as well as sales through racks, one-stops and chain stores' central buying offices.

The *Billboard* store survey for 1961 (CX 244) and 1962 (RX 311) produced these results:

	1961	1962
	Percent	Percent
Columbia (incl. Epic)	17.4	17.7
RCA-Victor (incl. Camden)	16.3	13.8
Capitol (incl. Angel)	13.1	13.1
Total "Big Three"	46.8	44.6
Decca (incl. Coral)	5.1	4.8
All others	48.1	50.6

Of the total LP dollar sales in stores measured by *Billboard* in 1961, 27 manufacturers accounted for 84.1% (CX 241a, b). Of total LP sales in stores measured by *Billboard* in 1962, 23 companies accounted for 83% of total sales (RX 311 *in camera*, pp. 4a, c).

Respondents object to the Government's emphasis on only those two years. Among other things, they note that in the stores surveyed by *Billboard*, the share of LP sales accounted for by all companies other than the "Big Three" rose almost 10 percentage points—from 45.8% to 55.4%—from mid-1957 to 1962 (RX 429 *in camera*). This shows a pattern of deconcentration.

Examination of other data from *Billboard's* store survey of LP sales shows certain other facts inconsistent with the Government's position. There has been volatility in the relative positions of Columbia, RCA and Capitol (RX 430 *in camera*)—a fact tending

to negate the notion of oligopoly (Max 9727-28) urged in the Government's brief.

While Columbia's share of LP sales in those stores included in the survey rose slightly between mid-1957 and 1962, the shares of RCA and Capitol declined (RXs 421 and 433 *in camera*). That is inconsistent with the theory that the Columbia Record Club and its sales of outside labels injured retail sales. On the basis of testimony to that effect by the Government's dealer witnesses, Columbia's share of LP sales in stores should have declined—and more so than that of RCA and Capitol, which had smaller clubs.

The suggestion in CPF 384 that in 1961 and 1962, some 20 to 30 companies had over 80% of LP sales in stores surveyed by *Billboard*, is also misleading in any analysis of concentration on the manufacturing level. Government counsel introduced other evidence—which is here ignored—that 57 companies accounted for 90% of LP sales through *all* of the various channels of distribution (CX 246; Noonan 414, 515). Ackerman said that there are perhaps as many as 75 “significant LP companies” (Ackerman 4234). And Noonan testified that there were approximately 50 significant companies producing LPs that accounted for 83% of LP sales in stores in 1962, plus many other LP labels (Noonan 6940).

While the Government refers to the *Billboard* study as “only a *limited* index of respondents' strength,” respondents note that the survey tends to exaggerate Columbia's position because it admittedly omits rack outlets. Rack outlets accounted for 25% of 1961 over-the-counter sales (CX 199a) and 40% by mid-1963 (Noonan 10900). Such outlets account for the bulk of budget line sales, and Columbia's status in the sale of that type record is lower than in full-price lines (see RPF 36).

Concentration in Retail Market

CPFs 347-52 appear under the heading “Concentration in retail market” and refer to sales through all types of outlets. They thus recognize the existence of a *single* retail market. However, since those findings are limited to data with respect to LP sales and exclude sales of other types of records, they are not relevant. The examiner has held that all types of records are in the relevant “retail market.” However, findings are made on the subject on an *arguendo* basis to avoid the necessity for remand if the Commission should rule otherwise.

The mention in the heading of “Concentration” in the retail market and the repeated references in the findings themselves to

the Club's "leading position" in that market are wholly meaningless. There is no concentration in the retail market. As Government counsel themselves recognize in their Argument (page 334), the "retailing of records" is "now atomistic." There are 150,000 retail outlets scattered across the nation. In each local area, consumers may purchase from one or more record dealers, discount houses, rack locations and/or mail-order sellers. The Club is obviously a small factor, and not in a so-called "leading position," since consumers may buy through a multitude of different outlets. It is undoubtedly the smallest factor in most areas. Indeed, in areas where there is the greatest availability of retail outlets, record clubs have the smallest relative share of sales (see RPF 415). The fact that the Club's total sales appear large in comparison to the sales of a dealer is not strange since the Club sells throughout the nation and not just in one or more local trading areas.

According to CPF 347, Columbia "has achieved a leading position in the sale of LPs to consumers, and this leadership has increased as a result of the Licensing Agreements." No record reference is given, and the record fails to support that finding.

The Club's share of total industry LP sales has been as follows (RX 424 *in camera*):

	Percent
1958	7.72
1959	7.26
1960	9.45
1961	9.42

Comparison with the Club's dollar sales of outside labels (RX 425 *in camera*) shows that although there has been an increase in the Club's share of LP sales since the addition of outside labels, nevertheless, in 1961, when outside label sales rose sharply in volume, the Club share of the industry's growing LP sales remained stationary in comparison with the preceding year.

Using the same methodology employed in RX 424, Government counsel aver (CPF 347) that Columbia's largest Club competitor, RCA-Victor, had 3.4% of all LP sales to consumers (CX 305); the largest direct-mail company, Reader's Digest, had 2.7% of all LP sales to consumers (RX 700); and the largest retail record dealer, E. J. Korvette, had 1.8% (Rothfeld 746-47).

Those figures they compare with 1961 Club sales of licensors' records, amounting to 2.91% of all LPs sold to consumers (RX 426 *in camera*). Thus, Club sales of licensors' records alone in 1961 exceeded the total sales of any retail store and were exceeded

by only one other distributor to consumers, that is, RCA-Victor Record Club. The comparison fails to withstand analysis.

Respondents point out that the Club share of total LP sales in 1961 is overstated, and not understated as suggested by the Government in footnote 141. The base figure of 440,800,000 for total LP sales which Government counsel now argue is too high, comes from *Billboard's Buyer's Guide* (CX 199a), introduced by the Government. That exhibit sets forth LP sales via stores, rack jobbers and clubs, but omits nonclub mail-order sales.

The record does not support the percentage shown in this finding for Reader's Digest in 1961. It is impossible to compute a 1961 percentage for Reader's Digest since that company did not disclose actual sales for that year (RX 700 *in camera*). Instead, it gave a figure for 1960 and average annual sales for 1960-62. Although no 1961 figure was given, it is possible to compute the average sales for 1961 and 1962 (see RPF 299, *in camera* appendix). That two-year average (3.2%) is higher than the three-year average, but Government counsel use here the lower three-year average figure.

The Korvette figure is dubious because the testimony was not that Korvette was the largest dealer in 1961, but that it was at the time of hearing in 1963 (Gallagher 9086). Korvette's sales took an enormous leap upwards in 1962 (see Exceptions, pages 275-77).

CPF 347 focuses only on 1961 data, thereby ignoring the more rapid growth of Columbia's competitors in 1962. As shown in RPF 437 (*in camera* appendix), club and other mail-order competitors grew at a more rapid rate in 1962. Korvette expanded its record sales from \$8 million to \$14 million between 1961 and 1962—an increase of 75% (Rothfeld 746-47, 3974).

When thus corrected and put in perspective, CPF 347 loses its impact.

Concentration in Club Market

The examiner has found that there is no separate "club market" or "subscription method" submarket appropriate for measurement of the competitive impact of the licensing agreements. Obviously, clubs do represent a specialized channel of distribution, but they are in the same market as the other channels of distribution, such as other mail-order sellers and all types of over-the-counter retailers.

Despite that position of the examiner, the findings to follow will deal with certain statistics applicable to what might be called

the club market if the Commission disagrees with the examiner's analysis. These findings are included on an *arguendo* basis against the possibility that the Commission may find that clubs do constitute a separate market.

Referring to RXs 356, 357 and 451, the Government credits Columbia with 55% of the club market in 1959, and 56.1% in 1960. On the basis of RX 357, the Government proposes a finding that the "Big Three" (Columbia, RCA and Capitol) had over 90% of the club market in 1960. The exhibit so shows.

Respondents complain, however, that the Government's proposed finding (CPF 449) gives an incomplete and misleading picture of what all the evidence shows as to Columbia's share of such a market.

Government counsel refer to research data of Market Research Corporation of America (MRCA) for only the two years, 1959 and 1960, although the record contains MRCA figures and other data for a longer and more recent time period. Those data show that Columbia's share of the alleged club market has been declining (see Exceptions, pages 391-93, and *in camera* reply appendix, pages 12-13).

RX 451 *in camera* shows that Columbia's share of total record club sales reached its high point in 1957—one year before its addition of outside labels—and thereafter fell sharply through 1961, the last year of complete data. By 1961, the drop was to a level in the range of 24% to 37% below the Club's 1957 high.

The record lacks complete information as to all record club sales in 1962, but it is apparent that Columbia's relative position in the claimed club market continued to slide in that year. The sales of the RCA Record Club rose from 1961 to 1962 at a rate greater than the sales of the Columbia Record Club during the same period (RX 645a; RX 645b *in camera*; CXs 256 and 783e *in camera*; see RPFs 437-39, respondents' *in camera* appendix).

Columbia's share of all mail-order record sales, both club and non-club, also has been on the decline as the result of the entry and growth of competitors. RX 450 and the underlying data (RX 345) measure mail-order sales of records (whether made by record clubs, direct-package sellers, retail stores, mail-order houses or others) on a label-by-label basis—Columbia, RCA, Reader's Digest, Capitol and "all others"—and not by the identity of the mail-order seller who made the sales. Between the last two quarters of 1961 and the first three quarters of 1962, the share of mail-order sales consisting of Columbia records declined, whereas the share of sales accounted for by records of Reader's Digest,

RCA and "all others" rose. The aggregate mail-order sales of RCA and Reader's Digest increased to almost 40% (RX 450; see RPF 438).

Mail-order package sales by BOMC (RX 502 *in camera*) and by *Life* (RXs 507a-b and 508 *in camera*) increased between 1961 and 1962 at a rate in excess of the Club's sales. Between 1960 and either or both of 1961 and 1962, the substantial mail-order sales of the Reader's Digest-RCA packages (RX 700 *in camera*) grew at a rate greater than sales by the Columbia Record Club (CXs 256 and 783e *in camera*). (See RPF 439.)

The 1961 figures relied on by respondents are condemned as "unreliable" by the Government (CPF 449). Government counsel contend that the partial 1961 figure of 50.5% as of May 1961 bears no relationship to end-of-year figures. They purportedly base this conclusion on testimony by Kirkpatrick at Tr. 8195-96. Actually, Kirkpatrick simply stated the obvious fact that year-to-date data can fluctuate between May and the end of a year. The figure was presented as of May 20, 1961, because that was the most recent information compiled by MRCA before it terminated ten years of market research in the record industry (Kirkpatrick 8003-04, 8141-42). The figure for mid-1961 has not been represented as an end-of-the-year figure. Incidentally, the May 1961 share-of-market figure used by respondents is higher than the percentage figure for any reporting period earlier in 1961 (RX 358). For instance, the year-to-date figure as of January 28, 1961 (covering the previous 12 weeks), was 43.7% (RX 358).

In 1960, when MRCA conducted research for the full year, Columbia's share of dollar purchases through clubs was virtually identical on May 20 and December 31 (RX 357).

In any event, it should be noted that although Government counsel initially objected to the MRCA exhibits herein in question, they were admitted in evidence after withdrawal of the objections. Moreover, Government counsel can hardly be heard to complain, in principle, about the use of "partial" annual data when they themselves have relied on such data, even when full-year information was available. For example, CX 242 *in camera* presents year-to-date data from the *Billboard* store survey for only part of 1962; yet Government counsel now request findings on the basis of that exhibit (CPF 300), even though the record contains figures for the full year (RX 311 *in camera*). Likewise, Government counsel request findings (CPF 425 and 451) on the basis of NFO research covering less than a full year (RXs 345, 347).

Record Clubs Treated as Separate Line of Commerce

If, contrary to the examiner's findings, it should be determined that record clubs are in a separate line of commerce, then the further question arises whether such line of commerce should be limited to record clubs (what the Government calls the "subscription method") or whether it should embrace mail-order selling of records generally (including the so-called "package" business).

The examiner finds that the two methods compete and should be considered together.

The findings that follow relate to the relationship between club selling and mail-order selling.

Club Sales and Mail-Order Sales

Considerable space is devoted in the Government's proposals (CPFs 425-448) to various alleged differences between the ways in which clubs, particularly the RCA Victor Record Club, and the Reader's Digest-RCA package business are operated. Such differences were advanced by Reader's Digest in resisting a subpoena issued at the behest of the respondents, but the very witness who described these differences also testified that the Reader's Digest record packages "compete generally * * * with the amount of money that anyone is willing to invest in records," and "are generally competing in the whole area of the individual consumer's ability to buy a certain number of records." This colloquy then ensued:

Q. Do you mean, sir, that they compete with every other form of distribution in terms of sales to the consumer?

A. Yes, I think so. In other words, if a person can afford to pay \$50 a year for records, whatever method they receive them through, in that general sense we are competing with everybody else. (Hitesman 10140.)

Thus, Reader's Digest, with record packages that compete "with everybody else" selling records, is in the same market as "everybody else."

The claim that the RCA Club involves "the sale of single LP's," as opposed to the Reader's Digest packages which generally contain "8 or more records," is at the least an oversimplification.

The packages have contained anywhere from 3 to more than 9 LPs, with the majority containing over 9 (CXs 514-23). Under the various RCA Club offers, members have received anywhere from 5 to 12 records (enrollment plus commitment records) during their first year of membership. Thus, RCA Club members receive over a year approximately the same number of records as contained in Reader's Digest-RCA packages.

Moreover, the RCA Club itself offers packages containing anywhere from 2 to 7 LPs (for example, RXs 120, 171, 552, 553, 601, 603, 615-19, 678).

The package operation is not, as claimed, a simple "one-time operation." Many purchases are made on credit, with installment payments frequently spread over 4 months (Hitesman 10141). The package purchaser, like the club member, continues to receive promotional literature respecting records.

The Government's attempt to distinguish the record club business and the mail-order package business on the basis of the type of musical content, and particularly the presence or absence of "stars" among the performers, is hardly borne out by the record (see Exceptions, pages 366-74).

The examiner specifically rejects the contention that the Reader's Digest packages "have no stars and are merely an offering of favorite music."

The Government also espouses a distinction without a difference in its contention that Reader's Digest packages are not offered in the RCA Victor Record Club, and that RCA Victor single LP records are not offered by Reader's Digest in direct mail (see Exceptions, pages 372-74).

The Government contends (CPF 425) that the "only significant record company in direct mail, apart from the 'Big Three' record clubs, is the Reader's Digest." Thus does the Government ignore other mail-order sellers.

In identifying Reader's Digest as a "record company," Government counsel take a position different from their statements in the course of hearings (Tr. 4289-92, 4352-56). This belated recognition of Reader's Digest and its role in the record industry requires a re-evaluation of the Government's position and proposed findings regarding the "configuration" of the record industry because, generally, they do not include Reader's Digest. This would result, of course, in exaggeration of the market share of Columbia. Similarly, 1961 figures as to total industry sales in the *Billboard Buyer's Guide* (CXs 199a,b) are understated since they do not include mail-order sales by Reader's Digest and others.

Other "significant" record companies and mail-order vendors include Sam Goody who, along with other dealers, sells by direct mail the most popular records by the most popular artists (for example, RXs 6, 9, 12, 13b, 14, 144, 285, 287).

The "Music of Life" package presented by RCA and sold by *Life Magazine*, can hardly be called "merely an offering of favorite music" without any "stars" (see RX 509).

It strains credulity that RCA records sold in the *Life* package, RCA records sold in the *Reader's Digest* package, RCA records sold by the RCA Record Club and RCA records sold by dealers, department stores and racks, are all in different markets.

Another mail-order seller of some stature is Book-of-the-Month Club, which offered a package of folk records produced by Vanguard (RX 499); Pickwick (RX 538); and Concert Hall Society (RX 541).

In a footnote to CPF 425, the Government states that RX 345 shows that in 1962 the Columbia Club had 44% of all sales by direct mail. Later in the footnote, that sweeping statement is qualified by the statement that

RX 345 tends to be ambiguous on its face. The designation "Columbia Club" was intended to include some indeterminate non-Club mail order sales of Columbia and Epic records (Wright 8039).

Actually, that figure includes:

- (1) Sales of Columbia, its subsidiary labels and of outside labels through the Columbia Record Club.
- (2) Non-Club mail-order sales of Columbia and its own subsidiary labels by record dealers, mail-order specialty houses, etc.
- (3) Packages sold by Columbia on a test basis.
- (4) Packages pressed by Columbia for, and sold by, third parties.

The 44% figure represented sales for the first three quarters of 1962 and not the entire year, as indicated in the Government's proposed finding. Moreover, the figure represented a decline from the third and fourth quarters of 1961 (RX 450).

Otherwise, the record indicates that Columbia's share of all mail-order sales continued to slide during the rest of 1962. *Life*, for example, achieved its major sales volume on record packages at the end of 1962 (see RPF 273); BOMC increased its mail-order activity in and toward the end of 1962 (see RPF 274; RX 496, RX 502 *in camera*); and the RCA Clubs grew rapidly during the entire year (see RPF 437).

The Government notes "a high degree of concentration in direct mail sales" on the basis of RXs 345 and 450:

	<i>Percent</i>
Columbia	44
RCA Victor	20.8
Reader's Digest	18.2
Capitol	8.1
Total	91.1
All others	8.9

According to respondents, this conclusion of concentration is contrary to the facts. It refers to RX 451, which purports to show a decline in Columbia's share of the so-called club market. RX 451 shows Columbia's percentage share of total record club dollar purchases as declining from 66% in 1957 to 41.5% in 1961 (or possibly 50.5% as of May 1961).

Respondents also complain that the Government ignores the trend toward a dispersion of sales with the entry of new firms into this new field of mail order (see RPFs 273-78, 436-40).

Respondents also challenge the Government's statement that "there is no question that the Reader's Digest is the largest direct mail seller by far, apart from the record clubs" (citing Adler 4915).

Adler did testify that Reader's Digest was the largest direct-mail seller (Tr. 4915)—a fact acknowledged by Hitesman (Tr. 10143-45)—but without comparing its sales to those of record clubs.

In camera evidence shows that Reader's Digest sales are substantially higher than those of the Capitol Record Club (compare RX 700 *in camera* and CX 465 *in camera*; see also RPF 299).

The demonstrated fact that records sold by the Reader's Digest and the RCA Record Club sound similar is dismissed by Government counsel as "nothing more than a revelation that some classical and popular music is recorded from a standard written score. * * *" It is difficult to reconcile this argument with the Government's repeated insistence that performances by individual artists are "unique." The fact of the matter is that records may be artistically distinctive and yet compete with each other in the market place. "A man by the name of Rene Leibowitz" will hardly be credited with contributing to the Government's effort to draw a hard-and-fast line between club records and package records (compare CPF 443 with Exceptions, pages 388-89).

The opinion testimony of Marek and RCA as to claimed differences between record club members and buyers of record packages is contradicted by the business operations of his own organization (see respondents' Exceptions to CPFs 425 and 439).

The price structure used in the mail-order sale of packages is not "entirely different" from club prices. The per unit price, or the total dollar commitment, is similar.

The best selling Reader's Digest packages (in mono) have prices ranging from \$12.98 to \$22.89 (RXs 386c, 703a,b). New mono members of the RCA Record Club have obligated themselves to spend from \$16 to \$22 during the first year of membership

for enrollment and commitment records. (Both the Reader's Digest packages and the RCA Club payments are exclusive of mailing and handling charges, the amounts of which are not shown in this record.)

On a per-LP basis, prices of the Reader's Digest packages and the RCA Record Club are also similar. The average prices per LP for the Reader's Digest packages (mono) range from \$1.33 to \$2.33.

Prices charged by the RCA Record Club during the first year of membership have averaged from \$1.77 to \$2.18 per record.

Interestingly enough, the *Reader's Digest* offers a preferential price to members of the "*Reader's Digest Family*." The Government, in a footnote, identifies the Family as comprising *Reader's Digest* subscribers. Actually, the Family includes also active and cancelled members of the RCA Record Club (RX 386; Hitesman 10079; Adler 5008). This broadening of the Family to embrace both package buyers and club members ill comports with the Government's theory of separate markets.

OPINION OF THE COMMISSION

JULY 25, 1967

BY DIXON, *Commissioner*:

The complaint in this case, issued on June 25, 1962, charged that the Columbia Broadcasting System, Inc., and its wholly owned subsidiary, Columbia Record Club, Inc., had engaged in certain unfair business practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45,¹ including attempted monopolization, the "squeezing" of retail dealers with whom it competes, and the making of agreements with competing record manufacturers to fix noncompetitive record prices, fix and depress the prices paid to artists for their recording services (royalties), and cut off the supply of certain records to actual and potential competitors in the "club" sector of the phonograph record industry.² Hearings were held before a hearing examiner of the Commission, and approximately 11,000 pages of testimony and 1,400 exhibits in support of and in opposition to the allegations

¹ That section provides in part: "Unfair methods of competition in [interstate] commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

² The complaint also charged (Count II) that respondents had unfairly misrepresented, in certain of their advertising, the "savings" to be realized by the consumer in purchasing records from the Club. That charge was subsequently abandoned by counsel supporting the complaint.

of the complaint were received into the record. In an initial decision of 304 pages filed September 30, 1964, the examiner found that the allegations of the complaint had not been sustained by the evidence and ordered the dismissal of the proceeding.

We believe that decision was erroneous and hence must be reversed and set aside.

The charges in the complaint center around Columbia's formation and operation of its Columbia Record Club, an organization that distributes phonograph records direct to the consuming public through what is called the "club" or "subscription" form of mail order selling.³

Columbia entered the club market in August of 1955. One of its purposes in so doing was to prevent the entry of certain non-record firms, particularly the entry of mail order book-distributing organizations.⁴

Commencing in May 1958, Columbia decided that the Club could be more profitably operated if it sold not just its own (Columbia) records, but those of some of its competitors as well. However, instead of going to those manufacturers' wholesale distributors (the "open market") and buying the records at the same price paid by other record retailers (the Columbia Record Club is admittedly a "retailer," in that it sells directly to the ultimate consumer), the Club entered into a series of "licensing" agreements with nine (9) of its medium-sized and smaller competitors under which it gets their records for a total of some 87.5¢, versus a price of \$1.60 or more all competing retailers are required to pay for those same records. It also included in those "licensing" agreements provisions (a) fixing (depressing) the price (royalty) to be paid by those manufacturers to their artists on records sold through the Columbia Record Club,⁵ and (b) giving the Columbia Record Club the sole and "exclusive" right or "license" to make records from those nine competitors' "master"⁶ recordings (for a "royalty" of some 17.8¢ per record made from them), those competitors expressly promising not to engage in a club operation themselves, not to sell directly to anyone else who operates a club,

³ Finding 3.

⁴ Finding 5.

⁵ Two of the earlier contracts also contained provisions fixing the price at which the Columbia Record Club was to sell the competitors' records through the Club and fixing the price at which the competitors themselves were to sell the same records to their own distributors (nonclub channel). There is insufficient evidence to establish that those agreements are currently in effect, however, or that similar agreements were ever entered into with the other seven licensor-competitors. The evidence on the fixing of artists' royalties, on the other hand, is clearly set out in several of the contracts, including the later ones. Findings 10 and 11.

⁶ A master is an original recording or duplicate thereof, from which other phonograph records can be manufactured.

and not to allow anyone else to use their "masters" for the purpose of producing records to be sold through a club. In short, Columbia sought to assure itself that no one else would be able to sell the records of those nine producers through the mail in competition with the Columbia Record Club.

I

The Columbia Broadcasting System, Inc. (hereinafter CBS or Columbia) is a New York corporation with seven (7) operating divisions, one of which is Columbia Records,⁷ a manufacturer and seller of phonograph records. In 1961, CBS as a whole had sales of \$473.8 million and net assets of \$142.4 million. In 1961 and 1962, the Columbia Record Club had phonograph record sales of \$41.5 million and \$53 million, respectively; the company's nonclub sales of records (to wholesalers and retailers) was roughly the same in volume, making phonograph records somewhat less than 20% of CBS' total sales.

Columbia is the leading producer and seller of phonograph records in the United States. In 1960, total consumer expenditures for all kinds of records (including "LP's" and "singles" ^s), through all channels of distribution (including clubs, racks,⁹ juke boxes, and dealer stores), was an estimated \$521 million.

One of the principal issues to be determined in this proceeding is the "relevant market" in which the competitive effects of these challenged agreements with Columbia's nine competitors are to be evaluated. Respondent argues in favor of a broad "all-record" market. Counsel supporting the complaint, on the other hand, argues that the appropriate "relevant market" involved here is not the sale of all records through all channels of distribution but the sale of "LP" records only, through only one of the mail order channels, a method of selling by mail called the subscription of "club" technique.

The outer boundary of the relevant market is the broad, all-record market. This market, however, consists of four channels by which records are distributed to consumers: retail stores, racks,

⁷ The other six are: (1) CBS Television Network, (2) CBS Television Stations, (3) CBS Radio, (4) CBS Laboratories, (5) CBS International, and (6) CBS News.

⁸ "LP's" are the "long-playing," larger discs that have six performances on each side and retail for \$2 and up; "singles" are the smaller discs with one performance on each side, retailing for less than \$1. The LP's account for about 75% of all record sales, "singles" for the remaining 25%.

⁹ "Racks" are the familiar structures displaying the 50 or so current "hits" in supermarkets, drug stores, and other high traffic areas.

nonclub mail, and club mail.¹⁰ We find the club market to be a relevant submarket.

The very fact of these agreements excluding competitors from an equal opportunity to sell these records "through any mail order record club"¹¹ evidences Columbia's *own* conviction that the clubs are a sufficiently distinct market to make this restrictive arrangement economically worthwhile. As one text writer has put it, "the courts will take as the market, for the purposes of deciding cases, just that market which the concern itself takes for its field of activity; if a firm shows an intent to exclude competition from that field, it will be assumed that the field sufficiently describes a market, for otherwise what would be the point of the effort to exclude?"¹²

Furthermore, as discussed in some detail in the accompanying Findings As To The Facts, a number of economic factors operate to produce entirely different conditions of supply and demand in the sale of phonograph records through the various submarkets. Each of the relevant submarkets possesses different cost components and structures.¹³ On the demand side they offer consumers different sets of advantages and disadvantages. The clubs especially appeal to a group of customers that have certain distinctive characteristics.¹⁴ These supply and demand conditions are sufficiently different between the retail and club markets, for example, that each is capable of generating particular competitive forces which, in turn, can discipline one another.

The present arrangement is found to be a restriction upon competition in the club market as a relevant submarket. In addition, this practice lessens the competitive contribution of the club submarket to the broader, all-record market. In certain structural situations a given practice which occurs and is measured in a relevant submarket can have an adverse effect not only in that submarket but also upon the broader market itself. This is especially true—as in the instant case—where the submarket under question enjoys a cost advantage.¹⁵ The capacity of the other channels of distribution to discipline the club sector is limited by their cost disadvantages. In such an instance it is especially

¹⁰ Finding 13.

¹¹ CX 20.

¹² Neale, *The Antitrust Laws of the USA*, p. 125 (1960).

¹³ Finding 22.

¹⁴ Findings 19 and 20.

¹⁵ Findings 22 through 24. For a brief discussion of the significance of different cost structures upon competition among relevant submarkets (or "interindustry competition") see: (1) Kaysen and Turner, *Antitrust Policy*, p. 102, fn. 2 (1959) and (2) *United States v. Corn Products Refining Co.*, 234 Fed. 964, 975-977 (S.D.N.Y. 1916).

important to maintain the level of competition in the advantaged outlet.

II

Columbia maintains that the "licensing" agreements challenged in this proceeding were entered into with its nine competitors for the purpose of meeting the demands of its Club members for a greater "variety" of records to choose from. The evidence is very clear, however, that the relatively small number of records offered by the Columbia Record Club is not a matter of record shortage but a deliberate policy on the part of the Club's officials, in accordance with what they conceive to be the particular tastes of their Club members. The Columbia Record Club could offer an unlimited variety of phonograph records to its members if it thought such a policy would be more profitable than the narrower selection it now offers.¹⁶

III

The purposes and the effects of the "licensing" agreements at issue here are twofold, namely, (a) to give the Columbia Record Club a discriminatorily low price on the "hit" records of those nine competitors, and (b) to bar the entry of competing clubs into the market by denying them access to suitable records ("hits") on equally favorable terms, *i.e.*, at costs that would permit them to profitably compete with the Columbia Record Club.

It should be emphasized that, while these agreements are couched in terms of "exclusive" contracts, their immediate effect is not to deny other club operators access to those records altogether, but simply to make the newcomer pay a higher price for them. Thus, it was agreed between Mercury Records, one of the nine "licensors," and the Columbia Record Club, that "during the term of this agreement you [Mercury Records] will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control."¹⁷ The effect of this provision is not, however, to physically prevent other clubs from acquiring these records at all; rather, since anyone can buy any manufacturer's records on an "open market" at a going market price from the country's

¹⁶ See Findings 21, 25 and 28.

¹⁷ CX 34, p. 3, par. 7.

hundreds of independent wholesalers,¹⁸ the effect is simply to force any other club desiring to sell those records to go to the wholesalers and pay that "open market" (distributor-to-dealer) price of \$1.60 to \$2.47.¹⁹ Under these licensing agreements, however, the Columbia Record Club's total costs of acquiring a finished Mercury, Kapp, or other licensor record, ready for sale through the club, is 87.5¢.²⁰ This gives it, then, a cost advantage on these records of from 72.5¢ to \$1.59½, depending on whether the new club operator is able to acquire those same records from the wholesalers at the "best" price (\$1.60) or the "list" price (\$2.47). The magnitude of this barrier²¹ thus thrown up in the path of potential club operators is suggested by the fact that the Columbia Record Club's own profit, according to its own figures, was no more than 24¢ per record on sales to first-year members and 75¢ per record on sales to second-year members.²²

This cost "handicap" imposed on potential club entrants by these licensing agreements has obviously affected the structure of the club market and seriously lessened the vigor of competition in it. There can be little question but that entry into that market would be substantially more attractive if the potential entrant could secure the records of these nine manufacturers for the 87.5¢ paid by the Columbia Record Club, rather than for the \$1.60 to \$2.47 charged by the wholesalers. The records of these nine firms constitute a quite substantial share of the total supply of records available to club operators on at least potentially realistic terms. As discussed in the accompanying Findings, the "big three"—Columbia, RCA, and Capitol—can foreclose from potential entrants into the club field some 48% of all records simply by unilaterally refusing to sell their own respective labels (Columbia, RCA, and Capitol) directly to such potential entrants

¹⁸ These nine competitors of Columbia promised only that *they* would not sell to any other club operator and wouldn't "authorize or consent" to the sale of their records through a club by any third party. There is of course no authority under the law for these manufacturers to control the further disposition of their records, once those records have been sold to their wholesalers, *i.e.*, the producers cannot lawfully prevent their wholesalers from reselling the records to other clubs, regardless of what the "exclusive" contracts with Columbia might say about it.

¹⁹ Finding 23.

²⁰ Finding 22.

²¹ Barriers to entry are "evaluated roughly by the advantages of established sellers in an industry over potential entrant sellers. . . ." Bain, *Barriers to New Competition* 3 (1956) (emphasis in original). One such barrier is the ability of established firms to secure needed input factors, *e.g.*, phonograph records for resale, "at lower prices than potential entrants can. . . ." *Id.*, at 14.

²² The Columbia Record Club reported total costs of not less than \$2.13 per record. Subtracting this from its first- and second-year prices of \$2.37 and \$2.88 gives a profit of 24¢ and 75¢, respectively.

(or by refusing to sell to him except on prohibitive terms²³). For all practical purposes, then, the new club that expects to seriously compete with the clubs of the "big three" would be limited to the records of the nonbig three manufacturers, those represented by the remaining 52%.

Since RCA and Capitol both testified in this proceeding that their clubs had been profitably operated with the use of only their own records—i.e., RCA has operated a successful club using only RCA records (16% of all records sold in the country in 1960), and Capitol has operated a successful club offering only Capitol records (11.1% of all records)—this remaining 52% would undoubtedly be sufficient to permit the profitable operation of a number of additional record clubs besides those of the "big three." The "licensing" contracts involved here, however, not only expressly bar these nine most likely entrants from starting their own clubs,²⁴ but dries up their share of that remaining 52% of the total supply of records to all other potential entrants. They sold, in the 12 months prior to the signing of their respective licensing contracts with Columbia, an aggregate of some 11.2% of the LP's²⁵ sold through retail dealer stores.²⁶ This transfer of another 11.2 percentage points out of the nonintegrated sector and over to one of the "big three" integrated firms further reduces by that amount the supply of records available to potential new club operators on economical terms.

The foreclosure involved here, however, is considerably greater than that indicated by any of these figures. As noted above, not all of the approximately 25,000 separate records offered for sale by the country's approximately 50 record manufacturers are equally attractive to the particular segment of the record-buying public that joins clubs. Their preferences run primarily to the most popular of the "hit" records, particularly to the 150 or so records that are, at any given moment, on the popularity "charts" published by the trade magazines (*Billboard*, etc.). It is from these much smaller groups of records that the bulk of the records *suitable for club use* are apparently drawn in actual practice.

²³ Columbia did in fact refuse to sell to one ultimately unsuccessful club except at the full wholesaler-to-dealer "list" price of \$2.47, less periodic discounts, or at an average price of \$2.12. Tr. 9014-9015; finding 27. A club paying that price for its records, and incurring the same additional costs that the Columbia Record Club incurs, would have total costs of \$3.37½, and hence would lose just over \$1 on each record sold in competition with the Columbia Record Club at the latter's price of \$2.37.

²⁴ Findings 6-9.

²⁵ "Singles" cannot be sold economically through clubs.

²⁶ This is presumably a fair approximation also of their share of all LP sales through all nonclub channels of distribution, i.e., racks and juke boxes as well as dealer stores.

And of course it was precisely on the basis of their actual or potential capacity for producing "hits" that the nine "licensors" were selected by Columbia in the first place.²⁷

These licensing contracts foreclosed to potential club entrants (except on disadvantageous terms) some 41.2% of what would otherwise have been an "open" market in "hit" records suitable for club use.²⁸

But even if the effects of these contracts are evaluated not in terms of the share of club-type records actually tied up by the Columbia Record Club and hence actually foreclosed to potential club operators, but simply in terms of the smaller dollar share represented by the Columbia Record Club's sales of those particular records it ultimately elected to use itself (approximately 30% of the records it tied up), the principal conclusion would still be the same.

The Club's 1961 sales of \$41.5 million were an estimated 53% of all "club" sales in that year, with approximately 36.7 percentage points representing its sale of its own (Columbia) records (\$28.7 million), and the other 16.3 percentage points (\$12.8 million) representing its sale of the nine competitors' records. In these circumstances we think the most clearly appropriate legal standards by which to judge the legality of the conduct involved are those expressed in the Supreme Court's recent merger²⁹ decisions, particularly those involving the so-called "horizontal" combinations.³⁰ The factual situation before us—one

²⁷ Finding 25.

²⁸ *Ibid.*

²⁹ While combinations effected by contract are admittedly less "permanent" than mergers of stock and all physical assets, we do not understand the law to be that competition may be lessened and monopoly created merely because it is scheduled to end at some specified future date; if there is injury to competition, there is injury to the public and should be ended without delay. Here, moreover, the time limit itself is more apparent than real; the contracts run for a stated period of years (*e.g.*, three years), but they are frequently renewed for additional periods of similar length.

It might be suggested that, since the actual effect of these agreements is not to "exclude" competitors from access to the records of these nine licensors in the physical sense of that term but only to make them pay a higher price than the Columbia Record Club pays, the applicable legal standard should be that expressed in the price discrimination law. Since the price differential (87.5¢ vs. \$1.60) has allowed into the club market no significant competitors other than the integrated "big three" and has thus given the Columbia Record Club a virtual monopoly on the sale of the records of these nine firms through clubs, we think the situation should be evaluated primarily in terms of merger standards. However, considering the magnitude of the discriminatory price involved (a discrimination of some 54.7% in the Columbia Record Club's favor) and of the market share it has been able to get and hold as a result of it (53% in 1962), the conclusion would doubtless be the same under the price discrimination law. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (April 24, 1967).

³⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America (Alcoa-Rome)*, 377

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in which a firm with some 36.7% of the relevant market already, has acquired by contract with nine of its competitors another 16.3%, and in which it then shares over 90% of that market with only two other firms³¹—falls squarely within the rule of *Philadelphia Nat'l Bank* against a consolidation that “produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market. * * * ”³² That merger, had it been allowed, would have produced a firm with 36% of the relevant market, substantially less than the 53% held here by the Columbia Record Club.

IV

Columbia offers several “business justifications” as to why it should be allowed to retain its “exclusive” hold on the sale of the records of these nine competitors in the club market. One of them—the argument that the Columbia Record Club is a less efficient retailer of records than the country’s approximately 5,000 record dealers and thus should be allowed to buy at a lower price in order to offset the latter’s alleged cost advantages—would be relevant only if the question was solely one of discrimination against, and competitive injury to, the dealers. Here, however, the competitive injury we find has occurred in the club rather than the nonclub market. A club’s “justification” for inducing a discriminatory price not accorded to the operators of dealer stores obviously is no “justification” for contract provisions imposing a higher price *on clubs*.

Respondent argues further, however, that the Columbia Record Club is entitled to keep its “exclusive” hold on the Club sale of these records, and hence its advantage over other clubs, because of certain “guarantees” it gave the nine competitors in question. In negotiating these contracts, Columbia expanded its obligation beyond the unit “royalty” payment of so much for each licensor record sold (an average of 17.8¢ per record) by adding a promise on its part to pay the licensor-competitors a *minimum* total dollar figure, regardless of how few licensor records the Club might in fact sell. For example, in its contract with Kapp, respondent agreed to pay Kapp royalties on *at least* 150,000 records per year, for four years.³³ From this point, respondent reasons as follows:

U.S. 271 (1964); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

³¹ See generally *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967); Brodley, “Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy,” 19 *Stanford L. Rev.* 285, 299 (January 1967).

³² *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

³³ See CX 41, 44, 45, 81, 180, 184, 191, 265, 512.

"[T]hese [licensor] companies almost universally demanded guarantees and we felt that we could meet the guarantees more successfully if we had exclusivity on the artists and the product [records] produced by these companies."³⁴

There would seem to be no question but that the Columbia Record Club could, in fact, "meet the guarantees *more successfully*" if we had exclusivity" on those records, *i.e.*, that it could take in more revenue if it had a monopoly on the mail order distribution of those records than if it had to compete with others selling those same records through the mail. This follows from the elementary economic principle that the sale of any product is more profitable, *i.e.*, that more money can be gotten for it, if it is sold in a monopolized rather than a competitive market. It does not follow, however, that one can first agree to pay a high price for something, a price that reflects the expectation of being able to resell it in a market free of competition, and then use the high price originally paid for it as "justification" for keeping the monopoly. This is a circular or "boot-strap" argument, to say the least. Assuming that Columbia has in fact "guaranteed" to pay Kapp and the others more than the club can earn from the sale of their records in a genuinely competitive market,³⁵ this establishes only that the parties knowingly bargained for the purchase and sale of a monopoly, not that the monopoly itself should be sustained. We know of no principle of law under which a private interest in realizing the fruits of a purchased monopoly must be given precedence over the public interest in preventing such monopolies.

Respondent's "advertising" argument is somewhat similar to those already discussed. A Club official explained it to the hearing examiner this way: "The basic reason [for demanding "exclusive" rights to sell these records through the mail] was that we would be advertising the artists and the labels extensively, spending millions of dollars in advertising for new members and in promoting these artists and their records and the labels in our club magazines, and we felt that during the period of the contract our

³⁴ Tr. 5240.

³⁵ There is little evidence that the "guarantees" given are actually all that "high." Thanks to the "negative option" system employed by the Club, approximately 35% of the Club's total membership (some 2 million) can be expected to accept the record "selected" for them (the "regular selection") each month (Finding 3). Thus, in 1962, no "regular selection" in the Club's "popular division" (40% of the total membership) sold less than 95,000 records. In effect, this means that the Columbia Record Club can generally meet a 100,000-150,000 "guarantee" by simply picking one of the licensor's records for the coveted role of "regular selection" of the month. In fact, there is reason to believe this is the real significance of the guarantee provisions in the contracts—they assure the licensor he'll get at least one of his records featured as a "regular selection" and hence in the hands of 100,000 "automatic" buyers.

[advertising] investment justified this exclusivity.”³⁶ As we understand it, respondent’s basic argument here is that its advertisements, some of which carry the names of these nine licensor-competitors’ labels, and the names and pictures of some of their more popular artists, have created some sort of residual or continuing “demand” for the records of those manufacturers and their artists and that this continuing “demand” is something respondent alone, as its creator, should be allowed to exploit. To allow a newcomer to sell Mercury, Liberty, Verve, Caedmon, Kapp, Warner Bros., United Artists, Vanguard, and Cameo-Parkway records through the mail would thus permit such a newcomer to take a part of what respondent’s advertising had created—in short, it would, as we understand the reasoning, permit him to reap where he had never sowed. Or, stated another way, respondent is apparently arguing for the establishment of a principle of law that the *first* seller to *advertise* a given product must thenceforth be allowed to enjoy a monopoly on the sale of that product in the area covered by his advertisement, lest some residual “demand” created but not harvested by that first advertiser be garnered by later entrants into that market. We are at a loss to understand how, under such a rule as this, competition could ever arise at all.

There is nothing in respondent’s advertisements to support such a conclusion.³⁷

The purpose of these advertisements is as straightforward as their appeal to the customer’s “bargain” instinct:

Q. Mr. Rabar, what is the basic purpose of Columbia Record Club national advertising?

A. There is only one purpose; to get members.³⁸

The sole criteria applied in determining whether a club advertisement will be placed in a particular periodical is whether it produces

³⁶ Tr. 5239 (emphasis added). Although Columbia’s licensing contracts give it an “exclusive” on *all* of the records in each licensor’s catalog (including new ones as they’re released), it doesn’t actually use all of them. Thus, of the 2,509 records offered for sale by these nine producers, the Columbia Record Club has elected to use or offer to Club members only 736 (29.3%) of them. Its “exclusive” contracts, however, barred all other clubs from using not only these 736 records but the other 1,773 records (70.7%) as well, records that it had no desire to use itself but didn’t want anyone else to use, either. The President of RCA testified that, in his view, this was one of the “deleterious” effects of exclusive licensing: “[N]o record club can use up all of the repertoire of a Verve, a United Artists, other labels, and that it may well be, if you have an exclusive contract with another label, that part of the repertoire remains unused; it lies fallow; it stays on the shelf. And if that is true, then the cultural effect, as you call it, would be deleterious.” Tr. 1871. He also thought it had bad “commercial” effect: “I think exclusive [licensing] contracts, in that sense, such as the one that Columbia has had with [these licensor] labels, [is] likely to have certain bad effects. These bad effects * * * always do come about when one agency in distribution or in entertainment, become so all-powerful [a] smaller manufacturer listens all too carefully to what this agency dictates or tells [it].” Tr. 1871.

³⁷ See, e.g., Finding 3, n. 4.

³⁸ Tr. 6779.

a "profitable cost per order [member enrollment]" ratio.³⁹ Every word in the advertisement itself—including the prices quoted, and the artists mentioned by name—is similarly aimed at improving the advertisement's "pull," *i.e.*, the percentage of the advertisement's viewers that respond and join the Club.

In short, this is not "institutional" advertising engaged in to promote these nine competitors' names or their particular "brands";⁴⁰ rather, it is straightforward "price" advertising, aimed at selling not so much the idea that these records are "better" than some other sellers' records, but at selling the consumer on the idea that the Columbia Record Club is a better or more economical source from which to buy records the public already knows about. (The Club is normally not interested in offering a record of one of its licensors until that record has already become relatively well known, *e.g.*, until its sales hit the 50,000 mark.)

Respondent's argument here is also inconsistent with the relatively short "life" of the typical popular record. There was testimony that the "normal sales curve" of a hit record generally covers a span of some three months (in order to have at least one popular record selling well at any given time, the better known artists carefully arrange to release a new one at least once every three months). In this situation, it is not clear how much "harvest" is actually left in the fields for any newcomers to get from the "old" records advertised by the Club in times past. The real harvest is more likely to come from the sale of records not yet recorded and hence not yet advertised by the Columbia Record Club. The question, then, is not whether some new entrant should be allowed to reap where he never sowed, but whether he should be permitted to participate in *both* the future sowing and the future reaping. We are clear that he should. The Columbia Record Club has, by the admission of its own officials, earned a satisfactory profit on every dollar it has spent so far, including every dollar "invested" in advertising. Having gotten back all that it spent, plus a return it considers satisfactory, we see no rational justification for not allowing new firms to share in whatever profits there may be in the mail order sale of these licensors' *future* records and for denying the record-buying public the benefits of their competition for those profits.

³⁹ Tr. 5148.

⁴⁰ It should be noted that, by and large, the demand for phonograph records runs primarily toward the particular artist, rather than in terms of the "label" of the manufacturer he may happen to be temporarily recording for.

V

Our order is a narrow one, designed simply to stop the fixing of artists' royalties by Columbia and its competitors, and to eliminate the "exclusive" feature of these contracts. In the latter regard, respondents will be prohibited from entering into or maintaining any contracts with competing record manufacturers that "prevent other club operators, including potential club operators, from acquiring the phonograph records of any other manufacturer or producer on the same terms and conditions as respondents acquire such records * * *." Elimination of this cost barrier can reasonably be expected to make the club market substantially more attractive to potential entrants and thus to promote the public interest in the development of a more competitive structure and more vigorous competition in this market.

VI

One further matter requires mention here. Respondents and several nonparty witnesses to this proceeding persuaded the examiner to put a mass of data *in camera*. We have examined that material carefully and have found only one exhibit that, in our opinion, ever had any serious claim to being "confidential," and the basis for that claim has been removed by time. This was a *Billboard* market study for 1962.⁴¹ It would of course be improper to unnecessarily publish data that constitutes a firm's stock-in-trade and thus allow its potential customers to get it free rather than having to pay for it. But its saleability was described as depending upon its timeliness, and hence the 1962 data can now have no more "secrecy" value than the 1961 data that was considered already "stale" at the time of the hearings in 1963.⁴² The other documents placed *in camera* by the examiner and considered so "confidential" by respondents and these nonparty witnesses consisted largely of sales data and club membership figures. There is nothing "confidential" about sales data in an antitrust proceeding; unless it can be used freely, meaningful measurement of the various markets involved are virtually impossible.

Nor is there any presumption of confidentiality for any other data the parties might prefer to call "secret" and withhold from public scrutiny. Indeed, the presumption is the other way. Competition depends for its continuing vitality upon free entry and free exit to and from industries, and entry depends in no small measure upon knowledge of opportunities, *i.e.*, knowledge of sales

⁴¹ RX 811, *in camera*.

⁴² CX 244a, *in camera*.

volumes, of probable costs, and of estimated profits. The public interest lies in encouraging entry, not in protecting the barriers erected around industries by established firms, whether these be knowledge barriers or other kinds. Only in the most extraordinary circumstances should data of this kind be withheld from the public record. *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961).

An appropriate order will be entered.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint in this matter on June 25, 1962, charging that the Columbia Broadcasting System, Inc., and its wholly owned subsidiary, Columbia Record Club, Inc., has engaged in certain unfair business practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Hearings were held before a hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed September 30, 1964, the examiner found that said charges of law violation were not sustained by the evidence and ordered the dismissal of the proceeding.

The Commission, having considered the appeal filed by counsel supporting the complaint and the entire record, and having determined that the initial decision should be vacated and set aside, now makes these its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

1. The respondent, Columbia Broadcasting System, Inc. (hereinafter CBS or Columbia), is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business at 485 Madison Avenue, New York, New York. It has seven operating divisions: (a) CBS Television Network, (b) CBS Television Stations, (c) CBS Radio, (d) CBS Laboratories, (e) CBS International, (f) Columbia Records, and (g) CBS News. Its aggregate sales increased from \$316.5 million in 1955 to \$473.8 million in 1961.¹ Its total net assets increased, in that same period, from \$74.0 million to \$142.4 million.

2. An unincorporated division, Columbia Records Division, pro-

¹ CX 264, pp. 34-35.

duces phonograph records in its four (4) manufacturing plants² and sells them to a wholly owned subsidiary, Columbia Records Division Corporation, which in turn sells to (a) a division that sells to wholly owned "branch distributors" and to non-CBS independent wholesaler distributors, both of which resell to sub-distributors and retail record stores and (b) a wholly owned subsidiary corporation, Columbia Record Club, which retails the records directly to the consuming public, bypassing the wholesaler-retailer distribution channels. In 1961, and 1962, the Club's sales of records to consumers totaled \$41.5 million and \$53 million, respectively³; Columbia's nonclub sales to the trade were approximately the same as its Club sales. In the aggregate, then, phonograph records accounted for somewhat less than 20% of CBS's total sales of \$473.8 million in 1961.

3. This proceeding is concerned primarily with Columbia's formation and operation of its Columbia Record Club, an organization that distributes phonograph records direct to the consuming public through the "club" or "subscription" form of mail order selling. Under the "club" method of selling, the consumer becomes a "member" of the selling organization and "commits" himself to buy a minimum number of phonograph records over a stated period of time.

The principal features that distinguish the "club" from the nonclub (retail dealer or rack) method of selling and buying are as follows. The Club's initial communication with the consumer is accomplished by extensive advertising, principally in such national magazines as *Life*, *Look*, etc. These advertisements describe an "introductory offer"⁴ under which the consumer, as an inducement to "join" the Club and agree to buy a certain number of records at a fixed price over a stated period of time, is offered a number of records immediately at a nominal (below-cost) price.⁵

² These plants are located at (a) Bridgeport, Connecticut; (b) Pitman, New Jersey; (c) Terre Haute, Indiana; and (d) Los Angeles, California. The one located in Pitman, New Jersey, completed in May 1961, houses "the world's largest Lp [long-playing] manufacturing facilities," with "an annual capacity of 25 million Lp's." CX 264, p. 9. That is 14.4% of all LPs sold in the United States in 1961 (163 million). RX 441.

³ CX 256, 783-e, and RX 422, *in camera*.

⁴ For example: "[T]he Club offers the biggest hits from Columbia—Mercury—Kapp—Liberty—United Artists—Warner Brothers—Epic and many other record companies! More Top Stars * * * More Savings * * * the greatest values ever offered by any record club! * * * fabulous savings * * * world's largest record club. By joining now, you can have your choice of ANY SIX of the 78 outstanding records shown on these two pages—up to a \$36.88 retail value—ALL SIX for only \$1.89. What's more, you'll also receive a handy record brush and cleaning cloth—an additional value of \$1.19—absolutely FREE! * * * only membership obligation is to purchase six selections from the more than 400 to be offered in the coming 12 months. * * * CX 731-B.

⁵ Tr. 5144.

The basic "popular" LP carries a "list" price of \$3.98 in both Club and nonclub channels. Discounting and the like among the retail dealers has reduced their average price, in recent years, by an estimated 25 % below list, or to \$2.98. The clubs, on the other hand, "discount" by "giving away" records designated as "free." Thus, at the time of these hearings in 1963, the Columbia Record Club's "introductory offer" to new members was six (6) records for an aggregate price of \$1.89, plus 55¢ postage, or approximately 41¢ per record, provided the new member also agrees to buy *another* six (6) records in the next 12 months at the "list" price of \$3.98 each, plus 35¢ postage on each, or a total of \$4.33 per record. The total bill for the 12 records figures to \$28.42, or \$2.37 each.

In the second year, the Club member buys on a 3-for-the-price-of-2 basis. For each two he "buys" at the list price of \$3.98, he gets a second one "free." Thus, he buys two for \$3.98 each (\$7.96), plus a 35¢ mailing and handling charge for each (70¢), or a total of \$8.66—for an average price of \$2.88 per record.

After receiving the first six records under the "introductory offer," the new member buys his second six in accordance with what is called the "negative option plan." Every 28 days the Columbia Record Club mails to its members a 24-page magazine describing the 100 to 200 records currently being offered by the Club, along with a card of the type used in data processing machines, called a "negative option card."⁶ The card describes four (4) "options." First, the member can do nothing about the card (*e.g.*, throw it away), in which case he will automatically be sent, and billed for a phonograph record called that month's "current selection" of the Club "division" to which he belongs.⁷ Second, the member can "check" a "box" on the card reading: "INSTEAD OF the current selection, send me the records I have checked on the reverse side." Third, he can check a box reading: "IN ADDITION TO the current selection, send me the records I have checked on the reverse side." Fourth, the member can check one saying: "CHECK here if you DO NOT wish to receive *any* records this month."⁸ In practice, the Club's officials anticipate in advance that approximately 35 % of the members of its largest ("popular") division will not return

⁶ See RX 385, attachment to p. 19.

⁷ The Club had four divisions until recently: Listening and Dancing; Classical; Broadway; and Jazz. A fifth division, Country and Western, was later added. Some 40% of the Club's total members are in the largest division, Listening and Dancing ("popular") division. The other three were of approximately equal size, about 20% each. The Club had approximately 2 million members in all divisions in November 1962. Tr. 5128.

⁸ RX 385, attachment to p. 19 (boldface type in original; emphasis added). The member that wants no record at all in a particular month will of course still have to buy at least six (6) records over the commitment period of 12 months.

Findings

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the card and hence will receive and accept the record selected for them by the Club.⁹

4. The Columbia Record Club itself was formed in August 1955. Thereafter, commencing in May 1958, Columbia decided the Club could be more profitably operated if it sold not just its own (Columbia) records, but those of some of its competitors as well. However, instead of going to those manufacturers' wholesale distributors (described here as the "open" market for phonograph records) and paying the same price paid by other record retailers (the Columbia Record Club is admittedly a "retailer," in that it sells directly to the ultimate consumer), the Club entered into a series of "licensing" agreements with nine (9) of its medium-size and smaller competitors under which it uses their "masters" to produce finished records at a total cost of some 87.5¢, versus the \$1.60 or more all competing retailers (whether clubs or stores) are required to pay wholesalers for those same records. It also included in those "licensing" agreements provisions (a) fixing (depressing) the price (royalty) to be paid by those manufacturer-competitors to their own artists on records sold through the Columbia Record Club¹⁰ and (b) giving the Columbia Record Club the sole and "exclusive" right or "license" to fabricate records from those nine competitors' "master" records (for a royalty of some 17.8¢ on each record it fabricates from them), those competitors expressly promising (i) not to engage in a "club" operation themselves, (ii) not to sell their records directly to anyone else who resells them through a mail order "club" operation, and (iii) not to allow anyone else to use their "master" recordings for the purpose of producing finished records for resale through a mail order "club" operation.

5. Columbia established the Record Club for the purpose of preventing the entry of certain nonrecord firms, particularly *book* publishers and distributors. Columbia intended to thwart further competition not only in the sale of records but in the hiring of

⁹ Tr. 713-714. In one period, for example, the lowest "pull rate" of any record (percentage of members accepting the record selected for them) in the monophonic section of the Listening and Dancing Division was 25% (95,667 records sold); the highest had a pull rate of 34% (156,948 records sold). Tr. 8411. One of the Club's officials testified that the "current selections" sent automatically to members accounted for 48.4% of the Club's total sales volume in 1962. Tr. 8418, 8531-8532.

¹⁰ Two of the earliest of these contracts also contained provisions (a) fixing the price at which the Columbia Record Club was to resell the competitors' records and (b) fixing the price at which those competitors were themselves to sell their records in nonclub channels, i.e., to their own distributors (who in turn sell to retail stores). The evidence is not sufficient, however, to support a finding that these two price fixing agreements have continued in effect or that they were a part of the later licensing contracts.

The evidence on the fixing of artists' royalties, on the other hand, is clearly set out in several of the contracts, including the later ones. See Findings 10 and 11.

artists. In approximately the middle of 1951, Mr. Goddard Lieber-son, then the executive vice president of Columbia Records, initiated a series of meetings with an official of the Book-of-the-Month Club, Mr. Harry Scherman,¹¹ to see if there "was an area of possible working together with someone in the *book club* business to go into something of the record club type of operation."¹² Columbia concluded that the book club's approach was "not realistic" and dropped the matter. Then, in 1954, the book club initiated further meetings. Again, Columbia found the proposal unattractive. At the last of that series of meetings, however, in December 1954, the book club's official announced "that he had come to the *final decision that the Book of the Month Club under his management was definitely going into the record club business*, that he would repeat to us his interest in doing it in conjunction with Columbia Records, and when we told him that we did not have an interest in joining with him in this venture, he told us that, be that as it may, he should *warn us then that he would need important artists, and if they were ours, and some of them would be, he said, he would make an effort to get them under contract*, you know when their contracts with us had terminated."¹³ This was later confirmed by several of Columbia's artists, who reported that they had in fact been approached by Book-of-the-Month Club with very attractive offers.¹⁴

Columbia's officials were concerned over this new competitive threat: "[I]t was perfectly obvious that the club form of selling was the way of the future and that Book-of-the-Month had already demonstrated through its Music Appreciation Record Club that it could make a successful club. * * * Well, if the mail order people became powerful in the record club field, as they gave every indication of doing in 1955, it was entirely conceivable and in fact probable that *with the immense purchasing power that could be generated through mail order selling, the important recording artists would naturally gravitate to these companies*. * * * [Hence those artists] would be not available for retail, or at least would be available under such terms and conditions as might not be beneficial to the retail business."¹⁵ "[I]t was soon obvious they [the book firms] would be able to go to artists and offer them better deals than we could."¹⁶

¹¹ Tr. 6168, *et. seq.*

¹² Tr. 6170 (emphasis added).

¹³ Tr. 6173 (emphasis added).

¹⁴ Tr. 6174.

¹⁵ Tr. 5035-5038 (emphasis added).

¹⁶ Tr. 4839.

Columbia moved swiftly and effectively:

Q. Before this was over, Mr. Adler, which Columbia artists did Book-of-the-Month Club actually sign?

A. I don't recall now whether they signed one or none. I think *we effectively thwarted it*.

Q. Is it possible that they didn't sign any Columbia artists?

A. I said I didn't know whether they signed one or none. *We effectively thwarted their plan.*¹⁷

This threat of new competition was particularly alarming because it came from outside the "industry" (records), posing the danger of entry by a complete stranger: "Well, we felt that several things could happen with a third party being in the business, a third party, I mean, other than the record manufacturer and the dealer and the normal distribution that goes to the dealer. We felt that if the important artists were siphoned away into a club there was a reasonable possibility that they would never find their way to the retail business; therefore, the retailer would suffer. We would also suffer by not having these artists."¹⁸

6. Columbia's purpose in entering into the licensing contracts with its competitors included, in addition to the obvious one of increasing the Club's sales and market share, the desire to prevent those competitors from entering the club field on their own or from selling their records to anyone else who attempted to sell in that club field. The first contract between Columbia and its competitor-licensors, the one with Caedmon dated May 15, 1958, granted Columbia "the *exclusive* right, privilege and license" to "use the master recordings" of Caedmon in the manufacture and sale "through our mail order record club," Caedmon agreeing that it would "not sell *by mail order methods* of any kind or nature whatsoever, and [would] not authorize or consent to such sale *by any third party*, of phonograph records manufactured from any of the master recordings, or from copies or duplicates thereof."¹⁹ This provision was amended 11 days later, May 26, 1958, to make it somewhat more specific as to the channel of distribution aimed at and the competitors Caedmon was not to sell to: "You [Caedmon] agree that, during the term of this agreement, you will not distribute or sell or authorize or consent to the distribution or sale by any third party of phonograph records manufactured from any of the master recordings, *through any mail order record club* which regularly distributes or offers for sale to its members significant quantities of phonograph records of a musical nature, *including,*

¹⁷ Tr. 5043-5044 (emphasis added).

¹⁸ Tr. 6177-6178.

¹⁹ CX 19, pars. 3(a) and 4(c) (emphasis added).

without limitation, the '*Book-of-the-Month Club*,' '*Music Treasures of the World*,' any *RCA Victor* record club, and any *Capitol* record club."²⁰

In other words, the restriction on Caedmon was reduced from the broader channel ("mail order methods of any kind or nature whatsoever") to the narrower one ("any mail order record club"), and four competitors of the Columbia Club were specifically named as examples of the competing "clubs" Caedmon was forbidden to sell to. (Caedmon remained free, however, to sell its records through normal retail channels.)²¹

7. The second of these contracts, the one with Verve dated March 31, 1959, similarly granted Columbia the exclusive "right, privilege and license" to manufacture and sell phonograph records made from certain specific Verve "Licensed Masters" through the club channel; i.e., "by direct mail in accordance with the merchandising method known and understood, in the mail order business, as the 'subscription' or 'club' plan as distinguished from individual over-the-counter sales by retail store outlets receiving their phonograph records from phonograph record distributors * * *." ²² "You [Verve] agree that during the Term of this agreement you will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control."²³

8. The third of these agreements, the one with Mercury dated April 1, 1960, granted the Columbia Club "the sole and exclusive right, privilege and license" to manufacture and sell records made from Mercury "master recordings" by "direct mail in accordance with the merchandising method known and understood, in the mail order business, as the 'subscription' or 'club' plan as distinguished from individual over-the-counter sales by retail store outlets receiving their phonograph records from phonograph record distributors. * * * ²⁴ It further provides: "You [Mercury] agree that

²⁰ CX 20 (emphasis added).

²¹ "It is understood and agreed, however, that nothing herein contained is intended to or shall in any way restrict the distribution and sale of such phonograph records through normal retail channels." CX 19, 4(c).

²² CX 23, p. 3.

²³ *Id.*, pp. 7-8. Certain records are excepted from this provision, under certain described circumstances. Thus, it was agreed that "you [Verve] will not authorize any other mail order record club (hereinafter referred to as 'other club'), such as the Capitol or RCA Victor Club, to release phonograph record albums embodying the performances of Ella Fitzgerald or Oscar Peterson except" in certain described circumstances. *Id.*, p. 4.

²⁴ CX 34, p. 2, par. 2.

during the term of this agreement you will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control."²⁵

9. The remainder of the contracts contain similar provisions giving the Columbia Club the "sole and exclusive" right to use the licensor's masters to produce records for sale by the "club" method and expressly prohibiting the licensor from selling in competition with the Columbia Club or allowing anyone else to use its masters to do so.²⁶

10. Certain of these contracts between Columbia and its competitors also contain express provisions fixing the prices (royalties) to be paid by these companies to artists who record for them. Thus the contract with Verve (March 31, 1959) provided that Verve would attempt to get its artists to agree to accept (a) a 50% reduction in their royalty rate on their records sold through the Columbia Club, and (b) a complete waiver of any royalty payment at all on those of their records that the Club should give away *free* to its subscribers as "introductory offer" or "bonus" records.²⁷ The contract recognized, however, that Verve might be "unable * * * to obtain execution [by the artist] of a modification agreement substantially in the form attached hereto as Exhibit I," and provided that, in such event, Verve was to notify Columbia of this recalcitrant artist within 15 days. "We shall then have the right to negotiate directly with any such artist to obtain the execution of any such modification, but in the event we shall be

²⁵ *Id.*, p. 3, par. 7.

²⁶ Respondent attaches significance to the fact that the contracts do not run in perpetuity, but are limited in time—*c.g.*, Cameo-Parkway, 1 year; Caedmon, 2 years and 1 month; Kapp, Liberty, and United Artists, 3 years and 4 months; and Mercury, 3 years and 6 months. However, several of them contain express "options to renew" and they are in practice regularly renewed.

Columbia also emphasizes the fact that the more recent of the contracts contain "release" clauses giving the licensor-competitors an option to either take individual records ("partial" release) or entire catalogs ("complete" release) out of the Columbia Record Club and put them in another club if they get a better offer from such other record club. (The Caedmon, United Artists and Liberty contracts contained both types of release clauses, and the Kapp contract had a "partial" release clause only.) There has been no significant use of these clauses, however, and the licensors make it clear that they like their arrangements with the Columbia Record Club and have no intention of allowing their records to be offered through any other club. See, *c.g.*, tr. 1594-1595.

²⁷ CX 27-a, 28-a. While Verve was to use its "best efforts" to obtain this kind of concession from its artists, Columbia said that "we agree to accept," in lieu of the one described, a modification "similar to Exhibit II. * * * CX 29-b. That "Exhibit II," prepared for the signature of the artist, provides in part: "I agree to waive [all] my royalties * * * on all records sold via mail order under the 'subscription' or 'club' plan * * *. I have received \$500 as payment in full for this waiver." CX 30.

unsuccessful, we agree that such master recording shall not be deemed to be included in Schedule A or C of this agreement [records to be used by the Club]. With reference to such direct negotiation, if we obtain a modification whereby the artist is to be paid a royalty in excess of fifty per cent (50%) of the royalty payable to you hereunder, with reference to such Licensed Master, the royalty payable to you pursuant to paragraph 12 [five (5) per cent of the royalty price with respect to ninety per cent (90%) of our net sales] shall be increased to a figure no less than two and one-half percent (2½%) greater than that payable to the artist."²⁸ Thus, taking \$3.46 as the "royalty price" on a \$3.98 list price record, Verve was to get 17.3¢ (5% of the royalty price) on 9 out of every 10 of its records sold by the Club. But if the artist insists upon more than half of that 17.3¢, it would be raised to the point where Verve could pay the artist his full price and still realize 8.6¢ (2½% of the "royalty price," \$3.46).

11. Another of Columbia's contracts with its competitors, the one with Mercury (April 1, 1960), was still more explicit on the subject of suppressing competition in bidding for artists' services: "You [Mercury] recognize that it is our [Columbia] policy to pay no more than half of customary artist royalty with respect to recordings sold by us by our direct mail operation, and agree in general to conform to this policy, except, in cases of artists who are dead or no longer under contract to you."²⁹ This provision concluded: "Nothing herein shall prevent you [Mercury] from absorbing or paying on your own behalf any additional royalty on records sold by us to any of your artists. You will, however, advise

²⁸ CX 23, pp. 19-20, par. 25. This provision continued: "Nothing contained in this paragraph shall alter the concept that all royalty payments to artists are to be made directly by you; and in that regard, we [Columbia] will send a copy of any modification obtained by us to you within five (5) days after such modification has been executed by the artist." *Ibid.*

The royalty provisions in at least one of the other contracts expressly designated the artist's share: "We [Columbia] will pay you [Vanguard] a royalty of five (5) per cent of the royalty price plus an additional artist royalty of two and one-half (2½) percent of the royalty price. Said royalty shall be paid on ninety (90) per cent of our net sales of Albums manufactured from the master recordings. Net sales are defined as gross shipment less returns." CX 43, p. 3, par. 7.

²⁹ CX 34, p. 6, par. 13. It was further provided: You [Mercury] will make your best efforts to make available to us under the terms of this agreement the performances of major artists who are now under contract to you or who have previously been under contract to you, and will supply us by May 31, 1960, with a list of those who are not so available. If this list in our view is so material to the terms of this contract that we deem it impossible to meet the guarantee herein provided, we shall so notify you within ten days thereafter and shall then be obliged to pay only such royalties pursuant to paragraph 11 as are earned on items already used or announced by us and not on the royalty guarantee as provided in section 11 hereof. Except for payment as such this contract shall thereupon be terminated.

"You agree that the performances of any artists signed by you subsequent to the date of this contract and to be performed before the termination thereof shall be available to us pursuant to the terms of this agreement." *Ibid.*

us on request of any such additional payments or agreements to pay, and you agree that we shall not be liable for any royalty beyond that specified in paragraph 11 [7½% and 10%, respectively, on nonclassical and classical records, figured on 95% of net sales]."³⁰

Similar provisions were contained in Columbia's contracts with its other competitors.³¹

12. While there are no provisions in the written contracts between Columbia and its competitors that deal with the matter of not attempting to hire away each other's artists, the record is clear that there is, in fact, an understanding or agreement among them to lessen their competition in this respect. Thus, one of Columbia's licensor-competitors was asked about an incident in which Columbia had let him know that one of his artists had offered his services to Columbia:

Q. Is this one of the advantages of being in the club, by the way?

A. I wouldn't say it is one of the advantages of being in the club. I can think of many other significant advantages. I would say that is possibly, one could consider this a *fringe benefit*.³²

13. Several alternative "markets" have been suggested as the appropriate area in which to evaluate the probable competitive effects of these licensing agreements, including (1) the "all-record," (2) "all-LP," (3) "all-mail-order," and (4) the mail order "club" markets. The one advanced by respondent is the "all-record" market, *i.e.*, all phonograph record sales in the United States, including both "LP's"³³ and "singles," and including sales made through all channels of distribution—retail stores, "rack,"³⁴

³⁰ *Ibid.* As a Columbia official explained the situation in a letter to Mercury: "It has been my experience—and of course I will be glad to defer to your judgment in this matter—that once you *truckle* to an artist, it is very difficult to get the artist in line again." CX 358(c)-(d) (emphasis added).

³¹ Warner Brothers, CX 39, p. 5, par. 11; Kapp, CX 41, p. 7, par. 13; Vanguard, CX 43, p. 4, par. 9; United Artists, CX 44, p. 6, par. 13; Liberty, CX 45, p. 6, par. 13; Cameo-Parkway, CX 453, p. 6, par. 13.

³² Tr. 3676 (emphasis added).

³³ "LP" is an abbreviation of "long-playing," a record that generally contains six (6) songs or performances on each side (usually 3 minutes of playing time per song), for a total of 12 songs or performances per record (36 minutes), as contrasted with the "single," which has only one (1) song or performance on each side (6 minutes playing time on both sides). The two records also differ in diameter and in turntable speed: the LP is 12 inches in diameter and revolves at a speed of 33⅓ revolutions per minute, while the "single" is 7 inches in diameter and turns at 45 revolutions per minute. The two also sell at different prices—the LP "list price" is \$3.98 and up, the "single" 98¢-99¢. The LP accounted for about 75% of total phonograph record sales in 1961.

³⁴ "Racks" are the familiar structures displaying phonograph records in supermarkets, drug stores, and other high-traffic retail areas. Their distinguishing characteristic is that, unlike the retail record dealer's store, which may carry virtually all of approximately 25,000 separate records offered for sale by all record manufacturers, frequently carry only the 50-150 most popular records (the current "hits").

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juke boxes, and "clubs."³⁵ In 1960, total consumer expenditures for all kinds of records, through all channels, were an estimated \$521 million.³⁶ Columbia's share of this total was an estimated 21.2%.³⁷ The other two members of the phonograph record industry's "big three," RCA and Capitol, had an estimated 16% and 11.1%, respectively, of the all-record market. Decca, Mercury, and MGM followed with 3.4%, 2.7%, and 2.4%, respectively. Some 20 other firms shared the bulk of the remaining 43.2%.

Firm	Share of 1960 all-record sales (percent)
Columbia	21.2
RCA	16.0
Capitol	11.1
"Big Three" total	48.3
Decca	3.4
Mercury	2.7
MGM	2.4
All others	43.2
	100.0

CBS produces a somewhat larger share of all "LP" (long-playing) records,³⁸ that is, exclusive of "singles".³⁹

Firm	1960 share of "LP" sales (percent)
Columbia	25.4
RCA	17.5
Capitol	13.6
"Big Three" total	56.5
Decca	3.3
Mercury	2.1
MGM	1.8
All others	36.3
	100.0

³⁵ The relative share of each of these four (4) channels of distribution in the consumer's total expenditures on phonograph records in 1961 was estimated as follows (CX 199a):

Channel of distribution	1961 sales	
	Dollars (millions)	Percentage
Retail stores	\$305	52
Racks	147	25
Clubs	100	17
Juke boxes	35	6
Totals	587	100

As noted below, the "club" figure for 1961—\$100 million—was later scaled downward, that figure being estimated as closer to actual Club sales in the following year, 1962, when the "universe" had grown to an estimated \$620 million. This would give the clubs 16.1% of all record sales in the latter year.

³⁶ CX 199b.

³⁷ RX 350.

³⁸ As noted, LP's account for approximately 75% of all phonograph record sales.

³⁹ RX 354.

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In what is referred to in this record as the "mail order" channel of distribution—the sale of phonograph records through the mail by all types of organizations, including sales by mail order houses, "clubs," etc.—respondent offers the following share data:⁴⁰

Firm	Share of all phonograph record sales by "mail order" in percent	
	3d & 4th quarters 1961	1st 3 quarters 1962
Columbia	47.1	44.0
RCA	18.3	20.8
Reader's Digest	17.6	18.2
Capitol	9.6	8.1
All others	7.4	8.9

In the still narrower "club" channel of distribution—that is, the sale of phonograph records through the "membership" or "subscription" method of mail order selling as described below—CBS accounts for more than 50% of total sales:⁴¹

Firm	1960 share of all phonograph record sales through "clubs" percent
Columbia	56.1
RCA	26.8
Capitol	7.7
"Big Three" total	90.6
All others	9.4

14. The significance of the specific sales volume acquired by Columbia under the challenged "licensing" agreements (some

⁴⁰ RX 450.

⁴¹ CX 357. Some market share data is available for two later years, 1961 and 1962, but it is not as complete for all channels of distribution as the 1960 figures set out above. One index for the all-record market is available, an index based on a comparison of individual record manufacturers' payments of excise taxes with total excise tax collections. This shows Columbia with 16.52% in 1960, 18.47% in 1961, and 20.72% of the all-record market in 1962. RX 418, *in camera*. Columbia contends that its share of all "club" sales fell from 56.1% in 1960 (as shown above) to 41.5% in 1961. RX 451, *in camera*. No such decline occurred. In fact, sales of the Columbia Record Club increased from \$80.4 million in 1959, to \$37.5 million in 1960, to \$41.5 million in 1961, and to \$53.2 million in 1962. CX 783-e and RX 422, *in camera*. Certainly no greater increases occurred in the sales of the club sector as a whole. The alleged decline in its share in 1961 is based on the fact that the "universe" figure—sales of all clubs—is not an exactly known figure but one estimated by *Billboard*, the industry's statistician, which admittedly "overestimated" the 1961 universe figure (putting all club sales at \$100 million) and thereby giving Columbia a fictitiously lower "share" of that inflated total. *Billboard* later put the 1962 figure at \$100 million, scaling the 1961 figure downward accordingly.

\$12.8 million in 1961) is similarly affected by the choice of the "relevant market." First, if there is only a single "all-record" market for phonograph records in the United States, then the *total* sales of the Columbia Record Club—including both its own Columbia records *and* those licensed from its competitors—do not constitute a dominant market share. Measured against the 1961 "universe" figure of \$587 million, the Columbia Record Club's sales of \$41.5 million in 1961 constituted some 7.07% of all phonograph records sold to consumers in that year. Of that \$41.5 million total, \$12.8 million of it (30.9%) represented the Club's sales of the nine (9) competitors' records under the challenged licensing agreements. Measured against the over-all, all-record universe figure of \$587 million, that \$12.8 million sales volume acquired by Columbia from its competitors amounts, therefore, to only 2.19% of all phonograph record sales through all channels of distribution. Stated another way, acceptance of an "all-record" market as the relevant market would mean the situation is one in which Columbia, with slightly less than 20% of that over-all market on its own labels, has "acquired" by contract another 2.19% from its competitors.

A much more concentrated structure is presented, however, if the sale of phonograph records through the "club" channel of distribution is itself considered a separate market, set apart from the over-all record market by meaningful economic factors. The Columbia Record Club had, as noted, 56.1% of the sales of all record "clubs" in 1960 and at least 53% in 1962. The latter figure is, we believe, a conservative estimate of its share in the intervening year, 1961. As noted above, its 1961 sales, in dollars, were \$41.5 million, with \$12.8 million (30.9%) being accounted for by its sales of competitors' records. This means that, *without* the sales volume acquired pursuant to these challenged licensing agreements, the Columbia Record Club's 1961 sales would have been \$28.7 million, or \$12.8 million less. In terms of percentages, it would have had not 53% of all sales through the "club" channel of distribution but some 37%, about 16 percentage points less. Stated another way, the existence of an economically meaningful "club" market would mean the situation is roughly one in which (1) a firm with some 37% of the relevant market already (\$28.7 million) has acquired another 16 percentage points by contract with nine of its competitors (\$12.8 million), for a total of approximately

53%, and (2) in which that firm and two others have more than 90% of the relevant market.⁴²

15. There is no persuasive evidence here that the sale of phonograph records through clubs and through nonclub mail order methods combine to make up an economically meaningful "mail order" market. The principal category of sales proposed for this "market," other than Club sales, is the sale of what are called record "packages," i.e., groups of records sold as a unit in a single mail order transaction. *Reader's Digest* magazine is the largest seller⁴³ of such packages, with sales of some \$12.1 million in 1962,⁴⁴ a figure that would be equivalent to approximately 12.1% of all "club" sales in 1962 (\$100 million) or approximately 2% of all record sales, through all channels of distribution (\$620 million in 1962).

The "package" records sold by *Reader's Digest*, however, are *not the same records* that are sold in the "clubs." Some of the records sold in these packages bear the same titles, and were performed from the same published music scores, but the *artists* are not the same. The official in charge of *Reader's Digest's* package operation testified that these package records consist primarily of "war horses" or "standard repertoire" (e.g., Beethoven's symphonies) performed by orchestras and performers that are generally unknown to the American public; no "name" artists are used as performers, and hence the records "cost less"⁴⁵ and sell

⁴² Using the Columbia Record Club's actual sales figure for 1962, \$53 million, and assuming that the licensors' contribution to that total remained at no more than the 30.9% they accounted for in the prior year, 1961, then the two components of the Club's 1962 sales of \$53 million would have consisted of (1) \$36.6 million on Columbia's own labels, plus (2) \$16.4 million on the licensors' labels. (In units, the nine licensors' records constituted 36.3% of all records shipped by the Columbia Record Club in 1962—8.1 million out of the total of 22.3 million LP's it shipped. CX 823, *in camera*.) Dividing each of these figures by the 1962 "club" universe of \$100 million gives 36.6% as the approximate share of the club market of Columbia's own labels, 16.4% as that of the nine licensors, for a combined total of 53%.

⁴³ The principal sellers of "packages" are *Reader's Digest* magazine, *Life* magazine, Book-of-the-Month Club, Columbia, and Sears Roebuck. Tr. 10, 157. *Reader's Digest* gave its phonograph record sales in terms of an "average" figure for the years 1960, 1961, and 1962 as \$12.1 million. RX 700, *in camera*. (Its sales in 1957 had been \$7.8 million. *Ibid.*) Both *Life* magazine and Book-of-the-Month Club had total phonograph record sales of \$1 million or less in 1962. RX 502 and 507-508, *in camera*. This latter figure is some 1/4th of 1% of the industry's approximately \$620 million total sales and less than 1% of the estimated \$100 million of all "club" sales in that year (RX 311, *in camera*; tr. 6867, 6931).

⁴⁴ *Ibid.* These "package" sales of *Reader's Digest* are separate and distinct from its sales through a "club" operation it conducts as a selling agent for RCA. In the package business, *Reader's Digest* sells records manufactured by RCA but bearing its own "Reader's Digest" label. In the other operation, it is under formal contract to "act as [RCA's] agent in developing, advertising, promoting, and servicing [RCA's] Record Clubs." RX 704-a (contract between RCA and *Reader's Digest*); tr. 9459. The RCA Club (administered by *Reader's Digest*) has a much larger sales volume, approximately \$14 million in 1961 and \$22.7 million in 1962. RX 645. The latter figure would be approximately 22.7% of the estimated \$100 million total "club" sales in 1962 (compared to the Columbia Record Club's \$53 million, or 53%).

⁴⁵ Tr. 10, 114-10, 115; 10, 146-10, 150.

for less. This is precisely the opposite of the situation in "club" selling. As discussed below, the records sold in clubs feature the artist and his personality, rather than the repertoire itself, and hence sell largely those records that carry the performances of well-known, highly publicized artists. In the one case, the seller is attempting to sell the repertoire alone (*e.g.*, Beethoven's Fifth Symphony); in the other, he is selling the artist (*e.g.*, Columbia's Leonard Bernstein).⁴⁶ Supply and demand conditions are obviously not the same in the sale of these two entirely different records. One of respondent's own officials implicitly recognized this. "They [Book-of-the-Month Club] are now *out* of the record club business. They are *in* the business of selling records by mail order."⁴⁷ The *Reader's Digest* official in charge of its "package" operation testified that "I don't think the package business is in competition with the record club business."⁴⁸ With different performers, different costs, and different prices, the "package" record and the "club" record are clearly in different markets.

16. In view of our findings below that club sales are in a market by themselves and constitute the relevant market involved in this proceeding, it necessarily follows that "singles" are not a part of that market; only "LP's" can be economically marketed through the club channel of distribution.⁴⁹

17. We find that the "relevant market" involved here is the sale of phonograph records through what respondent describes in its own licensing contracts as sale "by direct mail in accordance with the merchandising method known and understood, in the mail order business, as the 'subscription' or 'club' plan as distinguished from individual over-the-counter sales by retail store outlets,"⁵⁰ *i.e.*, the relevant market is the sale of records through the "club" channel of distribution.

First, as discussed in some detail above,⁵¹ this record is replete with evidence of respondent's *intent* to exclude competing clubs from that marketing channel. And a purpose to exclude others from an area necessarily implies a conviction that it constitutes an economically meaningful market, because otherwise there would be no potential economic gain from the exclusion. Respondent's own belief that the exclusion was from an economically meaningful market is inherent in the language of the contracts:

⁴⁶ See, *e.g.*, tr. 10, 159-10, 164; 10, 623-10, 635; 10, 661-10, 673.

⁴⁷ Tr. 5073 (*emphasis added*).

⁴⁸ Tr. 10, 123.

⁴⁹ Tr. 4894.

⁵⁰ See, *e.g.*, CX 23, p. 3.

⁵¹ Finding 5.

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You [Caedmon] agree that, during the term of this agreement, you will not distribute or sell or authorize or consent to the distribution or sale by any third party of phonograph records manufactured from any of the master recordings, *through any mail order record club* which regularly distributes or offers for sale to its members significant quantities of phonograph records of a musical nature, including without limitation, the "Book-of-the-Month Club," "Music Treasures of the World," any RCA Victor record club, and any Capitol record club.⁵²

You [Mercury] agree that during the term of this agreement you will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control.⁵³

18. A finding that the relevant market here is the sale of records generally would require a finding that phonograph records sold through local retail stores, "racks," and juke boxes are adequate "substitutes," as far as the consumer is concerned, for records sold through "clubs," *i.e.*, that, as to a given record⁵⁴ being offered at the same price, the consumer is indifferent as to which channel of distribution he patronizes. This is clearly not the case. First of all, the prices are not the same. There is an entirely different price structure on records sold through clubs and those sold through nonclub channels. In the nonclub sector, the "suggested retail prices" (prices the manufacturers suggest their dealers charge consumers) are as follows: (a) "popular" records, \$3.98; (b) "classical" records, \$4.98; (c) "broadway show tunes," \$5.98.⁵⁵ While respondents have adequately demonstrated that dealers in some of the smaller towns do in fact charge these full list prices, there was evidence that the "average" dealer price has been reduced ("discounting," etc.) by some 25%, to approximately \$2.98

⁵² CX 20.

⁵³ CX 34, p. 3, par. 7. See also Findings 6, 7, 8 and 9.

⁵⁴ The records sold through the Columbia Record Club are admittedly physically identical to records sold through dealer stores, racks, and juke boxes, *e.g.*, Andy Williams' "Moon River" (recorded by Kapp Records, one of the nine competing manufacturers that signed a "licensing" agreement with the Columbia Record Club) is simultaneously sold through the Columbia Record Club and through these other retail outlets. In other words, there is no "product differentiation" involved in the definition of the relevant market here. As noted below, however, this does not mean that club and nonclub outlets have exactly the *same repertoire* in all respects: the Columbia Record Club limits itself primarily to "hit" records, offering some 100-200 records per month (about 1,500 per year) to its Club members, whereas retail dealers often carry the entire 25,000 separate records currently offered by all of the country's record manufacturers. The point is simply that, on each of the small number of "hits" that the Club *does* elect to handle, physically identical copies of that precise record—the same song, same performer, etc.—are in fact being offered for sale to the consuming public at the same time by other retail outlets.

⁵⁵ These are the prices for monaural records; stereo records are \$1.00 more. "Singles," which constitute some 25% of all record sales, have a suggested list price of 98¢-99¢.

on a "popular" (\$3.98) record. The "club" price to the consumer, on the other hand, is approximately \$2.37 for exactly the same record, a difference of more than 20% between the club and nonclub prices to the consumer. If consumers were in fact indifferent as to which channel of distribution they bought their records through, making their choice solely on the basis of price, then the club channel would necessarily have all of the business on those particular records it elected to sell, and the nonclub sector would have none.⁵⁶ It is clear, then, that consumers do in fact distinguish between the various channels of distribution.

19. The so-called "disadvantages" of buying through club versus nonclub outlets—limited selection to choose from, having to wait from a month to six (6) weeks before the records arrive, not being able to play them before buying, and the necessity of making a "commitment" to buy six (6) records at \$3.98 each (plus mailing costs) over a period of a year—are obviously evaluated differently by different people. The clubs have their primary appeal to persons having certain characteristics, most particularly those having (1) a propensity to shop by mail,⁵⁷ (2) a desire to develop a phonograph record "collection,"⁵⁸ (3) a desire for "guidance" or expert assistance in developing that record collection⁵⁹ and (4) an active interest in buying at economical prices.⁶⁰

More specifically, the individuals that join phonograph record clubs tend to be (1) young adults, who have (2) just purchased a phonograph record *player*,⁶¹ who are (3) relatively uncertain in their own musical preferences, and who, having purchased other (nonrecord) items by mail in the past, (4) have no particular reluctance to buy records in that manner. These characteristics make up a record buyer that is, in the phraseology of Columbia's market researchers, "susceptible to club values,"⁶² i.e., a buyer that believes the clubs' "advantages" (20% lower price, the convenience of arm-chair buying,⁶³ expert "guidance" in developing a well-

⁵⁶ One of the Columbia Record Club officials testified that the larger part of the record-buying public obviously thinks there are some "disadvantages" in buying through the "club" channel because "otherwise, we would have all of the sales of records through clubs rather than at retail * * *." Tr. 4929 (emphasis added). As noted, the clubs accounted for something less than 20% of all record sales in 1962 (less than \$100 million out of a total of an estimated \$620 million).

⁵⁷ RX 320. Tr. 8338-8342.

⁵⁸ RX 340. Tr. 7959, 8315, 8320-8321.

⁵⁹ Tr. 8305.

⁶⁰ Tr. 8315, 8323.

⁶¹ RX 337. Tr. 7944-7945, 8308-8309.

⁶² See RX 340.

⁶³ Tr. 8319, 8323.

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rounded collection of "hits," etc.) far outweigh its "disadvantages."

20. Columbia's officials recognize the distinctive characteristics of the people who make up the "club" market for phonograph records, particularly the fact that they are "new collectors" who are only temporarily "susceptible" to club values and who will soon "outgrow" the Club or cease to be one of its potential customers. For the Columbia Record Club as a whole, the long-run "shrinkage rate," i.e., percentage of members resigning during the year, is 54.13%. This means that, of any hypothetical group of 100 new members enrolled at the beginning of any particular year, 54 of them would have dropped out by the end of the year.⁶⁴ The "club market," in short, is composed of those members of the record-buying public whose characteristics, at a particular period of time, make them regard the club's features as "advantages," not disadvantages, and who are thus responsive to the club's substantial price advantage over nonclub channels.

21. To the new collector who considers the "club" method of buying generally equal to or at least not decisively inferior to shopping for records in retail stores, price tends to become a highly significant factor. That is to say, in the area of "overlap" in product between the "clubs" and nonclub retail outlets,⁶⁵ a consumer "susceptible" to club values can be induced by the clubs' approximately 20% lower price to purchase his entire requirements of those particular records from them, buying none of those specific records in the retail dealer market. A club member who has just committed himself to buy 12 records from a club for \$2.37 each (including postage) may well buy *other* records at his local retail dealer's store for \$2.98, but not one of the 12 "hits" selected from the club's offerings at the lower price (and, to him, greater convenience). In the sale of those 12 records, to this particular consumer (and, therefore to the other three to four million club members like him), the clubs of the "big three" have no economically meaningful competition. This particular portion of the record-buying public—the young adults just beginning their record collections, those who have a relatively high propensity to shop by mail, etc.—is highly "susceptible" to the clubs' offer of this distinctive group of records ("hits") at a sharply differentiated price (20% lower), and hence constitutes a separate "market" in which

⁶⁴ RX 365. Tr. 8406.

⁶⁵ The three clubs offer, as noted, 200-400 records to their members in any given month, or less than 2% of the 25,000 records offered for sale in the retail stores. It is only in the sale of those relatively few records that there is any "overlap" between the offerings of the two channels of distribution.

different conditions of supply and demand operate than those present in the other channels of distribution.

22. The Columbia Record Club is able to profitably sell records at a lower price than those same records can be sold through nonclub retail outlets because it enjoys a substantial cost advantage over those other channels of distribution. That is to say, the "club" market is characterized not only by different "demand" conditions, but by different circumstances on the "supply" (cost) side as well. The cost structure in the club retailing of phonograph records is entirely different from the cost structure in nonclub record retailing. The Columbia Record Club presented data showing total costs per licensor record shipped by the Club in 1962 as \$2.13, broken down as follows:⁶⁶

	cents
Acquisition cost (mfg., royalties to licensors, etc.)	87.5
Free merchandise	12.3
Advertising costs	35.3
Sales promotion costs	17.2
Other operating and distribution costs	28.9
Bad debts	31.8
Total:	\$2.13

23. In the nonclub sector (*e.g.*, the manufacturer-wholesaler-dealer chain), the outlet at the end of the chain that is said to compete with the clubs, the dealer, necessarily incurs total costs that substantially exceed those of the club, no matter how efficient he might be. Instead of the 87.5¢ the Columbia Record Club pays for the records of Liberty, Kapp, Warner Brothers, and the other licensors, the dealer structure (there are some 5,000 or more phonograph record dealers in the country) pays a price that ranges from a low of about \$1.60 to a high of \$2.47.⁶⁷ Columbia's own

⁶⁶ Tr. 10,469-10,470; 10,937. The 87.5¢ "acquisition" cost is itself broken down as follows (CX 821, *in camera*):

Manufacturing cost	42.8¢
Royalties to licensors	17.8¢
Copyright royalties	13.7¢
AFM fees	2.4¢
Excise tax	10.8¢
Total:	87.5¢

⁶⁷ The "list" price structure of the industry calls for (on the "popular" record) a manufacturer-to-wholesaler price of \$1.89 to \$1.92; a wholesaler-to-dealer price of \$2.47; and, finally, a dealer-to-consumer price of \$3.98. There is, however, considerable "discounting" at two of these levels and, by some of the smaller firms at least, at all three of them. Thus, one distributor testified that, while "to many customers [retail dealers] we got as high as \$2.47" per record, "[t]o the customer which had the most preference by size and things of that sort, the lowest we would get down is between \$1.80 and \$1.85." Tr. 1427. Many dealers, however, apparently pay the full "list" price of \$2.47 for the majority of their records. See, *e.g.*, tr. 832-833; 1267-

dealers paid in 1961, after all "discounts" had been taken into account, an "average" price of \$2.12 per record. While the price paid for records is presumably the largest single item of cost to the dealers, it is not the only one. The addition of all operating and overhead costs would undoubtedly bring the costs of even the largest and most efficient phonograph record dealer substantially above the \$2.13 costs incurred by the Columbia Record Club in its operation. To the extent that the nonclub sector has higher costs than the clubs, its capacity to compete with them is proportionately reduced and the products it offers, at the higher prices its greater costs force it to charge, become progressively less acceptable as "substitutes" to the consumer. Here, the thin profit-margins of the many dealers that testified in this proceeding,⁶⁸ on the one hand, and the evident satisfaction of the Columbia Record Club with its profit-margin,⁶⁹ on the other, raises a fair inference that the difference in the prices charged (\$2.37 by the clubs versus an average of \$2.98 by the dealers) is more than accounted for by the difference in their cost structures. Different prices and different costs are two of the principal hallmarks of economically separate markets.

24. The source of the Columbia Record Club's advantage over the nonclub sector, the ability to acquire records for 87.5¢ that cost nonclub retailers \$1.60 or more, is also one of the primary factors responsible for the highly concentrated structure of the "club" submarket. On its own (Columbia label) records, this cost advantage stems simply from the fact of integration, *i.e.*, from the fact that Columbia, in its role as a manufacturer, can "sell" records to its retailing arm (the Columbia Record Club) at a lower price than it charges outside distributors (wholesalers and retailers). RCA and Capitol, being similarly integrated from manu-

1273; 2219-2221; 2893-2897; 3261; 3301-3302; 3392-3393; 5705-5706. Even Goody's, a large dealer in New York City, testified that "\$2.47 is the norm" and that \$2.00 "[is] the best deal" it can get. Tr. 1284-1285.

The wholesaler cannot sell for much less than that \$1.80 figure since he pays his own manufacturer-supplier a minimum of at least \$1.60. Thus, one wholesaler testified that "the best deal that I as a distributor can get * * * can bring my price [from the manufacturer] down to about \$1.61, * * *" Tr. 1418. Operating expenses would add "at least five or more percent to that figure," tr. 1419, bringing the total to \$1.69. This range is corroborated by the testimony of one of the smaller manufacturers, Audio-Fidelity (developer of the stereo record), that it sometimes sells to wholesalers "for \$1.60 or \$1.70." Tr. 2025-2026. (Columbia, however, apparently gets the full "list" price from its wholesalers. In 1961, its LP sales to its wholesalers on its own "Columbia" label totaled \$30,332,000 in dollar volume and 16,600,000 in units sold, for an average price of \$1.93 on each "Columbia" LP sold to its wholesalers that year CX 253, *in camera*.)

⁶⁸ See, *e.g.*, tr. 2149; 2185-2186; 2273-2274; 2345; 2397-2400; 2467-2471; 2554-2555; 2660; 2692; 2797-2798; 2811; 2957.

⁶⁹ Tr. 8532.

facturing to club retailing, presumably enjoy a similar position. The principal issue in this proceeding, however, is not integration, as such,⁷⁰ but the use of the restrictive "licensing" agreements described below to foreclose potential competitors from, and hence artificially maintain a noncompetitive structure in, the "club" market. In substance, those agreements enable the Columbia Record Club to enjoy the same cost advantage over potential entrants into the *club* market that it enjoys over retail dealers in the nonclub market. As noted, they enable the Club to acquire the records of these nine (9) medium-sized and smaller competitors at a total cost of 87.5¢ per record,⁷¹ while expressly prohibiting those competitors from selling directly to any other club, on any terms whatsoever, a restriction that would compel another club desiring to handle the records of those nine producers to go to the latter's wholesalers and buy them at the "open market" price (wholesaler-to-dealer) of at least \$1.60. This imposes on potential entrants into the club market an immediate cost disadvantage, vis-a-vis the Columbia Record Club, of at least 72.5¢ ($\$1.60 - 87.5¢ = 72.5¢$). The magnitude of that disadvantage is illustrated by the fact that, according to the Columbia Record Club's own figures, its profit on each record sold through the Club is not over 24¢ on those sold to first-year members, and not over 75¢ on sales to second-year members.⁷²

The significance of the market share foreclosed by this cost disadvantage can be summarized as follows. Columbia produces in its own plants, as noted above, some 21.2% of all phonograph records bought by American consumers through all channels of distribution. And RCA and Capitol have an estimated 16% and 11.1%, respectively. Therefore, these three companies—Columbia, RCA, and Capitol—can foreclose from potential entrants into the club field some 48% of all records⁷³ simply by unilaterally refusing to sell their own respective labels (Columbia, RCA, and

⁷⁰ While the complaint in this matter charged a form of "dual distribution" (selling direct to consumers, in competition with Columbia dealers, at a price (\$2.37) that is lower than the price charged by the Columbia factory to Columbia dealers (\$2.47) for the same Columbia records), the evidence of injury to competition at the dealer level is not, in our opinion, sufficient to support economically meaningful findings on this point.

⁷¹ Finding 22.

⁷² The price to first-year members, as noted, is an average of \$2.37 per record. Subtracting the Club's average cost figure of \$2.13 gives a per-record profit of 24¢. The second-year price averages \$2.88; cost remains the same, \$2.13, for a per-record profit of 75¢.

⁷³ Columbia did in fact refuse to sell to a club that attempted to enter except at the full wholesale-to-dealer price of \$2.47, less periodic discounts, or an average price of \$2.12. Tr. 9014-9015. A club paying that price for its records, and incurring the same additional costs that the Columbia Record Club incurs, would have total costs \$3.37½, and hence would lose just over \$1.00 on each record sold in competition with the Columbia Record Club at the latter's price of \$2.37.

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Capitol) directly to such potential entrants (or by refusing to sell except at prohibitively high prices). This still leaves, however, some 52% of the market "open" to nonintegrated clubs. Since both RCA and Capitol testified here that their clubs had been profitably operated with the use of only their own records—i.e., RCA has operated a successful club using only RCA records (16% of all records sold in the country in 1960) and Capitol has operated a successful club offering only Capitol records (11.1% of all records)—this remaining 52% would obviously be sufficient to permit the profitable operation of a number of additional record clubs besides those of the "big three." It is the foreclosure of the most significant portion of that nonintegrated 52% of the supply of records to potential club entrants, through the device of excluding them from direct access to these manufacturers, that is involved in the "licensing" contracts involved here. While data is not available on the share of all phonograph record sales through all channels of distribution by these nine manufacturers, a rough approximation is provided by Columbia's estimate of their share of all record sales through the largest of the distribution channels, sales through retail record dealers:⁷⁴

Licensor Record Manufacturer	Date of Contract	Licensor's Share of Retail Dealer "LP" Sales in Year Prior to Contract	
		As percent of all Dealer Record Sales	As percent of all Dealer Record Sales
1. Caedmon	May 15, 1958	—	—
2. Verve	March 31, 1959	0.6	1.1
3. Mercury	April 1, 1960	3.5	2.7
4. Warner Bros.	September 15, 1960	1.5	1.4
5. Kapp	October 7, 1960	1.7	1.8
6. Vanguard	June 1, 1961	*	1.5
7. United Artists	July 1, 1961	1.6	1.1
8. Liberty	October 25, 1961	1.7	1.0
9. Cameo-Parkway	December 15, 1961	1.2	0.7
Total:		11.8%	11.3%

* Indicates less than 0.5%.

No matter which of these figures is taken—11.8% or 11.3% of all record sales—the share of the nonintegrated supply effectively foreclosed by these contracts is substantial. Thus, 11.3% of all phonograph record sales constitutes some 22% of the 52% manu-

⁷⁴ RX 452 and 453, *in camera*.

factured by all firms *other than* the integrated "big three,"⁷⁵ and hence not subject to price control at the manufacturing level by those integrated competitors. In other words, the situation is one in which some 48% of the total supply of records is *already* controlled by the "big three" and hence subject to being withheld entirely from the new entrant into the "club" market (or sold to him only on terms so disadvantageous to him as to destroy his capacity to offer really effective competition), and in which one of those three integrated firms then proceeds to foreclose, by means of restrictive licensing agreements, economical access to *another* 11.3 percentage points, bringing the total record supply under the control of the big three to over 59% and leaving potential "club" entrants less than 42% from which to draw the records needed for club use.

25. The significance of the foreclosure is even greater to the would-be operator than any of these figures indicate, however. As noted above, not all of the approximately 25,000 separate records carried in the stores of the retail dealers are equally attractive to the particular segment of the record-buying public that joins phonograph record clubs. They tend to be relatively young, relatively unsophisticated in their record choices, and hence most prone to accept the most "popular" ("hit") records, those that are being played most frequently by the media and listened to most frequently by their friends.⁷⁶ The total quantity of records *suitable for club use* is therefore largely limited, as a practical matter, to the 100-400 records on the popularity "charts" at any given time. And the licensing agreements giving the Columbia Record Club exclusive club rights to the records of these nine competitors cover a disproportionately large share of these "hits," *i.e.*, those licensor-competitors are particularly strong with the kind of artists (and hence of records) that appeal to the purchasers in the club market.⁷⁷ Thus, the March 24, 1962, popularity "chart" published by *Billboard* magazine (a trade magazine) listing the 150 largest-selling monaural LP's as of that date indicated that 33 of the 150,

⁷⁵ 11.3% divided by 52% equals 21.7%.

⁷⁶ See Findings 19 and 20.

⁷⁷ "[W]e have the artists whom the public wants to hear. If I may say so, I think that's an important point. A person who buys a record, popular or classical, is largely buying the record because of the particular artist's performance. In the pop field, if it's an Andy Williams or Johnny Mathis, they want what Johnny Mathis or Andy Williams will do. So it is in the classical field. They want Bernstein's performance of this work or Ormandy's of that, or Bruno Walter's, or whomever it happens to be. *The public is concerned with the artist* and that is, by the way, our complete philosophy of recording." Tr. 7324 (emphasis added). Thus, one of Columbia Record Club's advertisements declared that "every record checked on this page has hit the best-seller lists." CX 114.

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or 22% of them, were records produced by the licensor-manufacturers that have given the Columbia Record Club exclusive rights to their "club" sales.⁷⁸ Columbia itself had another 32 on that chart (21.3%), for a total of 65 (43.3%) of the "hits" on either Columbia or licensor labels. Columbia, RCA, and Capitol together accounted for 103 of those 140 best-sellers (69.3%).⁷⁹ The remaining 47 records (30.7%) constituted, for all practical purposes, the principal records available to potential club entrants for club distribution. A more realistic assessment of the share of the market covered by the contracts in issue here is thus made by comparing the 33 licensor-hits foreclosed to the potential club operator with the number that would have been available to him had there been no such contracts on that date, namely, 80, or 53.3% of the entire 150.⁸⁰ Those contracts thus foreclosed potential entrants into the club market from 33 out of a total of 80 (41.2%) best-selling records that would have otherwise been available (those not on the "big three's" own labels).

26. The significance of the "exclusive licensing" contracts described above lies, as noted, in the fact that they give Columbia a *price advantage* over any actual or potential competitor in the "club" market (and, indirectly, in the nonclub market as well). It is this cost differential that makes it virtually impossible for competing clubs to enter the club market and successfully match the prices at which Columbia, RCA and Capitol⁸¹ resell to the

⁷⁸ United Artists (7 best-sellers on the chart); Kapp (7); Cameo-Parkway (5); Mercury (4); Warner Brothers (3); Vanguard (2); Verve (1). CX 200.

⁷⁹ Ibid. It was of course precisely on the basis of its estimate of their capacity to produce future "hits" for its Club that Columbia signed up the nine licensor-competitors in the first place:

"The basic reason [for signing up Cameo-Parkway] was that * * * Columbia and the companies we were then affiliated with had not [had] a great deal of success with the teen-oriented type of material. We found the type of members we were getting in were asking for this material. The profile of our club was getting younger, and we felt that we had to meet their legitimate requests for this type of material. Bernie Lowe, who was then head of Cameo-Parkway, had had a *long history of success in creating teen-oriented material* and one of his artists, Chubby Checkers, created the dance craze, the twist. He had, in addition, other popular teen artists such as Bobby Rydell. We felt, after he approached us, that it would be mutually beneficial for us to distribute his catalog through the club. Tr. 5199-5200 (emphasis added)."

Similar testimony was given in explanation of the other contracts. See tr. 5165 (Caedmon); 5166 (Verve); 5185 (Mercury); 5189-5190 (Kapp); 5195-5196 (United Artists); 5197-5198 (Warner Brothers); 5201 (Liberty); 5201-5202 (Vanguard).

⁸⁰ It has subsequently been reported in the trade press that another one of the big three, Capitol, has similarly been given "exclusive" rights to the club distribution of a number of other record manufacturers, thus presumably reducing still further the supply of records suitable for club distribution available to the potential entrant into the club market.

⁸¹ As noted below, RCA and Capitol were negotiating with certain other independent manufacturer-competitors for similar "licensing" arrangements at the close of the record in this proceeding and one of them, Capitol, has subsequently been reported by the trade press as having actually entered into such arrangements.

consuming public. This differential is accomplished by (1) allowing Columbia to borrow the "master" for a "royalty" payment (17.8¢) on each individual record it manufactures from that "master." The sum of that royalty payment (17.8¢ per record), and the additional costs Columbia actually incurs in manufacturing the physical records from that "master" (42.8¢), plus advertising and other costs, is a total of 87.5¢, the aggregate cost respondent actually incurs in acquiring the finished licensor records, whereas (2) Columbia's competitors are compelled to acquire those same records, if at all, through the more expensive route of buying them, *as retailers, from wholesale distributors* (all clubs are admittedly "retailers," in that they sell directly to the consumer and do so in direct competition with the traditional retail record store), at the usual distributor-to-dealer price of \$1.60 to \$2.47. In other words, Columbia has gotten a lower price for itself and has gotten, along with it, an agreement from its suppliers that they won't give that lower price to any of Columbia's club competitors. The result is a cost barrier⁸² to any would-be new entrants in the club market and the insulation of the Columbia Record Club from the added competition they necessarily would bring.

27. The effects of these arrangements on potential entrants to the club market are illustrated by the experience of a firm that attempted to enter in 1958, the Diners' Record Club.⁸³ Founded by Mr. Bernard Solomon (who also has an ownership interest in several small record manufacturing companies, one of which is also in the music publishing business), the firm was initially able to buy records *directly* from apparently all of the various manufacturers, including both the big three (Columbia, RCA, and Capitol) and the major independents. According to the testimony of Mr. Solomon, some of the *manufacturers* had sold him records for as little as 50¢ per record, the more general price,

⁸² As emphasized above, these "exclusive" contracts do not physically prevent competing clubs from acquiring or reselling the records of these nine manufacturers; they simply make it much more *expensive* for them to do so. Thus, the records of any manufacturer in the country can be readily obtained in the "open market," i.e., from that manufacturer's own *distributors* or from "transshipping" wholesalers who, in turn, acquire them from his distributors. Hence the only effect of these "licensing" provisions is to limit the *source* from which competing clubs can buy the records of these nine manufacturers, denying them the opportunity to buy *directly* from those manufacturers and therefore forcing all would-be competitors out into the "open market" where the price is necessarily higher. (As noted above, wholesale distributors pay at least \$1.60 per record and hence must necessarily charge at least that amount to any club they might sell these records to.)

⁸³ This firm was not owned by the well-known Diners' Club but had a contract to use its name, mailing lists, etc.

however, being some \$1.50.⁸⁴ Then, the manufacturers stopped selling to him *directly*:

Q. Did there come a time during the operation of the Diners' Record Club when you were unable to buy certain products?

A. Yes * * * Columbia, RCA and Capitol.

Q. Did there come a time when you were unable to buy [records] from Kapp Records [a Columbia licensor]?

A. Well, Kapp, I solicited and they said they couldn't sell me records.

Q. And did there come a time when you were unable to buy [records] directly from United Artists [another Columbia licensor]?

A. Well, I bought records from United Artists, but they discontinued selling the records to me.

Q. What is your understanding of the reason that Kapp Records discontinued selling to you? * * *

THE WITNESS: Well, Kapp Records never sold to me. We just had meetings, conversations, and correspondence, but they never sold me records. * * * Well, they stated to me that they had an exclusive agreement with Columbia and couldn't sell me any records.⁸⁵

Q. What is your understanding of the reason United Artists discontinued selling to you? * * *

THE WITNESS: Mr. Si Mael and Harry Goldstein of United Artists both informed me that they had to stop selling me because of the arrangements with Columbia Record Club.⁸⁶

Solomon had been selling, in his Diners' Record Club, a small label called "Challenge Records." Early in 1961, Warner Brothers, one of Columbia's "licensors," contracted with Challenge to take over its distribution. The Diners' Record Club promptly lost Challenge as a source of supply: " * * * Warners had an exclusive arrangement with the Columbia Record Club and they were taking over the distribution of Challenge; that could not be interfered with as part of the deal and Challenge would have to follow the same [exclusive] route for clubs as Warner Brothers did." ⁸⁷

In reply to a direct request from the Diners' Record Club, David Kapp, president of Kapp Records, wrote Solomon as follows: "Our agreement with the Columbia Record Club is an exclusive one, and consequently we cannot enter into any agreement to sell you records for your club." ⁸⁸ As to why the "big three" cut him off:

⁸⁴ "Generally, it was \$1.50 for monaural records and \$1.75 for stereo records, but there were variations both ways where we paid a lot more in some cases." Tr. 3787. See also tr. 3817, 3844, 3907-3911, 3943, 6531.

⁸⁵ Tr. 3787-3788, 3790-3791 (emphasis added).

⁸⁶ Tr. 3790-3791.

⁸⁷ Tr. 3796. While the Columbia-Warner contract covers only the distribution of certain specific Warner records, Solomon was still certain that he lost Challenge as a supplier because Columbia wanted it that way.

⁸⁸ CX 562. Similarly, Mercury wrote him, on January 27, 1961: "In view of our relationship with Columbia it is impossible for us to participate in your record club arrangement." CX 563.

Q. What is your understanding as to the reason the three majors [Columbia, RCA, and Capitol] refused to sell to Diners' Record Club?

THE WITNESS: In the cases of these approaches to these three companies, it was my understanding that the reason I couldn't buy product directly from the company was because of the existence of their own record clubs and therefore they didn't want to avail me of their products.⁸⁹

Solomon explained the failure of his Diners' Record Club in these terms:

Q. Mr. Solomon, why did your company go out of business?

A. Well, as I said before; No. 1, a lack of adequate source of material of records to feature in the club. We had a basic repertoire from a number of companies, but needed three major companies, certainly; Columbia, RCA, Capitol, as well as the affiliated [licensor] companies to Columbia Record Club in order to successfully operate the business.⁹⁰

Columbia maintains that the Diner's Record Club went out of business because of the business inadequacies and personal shortcomings of its controlling stockholder and chief executive officer, Mr. Solomon. It is alleged that those manufacturers who have refused to sell to him have done so for reasons unrelated to the issues involved in this case, including such things as slowness in paying for records previously sold to him, allegedly unreasonable demands on his part for price and promotional concessions from his suppliers, and, apparently, for alleged discrepancies in his income tax reports. While the first two items are obviously relevant, the record suggests that the financial difficulties of Mr. Solomon's Club, and hence his problems with creditors and his efforts to get more favorable terms, were at least in a substantial measure related to the price disadvantage he worked under.

Respondent also suggests that, notwithstanding the licensing provisions prohibiting its nine licensor-competitors from selling to any other club, Solomon's Club was still able to get records from those manufacturers. There is some evidence that at least some of those companies did make a few sales to Diner's Record Club after having promised Columbia they wouldn't do so. For example, Solomon conceded that Mercury sold him some 100,000 records for about 50¢ per record not only after the date of Mercury's "exclusive" contract with Columbia but even after the January 27, 1961, letter explaining that its contract with Columbia made it

⁸⁹ Tr. 3801-3802.

⁹⁰ Tr. 3928. He testified further: "Let me say that a lot of the names and material that we did offer in the club, as Mr. Rabinowitz [Columbia's attorney] pointed out before, were good names; however, they must be recognized that these were old masters that were recorded many years ago, and the quality was inferior. These same artists had all since gone and been attracted to Columbia, RCA, Capitol and other larger record companies, and we were dealing with old-type product, even though they had a name stature they still didn't stand up to the performance—their current performance. In addition, a lot of this older catalogue was not in stereo and stereo was a very big factor in our operation." Tr. 3928-3929.

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impossible for Mercury to do business with him.⁹¹ (These and later sales were apparently accomplished through the device of letting Solomon set up his own ostensibly "independent" distributorship.⁹²) However, some 90 % of the records bought at that price were what the industry calls "cutouts," records with so small a demand that the manufacturer is no longer currently producing them—in short, records that are on "sale."⁹³ The few current records they let him have "were put in in order to, like they call it, sweeten the pie."⁹⁴ Secondly, although Solomon was able to buy some records from Mercury still later through his own "distributor," he testified that "the prices were anywhere from 55 to 60 percent higher than I had paid previously."⁹⁵

28. A significant feature of these contracts giving the Columbia Record Club the sole and "exclusive" right to make copies of and sell these competitors' records in the club market is that, with two exceptions,⁹⁶ they gave Columbia the right to *prevent other clubs* from using *even the records Columbia did not want to use itself*. The total number of records thus removed from club distribution by these licensing agreements was 1,773, or 70.7 % of the 2,509 records owned by these 7 licensor-manufacturers in the 1962-63 period. Or, to put it another way, the Columbia Record Club elected to use 736, or 29.3 % of those 2,509 records, and effectively precluded anyone else from using any of them, including not only the 29.3 % it picked out for its own use, but the remaining 70.7 % as well. This is shown for each of the licensor labels in the table below:⁹⁷

Licensor-Mfr.	Number of Records in Catalog	Licensor Records Used by Columbia Club	
		Number	Percent of Total Number in Catalog
Caedmon	194	76	39.18%
Verve	695	86	12.37
Mercury	754	279	37.00
Kapp	275	124	45.09
United Artists	283	68	24.00
Liberty	248	77	31.05
Cameo-Parkway	60	26	43.33

⁹¹ CX 563.

⁹² Tr. 3944-3945.

⁹³ Tr. 3950-3951. Solomon defines them as records that "can be purchased on the open market at a price of less than a dollar and are not sold through the regular distributors, but through various * * * distress sale operations." *Ibid.*

⁹⁴ Tr. 3952.

⁹⁵ Tr. 3945.

⁹⁶ The Warner Brothers and Vanguard contracts covered certain named records of those two labels, rather than their entire catalogs. CX 39, 43.

⁹⁷ The catalogs of these companies are included in the record as CX 265, 285, 289, 398, 445,

29. Entry into the business of manufacturing or producing phonograph records for sale through the conventional distributor-retailer channels is relatively inexpensive. Representatives of several producers testified that all the new entrant needs is an artist under contract and enough money to (a) rent a recording studio for the required number of hours and (b) hire a "custom presser"⁹⁸ to run off a few thousand copies of the record for distribution to the "disc jockeys" and wholesale distributors around the country. The "custom presser's" charge for producing a "normal run" of 10,000 finished records from a tape is, as noted, 38¢ per record,⁹⁹ or only \$3,800. And while the cost of a contract with a well-known artist can run into many thousands of dollars,

Record Manufacturer	Year of Entry Into Record Industry
RCA	1928
Decca	1934
Columbia	1938
Capitol	1942
Mercury	1945
London	1946
Imperial	1946
Miller International (Stereo Fidelity)	1947
Jay-Gee (Jubilee)	1947
Atlantic	1948
MGM	1949
Dot	1950
Vanguard	1950
Kapp	1953
Audio Fidelity	1954
ABC-Paramount	1955
Liberty	1955
Verve	1955
Cameo-Parkway	1956
Chess Record	1956
United Artists	1957
Roulette Records	1957
Warner Brothers	1958
Reprise Records	1961

470 and RX 298. Respondent's officials initially testified that the Club had actually used 51 of Caedmon's records, 47 of Verve's, 177 of Mercury's, 86 of Kapp's, 54 of United Artists', 63 of Liberty's, 20 of Cameo-Parkway's. Tr. 5251-5252. Columbia's counsel, in oral argument before the examiner, said: "The Club has used almost 24% of United Artists catalog and not 17% as claimed at page 33 of Complaint Counsel's reply; and has used almost 37% and not 28% of the Mercury catalog." Tr. 11,074. And, by July 1963, the Club had used 26 Cameo-Parkway records, 43% of that label's catalog. Ibid.

⁹⁸ Tr. 2827.

⁹⁹ Tr. 2832-2834.

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there is testimony here that there is no shortage of *new* artistic talent¹⁰⁰ and hence that the new entrant has no difficulty in "discovering" new artists at relatively modest costs. This is corroborated by the fact that some 20 firms have entered since 1945 [page 363]:¹⁰¹

30. Entry into the "club" or "subscription selling" mail order market, however, is more expensive. Columbia suggests that the capital requirements for entering the "club" market are very high, relying principally on the fact that its own Columbia Record Club was launched in 1955 with an advertising campaign that cost \$500,000; that its own Club spent some \$8 million on advertising in 1962 (15% of sales); that servicing the Club operation is very expensive; and that Diner's Record Club, attempting to enter on an initial capital of \$5,000 and another \$30,000 in initial advertising funds secured from suppliers, ultimately went out of business.¹⁰² Respondent's economist, Mr. Peter Max, using the "net assets" held by Columbia, RCA, and Capitol when they formed their respective clubs in 1955 and 1958 (\$48.9 million, \$26.8 million, and \$305.6 million, respectively) as a test of adequate financial resources for entry,¹⁰³ concluded that there were at least six (6) "potential entrants" capable of making a "serious entry into this area":¹⁰⁴

Record Company	1961 Current Net Assets
Decca (MCA, Inc.)	\$63,954,886
London	18,055,842
Dot (Paramount Pictures)	75,118,096
MGM	90,943,354
ABC-Paramount	65,941,312
Colpix (Columbia Pictures)	44,178,523

Applying this test, however, at least three (3) others of the

¹⁰⁰ Tr. 5740-5746.

¹⁰¹ RX 437. Interestingly enough, entry into record *retailing* appears to require considerably more capital than entry into record "manufacturing." Thus, whereas several producing firms were founded on initial investments of \$5,000 or less (*e.g.*, Starday, tr. 5740-5746), one retailer testified that he had paid \$80,000 for his business—\$40,000 for his record inventory, \$15,000 for fixtures, and \$25,000 for the store's goodwill. Tr. 3157, 3161.

¹⁰² Finding 27.

¹⁰³ "Now, I should explain very briefly the measure that I selected here, namely, current net assets. This, of course, is defined as—in terms of balance sheet accounting—as the company's current assets less its current liabilities. It therefore yields, as a residual amount, a measure of the company's *highly liquid* assets or liquid assets which are unencumbered by short-term liabilities and represents in physical terms, of course, such things as cash and readily marketable securities which funds, if the company so chose, might be used to finance significant or serious entry into this area." Tr. 9789-9790 (emphasis added).

¹⁰⁴ Tr. 9789-9790; RX 487.

nine (9) "licensors" (besides MGM) are also potential entrants into the club business.¹⁰⁵

Record Company	1961 Current Net Assets
United Artists	\$65,364,751
Warner Brothers	47,513,439
Mercury (Consolidated Electronics)	40,554,784

31. As to the number of firms that have actually entered the "club" market, respondent's economist testified as follows: "As we know, it was only in 1955 when Columbia, as the first full catalog club, entered or launched into the mail [order] method of distribution in a serious way. Since that time, of course, there have been some highly significant entrants. Obviously the entry of Capitol and the entry of RCA Victor into this channel of distribution constitute highly significant entries. In addition, in defining this channel of distribution as the purveying of records through the mail, we have entry of such entities as *Life* [magazine] in, I believe, 1962. Dot [Records], very recently, as I understand it, at least in a preliminary way; I believe the record indicates a similar sort of entry, at least in a preliminary way, by Starday [Records]. Apart from RCA Victor, we have the entry into the distribution of records by mail by *Reader's Digest* [magazine] in fairly recent years."¹⁰⁶

In fact, only three (3) of these—Columbia, RCA, and Capitol—are "serious" or "significant" factors in the club market. Starday, a small manufacturer of records located in Madison, Tennessee, a suburb of Nashville, started producing records in 1952 on a beginning capital of less than \$1,000 and had total sales of only \$600,000 in 1962,¹⁰⁷ a very small fraction of 1% of the industry's 1962 sales. As to its own club: "I hope to start my own record club because I recognize the need. Whether I would want Columbia or one of the other clubs to handle my records would depend on unforeseen things in the future pertaining to my own club, if I get it started."¹⁰⁸

We know of no record evidence of any club having been in fact started by Dot.¹⁰⁹

¹⁰⁵ Moody's Industrial Manual, 1963.

¹⁰⁶ Tr. 9788.

¹⁰⁷ Tr. 5755.

¹⁰⁸ Tr. 5764.

¹⁰⁹ Mr. Randolph C. Wood, president of Dot Recording Corporation and vice president of his parent company, Paramount Pictures, testified that, from the selling of appliances in Gallatin, Tennessee, he had "entered the mail order business [of] selling records by mail,

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32. There has been no successful entry into the "club" market,¹¹⁰ then—at least as far as this trial record indicates¹¹¹ since RCA and Capitol entered in 1958. One serious attempt at entry was made, and it failed largely because of the cost disadvantage it suffered under in acquiring records for resale through its club. The club market thus remains, after nearly 10 years since the last of the "big three" entered, a tight knit oligopoly, with a single firm, Columbia, holding more than 50% of the market and two others, RCA and Capitol, sharing the bulk of the other 50%. This is in marked contrast to the relatively high rate of entry into the producing of phonograph records and clearly suggests the presence of substantial barriers to entry. The most formidable is plainly the "exclusive" licensing contracts between the Columbia Record Club and its nine licensor-manufacturers, and the 71.5¢ or more per record cost disadvantage¹¹² they impose on potential entrants into the club business on the records of this group of major independent producers, producers whose records a potential entrant would want to sell in a new club operation. This cost barrier constitutes a serious impediment to entry into the club

COD by radio" in 1947, and had founded Dot Recording Corporation in April of 1950. Tr. 4103. He testified further:

Q. Are you presently interested in having your products sold through a record club?

A. Mr. Lavine, I have been interested for several years, to the point of constantly thinking about this facet of the business, because in order to be competitive and do the best job for our artists, which, after all, are the most important part of our operation if you had to narrow it down, for competitive reasons I am almost *forced* to be interested in club operation, either through affiliation or through our own club. That doesn't mean that I really want to do it. It is the fact that I feel that I will have to do it or should do it.

Q. Are you taking steps at the present time to implement this point of view?

A. We are contemplating [it] but [have made] no definite decision. We are running mail order tests and we have negotiated and discussed the possibility with all of the companies who have clubs in the past; so far, we have not made a definite decision.

Q. When you say you are running mail order tests, is that with a view to the possibility of starting a Dot Record Club?

A. Yes, it would be a Dot Record Club.

(Tr. 4119-4120; emphasis added.)

Organized on an original investment of about \$1,000, Dot records had sales of some \$15 million in 1962 (tr. 4127-4135), mail order sales of less than \$100,000. It had, over-all, some 3.6% of the dealer LP market in 1961. CX 241.

¹¹⁰ There is, as discussed in Finding 15, no serious competition between "club" and "package" records.

¹¹¹ The trade press has subsequently reported, and advertisements confirm, the entry of a firm called "Record Club of America." Neither complaint counsel nor respondent have offered to inform us as to the competitive significance of this new entrant. It recently filed a motion to intervene in this proceeding, but only for the purpose of advising us that Capitol, like Columbia, had entered into a series of "licensing" agreements with other manufacturers, thus acquiring exclusive club rights over those manufacturers' records and denying the movant access to them. That information was largely cumulative of what was already in this record, and the motion to intervene was accordingly denied. Since both complaint counsel and respondent requested that the Commission deny that motion to intervene, we assume they are agreed that this new entrant, Record Club of America, has no competitive significance in the club market.

¹¹² Findings 6 and 22.

market,¹¹³ and the cause of a substantial lessening and prevention of competition within that market.

CONCLUSIONS

1. The Columbia Broadcasting System, Inc., and the Columbia Record Club, Inc., are corporations engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondent has entered into a series of "exclusive licensing" contracts with nine (9) of its competing phonograph record manufacturers or producers whereby, in return for "royalty" payments that average approximately 17.8¢ per record, those producers loan or "license" their record "masters" (from which finished records are made) to the Columbia Record Club on an "exclusive" basis, agreeing, in substance, that for a period of years they will not (a) sell their records through a mail order "club" operation of their own; (b) sell their records directly to anyone else who resells through a mail order "club" operation; or (c) allow anyone else to use their "master" recordings for the purpose of producing finished records for resale through a mail order "club" operation.

3. The relevant market in which to evaluate the competitive effects of these licensing agreements is the sale of phonograph records through mail order record "clubs." Members of such clubs constitute a separate and distinct sector of the record-buying public, their distinguishing characteristics being (a) a relatively high propensity to shop by mail, (b) a relatively high or beginner's interest in securing "guidance" or expert assistance in selecting records for that collection, and (c) a relatively active interest in buying at economical prices. The individuals that make up this market tend to be relatively young adults that have just purchased a phonograph record player, and that are interested in having someone else select for them the most "popular" or "hit" records at lower prices than can be secured in the conventional record dealers' stores. The clubs of the "big three" record producers (Columbia, RCA, and Capitol) cater to this distinct

¹¹³ We reject as frivolous the contention of respondent's economist, Mr. Peter Max, that these nine (9) "exclusive" licensing contracts, wherein those firms expressly promise not to start their own club and not to sell to anyone else who starts a club, constitute a "form of entry." Tr. 9791-9793. The essence of the concept of entry is the addition of a new decision-maker to challenge the price and product policies of the established firms and put competitive restraints on their discretionary power. See, e.g., Joe S. Bain, *Barriers to New Competition* 5 (1956). Here, these nine (9) firms, all potential entrants themselves and producers of products needed by other entrants, expressly abdicated that vital decision-making function, appointing the Columbia Record Club, in effect, their exclusive sales agent, to make all "club" decisions for them.

group of customers by selling them a limited variety of "hits" (some 200-400 per month, versus the 25,000 available in dealer stores) at a price that is approximately 20% lower than the dealers charge for the same records (\$2.37 versus approximately \$2.98). The clubs are able to sell to this market at these prices because they enjoy substantially lower costs than the nonclub retail dealers. Different prices and different costs in the two channels of distribution clearly indicate that different conditions of supply and demand prevail in each and that they therefore belong to separate and distinct "markets."

4. The purpose and the effect of these exclusive licensing contracts is to prevent other actual or potential club operators from acquiring the records of those nine producers on equally favorable terms. Because of those agreements, other clubs cannot buy at all from these manufacturers themselves, nor can they "rent" the latters' "masters" and fabricate their own copies as the Columbia Record Club is allowed to do. Rather, the existence of these exclusive grants to Columbia forces other clubs desiring to sell the records of those nine producers to go to the latters' wholesalers and pay \$1.60 or more per record—as contrasted with the 87.5¢ the same records (Mercury, Kapp, Warner Bros., etc.) cost the Columbia Record Club. This cost disadvantage has the effect of barring potential newcomers that would otherwise have found the operation of a club profitable and hence of preventing competition with the clubs of the "big three" that could have otherwise been reasonably expected to flourish. The result is that a competitive industry structure has never been allowed to develop in that market. The Columbia Record Club had 56.1% of that market in 1960; RCA had 26.8%; and Capitol had 7.7%. Together, the clubs of the "big three" controlled 90.6% of all phonograph record sales through clubs. As a result, potential competitors (clubs) have been denied access to that market and the returns they could have otherwise have earned in it and the public has been denied the lower prices and other benefits that could reasonably have been expected to flow from the heightened competition their entry would have created. This prevention of competition constitutes an unfair practice and an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

5. Respondent has further fixed and continues to fix and maintain, by agreement with several competing manufacturers or producers of phonograph records, the prices (royalties) paid by those producers, to the artists who record for them on records

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Order

sold through the Columbia Record Club, in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., and their officers, representatives, agents and employees, successors, or assigns, directly or indirectly, or through any corporate or other device, in connection with the manufacture, promotion, offering for sale, sale and distribution of phonograph records in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Entering into, maintaining, or continuing any contract, licensing agreement, or understanding with any other manufacturer or producer of phonograph records to:

(a) Establish, fix, or maintain the price or royalty paid by any other manufacturer or producer of phonograph records to any artist for such artist's recording services;

(b) Prevent other club operators, including potential club operators, from acquiring the phonograph records of any other manufacturer or producer on the same terms and conditions as respondents acquire such records, including but not limited to agreements which have the effect of:

i. Giving respondents the sole or exclusive right, privilege, or license to manufacture, distribute or sell through clubs phonograph records manufactured from master recordings owned or controlled by any other manufacturer or producer of phonograph records;

ii. Restricting or preventing any manufacturer or producer of phonograph records from licensing, authorizing, or consenting to the making of phonograph records from its master records by any other person for the purpose of resale by the subscription or club method of direct mail selling;

iii. Restricting or preventing any manufacturer or producer of phonograph records from selling its own records by the subscription or club method of direct mail selling;

iv. Restricting or preventing any manufacturer or producer of phonograph records from selling its records directly to any person for resale by the subscription or club method of direct mail selling.

Complaint

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It is further ordered, That the initial decision be, and it hereby is, set aside, and the Findings As To The Facts, Conclusions and Order of the Commission be, and they hereby are, substituted therefor.

It is further ordered, That respondents 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 set forth herein.

Commissioner Elman not concurring.
