

Complaint

IN THE MATTER OF

WARNER COMMUNICATIONS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4025; File No. 0010231**Complaint, September 17, 2001--Decision, September 17, 2001*

This consent order addresses an agreement between Respondent Warner Communications Inc. – a subsidiary of AOL Time Warner Inc. – and certain subsidiaries of Vivendi Universal S.A. concerning price and advertising levels for certain audio and video products featuring opera singers Luciano Pavarotti, Placido Domingo, and Jose Carreras, known collectively as The Three Tenors. The order, among other things, prohibits the respondent from agreeing with a competitor (1) to fix, raise, or stabilize prices for any audio product, or (2) to prohibit, restrict, or limit truthful, non-deceptive advertising and promotion for any audio product. The order also permits the respondent to join with other sellers to prevent the advertising, marketing or sale to children of audio products or video products labeled or rated with a parental advisory or cautionary statement as to content.

Participants

For the Commission: *Geoffrey M. Green, John Roberti, Cary Zuk, Melissa Westman-Cherry, Geoffrey D. Oliver, Richard B. Dagen, Rendell A. Davis, Jr., Roberta S. Baruch, Daniel P. Ducore, John Howell, Michael G. Vita, and Daniel P. O'Brien.*

For the Respondent: *Robert Joffe, Katherine Forrest, and John M. Lundine, Cravath, Swaine & Moore, George S. Cary and Tanya Dunn, Cleary, Gottlieb, Steen, & Hamilton, and Paul T. Cappuccio, Ed Weiss and Paul Washington, Warner Communications Inc.*

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 (“Commission”), having reason to believe that Warner Communications Inc., a corporation,

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hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

1. Respondent Warner Communications Inc. ("Warner") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019. Warner is a subsidiary of AOL Time Warner Inc.
2. PolyGram Holding, Inc. ("PolyGram Holding") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 825 Eighth Avenue, New York, New York 10019.
3. Decca Music Group Limited ("Decca Music") is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 347-353 Chiswick High Road, London, England W4 4HS. Decca Music is successor to, and was formerly named, The Decca Record Company Limited ("Decca Records").
4. UMG Recordings, Inc. ("UMG") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2220 Colorado Avenue, Santa Monica, California 90404. UMG is successor to, and was formerly named, PolyGram Records, Inc. ("PolyGram Records").
5. Universal Music & Video Distribution Corp. ("UMVD") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 10 Universal City Plaza, Universal City, California 91608. UMVD became the successor

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corporation to PolyGram Group Distribution, Inc. ("PolyGram Distribution") when PolyGram Distribution merged with UMVD on May 1, 2000. PolyGram Holding, Decca Music, UMG, and UMVD are all subsidiaries or affiliates of Vivendi Universal S.A., a French corporation.

6. Warner, acting directly and through certain subsidiaries (collectively, "Warner Music Group"), has for many years been engaged in the business of producing, marketing, and distributing pre-recorded music and videos in the United States and worldwide.

7. PolyGram N.V. ("PolyGram"), a Netherlands corporation, acting directly and through certain subsidiaries (collectively, "PolyGram Music Group"), was for many years engaged in the business of producing, marketing, and distributing pre-recorded music and videos in the United States and worldwide. Among the firms composing the PolyGram Music Group were PolyGram Holding, Decca Records, PolyGram Records, and PolyGram Distribution. In December 1998, PolyGram was acquired by The Seagram Company Ltd., a Canadian corporation. Two years later, The Seagram Company Ltd. merged with Vivendi S.A. and Canal Plus S.A., to form Vivendi Universal S.A.

8. The acts and practices of Warner, PolyGram Holding, Decca Records (predecessor to Decca Music), PolyGram Records (predecessor to UMG), and PolyGram Distribution (predecessor to UMVD), including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

9. The Three Tenors is a musical joint venture consisting of renowned opera singers Luciano Pavarotti, Placido Domingo, and Jose Carreras. Beginning in 1990, The Three Tenors have come together every four years at the site of the World Cup soccer finals for a combination live concert and recording session. The concert promoter is responsible for producing the master recordings. Prior to each performance, the concert promoter selects one (or

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more) of the major music/video distribution companies to distribute compact discs, cassettes, videocassettes, and videodiscs derived from the master recordings.

10. Distribution rights to the original 1990 Three Tenors performance, entitled *The Three Tenors*, were acquired by PolyGram Music Group. Distribution rights to the follow-up performance, *The Three Tenors in Concert 1994*, were acquired by Warner Music Group.

11. In a contract dated December 19, 1997, Warner Music Group and PolyGram Music Group agreed to collaborate in the distribution of audio and video products derived from the next Three Tenors World Cup concert, scheduled for Paris on July 10, 1998. Among the important undertakings of the parties were the following:

- (a) Warner Music Group would secure from the concert promoter worldwide audio, home video, and television broadcast rights to the 1998 Three Tenors concert (the “Rights”);
- (b) Warner Music Group would exploit the Rights within the United States;
- (c) Warner Music Group would license to PolyGram Music Group the right to exploit the Rights outside of the United States;
- (d) Warner Music Group and PolyGram Music Group would each be entitled to 50 percent of the net profits and net losses derived from the worldwide exploitation of the Rights (as well as from the production of a Greatest Hits album and/or a Box Set incorporating the 1990, 1994, and 1998 Three Tenors albums);

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- (e) PolyGram Music Group would reimburse Warner Music Group for 50 percent of any advance paid to the concert promoter; and
- (f) other expenses incurred by either Warner Music Group or PolyGram Music Group in the exploitation of the Rights (*e.g.*, manufacture, advertising, marketing, and distribution) would be deducted from revenues for purposes of calculating net profits (losses).

12. Warner Music Group and PolyGram Music Group were concerned that the audio and video products that would be derived from the upcoming Three Tenors concert in Paris would be neither as original nor as commercially appealing as the earlier Three Tenors releases.

13. In 1998, Warner and certain other members of Warner Music Group, and PolyGram Holding, Decca Records, PolyGram Records, and PolyGram Distribution, entered into an agreement not to compete. PolyGram Holding, Decca Records, PolyGram Records, and PolyGram Distribution agreed not to discount and not to advertise the 1990 Three Tenors album and video from August 1, 1998 through October 15, 1998. In return, Warner and certain other members of Warner Music Group agreed not to discount and not to advertise the 1994 Three Tenors album and video from August 1, 1998 through October 15, 1998. The parties referred to their agreement not to compete worldwide during this period as the “moratorium.”

14. The third Three Tenors album and video, entitled *The Three Tenors -- Paris 1998*, were released in the United States on August 18, 1998, and were distributed in the United States by Warner Music Group. During the moratorium period, August 1 through October 15, PolyGram Holding, Decca Records, PolyGram Records, and PolyGram Distribution refrained from discounting or advertising the 1990 Three Tenors album and video in the United States. During this period, Warner and Warner

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Music Group likewise refrained from discounting or advertising the 1994 Three Tenors album and video in the United States.

15. The moratorium agreement was not reasonably necessary to the formation or to the efficient operation of the joint venture between Warner Music Group and PolyGram Music Group.

16. The effect of the moratorium agreement among Warner, certain other members of Warner Music Group, PolyGram Holding, Decca Records, PolyGram Records, and PolyGram Distribution, as alleged herein, was to restrain competition unreasonably, to increase prices, and to injure consumers.

Violations Alleged

17. As set forth in Paragraph 13 above, Warner, PolyGram Holding, Decca Records (predecessor to Decca Music), PolyGram Records (predecessor to UMG), and PolyGram Distribution (predecessor to UMVD) agreed to restrict price competition, in violation of Section 5 of the Federal Trade Commission Act, as amended.

18. As set forth in Paragraph 13 above, Warner, PolyGram Holding, Decca Records (predecessor to Decca Music), PolyGram Records (predecessor to UMG), and PolyGram Distribution (predecessor to UMVD) agreed to forgo advertising, in violation of Section 5 of the Federal Trade Commission Act, as amended.

19. The acts and practices of respondent, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventeenth day of September, 2001 issues its complaint against respondent.

By the Commission, Chairman Muris recused.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Respondent, Warner Communications Inc., and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

1. Proposed Respondent Warner Communications Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019.

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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**I.**

IT IS ORDERED that, as used in this Decision and Order, the following definitions shall apply:

- A. “WCI” or “Respondent” means Warner Communications Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Warner Communications Inc., except Time Warner Entertainment Company, L.P.; and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Audio Product” means any prerecorded music in any physical, electronic, or other predominantly audio form or format, now or hereafter known, including, but not limited to, any compact disc, magnetic recording tape, audio DVD, audio cassette, album, audiotape, digital audio tape, phonograph record, electronic recording, or digital audio file (*i.e.*, digital files delivered to the consumer electronically to be stored on the consumer’s hard drive or other storage device).
- D. “Video Product” means any prerecorded visual or audiovisual product in any physical, electronic, or other form or format, now or hereafter known, including, but not limited to, any videocassette, videotape, videogram, videodisc, compact disc, electronic recording, or digital video file (*i.e.*, digital files delivered to the consumer electronically to be stored on the consumer’s hard drive or

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other storage device), that includes a performance by The Three Tenors.

- E. “Seller” means any Person other than Respondent that produces or sells at wholesale any Audio Product or Video Product.
- F. “Joint Venture Agreement” means an agreement between Respondent and a Seller that provides that the parties to the agreement shall collaborate in the production or distribution (including, without limitation, through the licensing of intellectual property) of Audio Products or Video Products.
- G. An Audio Product or Video Product is “Jointly Produced” by Respondent and a Seller when, pursuant to an agreement between Respondent and such Seller, each contributes significant assets to the production or distribution of the Audio Product or Video Product (including, without limitation, personal artistic services, intellectual property, technology, manufacturing facilities, or distribution networks) to achieve procompetitive benefits. For example and without limitation, an Audio Product or Video Product is “Jointly Produced” by Respondent and a Seller when (1) such product is manufactured or packaged by such Seller and sold at wholesale by Respondent, or (2) such product is manufactured or packaged by Respondent and sold at wholesale by such Seller.
- H. “The Three Tenors” means Jose Carreras, Placido Domingo and Luciano Pavarotti.
- I. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.
- J. “Officer, Director, or Employee” means any officer or director or management employee of WCI with responsibility for the pricing, marketing, or sale in the United States of Audio Products or Video Products.

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- K. “United States” means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

IT IS FURTHER ORDERED that Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, soliciting, participating in, entering into, attempting to enter into, implementing, attempting to implement, continuing, attempting to continue, or otherwise facilitating or attempting to facilitate any combination, conspiracy, or agreement, either express or implied, with any Seller:

- A. to fix, raise, or stabilize prices or price levels, in connection with the sale in or into the United States of any Audio Product or any Video Product; or
- B. that prohibits, restricts, regulates, or otherwise places any limitation on any truthful, non-deceptive advertising or promotion in the United States for any Audio Product or any Video Product.

III.

IT IS FURTHER ORDERED that:

- A. It shall not, of itself, constitute a violation of Paragraph II.A. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement to set the prices or price levels for any Audio Product or Video Product when such agreement is reasonably related to a lawful Joint Venture Agreement and reasonably necessary to achieve its procompetitive benefits.

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B. It shall not, of itself, constitute a violation of Paragraph II.B. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with an agreement that regulates or restricts the advertising or promotion for any Audio Product or Video Product where such agreement is reasonably related to a lawful Joint Venture Agreement and reasonably necessary to achieve its procompetitive benefits.

C. It shall not, of itself, constitute a violation of Paragraph II.A. of this Decision and Order for Respondent and a Seller to enter into, attempt to enter into, or comply with an agreement to set the prices or price levels for any Audio Product or Video Product that is Jointly Produced by Respondent and such Seller.

D. It shall not, of itself, constitute a violation of Paragraph II.B. of this Decision and Order for Respondent and a Seller to enter into, attempt to enter into, or comply with an agreement that regulates or restricts the advertising or promotion for any Audio Product or Video Product that is Jointly Produced by Respondent and such Seller.

E. It shall not, of itself, constitute a violation of Paragraph II.B. of this Decision and Order for Respondent to enter into, attempt to enter into, or comply with a written agreement, industry code, or industry ethical standard that is: (1) intended to prevent or discourage the advertising, marketing, promotion, or sale to children of Audio Products or Video Products labeled or rated with a parental advisory or cautionary statement as to content, and (2) reasonably tailored to such objective.

IV.

IT IS FURTHER ORDERED that:

A. Within sixty (60) days after the date this Decision and Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that Respondent has complied and is complying with this Order.

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B. One (1) year after the date this Decision and Order becomes final, annually for the next four (4) years on the anniversary of the date this Decision and Order becomes final, and at other times as the Commission may require, Respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which it has complied and is complying with this Decision and Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Decision and Order; and

B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

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VII.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Decision and Order becomes final, send a copy of this Decision and Order by first class mail to each Officer, Director, or Employee;
- B. Mail a copy of this Decision and Order by first class mail to each person who becomes an Officer, Director, or Employee, no later than (30) days after the commencement of such person's employment or affiliation with Respondent.

VIII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate twenty (20) years after the date on which it is issued.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order from Warner Communications Inc. (“Warner”). Warner is a subsidiary of AOL Time Warner Inc., and has its principal place of business in New York, New York.

The proposed Consent Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and decide whether it should withdraw from the agreement or make final the agreement's proposed Order.

The Commission has not held an evidentiary hearing concerning the complaint. By accepting this agreement, the Commission is affirming only that it has reason to believe that the allegations in the complaint are well-founded.

The Commission’s complaint charges that Warner has violated Section 5 of the Federal Trade Commission Act by agreeing with certain subsidiaries of Vivendi Universal S.A. (the “Universal Respondents”) to fix prices and to forgo advertising. According to the Commission’s complaint, the Universal Respondents are the successor firms to PolyGram Music Group.¹ The Universal Respondents have not signed an agreement containing a proposed consent order, and hence the Commission’s antitrust claims against the Universal Respondents will be addressed in an administrative trial.

¹ PolyGram N.V. was acquired by The Seagram Company Ltd. in 1998. Two years later, The Seagram Company Ltd. merged with Vivendi S.A. and Canal Plus S.A. to form Vivendi Universal S.A.

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The alleged conspiracy involves audio and video products featuring the renowned opera singers Luciano Pavarotti, Placido Domingo, and Jose Carreras -- known collectively as The Three Tenors. Beginning in 1990, The Three Tenors have come together every four years at the site of the World Cup soccer finals for a combination live concert and recording session. According to the complaint, prior to each performance, the concert promoter selects one (or more) of the major music/video distribution companies to distribute compact discs, cassettes, videocassettes, and videodiscs derived from the master recordings.² Distribution rights to the original 1990 Three Tenors performance, entitled *The Three Tenors*, were acquired by PolyGram Music Group. Distribution rights to the follow-up performance, *The Three Tenors in Concert 1994*, were acquired by Warner Music Group.

The complaint alleges that in 1997, Warner Music Group and PolyGram Music Group agreed to collaborate in the distribution of audio and video products derived from the next Three Tenors World Cup concert, scheduled for Paris on July 10, 1998. The parties agreed that Warner Music Group would distribute the 1998 releases in the United States; that PolyGram Music Group would distribute the 1998 releases outside of the United States; and that the firms would share all costs, profits, and losses on a 50/50 basis. The complaint does not challenge the formation or basic structure of the Warner/PolyGram joint venture.

According to the complaint, as the concert approached, Warner Music Group and PolyGram Music Group became concerned that the audio and video products that would be derived from the Paris concert would not be as original or as commercially appealing as the earlier Three Tenors releases. In order to reduce competition from these earlier releases, Warner Music Group and PolyGram Music Group adopted what they called a “moratorium” agreement. PolyGram Music Group agreed not to discount and

² The concert promoter is responsible for producing the master recordings.

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not to advertise the 1990 Three Tenors album and video during a designated time period (from August 1, 1998 through October 15, 1998). In return, Warner Music Group agreed not to discount and not to advertise the 1994 Three Tenors album and video during the same interval.

According to the complaint, the third Three Tenors album and video, both entitled *The Three Tenors -- Paris 1998*, were released on August 18, 1998, and were distributed in the United States by Warner Music Group. During the moratorium period, PolyGram Music Group refrained from discounting or advertising the 1990 Three Tenors album and video. During this period, Warner Music Group likewise refrained from discounting or advertising the 1994 Three Tenors album and video.

Finally, the complaint alleges that the moratorium agreement was not reasonably necessary to the formation or to the efficient operation of the joint venture between Warner Music Group and PolyGram Music Group. Rather, the effect of the moratorium agreement was to restrain competition unreasonably, to increase prices, and to injure consumers.

Warner has signed a consent agreement containing the proposed Consent Order. The proposed Consent Order would prohibit Warner from: (i) agreeing with a competitor to fix, raise, or stabilize prices for any audio product, or (ii) agreeing with a competitor to prohibit, restrict, or limit truthful, non-deceptive advertising and promotion for any audio product.³

The Federal Trade Commission is aware that there is a great deal of collaborative activity among companies in the music industry (*e.g.*, joint ventures, intellectual property licenses, sharing of artist rights and compositions). The proposed Consent Order re-affirms the Commission's view that participation in a

³ These Order provisions would also apply to video products that feature the Three Tenors. The proposed Order generally does not cover vertical restraints.

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joint venture is often pro-competitive, but that it is not a blanket excuse for price fixing or other serious restraints on competition. In this regard, The Antitrust Guidelines for Collaborations Among Competitors, issued by the Federal Trade Commission and the U.S. Department of Justice in April 2000, should not be read to suggest that all agreements “related to” a joint venture will be analyzed under the full rule of reason.

There are, however, situations in which horizontal restraints on price competition and advertising are permissible. Thus, the proposed Consent Order contains exceptions to the above-described prohibitions that are intended to permit Warner to engage in certain lawful and pro-competitive conduct. First, when Warner and a competing seller jointly produce a new audio product, the Order does not bar the firms from jointly setting the selling price and jointly directing the advertising campaign for that product. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).⁴ Second, when Warner and a competing seller enter into a legitimate joint venture agreement, the order does not bar the firms from entering into ancillary restraints both reasonably related to the venture and reasonably necessary to achieve the pro-competitive benefits of the venture. *See NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).

The Commission’s complaint alleges that the Warner/PolyGram moratorium agreement was not a lawful restraint on competition. Of critical importance is the allegation that the parties’ restrictions on competitive activity were not limited to jointly produced products. Instead, the complaint charges that Warner Music Group and PolyGram Music Group agreed to fix the prices of the pre-existing Three Tenors releases --

⁴ In order to fall within this proviso, the collaborating parties must each contribute significant assets toward production of the audio product so as to achieve pro-competitive benefits. Sham collaborations will not shield an agreement on price. *Cf. Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

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products that were separately produced and separately distributed. Restraints that operate on products outside of a joint venture will be scrutinized by the Commission with great care,⁵ particularly if the restraints are directed at price. Here the Commission has reason to believe that the alleged agreement between Warner and PolyGram is not reasonably related to the joint venture or reasonably necessary to achieve procompetitive benefits of the joint venture and is therefore per se unlawful.

One specific question involved in this proceeding is whether the moratorium agreement was reasonably necessary in order to address a free-rider problem.⁶ Suppose, hypothetically, that Warner Music Group's investment in advertising the 1998 Three Tenors album in the United States brings consumers into the record stores. Suppose further that many such consumers then opt to purchase, at a lower price, the 1990 album distributed by PolyGram Music Group. The result may be that PolyGram Music Group benefits from Warner Music Group's investment, leaving

⁵ See *General Motors Corp.*, 103 F.T.C. 374 (1984) (consent order) (manufacturing joint venture between General Motors and Toyota approved by the Commission, subject to conditions aimed at reducing the likelihood of collusion between the competitors with regard to both joint venture products and products outside the joint venture).

⁶ See *Chicago Pro. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992):

It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive. This makes investments in design and distribution of products less attractive, to the ultimate detriment of consumers. Control of free-riding is accordingly an accepted justification for cooperation.

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Warner Music Group (arguably) with less incentive to invest resources in promoting the 1998 Three Tenors album.⁷

The Commission has reason to believe that this hypothetical scenario does not justify the restraints on competition alleged in the complaint. According to the complaint, Warner Music Group and PolyGram Music Group agreed to share the cost of advertising the 1998 Three Tenors album. It follows that, with regard to such advertising, PolyGram Music Group need not be characterized as a free rider. In the words of Judge Easterbrook: “Free-riding is the diversion of value from a business rival’s efforts without payment When payment is possible, free-riding is not a problem because the ‘ride’ is not free.” *Chicago Pro. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992).⁸ More generally, when faced with a potential free-rider problem, firms should consider whether there are practical, less-restrictive alternatives than price-fixing.

The proposed Consent Order includes a third proviso that is designed to ensure that the Order does not impede Warner’s ability to participate in industry efforts to discourage the promotion of violent or otherwise inappropriate audio and video products to children. Although Warner is generally prohibited from agreeing with a competitor to restrict truthful and non-deceptive advertising, Warner is expressly permitted under the

⁷ Note that this is a hypothetical example. It is not apparent, *inter alia*, that an advertising campaign promoting the 1998 Three Tenors album would necessarily lead a significant number of consumers to purchase the 1990 Three Tenors album.

⁸ *Accord High Technology Careers v. San Jose Mercury News*, 996 F.2d 987, 992 (9th Cir. 1993); *Toys R Us, Inc.* ____ F.T.C. ____ (1998), 1998 FTC LEXIS 119, 131-35 (1998), *aff’d*, 221 F.3d 928, 938 (7th Cir. 2000); H. Hovenkamp, XIII *Antitrust Law* at 334 ¶ 2223b (1999) (“[F]ree rider defenses should be rejected when the firm that controls the input is able to sell, rather than give away, the good or service that is subject to the free ride.”).

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Order to join with other sellers to prevent the advertising, marketing or sale to children of audio products or video products labeled or rated with a parental advisory or cautionary statement as to content.

The purpose of this analysis is to facilitate public comment on the proposed Order, and it is not intended to constitute an official interpretation of the agreement and proposed Order or to modify in any way its terms.

Statement

Statement of Commissioner Mozelle W. Thompson

As I said in my statement¹ following the issuance of The Antitrust Guidelines for Collaborations Among Competitors,² I believe that joint ventures can enable companies to expand into foreign markets, fund expensive innovation and research efforts, and lower costs to the benefit of industry and consumers alike. But an otherwise legitimate joint venture may not shield price fixing or any other form of anticompetitive restraint if the restraint is not both reasonably related to the venture and reasonably necessary to achieve the venture's procompetitive objectives. The Commission's complaint against Warner Communications and the accompanying consent order that we accepted for public comment today underscore this important principle of joint venture law.

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<<<http://www.ftc.gov/os/2000/04/antitrustguidethompson.htm>>>

² The Federal Trade Commission and the U.S. Department of Justice issued the Guidelines in April 2000.

<<<http://www.ftc.gov/bc/guidelin.htm>>>

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IN THE MATTER OF

METSO OYJ AND SVEDALA INDUSTRI ABCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-4024; File No. 0010186**Complaint, September 7, 2001--Decision, October 19, 2001*

This consent order addresses the acquisition by Respondent Metso Oyj (“Metso”) – a Finnish corporation and one of the world’s largest suppliers of rock processing equipment such as cone crushers, jaw crushers, primary gyratory crushers, and grinding mills – of Respondent Svedala Industri AB (“Svedala”), a Swedish corporation that is another large supplier of such equipment. The order, among other things, requires the respondents to divest the Metso worldwide primary gyratory crusher business to Sandvik AB – a publicly-traded Swedish corporation, and a leading global supplier of drilling and excavation machinery, equipment and tools for mining and construction industries – and to divest their grinding mill businesses to Outokumpu Oyj (“Outokumpu”), a diversified Finnish metals corporation. The order also requires the respondents to divest Svedala’s worldwide cone crusher and jaw crusher businesses to Sandvik. In addition, the order prohibits the respondents, for one year, from soliciting or inducing any employees or agents of the rock processing equipment businesses involved in the divestitures to terminate their employment with Sandvik or Outokumpu. The order also requires the respondents, for one year, to provide technical assistance and training at cost to Sandvik and Outokumpu.

Participants

For the Commission: *Matthew J. Reilly, Joanne C. Lewers, Randall A. Long, Eric D. Dowell, Katherine F. Seifert, Ann Malester, David A. von Nirschl, Roberta S. Baruch, Jeffrey Fischer, Roger Boner, Daniel O’Brien, and David Scheffman.*

For the Respondents: *M. Elaine Johnston, Martin M. Toto, and Tara A. Hunt, White & Case, Robert S. Schlossberg, Christine A. Laciak, and Robert B. Wiggins, Morgan, Lewis & Bockius.*