

IN THE MATTER OF

ONKYO U.S.A. CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3092. Consent Order, July 2, 1982--Modifying Order, Oct. 24, 1996

This order reopens a 1982 consent order -- that prohibited the New Jersey manufacturer from attempting to fix the resale prices for its products, and from restricting the lawful use of its trademarks and brand names -- and this order modifies the consent order by permitting Onkyo to impose lawful price restrictive cooperative advertising programs and to unilaterally terminate a dealer for failing to adhere to previously announced resale prices.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST
TO REOPEN AND MODIFY ORDER ISSUED JULY 2, 1982

On April 23, 1996, Onkyo U.S.A. Corporation ("Onkyo"), filed its "Petition to Reopen Proceedings and Modify Consent Order" ("Petition") in Docket No. C-3092, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 ("Rules"). Onkyo asks the Commission to reopen and modify the consent order issued by the Commission on July 2, 1982, in *Onkyo U.S.A. Corporation*, 100 FTC 59 (1982) ("order").

Among other things, Onkyo asks the Commission to modify the order by adding provisions stating that the order will not be construed to prohibit Onkyo (1) from implementing lawful price restrictive cooperative advertising programs; and (2) from announcing resale prices in advance and unilaterally refusing to deal with or terminating dealers who fail to adhere to such resale prices. Onkyo also asks the Commission to eliminate or modify several order provisions. These provisions either limit Onkyo's ability to impose restrictions on its dealers' advertised prices in connection with the sale of its home audio products or limit its ability unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In addition, Onkyo requests the Commission to set aside the requirement that it furnish a copy of the order to certain employees and that the Commission terminate the order twenty years after the date it was

issued.¹ Onkyo maintains that reopening and modification is warranted by changes in the law and is in the public interest. Onkyo's Petition was placed on the public record for thirty days. No comments were received.

Onkyo has shown that it is in the public interest to reopen and modify the order. Onkyo's inability to condition advertising allowances on advertised price and unilaterally to announce pricing restrictions to its dealers has harmed its ability to market its products consistent with a marketing strategy that emphasizes knowledgeable sales personnel, attractive showrooms and "quality over price."² Consequently, Onkyo cannot operate its business as effectively as its competitors and is thus competitively disadvantaged in a manner that was not contemplated when the order was issued by the Commission. Onkyo has demonstrated that the modifications the Commission has determined to implement would enable it to use what Onkyo considers the most efficient and cost effective marketing strategy with respect to its products and would put Onkyo on an equal basis with its competitors.³ Permitting Onkyo unilaterally to terminate a dealer for failure to adhere to previously announced resale prices is also consistent with prior order modifications and would permit Onkyo to engage in conduct that is lawful under the Colgate doctrine and would give Onkyo greater control over its dealer network. *See United States v. Colgate Co.*, 250 U.S. 300 (1919). The order, as modified, will continue to prohibit unlawful resale price maintenance.

In light of the recent civil penalty action and settlement against Onkyo arising out of several alleged order violations, the Commission has determined, as discussed below, to deny Onkyo's requests (1) that the Commission set aside the provision requiring Onkyo to furnish a copy of the order to certain of its employees and (2) that the Commission allow the order to sunset after twenty years pursuant to Section 3.72(b)(3)(i) of the Rules.

¹ On July 25, 1995, the Commission filed a civil penalty action and settlement against Onkyo arising out of several alleged order violations. Consequently, the Onkyo order would now remain in effect for twenty years from the date the complaint alleging Onkyo's order violations was filed, pursuant to Section 3.72(b)(3)(ii) of the Rules. In its Petition, Onkyo requests that the Commission exercise its discretion to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules, which provides that existing orders would automatically terminate twenty years from the date that the order was issued.

² Petition at 3.

³ The Commission recently reopened and made similar modifications to orders in *Interco Incorporated, et al.*, Docket No. C-2929 (March 27, 1995), and *Pendleton Woolen Mills, Inc.*, Docket No. C-2985 (September 30, 1996). Likewise, the Commission modified the orders in *U.S. Pioneer Electronics Corp.*, Docket No. C-2755 (April 8, 1992) and *The Magnavox Co.*, Docket No. 8822 (March 12, 1990).

I. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").⁴

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and

⁴ See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. REOPENING IS IN THE PUBLIC INTEREST

In support of its Petition, Onkyo states that the relief it seeks is required by changed conditions of law and the public interest. Because the Commission has determined that the order should be reopened and modified in the public interest, it need not and does not consider whether Onkyo has shown changed conditions of law that would require reopening the order.

Onkyo has demonstrated that the order prevents Onkyo, but not its competitors, from freely choosing with whom it will deal.⁵ The order, according to Onkyo, also prevents Onkyo from unilaterally imposing price-related restrictions on cooperative advertising, a practice "freely engaged in by [Onkyo's] competitors."⁶ In addition, Onkyo, unlike its competitors, is unable to seek and obtain pricing information from its dealers with respect to its own and competing products,⁷ nor may it announce in advance suggested resale prices, and unilaterally choose to cease dealing with a dealer because of its

⁵ For example, some authorized Onkyo dealers discount Onkyo products by "cutting back on display, service and ambience, and by trading on the display and promotion which other dealers provide." Affidavit of Theodore W. Green, Vice President, Sales and Marketing, Onkyo U.S.A. Corporation (April 18, 1996) ("Green Aff.") ¶ 9.

⁶ Green Aff. ¶ 14.

⁷ According to Onkyo, "consumers, dealers, and manufacturers are constantly focused on the price of their [consumer electronics] products relative to the competition." Green Aff. ¶ 6. Onkyo characterizes the relevant market as highly price competitive and cites, as an example, the rapid decline in prices for new products. For example, when first introduced, mini-stereo systems sold for approximately \$1,000. Within months of their introduction, such systems became available for \$400 or less. *Id.*

Onkyo states that because of such rapid price changes, "it is vital to [Onkyo's and its dealers'] success" that Onkyo maintain "regular and effective communication about the competitiveness of our pricing and that of our competitors." *Id.* ¶ 7. Onkyo also needs "accurate feedback on market prices in order to plan the design and introduction of new products." *Id.*

pricing practices.⁸ As a result, Onkyo is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace with respect to its products.⁹ Onkyo has thus shown that it is in the public interest to reopen and modify the order. Onkyo claims that it is a less effective competitor because it cannot structure its distribution system to meet the demands of the marketplace in lawful ways that are available to its competitors.

III. THE ORDER SHOULD BE MODIFIED

Onkyo requests that the order be modified to permit Onkyo to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Onkyo products at Onkyo's previously announced resale prices. For these purposes, Onkyo has requested that the following paragraphs be added to the order:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of its products on conditions established by respondent, including conditions as to the prices at which respondent's products are offered in such dealer advertising.

It is further ordered, That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

The addition of these provisions would permit Onkyo to impose price restrictions on its dealers in connection with its cooperative advertising programs and would restore Onkyo's Colgate doctrine rights allowing it unilaterally to terminate a dealer who refuses to advertise and sell products at previously published resale prices. Modifying the order in this respect is consistent with the

⁸ For example, Onkyo cannot "readily refuse to deal with discounting retailers and thereby support its full-service dealers who educate potential consumers about the features of its products, but who frequently lose the ultimate sale to the 'free-riding' retailer who offers the same product at a discounted price." Petition at 21.

⁹ For example, unlike many of its competitors, Onkyo is unable to offer its dealers cooperative advertising programs that establish minimum advertised price restriction ("MAP") because the order may be construed to prohibit such programs. Consequently, Onkyo has been unable to expand its dealer base because dealers "are less inclined to carry the Onkyo line because [Onkyo] does not have a MAP program." Green Aff. ¶ 28.

Commission's actions in *The Advertising Checking Bureau, Inc.*, 109 FTC 146 (1987); *The Magnavox Co.*, 113 FTC 255 (1990); U.S. Pioneer Elec. Corp., Trade Reg. Rep. (CCH) ¶ 23,172 (1992); Clinique Laboratories, Inc., Trade Reg. Rep. (CCH) ¶ 23,330 (1993); Interco Incorporated, et al., Docket No. C-2929, Order Granting in Part and Denying in Part Request to Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); and Pendleton Woolen Mills, Inc., Docket No. C-2985, Order Granting in Part Request to Reopen and Modify Order Issued July 31, 1979 (September 30, 1996).

The approach followed by the Commission in adopting its new cooperative advertising policy by setting aside the order in *The Advertising Checking Bureau* and in the subsequent modifications, applies to Onkyo's request for a paragraph regarding price restrictive cooperative advertising. Without this provision, the order prohibits price restrictions that Onkyo might want to impose on its dealers in connection with cooperative advertising programs it may wish to implement. Such restrictions may not necessarily be part of an illegal RPM scheme and have now been recognized as reasonable in many circumstances.¹⁰ Of course, any cooperative advertising program implemented by Onkyo as part of an RPM scheme would be *per se* unlawful and would violate the order even if Onkyo's requested modification is granted.

The proposed second paragraph would permit Onkyo unilaterally to terminate a reseller for failure to adhere to previously announced prices. This type of conduct is lawful under the Colgate doctrine and would allow Onkyo greater control over its retailer network. Under the Colgate doctrine, a supplier can "announce its resale prices in advance and refuse to deal with those who do not comply."¹¹ The requested modification should enable Onkyo to afford some protection to Onkyo dealers who invest in significant pre-sale services and promotion and thereby have greater success in attracting and retaining these retailers within its distribution network. Such control would assist Onkyo in implementing its overall marketing plans.

The remaining order modifications requested by Onkyo are aimed at removing language that is in direct conflict with the proposed

¹⁰ See, e.g., *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988) (a vertical restraint of trade is not *per se* illegal unless it includes some arrangement on price or price levels); *In re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (agreements that withhold cooperative advertising allowances from dealers who advertise discounted prices are analyzed under the rule of reason).

¹¹ *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

cooperative advertising and "Colgate rights" provisions. Some of these changes, as discussed below, are appropriate to make the order consistent with the two paragraphs the Commission has determined to add to the order:

1. Onkyo's request to delete the words "directly or indirectly" from the order's preamble and from subparagraphs I.1, I.2, and I.3.

In support of this proposed modification, Onkyo states that the use of the modifier "indirectly" unnecessarily inhibits Onkyo from lawful, competitive behavior, "which has had a chilling effect on interbrand competition."¹² Onkyo asserts that the prohibition of acts that "indirectly" have an unlawful result constitute mere "fencing-in" relief that, "[a]fter more than thirteen years, is no longer necessary or appropriate".¹³

Onkyo's request to delete the phrase "directly or indirectly" from the order's preamble is denied. This standard language appears in virtually all of the Commission's orders, and serves to assure that a respondent is not able to do by indirect means what the order prohibits it from doing directly. Moreover, this phrase in the preamble prevents Onkyo from engaging in conduct that, although lawful, could lead to or facilitate an unlawful RPM scheme; for example, a threat to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.¹⁴ Onkyo may, consistent with the order as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices."¹⁵ Thus, retaining the "directly or indirectly" language in the order's preamble will ensure that Onkyo will not be able to engage in lawful conduct that could lead to or facilitate unlawful conduct.

Onkyo's request to delete the phrase "directly or indirectly" from subparagraphs I.1, I.2, and I.3 of the order is granted. The preamble

¹² *Id.* at 10.

¹³ *Id.* at 12.

¹⁴ See *Monsanto v. Spray-Rite Service Corporation*, 465 U.S. 752, 765 and n.10 (1984); see also *Lenox, Inc.*, 111 FTC 612, 617 (1989).

¹⁵ See *In re Interco Incorporated, et al.*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

covers Onkyo's conduct under the order's specific substantive provisions and inclusion of the phrase "directly or indirectly" in the preamble extends to Onkyo's conduct under those provisions. It is, therefore, not necessary to repeat the phrase "directly or indirectly" in the order's provisions prohibiting specific conduct.

2. Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 of the order.¹⁶

Onkyo requests that the words "advertise, promote," be deleted from subparagraph I.1 of the order to enable Onkyo to implement minimum advertised price programs as part of cooperative advertising arrangements.¹⁷ Although Onkyo's Petition does not expressly discuss the reasons Onkyo believes these words should be deleted from the order,¹⁸ presumably, Onkyo is concerned that even with the added cooperative advertising provision, the reference to advertising in subparagraph I.1 of the order could be confusing and, consequently, could exert a chilling effect on Onkyo's ability to implement price-restrictive cooperative advertising and promotional programs.

The language of the cooperative advertising proviso added to the order is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from subparagraph I.1, however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Onkyo has not requested or shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from subparagraph I.1 of the order is denied.

3. Onkyo's request to delete the word "Requesting" from subparagraph I.2 and delete subparagraph I.4 in its entirety.¹⁹

Onkyo states that the prohibition on "requests" is inconsistent with Commission's removal of the prohibition on the use of suggested

¹⁶ Petition at 13, 25. Subparagraph I.1 prohibits Onkyo from: "Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product."

¹⁷ *Id.* at 13, 25.

¹⁸ Onkyo requests that the words "advertise, promote," be deleted in the context of its discussion of why the Commission should add the cooperative advertising provision to the order.

¹⁹ Subparagraph I.2 prohibits Onkyo from: "Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price."

Subparagraph I.4 prohibits Onkyo from: "Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price."

In the alternative, Onkyo requests that the words "requesting, or" be deleted from subparagraph I.4 of the order and that the words "where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold" be added to subparagraph I.4. Petition at 13.

resale prices that was part of the order as originally proposed.²⁰ It also argues that deletion of "Requesting" and subparagraph I.4 in its entirety would be consistent with the recent Interco modification. In Interco, the Commission deleted a restriction on "suggesting" that a reseller refrain from advertising products at a certain resale price.²¹

Onkyo's request to delete the word "Requesting" from subparagraph I.2 and to delete subparagraph I.4 in its entirety, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 of the order is denied. Allowing Onkyo to suggest resale prices to its dealers does not mean that Onkyo can enter into vertical agreements to fix resale prices with its dealers. Such agreements are *per se* unlawful. In Interco, the Commission modified the order to permit the respondent only to suggest prices at which a reseller may wish to advertise a product without permitting the respondent to require a reseller to advertise products at a specified price.²² Subparagraphs I.2 and I.4 of the order, which, among other things, bar Onkyo from requesting dealers to adhere to resale prices and from requesting dealers to discontinue selling or advertising any product at any resale price, in essence prohibits Onkyo from directly or indirectly "inviting" its dealers to participate in a resale price maintenance scheme.²³ Requests, or any similar cooperative means of accomplishing the maintenance of resale prices fixed by Onkyo, in the context of its business relationship with its dealers, are analogous to threats to obtain dealer acquiescence in resale prices and thus are "plainly relevant and persuasive to a meeting of the minds."²⁴ Although cooperation and coordination between Onkyo and its dealers "to assure that their product will reach the consumer persuasively and efficiently" is not unlawful,²⁵ cooperation (*i.e.*: a request by Onkyo and acquiescence by the dealer) to maintain resale prices clearly is unlawful. The language of the new paragraphs is sufficient to permit Onkyo to implement lawful price restrictive cooperative advertising programs and makes it clear that Onkyo can

²⁰ The Commission stated in this regard that:

"In prohibiting Onkyo from restricting its dealers' prices, the Commission intends to prohibit only those actions that are aimed at maintaining specific resale prices However, the order does not preclude Onkyo from initially selecting its dealers and establishing performance criteria that are otherwise reasonable under the antitrust laws." 100 FTC at 61.

²¹ See Interco, 5 Trade Reg. Rep. (CCH) ¶ 23,791 at 23,541-42.

²² *Id.*

²³ In Lenox, the Commission denied a request to delete a provision that barred the respondent from requesting dealers to report any person who did not observe suggested resale prices. See *Lenox, Inc.*, 111 FTC 612 (1989).

²⁴ Monsanto, 465 U.S. at 765 and n.10.

²⁵ *Id.* at 763-64.

take any lawful steps with respect to its customers' pricing practices, but leaves in place the core prohibitions prohibiting price fixing.

4. Onkyo's request to delete subparagraph I.3.²⁶

The first part of subparagraph I.3 of the order is consistent with *Monsanto and Sharp* in which the Court said that vertical agreements to fix price are *per se* unlawful. The first part of subparagraph I.3, which bars Onkyo from "requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price,"²⁷ prohibits Onkyo from inviting its dealers to participate in a resale price maintenance scheme.²⁸ This provision does not bar dealers from complaining to Onkyo about price cutters. Instead, it bars Onkyo from seeking the dealers' participation in policing and maintaining resale prices.

The second part of subparagraph I.3 prohibits Onkyo from "acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer."²⁹ As written, this provision applies only when Onkyo solicits and obtains the cooperation of its dealers in enforcing compliance with resale prices and acts on the information so obtained.

In addition, termination of a price cutting dealer is not lawful in all circumstances. For example, a manufacturer's threat to refuse to deal to obtain compliance with resale prices can evidence an invitation to an unlawful agreement on price.³⁰ Nevertheless, as the Court explained in *Monsanto*, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action.³¹ To the extent that this second part of subparagraph I.3 may inhibit Onkyo from legitimate unilateral conduct it may cause competitive injury. Because any conduct that

²⁶ This provision prohibits Onkyo from: "Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer." 100 FTC at 63.

In the alternative, Onkyo requests that the Commission modify this provision to read as follows: "Requiring any dealer to report the identity of any other dealer who deviates from any resale price, where such requirement is imposed to fix, maintain, control or enforce the resale price at which any product is sold." Petition, Exhibit C.

²⁷ 100 FTC at 63.

²⁸ See *Monsanto*, 465 U.S. at 764 n.9 and 765.

²⁹ 100 FTC at 63.

³⁰ *Monsanto*, 465 U.S. at 765.

³¹ *Id.* at 763-64.

would be unlawful under this part of subparagraph I.3 would be prohibited by core provisions of the order, the reasons to set aside the second part of subparagraph I.3 outweigh any reasons to retain it.³²

5. Onkyo's request to delete subparagraphs I.5, I.4 and I.6 in their entirety or, in the alternative, delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6.³³

With the addition of the cooperative advertising proviso to the order, the references to "advertising" in subparagraphs I.5, I.4 and I.6 of the order are confusing and could, therefore, hinder Onkyo's ability to institute a lawful, price-restrictive cooperative advertising program. Deleting these words makes clear that Onkyo can impose price restrictions on its dealers in connection with any lawful cooperative advertising program. Price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. See Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987). The request to delete the words "advertising" and "or advertised" from subparagraphs I.5, I.4 and I.6 of the order is granted.

Onkyo's request to delete subparagraph I.5 in its entirety is denied. The prohibition against Onkyo's conducting surveillance programs to determine dealers' resale prices for the purpose of fixing such prices should remain in place for the duration of the order. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices.³⁴ Onkyo may, consistent with the order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices, and it may terminate any such dealer; but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices."³⁵

³² This recommendation is consistent with the Commission's determination to set aside a similar order provision in 1989. See *Lenox, Inc.*, 111 FTC 612, 617-18 (1989).

³³ Subparagraphs I.4 and I.6 are discussed elsewhere. Subparagraph I.5 prohibits Onkyo from: "Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised." 100 FTC at 63.

³⁴ See *Monsanto Co. v. Spray-Rite Corporation*, 465 U.S. 752, 765 and n.10 (1984); see also *Lenox, Inc.* 111 FTC 612, 617 (1989).

³⁵ See *In re Interco Incorporated, et al.*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

6. Onkyo's request to delete subparagraph I.6 in its entirety or, in the alternative, delete the word "Terminating" from subparagraph I.6.³⁶

Onkyo states that the word "Terminating" in subparagraph I.6 of the order is inconsistent with the new Colgate rights proviso and that the word "Terminating" has a chilling effect on Onkyo's ability unilaterally to terminate a dealer in response to price complaints by other dealers.³⁷

Onkyo's request to delete the word "Terminating" from subparagraph I.6 of the order is granted. Deleting this word is consistent with the Commission's action in *Lenox, Inc.*, 111 FTC 612, 617-18 & 620 (1989). In *Lenox*, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring *Lenox* from requesting its dealers to report any retailer that did not observe the resale prices suggested by *Lenox*. The conduct prohibited by the deleted words in *Lenox* includes termination of a dealer. Likewise, in *Pioneer*, the Commission deleted the word "terminating" from a similar order provision "as [that word] relates to advertising," and issued an Order to Show Cause why the *Pioneer* order should not be "further modified to remove the restriction on *Pioneer* to unilaterally terminate a dealer for not following suggested resale prices."³⁸ Unilateral termination of a dealer for discounting is not in itself unlawful.³⁹

The request to adopt Onkyo's proposed new language for subparagraph I.6 is denied. The proposed language is not consistent with similar provisions in other orders, and its prohibition on Onkyo's "preventing" the sale of products because of a dealer's deviation from any resale price is narrow and vague. The language proposed by Onkyo for subparagraph I.6 implicitly would allow Onkyo to "restrict" or "limit" (conduct currently expressly prohibited by subparagraph I.6) the sale of products because of a dealer's deviation

³⁶ Subparagraph I.6 prohibits Onkyo from: "Terminating, coercing or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product." 100 FTC at 63.

³⁷ See *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (Court held that a *per se* unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not *per se* unlawful unless there is also an agreement on price or price levels).

³⁸ U.S. *Pioneer Electronics Corp.*, Docket No. C-2755, Order Reopening and Modifying Order Issued October 24, 1975 (April 8, 1992) at 28-30.

³⁹ See *Interco Incorporated*, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10.

from resale prices acceptable to Onkyo. Other than the termination of a dealer, subparagraph I.6 involves conduct that if engaged in with regard to resale prices could lead to or be used as part of a resale price maintenance scheme. Subparagraph I.6 should be retained as written, with the exception of deletion of the word "Terminating." For clarity, the words "(other than termination)" should be added to subparagraph I.6 following the word "action."

7. Onkyo's request to delete subparagraph I.7 in its entirety.⁴⁰

In support of its request to delete subparagraph I.7, Onkyo states that to the extent that the law would permit Onkyo to take steps to prevent unauthorized dealers from using its trademarks, "Onkyo should be permitted, like its competitors, [to take] appropriate steps to prevent such use."⁴¹ Onkyo is concerned that unauthorized "free-riding" dealers have created a situation "in which authorized [Onkyo] dealers lose interest in carrying Onkyo products because they cannot profitably distribute such products."⁴² Onkyo asserts that in the context of the order's broad definition of the term "dealer,"⁴³ and unlike its competitors, it feels constrained in its ability to take action against authorized dealers who deviate from Onkyo's performance criteria and against dealers who sell Onkyo products but are not authorized by Onkyo to do so. According to Onkyo, "[t]rademark law itself provides protection for any dealer who lawfully utilizes the Onkyo trademark,"⁴⁴ and dealers who "unlawfully or inappropriately" use the Onkyo trademark "and thereby injure Onkyo's competitiveness in the market or its image and reputation should not be shielded by the existing prohibition in the order."⁴⁵

Onkyo's request to delete subparagraph I.7 from the order is denied. Given the two new order paragraphs allowing Onkyo to employ price restrictive cooperative advertising programs and to exercise Colgate rights, subparagraph I.7 does not prevent Onkyo from taking lawful steps to prevent the unlawful use of its trademark by authorized and unauthorized Onkyo dealers. Subparagraph I.7 prohibits coercion or threats against discounting retailers, which may

⁴⁰ Subparagraph I.7 prohibits Onkyo from: "Taking any action to hinder or preclude the lawful use by any dealer of respondent's trademarks in conjunction with the sale or advertising of any product." 100 FTC at 63.

⁴¹ *Id.* at 16.

⁴² *Id.*

⁴³ The term "dealer" is defined to mean "any person, partnership, corporation or firm which sells any product in the course of its business." 100 FTC at 63.

⁴⁴ Petition at 17.

⁴⁵ *Id.*

form the basis of *per se* unlawful resale price maintenance agreements.⁴⁶

A threat by Onkyo, to hinder or preclude a retailer from using the Onkyo trademark if the retailer did not stop discounting Onkyo products⁴⁷ could result in an implicit, yet nonetheless *per se* unlawful, resale price maintenance agreement. Onkyo will continue to be able to prevent the unauthorized use of its trademarks by any dealer. Of course, this provision also does not prohibit Onkyo from entering into and enforcing so-called transshipment bans.

8. Onkyo's request with respect to its obligations under paragraphs II and IV of the order.⁴⁸

Onkyo states that these provisions of the order "have outlived their usefulness and are inconsistent with more recent FTC consent orders."⁴⁹ In addition, Onkyo asserts that its competitors are not subject to similar obligations and that Onkyo, unlike its competitors, incurs "a significant expenditure of employee time and management supervision, which cut into Onkyo's profitability"⁵⁰ in connection with its perpetual compliance obligations under paragraphs II and IV

⁴⁶ See, e.g., *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1159 (7th Cir. 1987) (Posner, J.), cert. denied, 486 U.S. 1005 (1988), (manufacturer's threat to mix up a retailer's orders if the retailer did not raise prices to have resulted in an implicit, yet nonetheless *per se* unlawful, agreement).

⁴⁷ Similarly, fixing advertised prices, entering into advertised price agreements with dealers, sanctioning dealers who fail to enter into advertising agreements and threatening, intimidating or coercing dealers that do not comply with suggested advertised prices are all conduct which, depending on the circumstances, could fall within the *per se* ban. See, e.g., *Pioneer*, Docket No. C-2755, Order Reopening and Modifying Order Issued October 25, 1975 (April 8, 1992) at 25-26. Although advertising price arrangements standing alone may not be *per se* unlawful, threats, or Onkyo "taking any [other] action" to hinder or preclude the lawful use of its trademarks in conjunction with the sale of its products, may come dangerously close to or be used in conjunction with unlawful resale price maintenance activities.

⁴⁸ Paragraph II of the order reads as follows:

It is further ordered, That respondent shall clearly and conspicuously state the following on each page of any list, advertising, book, catalogue or promotional material where respondent has suggested any resale price to any dealer:

THE RESALE PRICES QUOTED HEREIN ARE SUGGESTED ONLY.

YOU ARE FREE TO DETERMINE YOUR OWN RESALE PRICES.

100 FTC at 64.

Paragraph IV of the order provides:

It is further ordered, That respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to present and future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order. *Id.*

⁴⁹ Petition at 23. In support of its position, Onkyo cites the Commission's Policy Statement Regarding Duration of Competition Orders, 59 Fed. Reg. 45,286, 45,288 (September 1, 1994) (supplemental provisions that impose affirmative obligations similar to those imposed by paragraph II of the order terminate after three or five years). In addition, recent consent orders limited comparable relief to five years. See, e.g., *Reebok*, Docket No. C-3592, *Keds*, Docket No. C-3490, *Nintendo of America, Inc.*, 114 FTC 702 (1991) and *Kreepy Krauly USA, Inc.*, 114 FTC 777 (1991). Similarly, fencing-in provisions similar to paragraph IV of the order usually expire within ten years. See 60 Fed. Reg. 42,569, 42,571 (August 16, 1995). See also *Reebok* and *Keds*.

⁵⁰ Green Aff. ¶¶ 25-26.

of the order. Onkyo's Petition, however, does not include any information supporting its assertion that it incurs significant costs in connection with its obligations under paragraphs II and IV of the order.

Paragraph II restricts Onkyo's use of suggested resale prices. Specifically, Onkyo must clearly and conspicuously state on each page of any material on which such suggested price is stated that such price is suggested only and that dealers are free to determine their own resale prices. In Clinique⁵¹ the Commission concluded that a similar provision addressed conduct (suggested prices) that may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, paragraph II should be set aside.

Onkyo's request to delete the paragraph IV requirement to distribute a copy of the order to present and future employees having sales, advertising or policy responsibilities with respect to resale prices is denied. In support of its request, Onkyo states that it "has been in effect for 13 years and has outlived its usefulness."⁵² Paragraph IV has not "outlived its usefulness." Onkyo's failure to comply with this provision may have contributed to the violation of the order alleged in the civil penalty complaint recently filed by the Commission against Onkyo. To help prevent future violations of the order by Onkyo, the order distribution requirement should be retained for two years after the date on which the modified Onkyo order becomes final, to familiarize Onkyo employees with the modified order and help ensure Onkyo's compliance with the order's core provisions.

9. Onkyo's request that the Commission retain the order's original sunset date.

Onkyo requests that the Commission "exercise its discretion"⁵³ to provide for termination of the order consistent with Section 3.72(b)(3)(i) of the Rules⁵⁴ and with the Commission's Statement of Policy with Respect to Duration of Competition and Consumer Protection Orders.⁵⁵ Specifically, Onkyo requests the Commission to add a new paragraph to the order stating that: "*It is further ordered,*

⁵¹ Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

⁵² Petition at 24.

⁵³ Petition at 29.

⁵⁴ Section 3.72(b)(3)(i) of the Rules states that "an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued"

⁵⁵ See Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,569.

That this order shall terminate on July 2, 2002."⁵⁶ In support of its request, Onkyo asserts that the "modest . . . circumstances of the recent enforcement proceeding"⁵⁷ justify "establishing the sunset date for the order as twenty years from its original entry."⁵⁸

Onkyo's request is denied. On July 25, 1995, the Commission brought a civil penalty action against Onkyo because it had reason to believe the order had been violated. The usual presumption that Onkyo should not remain subject to the order beyond twenty years does not apply and the Onkyo order should remain in effect until July 25, 2015, consistent with Section 3.72(b)(3)(ii) of the Rules.⁵⁹ But for the filing of the complaint against Onkyo alleging the order violations, the order in this matter would have terminated on July 2, 2002, pursuant to Section 3.72(b)(3)(i) of the Rules.

The Policy Statement and the Rules are clear on the duration of existing competition orders. Existing administrative orders automatically sunset twenty years after they were issued, unless the Commission or the Department of Justice has filed a complaint (with or without an accompanying consent decree) in federal court to enforce such order pursuant to Section 5(l) of the FTC Act during the twenty years preceding the adoption of the Policy Statement. In that event, "the order would run another twenty years from the date that the most recent complaint was filed with the court."⁶⁰ The Commission can adopt a different sunset period for core provisions "[o]nly in an exceptional case,"⁶¹ which has not been shown.

The request to terminate the order twenty years from the date of its entry is denied. A new paragraph is added to the order stating that the order shall terminate on July 25, 2015.⁶²

⁵⁶ Petition at 28-29.

⁵⁷ *Id.* at 29. According to Onkyo, it consented to settle charges involving only supplemental order provisions. In addition, Onkyo states that it was not charged with *de novo* violations and with conspiring with its dealers to enter into unlawful RPM schemes. *Id.*

⁵⁸ *Id.*

⁵⁹ Section 3.72(b)(3)(ii) states that "where a complaint alleging a violation of the order was . . . filed . . . in federal court by the United States or the Federal Trade Commission while the order remains in force . . . [the] order subject to this paragraph will terminate 20 years from the date on which a court complaint . . . was filed"

⁶⁰ See Fed. Reg., Vol. 60, No. 158 (August 16, 1995) at 42,481. The filing of such a complaint, however, does not affect the duration of the order if the complaint is dismissed or the court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal. In the enforcement action against Onkyo, the complaint was not dismissed and there was no court ruling that Onkyo did not violate the order.

⁶¹ *Id.* at 42,573 n.18.

⁶² Onkyo may file another petition to reopen and modify the order pursuant to Section 5(b) of the FTC Act, 15 U.S.C. 45(b), or Section 2.51 of the Rules, 16 CFR 2.51. If Onkyo files such a petition requesting the Commission to terminate the order prior to its termination date, it would have to make a satisfactory showing that changed conditions of law or fact require reopening of the order or that the public interest so requires.

V. CONCLUSION

Onkyo has shown that reopening the order is in the public interest and that the order should be modified as described above.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order in Docket No. C-3092 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) By adding the following paragraphs at the end of the order:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of its products on conditions established by respondent, including conditions as to the prices at which respondent's products are offered in such dealer advertising.

It is further ordered, That nothing in this order shall prohibit respondent from announcing any resale prices for any products in advance and unilaterally refusing to deal with or terminating any dealer who fails to advertise, offer for sale or sell such products at the announced prices.

(b) Onkyo's request to delete the words "directly or indirectly," from the order's preamble is denied.

(c) Onkyo's request to delete the words "advertise, promote," from subparagraph I.1 is denied.

(d) Subparagraphs I.1, I.2 and I.3 are modified by deleting the words "directly or indirectly,".

(e) Onkyo's request to delete the word "Requesting" from subparagraph I.2 is denied.

(f) Onkyo's request to delete subparagraph I.4, or, in the alternative, to delete the words "requesting, or" from subparagraph I.4 is denied; subparagraph I.4 is modified to read as follows:

— Requesting or requiring that any dealer refrain from or discontinue selling any product at any resale price.

(g) Onkyo's request to delete subparagraph I.3 is denied; subparagraph I.3 is modified to read as follows:

Requesting or requiring any dealer to report the identity of any other dealer who deviates from any resale price.

(h) Onkyo's request to delete subparagraph I.5 is denied; subparagraph I.5 is modified to read as follows:

Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold.

(i) Onkyo's request to delete subparagraph I.6 is denied; subparagraph I.6 is modified to read as follows:

Coercing, or taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold, is selling or is suspected of selling any product.

(j) Onkyo's request to delete subparagraph I.7 is denied.

(k) Paragraph II of the order is set aside.

(l) Onkyo's request to delete paragraph IV is denied; paragraph IV is modified to read as follows:

It is further ordered, That for a period ending two (2) years from the date this order becomes final, the respondent shall forthwith distribute a copy of the July 2, 1982, order in Docket No. C-3092, as modified, to all operating divisions of said corporation, and to present and future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of the order in Docket No. C-3092, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

(m) Onkyo's request to terminate the order on July 2, 2002 is denied; the order is modified by adding the following paragraph:

It is further ordered, That the order in Docket No. C-3092, as modified, shall terminate on July 25, 2015.

Commissioner Starek concurring in the result only.

IN THE MATTER OF

GREY ADVERTISING, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3690. Complaint, Oct. 30, 1996--Decision, Oct. 30, 1996*

This consent order prohibits, among other things, the New York-based advertising agency, that handled the Hasbo, Inc., paint-sprayer toy account, from using deceptive demonstrations or otherwise misrepresenting the performance of any toy.

Appearances

For the Commission: *Rosemary Rosso* and *Michael Ostheimer*.

For the respondent: *Leonard Orkin, Kay, Collyer & Boose*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that Grey Advertising, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Grey Advertising, Inc. is a New York corporation, with its principal office or place of business at 777 Third Avenue, New York, New York.

PAR. 2. Respondent, at all times relevant to this complaint, was an advertising agency of Hasbro, Inc., and prepared and disseminated advertisements to promote the sale of Colorblaster Design Toys, spray painting toys.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. The Colorblaster Design Toy consists of a plastic drawing tray with an oblong plastic air tank underneath. An attached handle is used to pump up pressure inside the air tank. Special color pens are inserted into a sprayer connected to a hose attached to the air tank. Several sets of stencils, four color pens and blank paper are included with the toy. The enclosed instructions state: "Fully extend