

IN THE MATTER OF

WARNER COMMUNICATIONS INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr. and Richard Malatt.*

For the respondents: *Stuart Robinowitz and Martin Flumenbaum, Paul, Weiss, Rifkind, Wharton & Garrison, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, Warner Communications Inc., Warner Bros. Records, Inc., (collectively "Warner"), Chappell & Co., Inc., and PolyGram Records, Inc. (collectively "PolyGram"), subject to the jurisdiction of the Commission, have agreed to a merger of each firm's prerecorded music businesses that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, *prerecorded music* refers to music sold to consumers in the form of records (singles, LPs, and compact discs) and tapes (cassettes, 8-track cartridges, and reel-to-reel tapes).

II. WARNER COMMUNICATIONS INC. AND
WARNER BROS. RECORDS, INC.

2. Respondent Warner Communications Inc. is a Delaware corporation with its principal place of business in New York, New York. Warner Communications Inc. is a worldwide entertainment firm with interests in prerecorded music, pay television, motion pictures, consumer electronics and publishing. In 1982 it had revenues of about \$4 billion and a profit of \$257.8 million.

3. Warner Communications Inc. is the owner of all the outstanding shares of Warner Bros. Records, Inc.

4. Warner Bros. Records, Inc. is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Warner Communications Inc., and one of several Warner Communications' domestic companies involved in the prerecorded music business.

III. CHAPPELL & CO. AND POLYGRAM RECORDS, INC.

5. Chappell & Co. and PolyGram Records, Inc. are part of a collection of domestic and foreign corporations known as the "PolyGram Group," which is a joint venture of the N.V. Philips Gloeilampenfabrieken ("Philips") of the Netherlands and Siemens, AG of West Germany. Both Chappell & Co. and PolyGram Records, Inc. are corporations organized and existing under the laws of the State of Delaware with their corporate headquarters located in New York, New York.

6. PolyGram Records, Inc. is currently the PolyGram Group's principal organization for its U.S. prerecorded music operations. The PolyGram Group had worldwide prerecorded music sales in 1982 of about \$1 billion, with gross sales exceeding \$150 million in the United States.

IV. JURISDICTION

7. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE PROPOSED MERGER

8. Warner and PolyGram have agreed to merge their prerecorded music businesses in the U.S. and in the rest of the world. In the United States, Warner will transfer its prerecorded music assets to respondent Warner Bros. Records, Inc. PolyGram will transfer its prerecord-

ed music business to respondent Chappell & Co. These two corporations will then merge, and the surviving corporation, Warner-PolyGram, Inc., will then issue new stock: 80 class A shares to Warner; 13 class B shares to PolyGram's shareholder, PolyGram B.V. and 7 class B shares to PolyGram's shareholder, PolyGram GmbH. Warner will also receive 65 shares (representing \$65 million principal amount) of Non-Voting 9 percent preferred shares.

9. Warner and PolyGram's parent, Philips, also plan to merge their prerecorded music businesses in the rest of the world.

VI. TRADE OF COMMERCE

10. The relevant product market in which to assess the competitive effects of the merger is the market for prerecorded music.

11. The relevant geographic market in which to assess the competitive effects of the merger is the United States.

12. The relevant market is moderately concentrated.

13. Barriers to entry into the distribution of the relevant product are substantial.

14. Both Warner and PolyGram are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE MERGER

15. The effect of the proposed merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in all of the following:

(a) Eliminate substantial actual competition between Warner and PolyGram in the relevant market;

(b) Eliminate substantial potential competition between Warner and PolyGram;

(c) Eliminate substantial actual and potential competition between the other companies engaged in the distribution of the relevant product; and

(d) Significantly increase the level of industry concentration in the relevant market.

VIII. VIOLATIONS CHARGED

16. The proposed merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents Warner Communications Inc. and Warner Bros. Records, Inc. with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Warner Communications Inc. and Warner Bros. Records, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located at 75 Rockefeller Plaza, in the City of New York, State of New York.

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

ORDER

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram

Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., Capitol Records Inc., RCA Corporation and MCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale. *Distribution Agreement* shall not include an arrangement by which a major record company licenses particular tracks of an artist's music to another record company for the purpose of making so-called *compilation albums*.

Effective date, as used herein, means the date on which the agreement containing consent order between respondents and counsel for the Commission was executed.

I.

It is ordered, That Warner terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of PolyGram in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to Warner by PolyGram in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of any major record company; *provided, however*, that nothing in this order shall prohibit a director of Warner from acquiring, for investment purposes only, an interest of not more than one (1) percent of the stock, share capital or equity of any such concern.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner shall not, without providing written advance notification to the Federal Trade Commission, enter into a distribution agreement with a major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). Warner shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). The Notification shall be given by Warner and not by any party whose records Warner seeks to distribute. At the time of the filing of the Notification, Warner shall provide to the Commission supplemental information, either in Warner's possession or reasonably available to Warner. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of Warner and the firm whose records are to be distributed who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commission makes a written request for additional information, Warner shall comply with said request within an additional period of fifteen (15) days or sooner. Warner shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect Warner's compliance obligations arising out of this order, Warner shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That Warner shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years,

file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

POLYGRAM RECORDS, INC., ET AL.

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Appearances

For the Commission: *Robert W. Doyle, Jr. and Richard Malatt.*

For the respondents: *James E. Akers, Sullivan & Cromwell, New York City.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents, Chappell & Co. Inc., formerly an affiliated company under common ownership now merged with PolyGram Records, Inc., and PolyGram Records, Inc., with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent, PolyGram Records, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in

* Complaint previously published at 108 F.T.C. 105