FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1967, TO DECEMBER 31, 1967

IN THE MATTER OF

CORAN BROS. CORPORATION ET AL.

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

Docket 8697. Complaint, July 20, 1966—Decision, July 11, 1967

Order requiring a Boston, Mass., distributor of commercial solders to cease misrepresenting the nature, quality or composition of any of its solder products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Coran Bros. Corporation, a corporation, and John Coran and Charles Coran, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State (Commonwealth) of Massachusetts, with its principal office and place of business located at 509 East 2nd Street in the city of Boston, State of Massachusetts.

Respondents John Coran and Charles Coran are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of commercial solders including wire solders designated "50/50 by volume" and "40/60 by volume." Said solders are sold to wholesalers and retailers for ultimate resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PAR. 5. By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PAR. 6. In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mrs. Rose W. Sloan and *Mr. Herbert L. Blume* for the Commission.

Mr. Jack H. Backman and *Mr. Jerrold C. Katz,* Boston, Mass., attorneys for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 27, 1967

In the complaint, which was filed on July 20, 1966, the respondents are charged with the violation of Section 5 of the Federal Trade Commission Act in connection with the manner in which they described and labeled certain wire solders sold by them in commerce. The complaint reads in part:

PARAGRAPH FOUR: In the course and conduct of their business, and for the purpose of inducing the purchase of their commercial wire solders, respondents have engaged in the practice of labeling and describing certain of said solders as "50/50 by volume" and "40/60 by volume."

PARAGRAPH FIVE: By and through the use of the aforesaid manner of labeling and describing said wire solders, the respondents represented:

(1) That their wire solder designated "50/50 by volume" is a 50/50 solder which is known in the trade as a solder containing 50% tin and 50% lead by weight.

(2) That their wire solder designated "40/60 by volume" is a 40/60 solder which is known in the trade as a solder containing 40% tin and 60% lead by weight.

PARAGRAPH SIX: In truth and in fact:

(1) Their wire solder designated "50/50 by volume" is not a 50/50 solder as known in the trade as it contains less than 50% tin and more than 50% lead by weight.

(2) Their wire solder designated "40/60 by volume" is not a 40/60 solder as known in the trade as it contains less than 40% tin and more than 60% lead by weight.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PARAGRAPH SEVEN: In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PARAGRAPH EIGHT: The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PARAGRAPH NINE: The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

In the answer filed by the respondents, they admit the allegations of Paragraph Four, but deny that the statements and representations are false, misleading and deceptive.

Hearings were held at Boston, Massachusetts, on November 28, 29, and 30, 1966, at which time complaint counsel put in their case and the respondents submitted their defense. Testimony was received from a total of 22 witnesses called by complaint counsel. The defense submitted the testimony of one witness, respondent John Coran, who had testified in connection with the case-in-chief. On January 13, 1967, the parties filed proposed findings, together with briefs in support thereof. Replies thereto were filed by complaint counsel on January 23, 1967, and by respondents on January 25, 1967. The proposed findings and conclusions not hereinafter specifically found or concluded are herewith rejected. The following abbreviations have been used herein: "C." for Commission's Complaint; "A." for Respondents' Answer; "Par." for paragraph; "Tr." for Transcript of Proceedings; and "CX" for Commission's Exhibit. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Coran Bros. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office, manufacturing plant and principal place of business located on premises owned by it at 509 East 2nd Street, Boston, Massachusetts (C., Par. One; A., Par. 1; Tr. 21). After its organization in December 1947 or January 1948 to the year 1951, it was engaged in the scrap metal business (Tr. 47–8, 403). The corporation is now, and since 1951 has been, engaged in the manufacture, offering for sale, sale, and distribution of commercial solders that are mostly sold to wholesalers and retailers, located in approximately 30 States of the United States, for ultimate sale to the public (C., Par. Two; A., Par. 2; Tr. 36). Its gross sales in the years 1963, 1964, and 1965 were $506,000, $743,000, and $829,000, respectively; for the first ten months of 1966, its gross sales were $619,000 (Tr. 296–99). In the conduct of its business, the corporation now causes, and for some time last past has caused, its products, when sold, to be shipped from its place of business in Massachusetts to purchasers thereof located in various other States of the United States, and maintains, and at the times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act (C., Par. Three; A., Par. 3; Tr. 36–7).

The respondent John Coran is president and respondent Charles Coran is treasurer of the corporation (brothers) (Tr. 22, 67). Their address is the same as that of the corporate respondent (Tr. 21). They, together with Ruth Coran, the wife of John Coran, constitute the board of directors (Tr. 66). Since its inception, the corporation has been a family business (Tr. 45). John Coran owns 80% and Anne Coran, the wife of Charles Coran, 20%, of the stock of the corporation (Tr. 45). A third brother, Hyman B. Coran, did own 40% of the stock, but this was acquired by John Coran five or six years ago (Tr. 45). Although the respondents in their answer admit the allegation of the complaint that John Coran and Charles Coran "formulate, direct and control the acts and practices of the corporate respondent" (C., Par. One; A., Par. 1), the evidence establishes that Charles Coran functions only as a salesman for the corporation on a salary basis, and has no part in formulating any of the policies of the corporation (Tr. 66–9). John Coran, from the outset of the corporation, has set the policies of the corporation, and the acts and practices that are challenged in this proceeding are the results of a decision reached by him without consulting the other directors or the other stockholder (Tr. 29–30, 37, 40, 43, 45–6, 49–50, 66–7).

The record establishes that it has been industry practice for many years, and is current industry practice, when solders are labeled by numerical designations such as "50/50" and "40/60" that the first number before the slant mark (/) indicates the percentage of tin by weight and the second number after the slant mark (/) indicates the percentage of lead by weight. Further, the record also establishes that it has not been, nor is it presently, industry practice to use the words "by weight" in connection with the aforesaid numerical designations, but that the use alone of such numerical designations indicates the percentage of tin and lead by weight.

Mr. Robert A. Putney, assistant manager of the metal division of the National Lead Company, having been employed by that company for 36 years (Tr. 136–37) testified:

Q. And as to product designation on the package or any other advertising description, to your knowledge, if you know, how has the product been sold as to product designation? With respect to tin-lead content?

A. Well, 50 per cent tin, 50 per cent lead wire solder would mean an alloy where per hundred pounds, you would use 50 pounds of lead and 50 pounds of tin.

Q. And would this apply to a 40/60 designation as well?

A. Forty pounds of tin and 60 pounds of lead, right.

Q. Based upon your knowledge of 36 years experience in the industry, has the product been sold on that weight basis?

A. Yes, it has (Tr. 140–41).

* * * * * * *

Q. Now, is it our understanding based on your marketing knowledge that prior to two years ago, approximately, all solders are or were described in the trade purely on a by weight basis as to tin-lead ratio?

A. If they were described as 50/50 or 40/60, the practice in the trade has been for those solders to contain 50 per cent tin, 50 per cent lead in the case of 50/50, and 40 per cent tin, 60 per cent lead in the case of 40/60.

Q. That is by weight, not volume?

A. By weight (Tr. 141–42).

Mr. Alan R. Oatey, vice president of L. R. Oatey Company, Cleveland, Ohio, manufacturers of plumbing, automotive and hardware supplies, as well as solders, testified (Tr. 214):

THE WITNESS: Well, it has been historical in the industry to mark the spools by the 50/50 designation or 40/60. That is considered to be weight. That is accepted by the industry, by the manufacturers, and by the people who consume the product.

* * * * * * *

THE WITNESS: I do know, and these numbers stand for—the first 50, the first number always stands for tin, and in this case, 50 per cent would be tin. This is important, too, because in the industry, the first number given is always tin. This is how it has been right along.

Respondent John Coran testified (Tr. 410):

Q. Mr. Coran, in connection with your wire roll solder sold in spools, particularly one-pound spools, how do you label the 50/50 solder sold by your company when it is sold by weight?

A. 50 slant 50.

Q. Do the words "by weight" appear?

A. No.

Wire solders labeled and designated "50/50 by volume" and "40/60 by volume" were first placed on the market by the respondent corporation in the year 1963. It pioneered in this type of labeling (Tr. 41–2). Thereafter other manufacturers employed the "by volume" label. John Coran, when asked, "Have other competitors labeled their product by volume?", answered: "I have seen at least one, maybe two. I have heard of several others, but I have never seen their labels" (Tr. 414). The Commission issued a complaint, dated August 2, 1966, against *Thomas F. Lukens Metal Company, et al.,* of Philadelphia, Pennsylvania (Docket No. C–1089), wherein, on the same date, the Commission entered a consent order to cease and desist from the practices challenged as unfair and deceptive [70 F.T.C. 479]. A complaint, dated September 21, 1966, was issued against *Bow Solder Products Co., Inc., et al.,* of Newark, New Jersey (Docket No. 8712), wherein a consent cease and desist order was entered on January 19, 1967 [71 F.T.C. 48]. In each instance, the order recited that it was for settlement purposes only and did not constitute an admission by the respondents that they had violated the law. The charges in both complaints were similar to those in this proceeding. Respondents' counsel brought out on cross-examination of Mr. Putney of National Lead Company that four or five years ago one of the branches of his company had, for a period of about six months, labeled a solder with the number "50," which had only 40% tin by weight. In this connection, Mr. Putney testified (Tr. 155):

> Now, when we received the letter from the Federal Trade Commission about four years ago and we reviewed all of the names assigned to the various grades of solder that we make, and when we found this out, we stopped it.

Mr. Oatey of L. R. Oatey Company testified on cross-examination that his company did label solders with the numbers "50" and "40," but they contained only 40% and 30% tin by weight, respectively, and the practice was discontinued over four years ago as a result of a letter from the Federal Trade Commission. Mr. Oatey said:

> This letter was sent to most all manufacturers pointing out that there was problems in the solder industry and there has been problems for many years and they were being the clearing house for trying to correct this situation. They were asking the manufacturers to discontinue labeling solders by numbers and any other designation that would cause confusion in the type of solder that it was. With this, we discontinued the use of the number 40 and the number 50 (Tr. 232).

When asked, "Are people apt to believe when you label that as a 50 as containing 50 per cent tin?", Mr. Oatey answered: "This is why we discontinued it. Exactly right" (Tr. 231).

A "50/50 by volume" solder has a tin content of 39% by weight (61% lead), and a "40/60 by volume" solder a tin content of approximately 29% by weight (71% lead). This is explained by the fact that tin has a specific gravity of 7.3 and lead 11.4 (Tr. 204). Specific gravity of solids (such as the metals, tin and lead) is defined as the ratio of the weight of any given volume of the substance to the weight of equal volume of water (*Webster's New Collegiate Dictionary,* 1961). Therefore, tin is 7.3 times, and lead 11.4 times, as heavy as water. Thus, it is apparent that the weight of tin in a "50/50 by volume" solder is considerably less than 50%, and the weight of tin in a "40/60 by volume" solder is considerably less than 40%.

The principal solders used in the plumbing trade are solders designated and labeled "95/5," "50/50," and "40/60." Mr. Charles A. Buresh, a plumber, testified that "95/5" containing 95% tin and 5% antimony is used "for high temperature work, heating—copper heating pipes * * * say, running water, say 220, 220 degrees through heating pipes with a lot of expansion and contraction, frequent expansion and contraction" (Tr. 369–370); that the higher the temperature, the more tin you would want in the solder (Tr. 371); and that he uses "50/50" for "General purpose work, which is most work" (Tr. 366). Mr. Robert O. Weider, who is in the plumbing and heating business, testified: "Well, of course, the more tin content there is to the solder, the better the solder or the finer the solder is" (Tr. 317); and that "50/50" suits his general requirements (Tr. 318). Mr. Oatey of National Lead Company testified that "when you reduce the tin content, you are reducing the strength of the joint" (Tr. 242); that "most of them [plumbers] like to use 50/50 because it is recommended by the copper people as being the solder to use. This is the standard of the industry" (Tr. 242); that "Some 40/60 may work" (Tr. 243); that "No, 30/70, you are getting down so low in tin content, that the solder is chalky" (Tr. 243); and that "40/60 is not too bad a solder, but you can tell the difference between 40/60 and 50/50" (Tr. 243).

There were received in evidence nine one-pound spools of wire solder, five labeled "50/50 by volume," and four labeled "40/60 by volume," the products of the corporate respondent, which had been purchased by Attorney Richard J. Walsh of the Commission's Boston office during the month of August, 1966 from four wholesale supply houses located in the States of Connecticut and Rhode

Island (Tr. 97–115; CX 8, 9, 11, 12, 13, 15, 16, 17, 19, 20, 21, 22, 23). The said spools of solder were submitted to the Arnold Greene Testing Laboratories, Inc., of East Natick, Massachusetts, for analysis to determine the tin and lead content (Tr. 106). Copies of the laboratory reports setting forth the results of the tests are in the record. With reference to the five samples labeled "50/50 by volume," the reports show that the percentage of tin content by weight varied from 38.8% to 41.10%. The reports on the four samples labeled "40/60 by volume" show the percentage of tin by weight varied from 29.02% to 29.17%, and the lead content by weight varied from 70.32% to 70.62%. (The percentage of antimony content by weight on the nine samples varied from 0.18% to 0.41%; Tr. 115–136.) The findings show that, within tolerable allowances, the volume of tin and lead in each of the spools is consistent with the labels (Tr. 135–36).

Complaint counsel recognize that the products in question contain the volume of tin and lead represented and are truthfully labeled, but contend that the use of the "by volume" designation by respondents has a capacity and tendency to mislead members of the purchasing public. It is the position of the respondents, in their brief filed with their proposed findings, "that the members of the trade and the general public can distinguish between ounces and pounds, meters and feet, *weight* and *volume*, cubes and squares, grams and ounces, and other universally accepted standards of measurement, where it is relevant to the requirements of their work"; and that, so long as the "by volume" designation is a truthful statement, there can be no deception.

The labeling of a product with a designation which is literally true but nevertheless misleading or confusing is contrary to the elementary legal prohibition against deception.

In *United States* v. *95 Barrels of Vinegar, et al.*, 265 U.S. 438 (1924), the Court said (at 443):

> Deception may result from the use of statements not technically false or which may be literally true. * * * It is not difficult to choose statements, designs and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the act.

The principles of the above quoted case, which arose under the Food and Drugs Law of 1906, have been extended to matters arising under the Federal Trade Commission Act covering a multitude of products including, by way of illustration and not limitation, automotive lubricating oil,[1] lumber,[2] flour,[3] and many other products.

In *Bockenstette, et al.* v. *F.T.C.*, 134 F. 2d 369 (10th Cir. 1943), the Court said (at 371):

> Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive.

See also *Koch, et al.* v. *F.T.C.*, 206 F. 2d 311 (6th Cir. 1953).

In *Korber Hats, Inc.* v. *F.T.C.*, 311 F. 2d 358 (1st Cir. 1962), the Court said (at 360–61):

> [1] Section 5 of the Act makes unlawful unfair methods of competition and unfair or deceptive acts or practices in commerce. Congress thus gave the Commission a broad mandate to prevent public deception in the give and take of the market place. It is clear that what is an "unfair" method of competition can only be assayed in the environmental and marketing context of the particular practice put in issue. In *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 532, 533, 55 S.Ct. 837, 844, 79 L.Ed. 1570 (1935), the Court said: "What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."
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> [2] The power of the Commission to issue cease and desist orders against mislabelling or false advertising was recognized at an early date. *Federal Trade Comm.* v. *Winsted Co.*, 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729 (1922). Courts have consistently upheld the Commission's efforts to compel manufacturers and retailers to adhere to a high level of honesty in connection with their labelling and advertising habits, see *Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654, 656, 65 A.L.R.2d 220 (7th Cir., 1956), *cert. denied*, 352 U.S. 1025, 77 S. Ct. 591, 1 L.Ed.2d 597 (1957), and to "insist upon the most literal truthfulness" in marketing their goods. *Moretrench Corporation* v. *Federal Trade Commission*, 127 F. 2d 792, 795 (2nd Cir., 1942). In this area not only the cynical but the naive are to be protected and if the Commission, in its discretion, "thinks it best to insist upon a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise their judgment." *General Motors Corp.* v. *Federal Trade Commission*, 114 F. 2d 33, 36 (2nd Cir., 1940).
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> [3] While advertising and labelling are frequently considered together, there is good reason to insist upon a higher degree of veracity in the latter. It may well be argued that consumers accept labelling statements literally while perhaps viewing with a more jaundiced eye the vaunted claims of the advertising media.

The question here is whether there is substantial evidence to support a finding that a consumer in buying the corporate re-

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[1] *Royal Oil Corporation, et al.* v. *F.T.C.*, 262 F. 2d 741 (4th Cir. 1959); *Double Eagle Refining Co., et al.*, v. *F.T.C.*, 265 F. 2d 246 (10th Cir. 1959), *cert. denied*, 361 U.S. 818; *Mohawk Refining Corporation, et al.* v. *F.T.C.*, 263 F. 2d 818 (3d Cir. 1959).

[2] *F.T.C.* v. *Algoma Lumber Co., et al.*, 291 U.S. 67 (1934).

[3] *F.T.C.* v. *Royal Milling Co. et al.*, 288 U.S. 212 (1933).

spondent's solders labeled "50/50 by volume" or "40/60 by volume" might be misled.

The record contains the testimony of the following five Commission witnesses who were engaged in the wholesale plumbing supply business:

Mr. Irving Rose, who has been in the plumbing supply business for forty years and is president of the Mattapan Supply Company with locations in Boston, Medford, and Mattapan, Massachusetts, with annual sales volumes somewhat in excess of one million dollars (Tr. 72–3), said that he bought solder from Coran only two or three times (Tr. 79). He testified further:

A. Well, we buy 95/5 solder. We buy that by the number. This we know. This is a guaranteed item to us, 95/5. We buy 50/50 or 40/60 as by volume. There is a certain marking on 50/50 that we buy by volume. They will tell us that it will be 43 per cent tin, 42 per cent, it will vary from time to time. We buy 50/50 solder, and if we tell them that we want exact 50/50 solder, they will tell us whether they can give it to us or not.

Q. Have you been familiar with solder which is labeled 50/50 by volume?

A. I would only be guessing if I say it (Tr. 76).

* * * * * * *

Q. Now, do you recall when you first came across a solder labeled 50–50 by volume?

A. As far as I know, this has been marked this way for the many, many years that I have been in business, the 50/50. There is a certain hyphen one way. I used to be able to tell the difference by the marking.

HEARING EXAMINER JOHNSON: The question was by volume.

THE WITNESS: By volume, yes.

HEARING EXAMINER JOHNSON: It had been marked that way?

THE WITNESS: I can't recall. I said I would be guessing if I said so (Tr. 77).

* * * * * * *

HEARING EXAMINER JOHNSON: If you read 50/50 by volume on the spool, would that make any difference to you?

THE WITNESS: I would believe it is 50/50 by volume.

HEARING EXAMINER JOHNSON: Yes, and you would not believe it is 50/50 by weight, would you?

THE WITNESS: I would not know what 50/50 by weight meant (Tr. 80).

Mr. Alfred Paul Ardente, of Providence, Rhode Island, has been selling plumbing supplies since 1946, doing buisness as The Ardente Supply Company, Inc. Prior thereto, starting in 1930, he was a plumber. The company buys and sells the corporate respondent's products. During the course of his examination, he was shown four spools of Coran solder (CX 20, 21, 22 and 23), which he had sold to Attorney Walsh of the Commission. When questioned with respect to the "By volume" label appearing on the exhibits, he stated (Tr. 262): "To us it really don't mean anything.

When I buy solder, I tell him I want 40/60 or 50/50 or 95/5, that's it." He added that he did not know if there is a difference between weight and volume. On cross-examination, he testified:

Q. Mr. Ardente, if you saw a solder labeled "50/50 by weight" and another solder labeled "50/50 by volume," would you know the difference?

A. No, I would not know the difference.

Q. You would not know the difference?

A. No.

Q. In other words, you just have no conception of the difference between weight and volume?

A. No (Tr. 265).

* * * * * * *

Q. In other words, you have no conception, actually, of the difference between weight and volume in general?

A. No, I take it for granted it is the same product. When I order 50/50, it should be 50 tin, 50 lead, and that's it (Tr. 266).

Mrs. Eleanor Rhian, of Providence, Rhode Island, testified that she has been running the Rhian Supply Company, which has been in business for 31 years, since her husband's death three years ago, and during the three years she has bought and sold Coran products (Tr. 266–68). She was shown the spools of solder labeled "50/50 by volume" (CX 16) and "40/60 by volume" (CX 17) which she sold to Attorney Walsh, and, upon being asked, "When you order the type of solder that we are referring to in these two exhibits, how do you specify the type of solder?", she replied: "Well, I order 40/60, 50/50, or 90/10, depending on what I need to fill orders" (Tr. 268). When asked what "by volume" means to her, she said: "It does not mean anything. I just read the number. That is it" (Tr. 269).

Mr. Abraham Feinstein, chairman of the board of the Republic Pipe and Supply Company of Roxbury, Massachusetts, has been in the plumbing supply business for over 35 years, but never sold any of the Coran solder (Tr. 273–74, 279). He testified (Tr. 275):

Well, we call the company up and order so many spools of 50/50, so many spools of 95/5, and so many spools of 40/60.

* * * * * * *

Well, that is how the plumbers ask for it and it is 50 per cent tin, 50 per cent lead.

He said there is no language or description on the solder package, other than the number, that had any significance to him in his business (Tr. 275). On cross-examination, he testified that he did not know if the spools of solder he had ordered were by volume or by weight (Tr. 276), and he never had occasion to do business with any solder marked "50/50 by volume" or "40/60 by volume" (Tr. 277).

Mr. Richard Rollins, manager for the past two years of the Atlantic Pipe and Supply Company of Boston, Massachusetts, with six years of experience in purchasing plumbing supplies, testified that he ordered spools of solder designated "50/50" and "95/5" (Tr. 335–36); that solder marked "50/50" contained 50% lead and 50% tin (Tr. 336); and that he "always figured it would be by volume" (Tr. 337).

The record also contains the testimony of the following nine consumer witnesses (six being engaged in the plumbing and heating trade) called at the instance of complaint counsel:

Mr. Robert L. Sawyer, a plumber since 1949, took over Edward Sawyer Company, Incorporated, of Mattapan, Massachusetts, a business his father started in 1918. When asked how he customarily bought tin-lead wire solder, he said: "Well, we order it 50/50 or 95/5. We, you know, place the order, we want so many spools of 50/50 and so many spools of 95/5" (Tr. 89–90). He testified that when at supply houses he had heard other people ordering solder: 'They usually go to a counter and say I want a spool of 50/50, or a pound of 50/50—you know, a spool or a pound. That is it. Or give me a roll or a spool or a pound of 95/5" (Tr. 91). He said that he would know the difference between "by volume" and "by weight" (Tr. 93); and on being asked how much tin there would be in a solder marked "50/50 by volume," he answered (Tr. 94):

> Well, if you make it down by weight, you would get a cubic foot of lead weighs approximately 400–some odd pounds and a cubic foot of tin weighs approximately 300–some odd pounds. I have not mathematically figured it out for a while. I think it comes to 40–60.

He testified further (Tr. 95):

> Q. During the course of your experience in purchasing solder, have you ever had occasion to receive solder marked 50/50 by volume when you ordered 50/50 solder?
>
> A. Well, it has been so long that we have bought these other brands of solder that I imagine we must have.
>
> HEARING EXAMINER JOHNSON: Do you know?
>
> THE WITNESS: To be honest with you, whether we have received it by volume?
>
> HEARING EXAMINER JOHNSON: Yes.
>
> THE WITNESS: The only way I can say is the way it was flowing, it was not 50/50 by weight, because we could not make a good tin joint.
>
> HEARING EXAMINER JOHNSON: You could not say that you received some 50/50 by volume when you ordered 50/50 by weight, could you, definitely?

THE WITNESS: Well, definitely, I would say the way the solder was flowing, the joints were being made up, we could assume that it was not a 50/50 joint.

Mr. William A. Strickland, of the William L. Collins Company of South Boston, Massachusetts, has been in the plumbing and heating business for 26 years. He testified that in connection with his work he uses "50/50" and "95/5" solder 75% of the time; and, when asked if that was by weight or by volume, he said: "By volume. By volume, I assume, yes. I don't know. I assume by volume" (Tr. 255); and that when he orders solder for copper pipe, he specifies (Tr. 255):

Just 50/50 solder. It is noted in the trade as fine solder, 50/50 solder. It is usually on your spool and says 50/50. It does not say by volume or by weight. Specifically. We usually buy Dutton's solder and I know that is 50/50.

He stated that solder marked "50/50" or "50/50 by volume" is the same thing as far as he is concerned—he does not know the difference (Tr. 255–56). On cross-examination the following exchange took place:

Q. However, assuming that you saw a solder labeled 50/50 by weight and you saw another solder, 50/50 by volume, you would understand the difference, would you not?

A. No, I would not. I would assume it was the same.

Q. You would assume it was the same?

A. I could tell the minute I used it.

Q. You could tell when you used it?

A. It would not be fine enough, if it was 50/50 by weight, it would not be fine enough.

Q. It would not be fine enough?

A. 50/50 by weight is too light. That is why they use the 50/50. It usually says "fine" on it, for that purpose, I assume.

Q. You know the difference between volume and weight, of course?

A. Positively (Tr. 256).

* * * * * * *

Q. By any chance, have you ever used Coran Brothers solder?

A. No, I never have. I have never heard of it.

Q. You have never heard of it?

A. No, we use Dutton and Dutch Boy, Puritan.

HEARING EXAMINER JOHNSON: Do they label their's by volume?

THE WITNESS: No, they just say 50/50 fine (Tr. 258).

Mr. Harry B. Sandofsky, of the Sandy Plumbing Company, Dorchester, Massachusetts, has been in the plumbing business over 40 years, and has had as many as 97 plumbers in his employ (Tr. 283–84). He testified that in soldering copper piping he uses "50–50, mostly" (Tr. 284–85); that in ordering that solder, "I would say send me a case of 50/50 solder" (Tr. 285); that he had ordered "50/50" solder and sometimes he had been sent solder marked "50/50 by volume" (Tr. 286); that, as far as he was concerned, "50/50" and "50/50 by volume" were one and the same thing (Tr. 287). On cross-examination, he testified:

Q. I was not clear on your answer. When you get a spool of solder and it is marked 50/50, do you assume that to be 50/50 by volume?

A. I never found out what "by volume" means.

Q. I see. And you don't know what by volume means?

A. No, I do not.

Q. You have never inquired?

A. I have inquired (Tr. 290).

* * * * * * *

Q. What led you to make inquiry?

A. Because if I am, if I have been in the business for over 40 years and Mr. Blume and the other gentleman walks into my place and asks me a question about solder, then I felt like a darned fool not knowing what that meant. And for my own curiosity. I wanted to know what "by volume" meant.

Q. And you don't know what "by volume" means?

A. I have not been able to find out what "by volume" is, no.

Q. Did Mr. Blume tell you?

A. No, sir (Tr. 291).

* * * * * * *

Q. When you say 40/60, do you know what 40/60 refers to?

A. Yes.

Q. What is that?

A. That is 60 per cent lead and 40 per cent tin (Tr. 293).

After the last answer, the hearing examiner inquired if it was "by weight or volume," to which the witness replied (Tr. 293–94):

Judge, I cannot answer you. I cannot answer that question for you, because until I saw the spools coming through marked "by volume", I never knew what it was and as I say, since Mr. Blume was in my office, I have inquired and I have gotten such vast variations of answers that I still have not got the answer for you.

Mr. Frank N. Zabarsky is with the Electronic Brazing and Soldering Company located at Waltham, Massachusetts, specializing in soldering for electronic firms in and around Boston. This is all government work, such as rockets, missiles, radar and space (Tr. 302–304). He testified that he uses tin-lead wire solder designated as "50/50" on brass, steel, bronze, stainless and copper, and that, when ordering this solder, he asks for "50/50" (Tr. 304); that in making purchases he has never been shipped a solder designated "50/50 by volume" (Tr. 305); that if it said on the spool "50/50 by volume," he stated, "It would not make any difference as long as it is 50" (Tr. 305). On cross-examination, when asked if he would "understand the difference between 50/50 by volume and 50/50 by weight," he answered: "I would question it, what the story is, by volume or by weight. I'd never order it that way. * * * It would confuse me" (Tr. 306–307).

Mr. Robert O. Weider, with the company of Otto G. Weider located at Dorchester, Massachusetts, has been in the plumbing business since 1936 and employs five men (Tr. 315–316). He testified that the only type of solder that he purchases is "50/50," which suits his general requirements (Tr. 317–18); and that the first time he came across a solder labeled "50/50 by volume" was "the other day" (Tr. 318). When asked, "When you buy your solder, does it make any difference to you after you say the numbers whether it says by volume or not?", he replied (Tr. 320):

> Well, in other words, what else could I buy? If a supplier supplies me with 50/50 by volume, I am sure I am not going to scout around and find some other solder that will say 50/50 by weight. I never seen a 50/50 by weight.

He also testified that he was getting the same quantity of tin in a solder labeled "50/50 by volume" as in a "50/50" solder (Tr. 321).

Mr. Richard W. Ross, manager of the machine and brazing shop of the Fab-Braze Corporation, Waltham, Massachusetts, an electronics business with approximately 50 men in the shop, has had 20 years experience as a machinist (Tr. 322–23, 333). He testified that in connection with his duties he purchases solder marked "50/50" (Tr. 324); that until he was shown Commission Exhibit 12 at the hearing, he had never seen a solder marked "50/50 by volume," and that if he received a solder labeled "50/50" by volume," it would be the same to him as a "50/50" solder (Tr. 329–333).

Mr. Gerald J. Vallati, of Dorchester, Massachusetts, doing business as the Gerald J. Vallati Company, has been in the plumbing and heating business since 1934, and employs one to three men (Tr. 341–42). He testified that the type of solder he uses is marked "50/50" or "95/5" (Tr. 343); that a "50/50" solder is 50% tin and 50% lead by weight (Tr. 341–351); that "about three years ago, two years ago, perhaps" he bought one spool labeled "50/50 by volume" (Tr. 352); that "I used part of it. I did not care too much—on the job I had to use it on, I mean, I would not want to take the chance. * * * It soldered all right, but back in my mind, I questioned it, you know" (Tr. 352); that he made inquiry about it at the supply house and "They told me that was 50/50 and that is it. I could not seem to break that down"

(Tr. 353). He further stated (Tr. 357): "I objected. But I needed that solder at that particular time and I did not want to chase around, so I took it."

Mr. Ernest L. Cataldo, after five years as a jeweler, was employed by the Fab-Braze Corporation of Waltham, Massachusetts, for almost ten years, and at the time of his appearance as a witness he was with, and had been with, the Cambridge Wave Guide Company for two months (Tr. 358–360). He testified that 99 per cent of his soldering work at the Fab-Braze Corporation was with silver solder, but that he had on occasion used tin-lead solders, using mostly solders labeled "50/50" (Tr. 361–62). When asked, "If you know, would a solder marked 50/50 by volume have the same content as a solder marked 50/50?", he answered (Tr. 362): "Should if it is marked. * * * If it is marked that. I go by the number."

Mr. Charles A. Buresh has been a plumber for about 17 years and, with two partners, does business at Dorchester, Massachusetts, under the name of Boston Bath Company (Tr. 363–65). He testified: "Generally today, in our work—as a matter of fact, 99.9 per cent—it is either 50/50 or 95/5" (Tr. 366); and that "We look for numerals indicated on the end of the spool, and it usually says 50 over 50 or 95 over 5" (Tr. 368). When asked, "Now, if that spool, after the 50/50, for example, said 'by volume,' would that make any difference to you?", he answered (Tr. 368):

> Well, I have not seen too many rolls like that. However, without stopping to actually think it over, I would still think that if I ordered 50/50 or 95/5, I would be getting those proportions of lead and tin.
>
> * * * * * * *
>
> That is right, a half pound, say a half pound of lead and a half pound of tin in a 50/50 one-pound spool.

On cross-examination, he testified:

> Q. You understand the difference between weight and volume, do you not?
>
> A. Yes.
>
> Q. Now, if you saw a solder that was marked 50/50 by volume, you would understand the difference between something marked 50/50 by volume and a solder that you bought 50/50 by weight, would you not?
>
> A. Possibly, if I sat down and thought it over. If I ordered solder on to a job and I had, say, a couple of men there working, busy with their jobs and so forth, I could get, say, a half dozen spools of the solder you are talking about and pay for it and not receive what I thought I was getting. I will answer it that way (Tr. 374–75).
>
> * * * * * * *
>
> I am in business. I don't go around looking and checking things carefully the way you are talking about. When I am on a job, sure I could pick up that, I could easily think I have 50/50 and so forth and not have it (Tr. 375).

On redirect examination, he testified (Tr. 376):

Q. Mr. Buresh, if somebody sold you a solder labeled "50/50 by volume," how much tin would it contain by weight?

A. Well, since "volume" refers to cubic space—this isn't exactly the place to do mathematical work, sitting here. Since lead is a great deal heavier than tin, I would be inclined to say that I would be getting more lead than tin, even though it was marked 50/50. Generally, mechanics mean in the field working, if you order 50/50 solder, they get a bunch of rolls of solder and it says 50/50 and if they were doing plumbing and heating, they look at the 50/50 and say, it is all right, we will do that for the plumbing work, and 95/5, it is for the heating, they would go ahead. They would not look at it, say it is by volume, it is this, it is that; they would go ahead and do the job. They would expect they were getting 50 per cent lead and 50 per cent tin.

Q. By weight?

A. By weight, yes.

Respondents used only one witness in connection with their defense. John Coran testified that when he labeled a solder "50/50 by volume," it contained 50 per cent tin and 50 per cent lead by volume; that when a customer requests "50/50 by volume," the company sells him "50/50 by volume"; and that when a customer requests solder "50/50 by weight," they sell him "50/50 by weight" (Tr. 396–97). When asked, "when a customer requests solder as 50/50, what do you sell him?", he answered (Tr. 397):

It depends on the customer. If he is an established, old customer, we sell him what he has had in the past, either 50/50 by weight or 50/50 by volume. If it is a new customer, we explain to him the difference between the two solders we make and let him make his own choice.

On cross-examination, he added (Tr. 402):

Q. Now, how is that explanation made?

A. That we have two grades of solder. One is made by weight and one is by volume.

Q. Yes, sir.

A. And by weight are equal parts by weight and by the volume are equal parts by volume of—well, let me fish for proper words.

Naturally, the by volume solder contains less tin, is less expensive. This is the general explanation we give.

Q. You don't know, though, whether they give that explanation to their customers, do you?

A. Who?

Q. Of your own knowledge?

A. Who are "they"?

Q. Your customers?

A. I don't know whether they do or not, no.

He also testified on cross-examination that they sell mostly to wholesale plumbing supplies and hardware outlets; they do have a few plumbing contractors that they sell to, but customarily they do not sell to plumbers (Tr. 400).

The evidence establishes that the "by volume" designation employed by the corporate respondent in the labeling of its solders has the capacity and tendency to deceive and mislead members of the purchasing public. Most of the wholesale vendors of plumbing supplies, and their customers, including plumbers and others, do not know the difference between solders marked "50/50" (which is by weight) and the "50/50 by volume." They are guided by the numerical designation in the ordering, selling and purchasing of solder, and to them a solder labeled "50/50 by volume" is the same product labeled "50/50."

In the conduct of its business, and at all times mentioned herein, the corporate respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by said respondent.

The use by the corporate respondent of the aforesaid misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said respondent's products by reason of said erroneous and mistaken belief.

The aforesaid acts and practices of the corporate respondent, as herein found, were, and are, all to the prejudice and injury of the public and of the said respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

It is the position of complaint counsel that any order entered herein should include John Coran in his individual capacity. (They concede that the complaint should be dismissed as to Charles Coran for lack of proof.) In their brief, they say (page 5), "there is more than adequate proof, particularly Mr. Coran's uncontradicted testimony to the effect that he is solely responsible for the overall management policy of the business of the corporation." A mere showing that an officer formulates, directs and controls the corporate policies and practices is not in itself sufficient to include in the order such an officer in his individual capacity. As the Commission and the courts have, in effect, stated, to justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future as an individual. One of the principal authorities relied upon by complaint counsel to support their position is *F.T.C.* v. *Standard Education Society,* 302 U.S. 112 (1937). There the Supreme Court recognized a finding by the Commission "that this corporation was organized by the individual respondent for the purpose of evading any order that might be issued," and stated (at 119):

> Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

In the Matter of Maryland Baking Company, et al., Docket No. 6327, 52 F.T.C. 1679 (1956), the Commission upheld a dismissal of a complaint against an officer of the corporation as an individual, saying (at 1691):

> There is no showing, moreover, of any special circumstances which would indicate a likelihood that Joseph Shapiro would cause an evasion of the order against the corporation. He is, in any event, bound by the order as a corporate officer. In the absence of some special reason for naming Joseph Shapiro personally, the order against the corporation, and its officers, representatives, agents, and employees, would seem to be adequate.

In the Matter of Kay Jewelry Stores, Inc., et al., 54 F.T.C. 548 (1957), the Commission stated (at 561):

> The Commission has wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist. But where there is no record evidence showing justification and where "no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities," their inclusion as individuals should not be approved.

In the Matter of The Lovable Company, et al., Docket No. 8620 (June 29, 1965) [67 F.T.C. 1326], where the hearing examiner in his initial decision, on the basis of a finding that (page 1332) "Said individual respondents formulate, direct and control the policies, acts and practices of Lovable," included in the order the officers in their individual capacities, the full five members of the Commission as now constituted modified the order, and in their opinion said (page 1336):

> In the case of the applicability of the order to the individual respondents, we feel that respondents' argument has merit. There is nothing in the record justifying an assumption by the Commission that these individual respondents might in the future violate Section 2(d) *in their individual capacities.* Respondents admit only that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation. There is no warrant in the record for finding that they do any of these things except

in their capacities as officers. To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual.* To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

There have been many cases before the Commission and the courts where this matter of individual responsibility has been involved, but the hearing examiner deems it sufficient to limit further discussion herein to two recent United States Court of Appeals cases.

In *Bascom Doyle* v. *F.T.C.,* 356 F. 2d 381 (5th Cir. 1966), where the petitioner sought reversal of a Commission order as it applied to him in his individual capacity, the Court said in part (at 383–84):

> These orders "are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952). In this important respect the orders of the Commission differ in purpose from the penal provisions of the Sherman Anti-Trust Act. Therefore, whereas many corporate officials have been joined as individual defendants in Sherman Act prosecutions, this has not been the practice in the issuance of cease and desist orders. In the latter area, where future corporate activities are the sole concern of the Commission, individuals have only been included in the orders, in almost all instances, when deemed necessary to prevent evasion. The Supreme Court recognized this "threat of evasion" test in *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937).
>
> * * * * * * *
>
> Since orders running against a corporation are automatically binding on the officials "responsible for the conduct of its affairs" (*Wilson* v. *United States,* 221 U.S. 361, 376, 31 S.Ct. 538, 543, 55 L.Ed. 771 (1911)), and these individuals may be punished by contempt if they prevent compliance by the corporation with the order, there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion, as was present in *Federal Trade Commission* v. *Standard Education Society, supra.* * * *

In *Flotill Products, Inc., et al.* v. *F.T.C.,* 358 F. 2d 224 (9th Cir. 1966), the Court said (at 233):

> In regard to the first ground of attack on the order, we note that the hearing examiner dismissed the complaint as to the Flotill executives in their individual capacities, finding that the corporate organization was stable and not a sham, and that "There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation." (R. 19.) In framing the order to include the in-

dividual petitioners, Chairman Dixon relied on no other fact than that the three individuals owned and controlled the corporation. He concluded: "Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt that an order against the individuals is necessary." (R. 95.)

We find that the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority for such deletion is to be found in *Coro, Inc.* v. *F.T.C.*, 338 F.2d 149 (1st Cir. 1964) and *Rayex Corp.* v. *F.T.C.*, 317 F.2d 290 (2d Cir. 1963).

There is nothing in this record justifying an assumption that John Coran would cause an evasion of any order which may be entered herein against the corporation. On the contrary, the hearing examiner is convinced that there is no likelihood that the said respondent would cause an evasion of any such order. When asked by the hearing examiner, "Would there be any reason why you would want to change the corporate structure just to avoid any order on the part of the Commission?", Mr. Coran answered (Tr. 64): "I have no reason to do that. It would be detrimental to me." The complaint will be dismissed as to John Coran and Charles Coran in their capacities as individuals.

ORDER

It is ordered, That respondent Coran Bros. Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of solders, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the designation 50/50 alone or in conjunction with the words "by volume" to designate, describe or refer to a commercial solder which does not contain 50% tin by weight: *Provided, however,* That it shall be a defense in any enforcement proceeding hereunder for respondent to establish that the tin content of a solder is within the permissible variations in composition allowed in the sampling procedures set forth in the then existing Specifications for Solder Metal

as published by the American Society for Testing and Materials.

(2) Using the designation 40/60 alone or in conjunction with the words "by volume" to designate, describe or refer to a commercial solder which does not contain 40% tin by weight: *Provided, however,* That it shall be a defense in any enforcement proceeding hereunder for respondent to establish that the tin content of a solder is within the permissible variations in composition allowed in the sampling procedures set forth in the then existing Specifications for Solder Metal as published by the American Society for Testing and Materials.

(3) Misrepresenting by any numerical designation or in any other manner the nature, quality or composition of any of their solders.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to John Coran and Charles Coran in their individual capacities.

OPINION OF THE COMMISSION

JULY 11, 1967

The complaint in this matter charges respondents with the violation of Section 5 of the Federal Trade Commission Act in connection with the manner in which they described and labeled certain wire solder sold by them in commerce.

The sole issue in this case for consideration by the Commission arises out of complaint counsel's appeal from that part of the hearing examiner's decision dismissing the individual respondent, John Coran. Neither side appealed the findings or conclusions of the hearing examiner that the substantive charge involving the mislabeling of the solder and the liability of the corporation were established, and that the case should also be dismissed against Charles Coran, another individual respondent. Oral argument was waived.

The hearing examiner dismissed John Coran as a party respondent on a finding that there is nothing in the record justifying an assumption that John Coran will cause an evasion of the order by the corporation or engage in the acts individually and apart from the corporation.[1]

Complaint counsel's argument in the instant matter is that Coran Bros. Corporation is a closely held family entity which at the will of John Coran could be reorganized and the illegal prac-

[1] Initial Decision, p. 22.

tices continued. There is no question that if continuation of the illegal practices was sufficiently beneficial to justify the legal expense and other problems involved, the corporation could in fact be dissolved and the practices continued.

We believe that, on the facts presented by this record, the hearing examiner misinterpreted the requisites necessary to hold John Coran as a party respondent. John Coran should be named in his individual capacity as a party in this proceeding because the following set of facts were found by the examiner and are uncontested:

(1) John Coran is president of this closely held corporate respondent and owns 80 percent of the stock. The remaining 20 percent is owned by other family members.[2]

(2) John Coran is responsible for formulating, directing, and controlling the policies of the corporation.[3]

(3) John Coran was responsible for, and made, the decision to engage in the specific acts and practices which are challenged in this proceeding. This decision was reached by him without consulting the other directors or stockholders.[4]

The examiner apparently based his decision to dismiss John Coran on the authority of several cases which have discussed the possibility of evasion of orders by corporations and individuals concerned as a factor in determining whether to hold an individual personally responsible.[5]

Where proof of possible or intended evasion is demonstrated, an even stronger case is made for holding an individual personally liable. Such a factor is not, however, controlling.

In the instant matter, the facts concerning the organization and operation of the respondent corporation by John Coran were fully explored and presented.[6] Because the factors outlined above

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[2] Initial Decision, p. 5.

[3] *Id.*

[4] *Id.*

[5] *E. g., Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112 (1937); *Bascom Doyle* v. *Federal Trade Commission,* 356 F. 2d 381 (5th Cir. 1966). In *Bascom Doyle* the court refused to hold an individual in his individual capacity because the individual was an employee, not an owner, of a wholly owned subsidiary of a publicly held corporation. The court distinguished the Doyle situation from the situations presented in *Standard Distributors, Inc.* v. *Federal Trade Commission,* 211 F. 2d 7 (2d Cir. 1954), and *Benrus Watch Co.* v. *Federal Trade Commission,* 352 F. 2d 313 (8th Cir. 1965), by stating that in these cases, the individuals held to be individually responsible were "officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices. Since petitioner Doyle did not serve in such a controlling capacity in Pacific Molasses Company, it is not necessary in reaching a decision in this case to consider these two cases further."

[6] In *Maryland Baking Co.,* 52 F.T.C. 1679 (1956); *Kay Jewelry Stores,* 54 F.T.C. 548 (1957); *Lovable Co.,* Docket No. 8620 (June 29, 1965) [67 F.T.C. 1326]; and *Flotill Products, Inc.* v. *Federal Trade Commission,* 358 F. 2d 224 (9th Cir. 1966), the records did not sufficiently demonstrate the specific responsibilities and activities of the individuals sought to be charged.

are present, it was not necessary, in order to subject him personally to the order, for the Commission counsel to go further and demonstrate an intent to evade or even a probability of evasion of the order against the corporation.

The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization. In a similar case the Seventh Circuit has stated the law applicable to the facts as follows:

> The Commission found, "Respondent Clyde C. Carr is president of, and the majority stockholder in, the corporate respondent, and has been such since he organized the corporation. The only other officers and stockholders are his son-in-law and daughter, who, together with him, constitute the board of directors. By virtue of stock ownership, officership, and active direction, the policies, activities, and practices of the corporate respondent are his."
>
> Notwithstanding this undisputed finding, it is argued that petitioner Carr in his individual capacity should not be included in the order under attack. The record unmistakably discloses that the management, direction and activities of the corporation were those of Carr. A corporation can act or speak only through its authorized officers and agents. In the instant case it was Carr alone, and it is not discernible either how or why his activities as a person should be separated or distinguished from those of the corporation. In our view, he as an individual occupies precisely the same position as does the corporation. To think contrary means that an individual as the sole manager of and responsible for the activities of a corporation can escape liability on the flimsy pretext that he was merely acting on behalf of the corporation and not as an individual. We think he is a proper party to the cease and desist order and approve the Commission's action in this respect. *Cf. Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 120, 58 S.Ct. 113, 82 L.Ed. 141; *Sebrone Co.* v. *Federal Trade Commission*, 7th Cir., 135 F.2d 676, 678.[7]

The initial decision and order of the hearing examiner will be modified to conform to the views of the Commission as expressed herein and, as so modified, will be adopted as the decision of the Commission.

In view of the unusual circumstances presented by this record, Commissioners Elman and Jones do not believe it is necessary to hold individual respondent John Coran.

[7] *Steelco Stainless Steel* v. *Federal Trade Commission*, 187 F. 2d 693, 697 (7th Cir. 1951).

Final Order

This matter having been considered by the Commission upon complaint counsel's appeal from that part of the hearing examiner's initial decision dismissing as a respondent John Coran, and upon briefs in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein, it is necessary to hold respondent John Coran a party to this proceeding and that the order should be directed against him both as an officer of the corporation and as an individual:

Accordingly, *it is ordered*:

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following paragraph be, and it hereby is, substituted for the initial paragraph of the order contained in the initial decision:

> *It is ordered*, That respondents, Coran Bros. Corporation, a corporation, and its officers, and John Coran, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of solders, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(3) That subparagraphs (1), (2), and (3) of the order contained in the initial decision be, and they hereby are, adopted for incorporation in the final order of the Commission;

(4) That the last paragraph of the order contained in the initial decision be revised to eliminate therefrom the name of John Coran;

(5) That the order contained in the initial decision, modified as herein provided, be, and it hereby is, adopted as the order of the Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

In view of the unusual circumstances presented by this record, Commissioners Elman and Jones do not believe it is necessary to hold individual respondent John Coran.

IN THE MATTER OF

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

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

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

Order requiring the Nation's leading producer and distributor of phonograph records to cease lessening competition in the mail order record market by conspiring with other record manufacturers to fix or control royalties paid recording artists, costs of records, and preventing other record clubs from acquiring phonograph records of certain manufacturers on the same terms as respondent acquires such records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Columbia Broadcasting System, Inc., and Columbia Record Club, Inc., hereinafter referred to as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

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

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

"Label"	— The manufacturer's trade name or trade style under which a record is merchandised.
"r.p.m."	— Speed in revolutions per minute of turntable.
"LP"	— A long-playing, twelve inch disc designed to be played on a turntable revolving at 33⅓ r.p.m.
"Single" (or "45")	— A seven inch disc designed to be played on a turntable revolving at 45 r.p.m.
"Master" (or "Master recording")	— An original recording or duplicate thereof embodying the performance of an artist on magnetic recording tape or wire or on a lacquer or wire disc or other material from which a phonograph record may be manufactured.
"Licensed Master"	— A master to which the right to manufacture, distribute, sell and advertise has been granted.
"Press"	— Manufacture (records)
"Subscription method" (or "Club method")	— A method of direct sale whereby the consumer contracts to buy a specified number of records within a designated period of time.]

COUNT I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PAR. 5. Dealers are compelled to stock a substantial number of records produced from masters owned or controlled by CBS as well as from the licensed masters, as hereinbelow discussed. Said dealers are in competition with the Club for the patronage of members of the purchasing public who are the ultimate consumers of said products. Said dealers are compelled to pay higher prices than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors, as hereinbelow discussed. For example, an ultimate consumer who joins the Club pursuant to the terms of the representative offer set forth in Paragraph Two, *supra*, and who orders only popular LPs bearing suggested list prices of $3.98, pays $1.89 for his first six LPs and $3.98 each for the next six LPs purchased during the first twelve months of his enrollment. Said consumer pays a total of $25.77 for twelve LPs, exclusive of the advertised "small mailing and handling charge," or an average of $2.14 per LP. Said consumer may choose freely among LPs manufactured from original masters of CBS as well as from LPs manufactured from licensed masters, as hereinbelow discussed, in determining which records he will receive pursuant to his enrollment offer of six records for $1.89 as well as pursuant to his purchase of six additional records at suggested list price. At the same time dealers are obliged to pay the price of $2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as $2.22 each for records of the same grade and quality, exclusive of cost of delivery.

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

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

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

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

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

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

The Licensing Agreements further provide as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PERCENTAGES OF TOTAL MARKET SHARES

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

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

1. Fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products.

2. Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers.

3. Divide or allocate various markets and channels of distribution in connection with the sale or offering for sale of LPs produced under the Licensors' labels by respondents and the Licensors from Licensed Masters or duplicates thereof.

4. Establish and compel the Licensors to adhere to a fixed differential between the amounts paid as artist royalties for records sold to members of the public through dealers and the amounts paid as artist royalties for records sold to members of the public through the Club.

5. Hinder, lessen or suppress competition between respondents and the Licensors and between respondents and other manufacturers of phonograph records.

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

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

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

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

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

PAR. 12. The acts, practices, methods and agreements of respondents, separately and cumulatively, as hereinabove alleged, are all to the prejudice of competitors of respondents; have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondents' record Club over dealers and over respondents' subscription method competitors; have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-playing phonograph records and in the manufacture, sale and distribution of all phonograph records; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

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

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

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

1. That they may purchase "Any 6 of these superb $3.98 to $6.98 long-playing 12-inch records * * * for only $1.89."

2. That certain combinations of six of the depicted LPs have a "retail value up to $36.88" or a "retail value up to $37.88."

3. That the subsequent purchase of "six selections from more than 400 to be offered during the coming 12 months," pursuant to the Club member's contractual obligation, will be made "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge."

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

PAR. 4. In truth and in fact, the amounts set out in connection with the aforesaid statements and the terms "retail value," "regular list price" and "usual list price," were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, but are in excess of the price or prices at which the merchandise is generally sold in said trade areas, and purchasers of respondents' merchandise would not realize a saving of the difference between the said higher and lower price amounts.

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

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

The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and have constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

SEPTEMBER 30, 1964

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PRELIMINARY STATEMENT

Statement of Proceedings

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

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

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

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

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

The case in support of the complaint was rested April 15, 1963. The respondents opened their defense case on May 6, 1963, and rested July 31, 1963. Hearings for the reception of rebuttal evidence began August 7 and ended August 9, 1963.

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

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

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

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

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

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

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

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

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

Statement of the Case

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

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

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

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

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

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

Explanatory Notes

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

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

Supplemental Findings—The findings made and conclusions reached by the examiner on certain subjects made it unnecessary for him to discuss in his primary findings certain matters that might be significant if a contrary decision were to be made. For example, the examiner has ruled that it is not appropriate to consider LPs as a separate market in this proceeding, and findings on such a purported market thus are inapposite.

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

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

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

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

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

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

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

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

As the examiner interprets the cited provision, *in camera* status does not preclude the examiner or the Commission from disclosing, in findings or opinions, such data as may be necessary for an adequate and informative exposition of the factual or legal issues involved in a particular proceeding. To the extent that *in camera* material has been published, it was done on that basis.

FINDINGS OF FACT

I. The Phonograph Record Industry

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

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

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

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

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

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

Technological Developments

Until 1948, the industry had produced primarily "78s"—records which revolved on a phonograph turntable at a speed of 78 revolutions per minute (r.p.m.). The 78 r.p.m. record was generally ten to twelve inches in diameter and contained three to four minutes of playing time on each side. In the field of popular music, 78s usually contained one song per side; on the other hand, symphonies and other long classical works, generally packaged in sets or albums, often required five or more separate records. Made of shellac, the 78s were breakable, bulky and heavy (Lieberson 78–79, 4783–84, 4792–93; Marek 1862; CX 192, p. 14; RX 44, p. 24).

Shortly after its entry into the industry, Columbia began experimenting with the development of a long-playing record (hereinafter referred to as the "LP") which operated on a phonograph turntable at a speed of 33⅓ r.p.m. After years of laboratory research and development, Columbia introduced the LP commercially in 1948.

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

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

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

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

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

There followed the competitive "battle of the speeds" between 45 and 33⅓ r.p.m. records. Within a few years, however, Columbia began producing 45s and RCA started to make 33⅓s.

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

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

In addition to 78 r.p.m. records, the industry also produces extended-play records (EPs), which are 45 r.p.m. records seven inches in diameter with about eight minutes, or two songs, per side; seven inch single records revolving at 33⅓ r.p.m.; and records which revolve at only 16 r.p.m. Moreover, in recent years, considerable repertoire has been issued on prerecorded tapes, in competition with phonograph records (CX 199a; Lieberson 4786–89; Gallagher 8890–94; RX 619b; RX 693, pp. 81–86).

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

Industry Growth

Although opinions may vary as to the exact causes, it is undisputed that technological advances in the recording art, along with marketing innovations, have significantly broadened consumer interest in records as a medium of home entertainment, with the result that industry sales have grown by leaps and bounds.

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

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

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

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

Retail Outlets

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

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

Generally operating small music shops in downtown business districts, dealers sold phonograph records together with musical instruments and sheet music. Packaged in plain green sleeves and stocked behind the counter, records were not "merchandised to the eye of the consumer" and there was little active promotion or advertising. Knowledgeable sales personnel, well versed in music, generally waited on customers. Since there were relatively few new releases from the handful of record companies then in existence, record shops generally carried a high percentage of the catalog of the various companies. Records were almost always sold at manufacturer's suggested list prices, sometimes under fair trade laws (Gallagher 8848–49, 9085; Roskin 2096–97; Stolon 1290–92; Koenig 3638–39).

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

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

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

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

Rack jobbing, which began in the drug and grocery fields, appeared in the record industry in the mid-1950's. The rack jobber introduced records to grocery supermarkets, drug stores, variety stores and other heavy-traffic retail outlets that had not previously carried such merchandise. Since such outlets do not specialize in records, the rack jobber normally furnishes such accounts with various merchandising services, including the selection and rotation of inventory and the formulation and execution of advertising and promotion campaigns (Noonan 323–25, 444–45, 591; Schlang 6702–12; Arlen 770–74, 5718–22; Shocket 189; L. Smith 1408, 1414–16).

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

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

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

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

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

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

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

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

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

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

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

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

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

Distributors and Subdistributors

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

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

Record Manufacturers

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

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

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

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

For example, Government witness Randolph Wood started Dot Records in 1950 with about $1,000; sold the company to Paramount Pictures seven years later for stock worth approximately $2,000,000; and, by 1961, Dot's annual sales exceeded $16,000,000 and its profits were about $800,000 (Wood 4127–35; RX 110; RX 106, p. 3 and Notes to Financial Statement). Liberty Records was launched in 1955 on an investment of only $5,000 and achieved sales of more than $7,000,000 seven years later (Bennett 6509, 6538). Kapp Records was started in 1953 with a small investment and enjoyed sales of more than $5,000,000 by 1962 (Kapp 1558, 5807). With an initial investment of under $1,500 in 1952, Starday achieved volume of approximately $600,000 by 1962 (Pierce 5741–43). Caedmon, organized in 1952 with an investment of only $1,500, developed an outstanding catalog in the spoken word field within a period of a few years (Mantell 6682–84; RX 117).

The following factors have made entry easy and relatively inexpensive:

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

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

(c) Newcomers need not make large financial investments in order to obtain national distribution for their output. There is a large and growing number of independent distributors across the nation handling many different labels, and most record companies use such outlets instead of setting up their own distribution networks (Lieberson 4810; Gallagher 8774–82). Many new entrants engage larger record companies to promote and distribute records through their established promotion departments and marketing machinery (Noonan 394–95; Pierce 5742–44; L. Hartstone 1058–60).

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

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

(f) Finally, there are no patent, trademark or copyright barriers to entry and no shortage of raw materials. Music in the public domain—*i.e.*, not subject to copyright protection—is available without any royalty payment (Berman 2130–32). Musical compositions subject to copyright, once licensed to a particular record company, automatically become available to all others under the compulsory licensing provisions of the Copyright Act (17 U.S.C.A. Sec. 1(e)) (Lieberson 4822). There is an abundance of music available to record, and the number of songwriters and music publishers has increased significantly in the past decade (Lieberson 4817–18; Berman 2136, 8388–89; Chapin 7311–16).

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

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

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

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

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

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

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

With the growth of new companies, the record industry, formerly centered in New York, has spread throughout the Nation, with many firms springing up on the West Coast and in the Nashville area (Ackerman 4026, 4228; Pierce 5741–42).

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

Product Alternatives Available to Customers

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

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

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

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

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

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

Advertising

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

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

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

II. The Respondents and Their Business

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

CBS consists of the following unincorporated operating divisions:

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

CBS Laboratories.
CBS International. (Admitted; CX 264.)

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

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

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

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

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

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

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

Concerning the Club, its sales increased 10.9 percent in 1961

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

Manufacture and Sale of Records

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

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

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

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

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

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

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

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

CRDC, a wholly owned subsidiary of CBS, consists of two elements or divisions: (1) Columbia Distributors, consisting of wholly owned branch operations, through which records are sold to retailers, and (2) Columbia Record Club.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Despite respondents' Exceptions to CPF 213–15, there is really no doubt that Columbia has been actively engaged in a vigorous program of obtaining exclusive contracts with key recording artists, and that this has had the effect of appending additional talent to the already substantial catalog of respondents.

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

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

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

III. Columbia Record Club and Its Competitors

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

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

By late 1954, it became apparent that the volume of business generated by the existing record clubs was substantial, some estimates putting it in excess of $6,000,000 (Adler 5127). Of the total dollars spent by consumers on classical purchases, 30% or more were being made through these clubs. Angel records, manufactured by EMI (which shortly thereafter purchased Capitol) were already being sold by one club, and it was believed that other labels would soon do likewise (CX 187a).

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

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

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

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

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

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

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

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

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

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

D. The dealer commission plan was established in order to encourage dealers to enroll members. Under this plan, a dealer who enrolled a member, without performing any further services, received a 20% commission on all purchases subsequently made by that member from the Club. Moreover, a dealer also receives the same 20% commission on all purchases by any new member who chooses to credit his membership to that dealer—even if the dealer had not signed up or solicited the member. Over $1,240,000 in commissions has been paid out to dealers since 1955 by the Club pursuant to this plan (Adler 4908–10).

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

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

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

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

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

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

In two sections of its proposed findings, entitled "Club: Formative Period and Use of Dealers" and "Club: Other Uses of Dealers" (CPF 225–264), the Government covers a multitude of background data not actually in issue in this proceeding. Those proposed findings constitute an attack on the original organization of the Columbia Record Club and its alleged relations with dealers in 1955 and 1956.

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

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

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

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

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

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

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

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

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

Club Operations

The Columbia Record Club competes in the retail sale of records with other retail sellers of records. In the course of its business, the Club has engaged in advertising and other promotional activities designed to acquire and retain Club members and thus to sell records. The Club has represented that is offers money savings and other benefits not available to the consumer through dealers.

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

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

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

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

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

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

After a member has completed his contractual commitment, he may leave the Club at any time. If he continues his membership, he pays full Club list price, plus mailing and handling, for each record he buys. He receives a bonus certificate for every two records he purchases. He may use the certificate to obtain a free record, either from the Club or through authorized dealer redemption centers (Keating 711).

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

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

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

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

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

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

For the most part, but subject to specific exceptions, the Club does not offer and has not offered to its members phonograph records which are not offered for sale through distributor-dealer channels. Moreover, the Club does not offer such records to its members prior to the offer of these records for sales through distributor-dealer channels. Generally speaking, phonograph records are offered through distributor-dealer channels one or more months prior to their offer through the Columbia Record Club.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Club advertising expenditures have been substantial. It is not surprising that Club advertising costs have been considerably greater than non-Club advertising expenditures. (Cf. CXs 50, 655, 665, 78–79.) However, non-Club advertising expenditures have been increasing. The total for the first eleven months of 1962 was almost triple the 1959 level. Columbia spends more on non-Club national advertising than any other record company. (See RPF 498g and h; Wunderman 6569–75.)

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

1961—five records for $1.97 in return for a commitment to buy five records during the year at the regular list price.

1962—six records for $1.89 in return for a commitment to buy six records during the year at the regular list price.

1963—six records for $1.99 in return for a commitment to purchase six records during the year at the regular list price.

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

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

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

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

Other Record Clubs

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

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

Under the terms of the contract, BOMC agreed to bill records to club members at the "manufacturer's nationally advertised prices" established by RCA (RX 652g). RCA agreed that it would not operate a competitive record club or supply RCA records to a competitive record club (RX 652m). BOMC was required to make a substantial yearly guarantee of sales (RX 652o). When the RCA arrangements were established, BOMC's existing club, Music Appreciation Records, was "coordinated" out of existence as a separate record club and was amalgamated into the RCA Club (RX 202a–d). In addition, RCA took over the management of the Metropolitan Opera Club, previously operated by BOMC, which was then reconstituted as the RCA-Victor Metropolitan Opera Club (RXs 190a–e, 188a–e). RCA thus obtained at the outset mature and experienced mail order facilities and personnel, access to a large mailing list, two existing record clubs and a group of important classical artists (Adler 4900).

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

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

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

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

The Columbia Club had developed a new advertising technique known as the "gate-fold"—and had held this favorable position in the Reader's Digest Magazine for many years. The format was a combination of a short back page, the inside flap and the facing page. The advantage was that the reader who grasped the magazine in his hand almost inevitably had to open the back page and flap and see the advertisement (Adler 4939–40; RX 119). When Reader's Digest entered into its contract with RCA, the Columbia Club's request for the gate-fold position was summarily rejected, and thereafter RCA Club advertisements were frequently run in that position (Adler 4939–45, 5106–07; RX 120). The refusal of Reader's Digest to accept the Columbia Record Club's advertising in this position was due to a prior "commitment" to RCA (Hitesman 10135–36).

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

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

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

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

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

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

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

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

IV. Licensing Agreements

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

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

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

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

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

Nature of the Agreements

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

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

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

The Mercury contract defines "master recordings" as:

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

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

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

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

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

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

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

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

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

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

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

The licensing agreements typically provide:

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

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

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

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

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

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

The fact that the early Caedmon and Verve contracts (CXs 20, 23k) singled out by name particular competitors and prohibited sales to them does not really change the legal significance of the exclusionary clause. Nor does the elimination of such specificity in later contracts make the restriction less complete.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Outside Label Contracts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Excise or similar tax.

(2) Container or packaging charge.

(3) Charge for program notes.

(4) Postage and handling charges "provided any such additional charge is deemed to be included in the retail selling price." (Whether it is so deemed is not now apparent to the hearing examiner. Neither party seems to have referred to this provision in the discussion of the propriety of including or excluding mailing and handling charges in figuring the Club price.)

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

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

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

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

The contract granted distribution rights for 20 specified records, as well as rights to such other Verve masters as might be agreed upon (CX 23c–d). The grant of exclusivity with respect to records of Ella Fitzgerald and Oscar Peterson, two of Verve's leading jazz artists, however, was limited (CX 23d–e). Columbia guaranteed the sale of 500,000 Verve records during the term of the contract (CX 23m).

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

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

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

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

Paragraph 5(b) provided in effect that if Columbia determined that the Verve label had depreciated to the status of a low price label through distress selling or through the consistent offering of records on the Verve label at retail prices comparable to the prices at which Columbia Harmony and RCA Camden records were being sold, Columbia might release records manufactured from the Licensed Masters under the Columbia label after having given Verve written notice of its election so to do. It was provided further in paragraph 5(c) that the provisions of paragraph 5(b) should not be used to frustrate the basic intent of the parties to utilize the Verve label. Columbia agreed that a substantial change in the existing situation and status of the Verve label would be required before it might invoke the provision of paragraph 5(b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In the original contract, Columbia agreed to include one Cameo record in 75% of its new member solicitation space advertising (CX 453c). When the agreement was later modified, the Club agreed to offer for sale 12 different Cameo albums during the contract term and to use Cameo records in 90% of its space advertising (CX 452a–b).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Each of the contracts required the Club to merchandise the records under the label name of the licensing company. Thus, Columbia has used the licensors' labels on records and on record jackets and has utilized in advertising and promotion their distinctive "logos" (CPF 38). Each of the contracts related to record club rights only and did not involve other retail distribution in any way.

The Caedmon and Verve Contracts

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

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

Respondents contend (Exceptions, page 13) :

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

The record indicates the following:

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

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

Early in 1960, however, the terms and conditions of the Verve contract were reviewed by Club executives and by their counsel. From a business point of view, it was concluded that the contract had been drafted to meet a business eventuality which, after almost a year of actual operation, had not in fact occurred. From a legal viewpoint, counsel felt that the purposes and effects of Paragraphs 3 and 4 of the Verve contract might be later misconstrued and misinterpreted—exactly as they have been in the Government's proposed findings. Accordingly, in February 1960, Columbia waived Paragraphs 3 and 4, and Verve promptly agreed to the contract amendment (Keating 5180–84; CX 32). That was prior to the commencement of the Commission investigation that led to this proceeding.

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

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

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

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

All the facts surrounding the amendment of the Verve contract in early 1960, its termination in early 1962, and the execution of the new Caedmon contract in 1961 were fully disclosed during the course of the precomplaint investigation. There is no claim that these facts came to the attention of Government counsel for the first time only after suit was filed. There is some basis for respondents' charge that the early-abandoned contracts are used as a tactic to invalidate the other contracts.

Position of Licensors

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

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

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

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

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

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

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

While many dealers did identify Columbia as an "important" label in their stores, there was not any unanimity on this point. For example, one dealer, unhappy with Club competition, led a boycott of Columbia records.

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

Catalog Distribution and Exclusivity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As already set forth, each of the most recently made agreements contained additional built-in provisions narrowing the period of exclusivity. Thus, the Caedmon, United Artists and Liberty contracts contained complete release clauses which enabled the licensors, at points well within the contract term, to take their entire catalog out of the Club if they obtained better offers from competitive clubs. Columbia retained no right of first refusal in the event of an exercise of this unilateral option on the part of the licensor. The acceptance of any such competitive offer would have completely terminated Columbia's exclusive club rights.

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

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

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

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

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

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

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

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

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

Purpose and Effect of Exclusivity

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

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

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

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

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

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

Despite respondents' protestations (Exceptions, page 41), there is no real dispute that the licensors, contractually, were prohibited from selling to the Diners' Record Club.

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

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

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

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

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

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

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

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

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

Background of the Agreements

CPF 182–212, appearing under the heading "Background of Licensing Agreements," apparently are designed to show that there was no business reason, or at least no necessity, for Columbia to sign any agreements with any outside labels. In those proposed findings, Government counsel attempt to show that the Club had sufficient repertoire without adding outside labels.

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

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

This is not such a case.

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

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

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

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

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

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

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

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

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

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

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

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

Against this background of behaviour, contemporaneous documents and expert opinion testimony about repertoire, Government counsel find little solid support for their position. Respondents, in their Exceptions (page 128), picturesquely accuse Government counsel of "name-dropping and advertising blurbing" and seeking to substitute their own "expertise" about jazz and other areas of music for that of professional record people.

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

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

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

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

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

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

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

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

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

The examiner does not suggest, however, that Columbia did not enjoy considerable success in those and other fields. The "Columbia" label stands high in the classical field.

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

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

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

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

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

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

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

Members demonstrated their dissatisfaction with the Club's repertoire in many other ways. A large number returned the negative option selection cards each month and indicated that they did not want to order any records. Members sent letters complaining about the lack of variety of selections. An increasing number of records was being returned each month. There was a marked decline in the "pull rate" (the number of each selection shipped divided by the gross members eligible to receive shipment) of the monthly selections.

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

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

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

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

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

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

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

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

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

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

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

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

Hammond explained that "pure jazz" and "pure jazz artists," examples of which may be found in the Columbia catalog, were important historically and artistically, but were rarely important factors in commercial sales (Hammond 7212–19). Hammond testified that there were many different jazz labels, that Sam Goody alone offered for sale 40 different such labels, that the small independent record companies were the leaders in this field, and that jazz accounted for only ½ of 1% of Columbia's total sales (Hammond 7225, 7227, 7289). He identified the prominent jazz labels including, among others, Roulette, Blue Note, Riverside, Atlantic, Verve and Argo (Hammond 7225).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Club's concern with the serious problem of membership drop-out—or "shrinkage"—was also readily documented. Viewed historically, shrinkage had steadily risen from 4.7% in 1955, the Club's first year, to 64.7% in 1959; thereafter, although still large, the upward trend seems to have been arrested (RX 365). The Club's policy on outside labels was in part directed to arrest this growth in shrinkage which was a reflection of the serious lack of diversity of the Club's catalog (Adler 4966–67).

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

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

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

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

Price-Fixing

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

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

As stated by respondents (Exceptions, page 81), the record shows that since 1955 the Club "has generally sold $3.98 records for $3.98, $4.98 records for $4.98 and $5.98 records for $5.98."

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

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

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

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

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

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

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

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

Most of the contracts fall into a second classification in which the Club agreed that it would pay royalties to the outside labels of a specified percentage of the so-called "royalty price." That was defined as the Club's "selling price," less four rather complicated deductions (including, for example, excise taxes and album covers).

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

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

The Caedmon and Verve Pricing Provisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The record does show these facts:

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

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

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

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

Paragraph 22 of the Verve contract stated:

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

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

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

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

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

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

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

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

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

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

Thereafter, Club literature made this claim:

NEW SAVINGS

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

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

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

Paragraph 12 of the Verve contract provides for the payment by Columbia to Verve of a "royalty of five (5) percent of the royalty price with respect to ninety percent (90%) of [Columbia's] net sales of phonograph records manufactured from the Licensed Masters." (CX 23L–M.)

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

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

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

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

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

Paragraph 4 of the Verve contract stated:

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

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

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