While Solomon could not recall refusing to distribute Caedmon records (Tr. 3869), Marianne Mantell, president of that company, could (Tr. 6911).

Solomon had a master licensing agreement with Vanguard, but never pressed any records under it (Solomon 3867).

He did not claim at the trial that he wanted or was unable to obtain records of Cameo-Parkway.

He did not claim at the trial that he sought to deal with Verve before, during or after the cancellation of its agreement with Columbia.

Kapp had refused to deal with Solomon early in 1959 (Solomon 3845–47; Kapp 5774–75)—more than a year-and-a-half before its contract with Columbia.

Warner Bros. refused to enter into any agreement with Solomon early in 1959 (Solomon 3855), long before its first contract with Columbia, but was willing to sell records to his club on an individual basis (Friedman 6107; Conkling 6199; Solomon 3792). But, over the next few years, he ordered only a few records, some of which he improperly returned, and became a credit problem (Friedman 6107–08; Solomon 3945–47).

Solomon's hearsay testimony (Tr. 3796) that Warner Bros. stopped selling to him early in 1961 because of "an exclusive arrangement" with Columbia was flatly denied by Joel Friedman, merchandising director of that company, and James Conkling, former president of Warners Records and now head of the Mormon Church's short-wave radio network (Friedman 6107–08; Conkling 6199–200). Solomon's claim, moreover, is dubious on its face since, at the date of the alleged cutoff, Warner had granted Columbia rights with respect to only three records.

While Solomon claimed that he did not even bother to offer UA a contract in 1959 because they "weren't a factor in the record business at that time" (Tr. 3848), Mael of UA recalled that a contract had been offered, and rejected (Tr. 7458–59). In any event, UA was willing to sell individual records to Solomon. But, over the next two years, he ordered small quantities of only two records (Mael 7459–60; Solomon 3848). And UA finally had to sue the Diners' Record Club in order to collect its bill (Mael 7460)—a lawsuit Solomon had difficulty recalling on cross-examination (Tr. 3850–51).

Although Government counsel did not question Solomon on direct examination about his ability to obtain Mercury and Liberty merchandise, it was shown on cross-examination that, after Liberty's contract with Columbia, the Diners' Record Club had in fact offered more Liberty merchandise than ever before (RX 48; Solomon 3829–33).

When confronted with that fact, Solomon explained that some Liberty records "might have filtered" into his record club because he obtained a supply of such records in his role as a fulfillment agent for "various" Liberty mail-order and premium programs (Solomon 3829–33). But the fact, later developed through Bohanan of Liberty, was that Solomon had acted as a fulfillment agent for only one Liberty program involving a single Liberty LP (Bohanan 6385)—an LP not used in the Diners' Record Club (RX 48). It finally was disclosed that Solomon had an interest in a distributorship that purchased records from Liberty (Solomon 3841–42); that the entire Liberty catalog was available to that distributorship (Bohanan 6383; also see Bennett 6529); and that the distributorship did not pay higher prices as Solomon belatedly claimed (Bohanan 6383-84).

Cross-examination also disclosed that, after Mercury's agreement with Columbia, Solomon offered more Mercury records than ever before (RX 47; Solomon 3819). Solomon reluctantly conceded that in November 1961—about 1½ years after Mercury's licensing arrangement with Columbia—he purchased at one clip more than 100,000 Mercury LPs covering 27 different titles at approximately 50¢ per record—a rather "favorable" price and quite a "substantial" quantity for a club with only about 10,000 members (Solomon 3816–19, 3942–43).

Solomon then "explained" that only 4 of the 27 titles were current (including Mercury's "1812 Overture" and records by Brook Benton, the Platters and the late Dinah Washington) and that the other 23 were cutouts (Solomon 3816–27, 3952). But he did not advertise the 23 records as cutouts.

Following Solomon's testimony, a Mercury employee checked the company's inventory control cards as to when records were cutout. Based on her testimony, the fact is that 23 of the records were current and only 4 were cutouts at the date of Solomon's purchase (Broun 10,491–93; RX 47). Solomon (a CPA) thus had simply reversed the numbers (Solomon 3871). Indeed, the Mercury order form in use almost a year later still listed 20 of those 27 records as current (CX 398; also see Broun 10,498). It is difficult to believe Solomon bought 100,000 LPs without knowing what he was buying. (See RPF 387 and footnotes.)

(For more detail concerning the Diners' Record Club, compare CPFs 63–64, RPFs 367–87; respondents Exceptions, pages 41–49; Government counsel's Reply, pages 71–77.)

In a field where there are many clubs and other direct mail-order sellers of phonograph records, the fact that the Government must rely solely on the Diners' Record Club as illustrative of a club that allegedly suffered competitive injury underlines the weakness of its proof in that regard.

Comparison of Introductory Offers—Any study of the state of competition among record clubs must take pricing into account. Here the position of the Government shows some ambivalence.

Contrary to the position they take elsewhere in their proposed findings (CPF 413), Government counsel, in their zeal to prove a separate club market, assert (CPF 440) that Columbia "responds in pricing and in other ways to other record clubs—which are the *Club's major competitors,*" and that in their advertisements, respondents "compare *their* offers to offers of *other* clubs." That proposed finding, taken together with the evidence, is hardly consistent with the Government's contention of an oligopolistic, non-competitive industry.

A comparison of the various club offers is illuminating.

The Government's proposed finding (CPF 440) that the RCA Victor Record Club "sells its records on the basis of 5 for $1.87 with the commitment to purchase an additional 5 at $3.98 and $4.98" is an oversimplification that does violence to the record. That particular offer (RX 154) was in effect during part of 1961 and the first few months of 1962. It resulted in a total price of $21.77 for 10 $3.98 LPs over the first year—or an average price of about $2.18 per LP (exclusive of mailing and handling charges, the amount of which is not reflected in the record).

The record indicates that throughout most of 1962, the RCA Record Club used a variety of different offers, generally resulting in lower average prices. It appears that the most common offer was one record for 10¢ to keep, plus four records on a trial basis that could be purchased for $1 upon a commitment to buy five additional records at list (RXs 15, 157, 162, 176, 178, 592). That offer resulted in a total price of $21 for 10 $3.98 LPs over the first year of membership—or an average price of $2.10 per LP, exclusive of mailing and handling charges. (See also RXs 613 and 631 for closely similar variations; *cf.* RX 630.)

Under another 1962 offer, the RCA Club advertised one record free with no obligation to purchase any additional records at all, and an additional four free records if the consumer accepted a trial membership and purchased four additional records (RXs 606, 612). If the full offer were accepted, the result was a total purchase price of $15.92 for nine LPs over the first year, or an average price of $1.77, again excluding mailing and handling charges.

Special offers extended by the RCA Club in 1962 to members of the Reader's Digest Family (RXs 189, 632) resulted in average prices of $2 and $1.78, respectively, for $3.98 list LPs.

Thus, the RCA Club had prices lower than indicated by CPF 440—and lower than average prices of the Columbia Club.

CPF 440 takes a curious twist in its proposed finding that Capitol Record Club prices are "identical" with those of the RCA Club "except for the introductory offer."

It is the introductory offer that establishes the average price per record for the first year of membership. And the Government has stressed the importance of the introductory offer as a competitive weapon (CPFs 325–27). Thus, Government counsel include the introductory offer in their computation of the average prices of the Columbia Record Club, and no reason appears for ignoring the same factor in referring to the prices of the Capitol Record Club.

In considering the competitive picture, and also in connection with allegations made elsewhere by the Government, it is worth noting that the Capitol Record Club advertisement (RX 179) cited in CPF 440 contains an introductory offer markedly different from that of either the RCA or the Columbia Club.

The Capitol ad offers up to seven records for 97¢, with a commitment to purchase five additional records. This results in a total purchase price of $20.87 for 12 records over the first year, or an average price of $1.74 per record, exclusive of mailing and handling charges. This is lower than Columbia's average price.

Other Mail-Order Sellers—The discussion of club competition would be incomplete without some reference to the growth of numerous other companies selling a great variety of recorded material through the mails on a nonclub basis, including various outside labels and outside artists. The evidence indicates the great success enjoyed by many new entrants into that type of merchandising.

Records are sold to consumers through the mail, not only by record clubs, but by a whole host of record dealers, department stores, mail-order houses, book clubs, magazines, record companies and others. As shown in detail by respondents (RPFs 246–79), all those mail-order sellers compete with record clubs and other channels of distribution.

Like clubs, they generally stress the convenience of armchair buying, assistance in record collecting and convenient credit installment arrangements. Like Clubs, they seek to cater to a broad consuming public by media advertising and direct-mail solicitation. They offer consumers the same records that are available over-the-counter and through clubs or, sometimes, specially prepared records similar to those distributed at retail and by clubs. Those mail-order vendors sometimes offer consumers individual records. In other cases they offer "packages" containing a collection of records programmed with a repertoire in a particular musical category.

The evidence establishes that many record dealers, department stores and other retail outlets sell records both over-the-counter and through the mail (*e.g.*, Adler 4919; Stolon 1260; Maggid 859–60; Leonard 5960–61; Prince 5502–07; Brigati 890–92; Bialek 1377; Collins 3003–04; RXs 6, 9–14, 144, 264, 268, 285, 287, 546).

Government witness Sam Goody initiated large-scale mail-order selling of records at discount prices in about 1950. He was soon joined by certain other retailers, including The Record Hunter, which, along with Goody, was circulating low-price ads in Chicago as early as 1953 (Gallagher 8856; Stolon 1290–91; Inden 5544; also see Ackerman 4222, 4240). In August 1955, before the Columbia Record Club began operations, *Billboard* noted "the competition of large mail-order discount houses at local levels thruout the country" (RX 113a).

Goody, with mail-order operations all over the world, runs daily and weekly advertisements soliciting mail-order sales of individual records and packages. Goody derives between $500,000 and $750,-000, or 10% to 15% of his sales, from mail-order sales (Stolon 1255–61; RXs 6, 9–14, 144, 264, 285, 287, 546). Others with fairly substantial mail-order business include The Record Hunter (Maggid 859–60; also see RX 268); the Harvard Co-op, which circularizes as many as 150,000 alumni located all over the nation (Leonard 5960–61, 5974–75); the Yale Co-op, distributing holiday catalogs containing as many as 200 selections at $1.98 per LP (RX 266); and Doubleday, selling at list price and featuring mail-order record buying in 25,000 monthly mailings and 100,000 special mailings (Prince 5502–07).

Unlike record clubs, dealers generally do not obligate their mail-order customers to buy a definite quantity of records (*e.g.*, Brigati 892). But, like clubs, they rely heavily on media advertising and direct-mail solicitations; they use this method of promotion to create consumer interest in records (Leonard 5973–74) and to satisfy the preferences of some consumers for the convenience of mail-order buying (Collins 3004; Bialek 1377; Brigati 890); they generally charge for mailing and handling (*e.g.*, RXs 266–67, 264, 285; Brigati 891); often sell on credit (*e.g.*, RXs 266–67); and sometimes even have organized fulfillment operations (Stolon 1260–61).

In addition, mail-order sales of records are made by large general catalog companies like Montgomery Ward, Spiegel, Aldens and Sears, Roebuck (Adler 4919; Hitesman 10157; Pierce 5747–49; RX 54c). Specialty mail-order houses, such as Spencer Gifts (with a mailing list of over 1,500,000), and others also sell through the mails the same records that are available at retail and through record clubs (*e.g.*, RXs 54b,c, 66, 67; Solomon 3830, 3902, 3915–16).

Hi Fi, a magazine in which the Columbia and RCA record clubs advertise (CX 47a; RX 386b), reviews new record releases and selects top records of the month, which it then sells at list price to readers "who have told us of difficulties experienced in securing new releases" (RX 693, pages 55–98).

Other companies advertise mail-order sales of individual records, either at list price or discount, sometimes with bonus records for every two or three records purchased (*e.g.*, RXs 256–57).

Records are also sold through the mail as premiums in conjunction with the sales of other consumer goods (*e.g.*, RXs 259–61).

Some record manufacturers sell by direct mail. Witness Pierce of Starday, for example, has been successful in selling both 45 r.p.m. and 33⅓ r.p.m. records, individually and in packages, by radio mail-order since 1950 (Pierce 5747–50).

The catalogs of record companies generally contain, in addition to individual records, "packages" containing a collection of anywhere from two to a half-dozen or more records featuring repertoire in a particular musical category (Kavan 10,623–28; *e.g.*, CX 307a, pages 48–49, 53, supplement page 8; CX 247, pages 9, 12, 13, 30, 34–36, 43; RX 297, pages 47, 49, 140, 142–43). Such packages are available at retail and often through record clubs (Kavan 10, 623–28; *e.g.*, RXs 121d, 150, 151; CXs 97, 99, 106, 115). Similar—and, in some cases, identical—packages are offered by direct-mail sellers on a non-club basis. RCA and Reader's Digest constitute the largest factor in that type of mail-order selling.

RCA presses packages of records for Reader's Digest and engages in joint marketing of those packages through the mail. Although Reader's Digest-RCA began selling such packages less than four years ago (Hitesman 10,111), they have achieved a substantial sales volume (RX 700 *in camera*) and are now the largest direct package mail-order sellers of records in the industry (Hitesman 10,145; also see RX 450). By 1962, the Reader's Digest-RCA non-club mail-order package sales accounted for almost 20%

of all records sold via mail, including the volume generated by both club and non-club sellers (RX 450).

In achieving this success in such a brief period of time, Reader's Digest-RCA had the benefit not only of the resources of RCA, but of subscriber lists of the Reader's Digest magazine, which has a circulation of almost 14 million, and a mailing list of the Reader's Digest Condensed Book Club, the largest book club in the world with about 3 million members (Adler 5008).

Like record clubs, Reader's Digest-RCA promotes direct package sales by media advertising and direct-mail solicitation (*e.g.*, RXs 386, 514–26, 535, 554–58; Hitesman 10,128–36). The package operation and the RCA Victor Record Club, which the Reader's Digest also operates, both advertise in some of the same consumer media and apparently take turns in the gate-fold position in the Reader's Digest magazine, from which the Columbia Club complains it was evicted (Hitesman 10,130–36; RX 535). They also exchange mailing lists (RXs 386, 647; Hitesman 10,079–80, 10,128–29, 10,156; also see RX 518). Thus, Reader's Digest-RCA solicits members and ex-members of the RCA Victor Record Club for package sales; and the RCA Victor Record Club, in turn, solicits present and former purchasers of Reader's Digest-RCA packages for club membership.

The two organizations rent almost identical mailing lists from outside sources for their mail-order selling activities (RXs 386, 647; Hitesman 10,079). The Columbia Record Club rents some of the same mailing lists (CX 48) and advertises in the magazines whose subscribers are included in such lists (CX 47).

From the inception of its package operation in 1959 until the end of 1962, Reader's Digest-RCA had "major mailings" of seven different packages (RX 386a). In addition, the record shows that during, and since that time, Reader's Digest-RCA has marketed at least two other direct-mail packages (Kavan 10,610–11; RXs 514, 516–20, 522–24, 535, 554–58).

Each of those nine packages—with such titles as "Music of the World's Great Composers," "Popular Music That Will Live Forever," "The Nine Symphonies of Beethoven," and "Music of Faith and Inspiration"—contains a collection of material in a particular musical category (RXs 514, 516–20, 522–24, 535, 554–58).

Three of the packages contain 3 LPs, and the other six packages contain anywhere from 7 to 12 LPs. The prices for the packages (exclusive of mailing and handling) run from about $7.00 for the smallest packages up to about $19.00 for the largest packages. On a per LP basis, the prices (exclusive of mailing and handling charges, the amount of which is not shown by the record) range from $1.33 up to $2.40 with five of the nine packages selling for $2 or less per record (RXs 514, 516–20, 522–24, 535, 554–58).

Most of the advertisements and mailing indicate that a consumer "might expect" to pay higher prices for each record, generally with references to prices of $3.98 and $4.98. Those references to higher prices are intended to refer to the suggested retail list prices of RCA records available over-the-counter and through the RCA Victor Record Club (RXs 514, 516–20, 522–24, 535, 554–58; Hitesman 10,151–55). The public is advised, for example, that the "huge" audience for good music and "the great resources of RCA" allowed "substantial economies" so that the records can be offered "at *far* below normal cost" (RX 514).

Reader's Digest-RCA sells the packages under a system of dual pricing. Reader's Digest generally charges those customers whom it refers to as members of the "Reader's Digest Family" about $1 less per package than outsiders (RX 386b–c). The "Family" includes, not only about 14 million subscribers to the Reader's Digest Magazine and about 3 million members of the Reader's Digest Condensed Book Club, and cancelled members thereof, but also active and cancelled members of the RCA Victor Record Club (RX 386; Hitesman 10,079; Adler 5008).

Like a record club, Reader's Digest-RCA sells most package records on a credit basis—with monthly installments averaging about $3.50 to $5.00 (Hitesman 10,141), the range of the periodic payments made by a record club member when he orders through a club. Reader's Digest-RCA, like record clubs, sometimes offers "free" bonus records (Hitesman 10,142; Kavan 10,617; *e.g.*, RXs 557–58, 517, 535).

The records in the packages are equal in quality to regular $3.98 and $4.98 RCA records (Hitesman 10,146; RXs 516, 518, 523).

While the records are all pressed by RCA (RX 698), the repertoire is planned and the packages are created jointly by RCA and the Reader's Digest—a fact stressed in all the advertisements and direct-mail solicitations (RXs 514, 516–20, 522–24, 535, 554–58).

The packages feature prominent recording artists (see RPF 265). Many of the artists on the packages have records in the RCA catalog available at retail and/or through the RCA Victor Record Club. Other artists featured on the packages record for London, Capitol, Angel and other outside labels (see RPF 266).

The musical repertoire contained in the packages is virtually identical to works available on RCA records distributed at retail and through the RCA Victor Record Club (Adler 4916–17, 5085–86; Kavan 10,610–17; RXs 518, 519).

Stanley Kavan, Director of Development for Columbia who has been testing mail-order packages (Kavan 10,606–10), compared the records appearing in seven of the Reader's Digest packages with records offered by the RCA Victor Record Club in its monthly magazines for January, February and March 1963. Of the 500 titles contained in those packages, over 200 appeared in those magazines during that period of only three months.

The similarity between the performances which appear on records in the Reader's Digest-RCA packages and on records distributed by the RCA Record Club was dramatically illustrated by a courtroom demonstration.

Thomas Shepard, a producer in the Masterworks Department of Columbia Records, examined a discography of the selections appearing in the Reader's Digest-RCA packages and in RCA Club albums and chose eight works which he believed represented examples of the most popular repertoire, including, for example, the "1812 Overture," "The Nutcracker Suite," "The Third Man Theme" and "Capriccio Italien." He then taped excerpts of the same passages in those compositions from records in the packages and from records distributed by the RCA Club and prepared a demonstration record (RX 697), about 20 minutes in length, that juxtaposed the two selections of each composition (Shepard 10,653–58). The record was played in the hearing room, and Mr. Shepard appeared as a witness (Tr. 10,643–75). The performances of the excerpts taken from the two different sources sounded strikingly similar.

Mr. Shepard also spliced together, and included in the demonstration record (RX 697), excerpts taken from a Rene Leibowitz performance of Beethoven's Fifth Symphony, which had been offered in a Reader's Digest-RCA package (RX 519), and excerpts taken from that work performed by Toscanini, contained in a record offered through the RCA Victor Record Club (RX 150). The small excerpts taken from the two different records were spliced one after the other to make a continuous, harmonious performance of a passage of that Symphony.

In addition to the nine packages specially created for the Reader's Digest-RCA program, Reader's Digest Music Inc. offered a package entitled "RCA-Victor Lifetime Treasury of the World's Best Loved Operas," which contains 10 complete recordings of "the most popular operas ever written" on 28 separate LPs at "the amazing bargain price of $69.95"—or about $2.50

per record (plus mailing and handling) (RX 521). Those records, featuring top operatic stars, are all RCA Victor Red Seal records, currently in the RCA catalog at suggested list price of $4.98 per record as part of multiple record sets (CX 307, pages 50–52).

Walter Hitesman, Reader's Digest vice president, testified that Reader's Digest Music Inc. offered this package to the public in its role as sales agent for the RCA Victor Record Clubs (Tr. 10,089–90). But, as the offer shows on its face (RX 521), it was open to the general public and not limited to club members.

Against that background, although he testified to differences between club sales and mail-order sales of record packages, Walter Hitesman, vice president and director of the Book and Record Division of Reader's Digest, conceded that the record packages compete with every other form of distribution of records; that they are "competing with everybody else" for the amount of money that consumers are willing to spend for phonograph records (Tr. 10,140). Norman Adler had previously testified that the packages compete with the Columbia Record Club (Tr. 4915–20). Music publishers regard Reader's Digest (and *Life* which also sells RCA packages) in the same light as record clubs.

Because they sell records through the mail with extensive advertising, publishers charge them the same royalty rate as are charged on sales via clubs (Starr 1692–93; Berman 8377–88).

At one point, Government counsel contended that RCA was merely a "custom presser" for Reader's Digest and that there was "no proprietary connection" between the two companies (Tr. 8057–58). But the record shows more than a mere custom-presser relationship. It shows that RCA and Reader's Digest operate the package business jointly—and apparently do so without even a formal agreement (Hitesman 10,097; see RPF 272).

In 1962, RCA further expanded its activities in the mail-order package field by producing a 5-LP set for *Life Magazine* entitled "The Music of Life," containing 60 best-selling popular performances pressed by RCA from original masters that had originally appeared in singles and LPs released at retail (RXs 509a, b, 510a–d; Kavan 10,623–24). Many of the individual selections still appear in the active RCA catalog (Kavan 10,623–24).

The package features prominent artists such as Harry Belafonte, Benny Goodman, Vaughn Monroe, Peter Nero, Bing Crosby and Dinah Shore. The set sells for $14.95—or less than $3 per LP (plus mailing and handling)—"just about half what they would cost * * * through the usual channels" (RX 510c). The package was first marketed by regular mailings in November

1962 and achieved a very high sales volume by the end of the year (RX 508 *in camera*). *Life* has also sold records in conjunction with books and anthologies (RX 506; RX 507 *in camera*) and realized substantial record sales in such a program in 1963 (Schnetzer 10,035–36).

There also has been the entry—or, more properly the re-entry—of still another firm into the record-package mail-order business in recent years. BOMC, which had marketed mail-order record sets from 1955 to 1957, "retired" from this activity for almost four years when it became the operator of RCA's record clubs (RPFs 59–62; RX 496; RX 502 *in camera*).

Once it stopped operating the RCA record clubs, BOMC began selling packages again in the latter part of 1961. It offered ten packages the following year at prices ranging from about $6 to $12 and achieved sizeable sales in that one-year period (RX 496; RX 502 *in camera*). The packages were primarily classical, including Handel's "Messiah" and a waltz set by the Vienna State Opera Orchestra (RXs 498, 501). BOMC also offered a package of folk songs by well-known artists like Pete Seeger, Joan Baez, The Weavers and Odetta that was widely advertised and highly successful (Adler 5006; Kavan 10,624–25; RXs 591, 499, 501). BOMC has offered records on various outside labels, including Kapp, Caedmon, Vanguard, Vox, Westminster, Unicorn and Weston Woods (Stipulation, Tr. 9989–90), most or all of which are also available at retail (Adler 4919; Kavan 10,624–25; H. Brown 10,006–07; RXs 497–501, 591). When BOMC operated record clubs on its own account, prior to its association with RCA, it offered some of its packages to members of its record club as well as to the general public (H. Brown 10,006–07).

The Capitol Record Club has also offered a series of packages, generally 10-record sets selling for $17.98—or less than $1.80 per LP (plus shipping charges) (RXs 695–96; Kavan 10,618–23). Capitol offered those packages, not only to members and former members of its record club, but also to the general public, sometimes as enrollment offers to its club or with solicitations to join the club (Kavan 10,618–23; RXs 695–96). The Capitol packages are basically similar to those sold by Reader's Digest-RCA (RXs 695–96; Kavan 10,618–23).

Others marketing mail-order packages include Golden Records (Miller 7136; Kavan 10,626; RX 513); Pickwick (RX 538; Kavan 10,626); Disneyland (Kavan (10,626); Artia-Parliament (RX 258); The Record Library (RX 540); Concert Hall Society (RX

541); Lexington Records (RX 545); and Sheraton Records (RXs 262–63). (See RPFs 276–78.)

Columbia has developed two direct-mail packages, entitled "The World's Most Beautiful Music" and "The World's Greatest Popular Music." The construction of the packages is similar to offerings by the Columbia Record Club; and comparable merchandising techniques were utilized, with installment payment arrangements and an emphasis on the factors of guidance and the convenience of armchair buying. Market tests showed that members of the Columbia Record Club were three to four times more interested in these packages than nonmembers. Columbia, thus far, has sold those packages only as part of limited market tests (Adler 4917–18; Kavan 10,608–10).

Benefits to Industry and Public

To the extent that record club operations would be hampered, the evidence indicates that the restrictions sought by the Government would adversely affect the record industry as a whole, particularly the smaller record manufacturers, songwriters, music publishers, musicians and artists. They also would adversely affect record buyers, especially record club members. All those groups have benefited as a result of club operations.

Since the advent of record clubs, new competition has been injected into the record industry and other important benefits to the entire industry have materialized. There is no convincing evidence that club operations, including the practices challenged in the complaint, have hampered the growth of any segment of the industry. Since the organization of the Columbia Record Club in 1955, every segment of the record industry has grown. As shown in more detail elsewhere in these findings,

1. There has been a marked increase in the sale of records through all channels of distribution.

2. The percentage of the population purchasing records has increased.

3. There has been an increase in the number of independent record manufacturers, and their share of the market has steadily risen.

4. There has been an increase in the variety of product offered to the public.

5. New artists, new publishers, new songwriters and new fads in music have appeared.

6. There has been a tenfold increase in the number of outlets selling records at retail to the public.

7. There have emerged many other competitive record clubs and mail-order sellers.

8. There has been an increase in the royalties payable to songwriters, music publishers, musicians, artists and to the outside labels distributed by the Club.

9. There has been an increase in consumer advertising, virtually nonexistent prior to 1955; this is important in making consumers aware of the thousands of new records becoming available each year.

The statistical data reflecting growth patterns of the record industry support the opinion testimony of Goddard Lieberson that the creation of the Club, followed by the organization of the other competitive clubs, has broadened the entire market for records and has interested more people in records and phonographs as a source of entertainment in the home (Lieberson 45–47).

Archie Bleyer, president of Cadence, testified that club advertising had a helpful effect on the entire record industry (Bleyer 6973). Herman Starr, who supervises one of the two largest representatives of music publishers, concluded, on the basis of the statistical evidence in his files, that the Club has been the single most important factor in increasing sales of records to the public in all forms; and that its advertising has revitalized consumer interest in records (Starr 7707–16). Record manufacturer Don Pierce, president of Starday, who has achieved great personal success in merchandising his records by mail, testified that the clubs have broadened the base of the record market, contributed heavily to the growth of the industry and enabled more people to participate in the record business (Pierce 5748–51).

To the same effect was the testimony of Samuel R. Rosenbaum, the trustee for the Musician's Trust Fund, who has seen payments to the trust fund for the benefit of 280,000 members of the American Federation of Musicians rise from approximately $4,836,000 in 1958 to approximately $6,000,000 in 1962 (Rosenbaum 7530–31, 7546–47).

The conclusion that record clubs have stimulated general consumer interest in records was also supported by other manufacturer and dealer witnesses (see, *e.g.*, Frankel 2091–92; Blincoe 5688–93; Karol 5587–93), and by the testimony of the outside labels, publishers, songwriters and artists.

Industry growth patterns were shown statistically by some 10 years of market research in the record industry conducted by Market Research Corporation of America (MRCA). MRCA determined that the percentage of population buying records in the early 1950's was relatively small, somewhere in the neighborhood of 10% to 15%. The percentage increased continuously thereafter. By the early 1960's, approximately 35–40% of the population was purchasing records (Kirkpatrick 8010–12).

The benefits of Club distribution realized by the outside labels have been discussed previously. It also has been shown that whatever the impact of Club competition on some individual dealers, the retail record trade, as a whole, has benefited from widened consumer interest in records resulting, at least in part, from Club and related advertising. The same is true with respect to manufacturers and other distributors.

Benefits to Artists—Thousands of recording artists would be adversely affected by curtailment of the Club's activities, as sought in the complaint.

Government counsel called no artists as witnesses. Respondents called Columbia artists Mitch Miller, Andre Previn, Percy Faith, Dave Brubeck, Jimmy Dean and a representative of Andre Kostelanetz, as well as U.A.'s Louis Teicher and the business managers for Liberty artists Martin Denny, Bobby Vee and Julie London. Their testimony stressed the importance of Club distribution to artists.

In addition, representatives of Mercury, Kapp, Liberty, Verve and Warner Bros. indicated that their artists strongly desired club promotion and distribution, and a U.A. representative explained that club advertising of artists "enhances the position of those artists to the general record buyer" (Green 10,230; Talmadge 7824; Kapp 1603–04; Linick 3668; Conkling 6187–88; and CX 88).

Each of those artists had a vital interest in the sales of records at retail because they received the bulk of their royalty income from that source (Miller 7148; Previn 6030; Faith 6474; Brubeck 7426; Dean 7583; Teicher 7021; Mills 6439). Each of them, or their representatives, testified that Club distribution had provided plus sales without adversely affecting retail sales (Miller 7150; Previn 6031–32; Faith 6474–75; Brubeck 7428; Dean 7581–82; Stone 8556; Teicher 7026; Mills 6440–44; Ginter 6066). Moreover, they demonstrated, specifically, how Club advertising and promotion had in fact stimulated the retail sale of their catalogs and of the very records offered by the Club (see RPFs 224–31).

Benefits to Publishers and Songwriters—Another segment of the record industry that would be adversely affected by the restrictions sought by the Government, is made up of the songwriters and publishers whose music appears on records. There are many thousands of songwriters and publishers active in the United States (Berman 8388–89).

Government witness Berman of the Harry Fox office represented some 800 publishers, approximately 70% of the total active publishers (Berman 2126). Government witness Starr of the Music Publishers Holding Corp. represented many important publishers (Starr 1684), substantially the balance of the publishers.

Publishers grant copyright licenses to record companies for mechanical reproduction of musical works subject to copyright and derive royalties, generally calculated upon the basis of suggested retail prices, from the sale of records at retail, through clubs and other channels of distribution. The copyright royalties paid to the publishers by Columbia on Club sales include payment of all royalties due on the distribution of outside labels through the Club (Berman 8377–79).

Publishers and songwriters have obtained substantial benefits from the operations of the record clubs. The operations of the Club, including its sales of outside labels, have resulted in substantially increased total royalty payments to songwriters and to publishers. Thus, payments by Columbia Records to the Harry Fox agency and Herman Starr, including club royalties, have risen substantially since 1958 (CXs 229a, 231 and RX 363).

The total increase in royalty payments to publishers and songwriters was not accompanied by any diminution in royalties attributable to retail sales. On the contrary, Columbia's royalty payments to the publishers represented by Fox and Starr on non-club sales virtually tripled between 1955 and 1962 (Berman 8377; Lorenz 8679; Starr 7714–15). That is uncontradicted statistical evidence of the large growth in retail sales that accompanied the growth in Club sales.

Since publishers and songwriters derive their principal record royalties from the sale of phonograph records at retail (Starr 7712), they keep detailed statistical records of the sources of all royalty payments. Starr, who testified that the Club had been a great stimulant to the entire industry (Starr 1693), stated that his statistical records proved that the Club had not adversely affected retail sales. On the contrary, they showed that non-Club sales had increased tremendously and that the growth in his royalties was attributable chiefly to copyrights which had been in his catalog for many years (Starr 7712–16).

Government witness Brown, one of the publishers represented by Fox, who considered his catalog the most important one in the business (Brown 1829), kept a close check on the impact of record club offers on retail sales. Under examination by Government counsel, Brown testified that he had observed record club offers after an album had run its course at retail, and that this had resulted in an increase in album sales, an increase in performance of those particular songs and an increase in music sales (Brown 1832–34).

Government witness Scopp was affiliated with the music publishers known in the trade as the "Big Three" (not to be confused with what Government counsel called the "Big Three" of the record industry). MGM is a principal stockholder (Scopp 1661). Scopp (another publisher represented by Fox) on his examination by Government counsel, testified that he had anticipated in 1955 that the Club would reach a broadened audience and that he had predicted that, if the Club were successful, his company's total revenues would be substantially increased without adversely affecting dealer sales (Scopp 1674).

On cross-examination, Scopp testified that his expectations had been fully realized. His company's income had in fact increased substantially. His company's statistical records, which he had reviewed only the day before he was called as a Government witness, confirmed that there had been no adverse effect on dealer sales; the ratio of dealer sales to total sales (*i.e.*, club, non-club and other sales) for the period 1959–61 was substantially the same as it had been in the past (Scopp 1679).

Copyright royalties are generally shared equally by the publishers and the songwriters (Scopp 1676). One of America's most prolific and best known songwriters is Richard Rodgers. Respondents' witness Norman J. Stone had been connected with the music industry for more than 25 years. During this time he acted as controller of the financial affairs for Rodgers & Hammerstein Enterprises. He also acted as accountant for Irving Berlin, another distinguished composer, and for Andre Kostelanetz, a prominent Columbia artist. Records containing the compositions of Rodgers and Berlin, and the performances of Kostelanetz, had been offered for sale both through non-club and club channels of distribution (Stone 8545–50, 8555–56).

The original Broadway cast recordings of Richard Rodgers' "South Pacific," "Flower Drum Song" and "Sound of Music" were offered through the Club. The movie soundtrack of "South Pacific" was offered through the RCA Record Club. The movie soundtrack of "Oklahoma" and the original Broadway cast album of "No Strings" were offered through the Capitol Record Club (Stone 8551–53).

Recordings of Mr. Rodgers' Broadway shows were initially distributed through the Club upon the recommendation of Stone after he had carefully reviewed sales statistics that proved to him that the Club's distribution of Kostelanetz records had not adversely affected store sales (Stone 8555–56).

Stone, on the basis of the statistics available to him many years after his initial recommendation, testified that record club advertising and promotion had been extremely helpful to Rodgers, and to his other artist and songwriter clients. In addition to the substantial increase in their royalty income, the club advertising promoted their shows and moving pictures, and kept their names in front of the general public (Stone 8556, 8560–63).

Retail sales of any record are an important matter to songwriters because the bulk of their record royalties are derived from retail sales and not from club distribution (Stone 8550). The sales statistics proved that the offer of the records of Richard Rodgers musical shows through the Columbia, RCA and Capitol clubs had not adversely affected retail sales (Stone 8556–62; see RPFs 242–44).

Benefits to Consumers—It is obvious that record clubs offer many advantages to consumers, including convenience, guidance, quality and value (Keating 5321–22).

The needs and interests of Club members were for a greater variety of selection and for more repertoire to be offered for sale and as bonus selections. To the extent that the Club has been able to satisfy the demand of consumers for variety by the use of outside labels, the consuming public has benefited from its activities.

The fact that approximately one-third of the records sold by the Club are outside label records indicates that the offer of outside labels gave consumers what they wanted.

The Club's offer of outside labels meets especially the wants of members who live in areas not serviced by retailers (Gartenberg 8492–97). Even in large cities where record stores are plentiful, consumers are often not able to buy many records of the outside labels; Club distribution thus provides a useful service in that regard. (See Adler 5117–18; Marek 1885.)

In assessing whether the Club's prices to consumers are too low —prices which are comparable to those charged by many stores, RCA, Capitol, and other record clubs, and by direct-mail sellers— consideration must be given to the needs and interests of the many millions who belong to all the various record clubs, or who buy records by mail at prices sought to be enjoined here. Club members demanded lower prices. To the extent that the Club met this demand, the public benefited.

Certain dealers complained that the Club sold too cheaply to consumers, or that they thought it was the "first discounter," or that it was "cheapening" records by offering them at low prices. Even if any or all of those charges were true, the consuming public would have been benefited thereby.

Such dealer testimony, however, was essentially contrary to fact, as well as to the Club members' understanding of the facts. Thus, in 1957, Politz found that a principal disadvantage cited by members and ex-members was the "higher cost" of Club records (RXs 482, 493).

By 1960, when the sale of records at discount record stores was increasing in certain areas, Stewart-Dougall reported that, next to lack of variety of selection, the principal reason cited by former Club members for discontinuing their membership was that the Club was not advantageous "from a cost point of view" (RX 341). The principal suggestion in that area was the admonition to "cut prices" (RX 342).

Many of the Government's witnesses, although frankly hostile to the Club, nevertheless conceded that the offering of outside labels through the Club, and the Club's pricing policies to members, benefited consumers. Such concessions were obtained, among others, from Mrs. Hurst (3237–38), Mrs. Rothstein (3333), Hollander (3123–24), Freedman (2594) and Winograd (3073). A few, like Schaps and Collins, would concede only "short range" benefits (Collins 3004–05); Schaps 3372–74). Metcalfe, although urging group boycotts against all manufacturers with record clubs, nevertheless conceded on cross-examination that the Club's activities and prices were not injurious to the public (Tr. 2920, 2969).

Opinion Testimony of Economic Expert

In making his findings and reaching his conclusions, the examiner not only took into account, but accorded considerable weight to, the careful and detailed economic analysis of the industry undertaken by Peter Max, an economist called as an expert witness by respondents.

The record shows the background and qualifications of Mr. Max. A graduate of Williams College with a B.A. Degree in Economics, Mr. Max studied at the Graduate School of Cornell University, where he completed all requirements for a Ph. D. in Economics except his doctoral dissertation, which is in the process of preparation. He was a distinguished scholar, having been elected to the honorary societies of Phi Beta Kappa and Phi Kappa Phi and awarded a Ford Foundation Fellowship in economics in a national competition. Mr. Max taught economics and government regulation of business, with particular emphasis on antitrust, at Cornell and at Carnegie Institute of Technology. At the time of his appearance, Mr. Max was associated with National Economic Research Associates, a firm of economists with broad experience in economic analysis in various areas related to Government regulation of business. In the course of his work, Mr. Max has undertaken economic analysis on behalf of numerous governmental and private agencies covering a wide variety of different industries and has appeared as an economic expert witness in various forums (Max 9177–86, 9679–82).

In undertaking his analysis, Mr. Max studied the pleadings, all the lengthy transcripts (numbering over 9,000 pages at the beginning of his testimony), most of the exhibits and a massive amount of additional data from governmental and other sources (Max 9184–85). He supervised the preparation of 74 statistical exhibits (numbering 115 pages), all but one of which were received in evidence.

Before taking the witness stand, Mr. Max personally devoted more than 1,400 hours to his analysis of competitive conditions in the industry, and members of his staff spent an additional 3,000 hours assisting him in his research (Max 9186).

Mr. Max was on the witness stand for portions of 9 different days, often subject to extensive and intensive cross-examination. His demeanor and candor, the well presented and informative mass of statistical material that he prepared, and his careful attention to details, all entitle his testimony to great weight. His expert appraisal of the industry stands essentially uncontradicted and unrebutted.

Government counsel had ample advance notice of Mr. Max's appearance and actually had a Commission economist present in the courtroom for several days (Tr. 9677, 9847–48, 9972), but no economist appeared to contradict Mr. Max or to support the economic theory or theories underlying the complaint.

Although the examiner does not consider himself bound by opinion testimony regarding the existence or nonexistence of competition, or actual or potential threats to competition, nevertheless, the uncontradicted analysis presented by a qualified economist is not to be lightly dismissed.

Having defined the relevant market as embracing all types of phonograph records sold through all channels of distribution (Tr. 9698, 9709), Mr. Max then proceeded to analyze the nature of competition in the record industry in terms of an analytical framework that he termed "workable" or "effective" competition (Tr. 9709, 9564–65).

That analytical approach requires consideration of the following major criteria: (1) the *structure* of the industry, including questions such as the number of companies, their financial resources and market shares and the degree of economic concentration in the industry; (2) the *performance* of the industry, including questions such as historical growth and evolution, the extent of entry of new companies, factors encouraging entry, product innovation and improvements, pricing patterns, reasons for growth of particular companies, and shifts in relative positions of competitors; and (3) *behavior* of the industry, including questions such as price competition, and also non-price competition—*e.g.*, product innovation and service to customers (Tr. 9564–72, 9709–10, 9737, 9754).

On the basis of those criteria, Mr. Max concluded that there was highly effective competition in the record industry (Tr. 9776–77, 9782–83, 9750).

In considering an analysis in terms of "workable competition," the examiner has not necessarily adopted all the theories that are considered to be embraced by that term. There are differences of opinion among economists as to which of the three criteria should receive the greatest emphasis in evaluating the forces of competition. That disagreement, however, is largely one of degree; economists generally agree on the nature of the questions that need to be asked (Tr. 9566); that is, after all, a matter of individual judgment. The labels are not important but the subjects embraced by them do provide a useful framework for analysis. Those criteria have been endorsed by a broad range of experts, including the Attorney General's National Committee to Study the Antitrust Laws (Tr. 9946–59; *cf.* Stocking, *Workable Competition and Antitrust Policy* (1961)).

VII. Price Representations

Count II of the complaint challenges as "false, misleading and deceptive" the price representations contained in Columbia Record Club advertising regarding Columbia, Epic and outside label records. The complaint (Par. Two of Count II) cites these representations:

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

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

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

Through such statements and the dollar amounts shown in connection with the terms "retail value," "regular list price" and "usual list price," according to the complaint, respondents have represented that those amounts "are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made." The complaint further alleges that "through the use of said amounts [$3.98, $6.98, $36.88 and $37.88] and the lesser amounts [$1.89]," respondents have represented that "the difference between said amounts [$3.98, $6.98, $36.88 and $37.88, on the one hand, and $1.89, on the other hand] represents a saving to the purchaser from the price at which such merchandise is usually and customarily sold in said trade areas."

Specifically, Paragraph Four of the complaint charges that the amounts set out in connection with the quoted statements and in connection with the terms "retail value," "regular list price" and "usual list price" [$3.98, $6.98, $36.88 and $37.88], "were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made * * * ."

The complaint alleges that the advertised figures actually "are in excess of the price or prices at which the merchandise is generally sold" in those trade areas. Consequently, the complaint adds, "purchasers of respondents' merchandise would not realize a saving of the difference" between the higher and lower price amounts —presumably the difference between $3.98, $6.98, $36.88 and $37.88, respectively, and $1.89.

The representations are alleged to have the "capacity and tendency" to mislead members of the public into buying substantial quantities of respondents' records, with consequent unfair diversion of trade.

Although Government counsel stated at the Prehearing Conference of September 12, 1962, that Count II contained allegations of a "typical" deceptive advertising case (Tr. 31), the proof at the trial was all to the contrary. The witnesses called by the Government—record dealers—did not claim that Club members were *deceived* by Club advertising into thinking they were obtaining bargains. Rather, their complaint was that Club members in fact did receive bargains and that Club members in fact bought too cheaply.

The only consumers who testified were called by respondents, and they had no complaints against the Club.

A look at the facts in some detail is called for.

Club Advertising

In the course of operating the Club, respondents have placed advertisements which contain, among other things, references to and illustrations of various LPs of respondents and the licensors. Typical of the 1962 ads is one appearing in *McCall's* in March 1962 and in *Life* on February 16, 1962 (CX 120). That ad stated:

> Any 6 of the $3.98 to $6.98 records described on these two pages—in your choice of REGULAR high fidelity or STEREO for only $1.89. Retail value up to $37.88.
>
> tremendous savings on the records you want!
>
> —up to a $37.88 retail value—ALL SIX for only $1.89.

Explaining that the offer was contingent on an agreement to purchase at least six additional records during the next 12 months, the text of the ad set forth:

> The records you want are mailed and billed to you at the regular list price of $3.98 (Classical $4.98; occasional Original Cast recordings somewhat higher), plus a small mailing and handling charge. Stereo records are $1 more.

If a consumer had utilized the reply postcard appended to the ad, he would have signed a commitment to purchase six additional records "at usual list price plus small mailing and handling charge."

Reference also was made in the text of the ad to the availability of "bonus" records if a member continued to purchase after fulfilling his initial commitment.

Similar representations have appeared in many other ads, including representations that the depicted records are $3.98, $4.98, $5.98 and $6.98 records (see Appendix B, Vol. II of the Government's Proposed Findings, etc.).

The representation of a retail value of $37.88 was an aggregate figure representing possible selection by the member of certain $3.98, $4.98, $5.98 or $6.98 records. In 1961, respondents were advertising five $3.98, $4.98 and $5.98 records for $1.97, retail value up to $25.90 (*e.g.*, CX 708b). That was explained by respondents' counsel (not in an ad) in terms of an aggregate of suggested retail prices (CX 68b–c). Even though the term "retail value" was directly applied only to such aggregate figures, it may be, and is, inferred that consumers might reasonably be expected to interpret the "retail value" claim as applicable to the $3.98 to $6.98 records, referred to in the same ad, as components of the sum.

Respondents have advertised certain records as having a "Reg. Price" of $3.98 and $4.98 (CX 147) and a "regular retail price" of $3.98 and $4.98 (CX 148). Those prices were contrasted with a Club offer of "6 for only $3.98" and the "money-saving program" of the Club offering records "at far less than usual cost" (CX 148).

Although respondents complain that CX 148 was not "typical," because it was an unprofitable "test" of an all-classical offer mailed to the public in 1959, it reached 700,000 persons (Klemes 7011–12). However, the term "regular retail prices" does not seem to have been used in other ads.

The reference to "Reg. Price" of $3.98 and $4.98 is not unique to CX 147. It appears in five other solicitations (CXs 680–83, 696). Mailed in early 1961, they represented the Club's Get-a-Friend mailings to old members.

(The complaint does not specifically challenge such terms as "regular retail" or "Reg. Price," unaccompanied by the word "list." However, they are, *a fortiori,* subject to the same charge and would be forbidden under any order phrased in terms of usual, customary or prevailing price.)

Other ads have referred to "records which regularly cost $3.98, $4.98 or $5.98 each" (CX 612c), and have represented that "Each record has a regular retail value of $3.98, $4.98 or $5.98" (CX 612b). The consumer has been told, "You pay only 39¢ each" (CX 612b). It appears that CX 612 was a 1961 test mailing of 40,000 copies (Klemes 7011).

Another representation, appearing in advertising text, has been that "The records you want are mailed and billed to you at the regular list price of $3.98 (Classical $4.98; occasional Original Cast recordings somewhat higher), plus a small mailing and handling charge * * *" (CX 707b; see also RXs 129b, 130b, 131b). Some coupons have used the words "usual list price" (CXs 760b, 762b).

Those representations, soliciting new membership, have appeared in close juxtaposition to the statement that, following fulfillment of his commitment, the member—

will receive—FREE—a Bonus record of your choice for every two additional selections you buy—a 50% dividend! (CX 707b).

"Get-a-Friend" direct mail solicitations—*i.e.*, mailings to old members inviting them to get their friends to join the Club—have depicted various Columbia, Epic and licensors' records and have set forth, for each record, a "Reg. Price" followed by the prices of $3.98 and $4.98 (CXs 680–83). The same solicitations have represented for the old members' reward a "retail value $7.96 to $11.98" and for the new enrollee a "value up to $25.90" (CX 681, page 3; CX 683, page 3). They also have represented that the "New Member" will be "stretching [his] record dollar by more than 60%" (CX 680, page 5; CX 681, page 9; CX 682, page 3; CX 683, page 3). The "New Member" was told he was being introduced to a "money-saving program" (CX 680, page 5; CX 681, page 9; CX 682, page 3; CX 683, page 3).

For another variation of the price representation, see RXs 134–36, 298; CX 564. Those are allusions to the respective actual disparities between the Club's "regular" prices and the "list prices" established by Verve and Caedmon for their records (RXs 134–36, 298; CX 564). For example, RX 134 advertised a "saving" of 97¢ on each Caedmon record, identified as selling through the Club at $4.98, compared to a "regular list price" of $5.95. The Caedmon catalog (RX 298) confirmed Caedmon's higher list price.

The CBS radio network carried 113 spot (30-second) commercials of the Club during the period December 24, 1962, through December 31, 1962 (CX 670). In the areas of the CBS-owned stations (New York, Los Angeles, Chicago, Philadelphia, Boston, St. Louis and San Francisco—CX 264, page 8) and throughout the United States over the CBS Radio Network, representations were made substantially as follows:

6 records, a $37.88 value, for only $1.99 (CX 671a);
6 records, worth up to $37.88, for only $1.99 (CX 671b);
$35.89 could be saved by getting 6 records for $1.99 (CX 671c);
save nearly $36 by getting 6 records for $1.99 (CX 671e);
any 6 records regularly selling for $3.98 to $6.98 each for only $1.99 (CX 671f);
save more than $35 by getting six records for only $1.99 (CX 671i).

It is accordingly found that, as alleged in the complaint, respondents have represented in advertising that the purchasing public may purchase six "$3.98 to $6.98" LP records "for only $1.89." They have further represented that certain combinations of six of such LPs have a "retail value up to $36.88" or a "retail value up to $37.88."

Finally, respondents have advertised that the offer of six records for $1.89 was contingent on the purchaser's agreement to buy at least six additional records during the next 12 months "at regular list price plus small mailing and handling charge" or "at usual list price plus small mailing and handling charge." That "regular" or "usual" list price was referred to in the text of advertisements as "$3.98 (Classical $4.98; occasional Original Cast recordings somewhat higher) * * *", with stereo records $1 more (CX 120).

It is further found that consumers indeed could purchase six records having list prices of $3.98 to $6.98 for only $1.89, subject to the commitment. Also, by applying the list price figures to certain combinations of six of the advertised records, it was possible to arrive at a sum total of $36.88 or $37.88.

It is further found as a fact that Club members not only committed themselves to purchase six additional records during their first year of membership at "usual list price" or "at regular list price," plus mailing and handling charges, but actually did purchase on such a basis.

There is thus no question that respondents have represented that "list prices" have some relationship to actual retail selling prices. The issue drawn by the pleadings is whether or not respondents have represented list prices as usual or customary or prevailing retail prices—the prices at which records are "generally sold."

Under precedents previously established (*e.g.*, *Gimbel Brothers, Inc.*, Docket 7834, July 26, 1962), the finding would have been that respondents had made such a representation. But since the closing of the record in this case, the Commission has taken a somewhat different view of the deceptive capacity of "list price" representations; has posed different questions to be resolved; and has indicated that the new standards were to be applicable to pending proceedings (*Guides Against Deceptive Pricing*, January 8, 1964; *Clinton Watch Company*, Docket 7434, Order on Petition to Reopen Proceeding, February 17, 1964; see Memorandum Opinion, *infra*).

Accordingly, we need to consider the background and significance of list price advertising in the record industry, particularly the Club's use of such claims, and the relation between list prices and actual retail selling prices. The question is not simply whether the list prices are usual, customary or prevailing prices, but whether they are the prices "at which substantial (that is, not isolated or insignificant) sales are made" in the area where the advertiser does business (*Guides*, page 4).

Meaning and Uses of "List Price"

The terms "suggested list" and "suggested retail" appear to be used interchangeably in the record industry (CX 94, page 1; CXs 268, 292c, 401a, 475; Koenig 3619; Metcalfe 2912–13; see also Ackerman 4195). Suggested list prices are established by the manufacturers, including respondents (CX 94, page 1; CXs 268, 292c, 401a, 475).

At the trial, dealer witnesses were consistently asked at what price they bought—or sold—"$3.98 LPs" (*e.g.*, J. Rosen 2774). It is evident that the $3.98 figure, for instance, has a broader meaning to the trade than simply a selling price (see, *e.g.*, Metcalfe 2893; Rothstein 3301; Wilf 2714; J. Rosen 2774–75).

The evidence suggests a finding that "$3.98 records" are typically recordings of popular music, the industry's best selling product which accounts for some 80 to 90% of all LP sales (Bien 7418–21; Del Padre 5638–39; Keating 5316–17; Halderman 7479; R. Miller 7192–93; Barlow 7673–74; Lutz 7883); that "$4.98 records" are primarily classical material, but also include records of a more specialized nature sold by such Government witnesses as Frey, Koenig, and Rubin (Del Padre 5638–39; Bien 7418–21; Halderman 7479; R. Miller 7192–93; Barlow 7673–74; Lutz 7883; CXs 321, 310; Koenig 3619–20); and that "$5.98 and $6.98 records" are special items such as original Broadway cast albums, or sets of albums (Bien 7418–21; Halderman 7479; R. Miller 7192–93; Barlow 7673–74; Lutz 7883; Del Padre 5638–39).

Those price categories are widely used in the industry for identification purposes. The *Schwann* catalog lists records by label, composer and by a serial number designated by the manufacturer. Such serial numbers fall within ranges corresponding to price categories identified in the rear of each catalog (Gallagher 8802–16; Keating 686; CXs 316–20; RXs 559–66). *Schwann* catalogs have been sold for many years to record stores which use them for reference purposes or distribute them, free or at a charge, to retail customers for record identification purposes (Bialek 1359; Press 1232; Zorek 752; Rosner 810; Reeves 1003; Sarkisian 1342–43; Goldfinger 1133–34; Germain 991; Mehling 1033; Prince 5539–40; Doctor 780; Kaplan 805).

In addition, some record stores for years have followed the practice of identifying the price categories for their customers by prominently displaying signs on the floors of their stores, or in advertisements and brochures, in which the list price is set forth or a corresponding identification number is used (Rosner

820–21; Zorek 951–52; Reeves 1009–10; 1015; Kutscher 1154–55; RX 266a–b; Doctor 780; Kaplan 803–05; Goldfinger 1143–44).

A "$3.98 record" is also a quality popular record which is regularly sold through the Club (Keating 5316–17; Gartenberg 8419–21). After the introductory offer, all records purchased by members are purchased at $3.98, $4.98, $5.98 or $6.98, plus mailing and handling charges. No record appears in the Club's introductory media advertising, until it has previously been offered for sale by the Club at the regular Club price. Accordingly, a "$3.98 record" in the Club's introductory advertising is also a record which has been recently sold at that very price by the Club.

The term "$3.98 to $6.98 records" also serves to differentiate, in the industry and in the minds of some consumers, top quality records from budget-line records (Keating 5316–17; Dreyer 6417–18; R. Miller 7192–93) which generally sell at prices below $3.98 (Keating 5316–17; Gallagher 8787–88; Schlang 6715–16). Finally, of course, "$3.98" is also the "list price" of a particular class of records.

List prices appear to be used by every record company in the United States, whether or not they sell through record clubs. "List prices" of records are significant to many people on every level of the industry:

(a) Columbia and other companies determine their distributor and dealer prices for each record by discounting from list price (Shocket 181). Thus, the reference in the testimony to a dealer discount of 38% is a reference to the so-called "base" price of $2.47, which in turn represents a discount of 38% off the "list price" of $3.98 (Gallagher 8804–16; Prince 5539–40).

(b) List price is the basis for computing royalty payments throughout the industry. (See CXs 172b, 173f, 176g and i, 177b and d, 178g and h).

(c) Copyright royalties on records sold, both at retail and through record clubs, vary depending upon the list price of the record on which the selection appears (Starr 7710–11; Berman 8379–80).

(d) Payments to the recording industry's Music Performance Trust Fund are based upon a percentage of the manufacturer's suggested list price (Rosenbaum 7533–36).

Such internal industry uses of list prices, of course, do not require that the term be used in advertising disseminated to the public.

The examiner specifically rejects CPF 466. Respondents have not conceded that the *purpose* of the price representations in part is to create the impression that they are the prices charged by retail dealers.

At the transcript page cited as supporting the finding, Keating was asked: "What a $3.98 record?" His answer was as follows:

A 3.98 record has in our minds the meaning that it is the price that the club regularly sells this record to members in commitment.

* * * * * * *

It is also the suggested list price of a certain class of records. Thirdly, it is the price at which this type of record is available in many areas of the country. And fourth, it described the particular category of records, the 3.98 category of records which is the 12-inch monophonic long-playing record featuring a reasonably well known artist, as contrasted to a low-priced record which would sell for a dollar (Tr. 5316–17).

Keating's statement is consistent with other evidence about the meaning of the term "$3.98 record" both to consumers and throughout the industry. His third definition, noting the prevalence of sales at $3.98 in many stores throughout the country, is consistent with consumers' testimony that they knew records were often, although not always, sold at those prices.

Consumer Testimony

Generally, the consumer witnesses called by respondents were familiar with the fact that records are sold through regular record stores, and also through retail outlets that conduct their business wholly or principally on a discount basis.

None of the consumer witnesses called by respondents understood the language in Club advertising, "Any six of these superb $3.98 to $6.98 long-playing 12-inch records * * * for only $1.89," to be a representation of the price at which phonograph records were being sold at record discount houses in their areas (Riley 7098–7101; Anderson 6461–62; Halderman 7479; Bien 7419–20; Lutz 7882–85; Dreyer 6416, 6420; R. Miller 7190–93).

Among consumer witnesses who appeared, four had joined the Club within two years of their appearance as witnesses at the trial. They came from New York, Los Angeles and New Jersey. Each knew of discount houses where records could be bought at less than list price. In fact, one of them had credited his Club membership to discounter Sam Goody when he joined (Riley 7098–99; Anderson 6458–59; Halderman 7476–78; Bien 7418–19).

Three other consumer witnesses, who had been Club members for a longer time, testified that the price references in the Club advertising were not representations of the prices available in discount stores (Lutz 7882–85; Dreyer 6416, 6420; R. Miller 7190–93). One witness usually bought records in a local store which charged list prices, but knew that there were other stores in her vicinity charging discount prices (Dreyer 6416). Another Club member bought records from discounters Goody, Korvette and Chambers (R. Miller 7190–91). Despite this knowledge, each remained a member of the Club. Their continued membership is incompatible with the inference that the public was attracted or remained attracted to the Club by erroneous impressions concerning the price advantages of Club membership.

The consumer witnesses called by respondents were diverse in their educations and in their professional backgrounds. They included, among others, a butcher's employee (Lutz 7882), a research chemist who joined the Club to start his collection (Halderman 7476, 7483), a mechanic (Anderson 6458), a radio repairman (Riley 7097) and a lady who became interested in dance music after she took lessons at Arthur Murray (Dreyer 6423). They were not "sophisticated buyers" but they were not deceived.

The fact that they believed the 6 for $1,89 deal to be a saving does not demonstrate deception, as contended by Government counsel (Reply, page 128)—it *was* a saving. It was not shown that Club ads constituted

> sales "gimicks" which lure consumers into a mistaken belief that they are getting more for their money than is the fact (*Guides*, page 1).

There was no evidence that the use by the Club in 1961 and 1962 of the type of advertising here alleged to be deceptive in fact brought any economic advantage to the Club in terms of motivating the public to join the Club. There is evidence to the contrary (see RPF 541).

Discounting and List Prices

The knowledge that the consumer witnesses had concerning the existence of discount record stores was merely a reflection of what might be called common knowledge. Prior to the early 1950s virtually all retail dealers charged full list prices for records. Since that time there has been an increase in discounting in various areas of the country. But these regular record discounters are well known to the public. Sam Goody and Korvette have been advertising cut-rate prices for years (see, *e.g.*, RXs 12, 9a, 13a, 13b and 146; Ackerman 4222–23; Gallagher 8848–53, 8856–57; Inden 5544). Other New York dealer witnesses appearing in the case-in-chief admitted that they had advertised cut-rate prices in newspapers and that consumers in their area knew that they could buy records at many stores at discount prices (Kutscher 1154; Maggid 830–32).

Outside of New York, both in areas where discounting is prevalent and in areas where it is rare, most local advertising was done by the discount record stores, and not by the regular retailers (Hill 10,303; Farr 10,454–55; Hurst 3179–200; Block 10,445; *e.g.*, RXs 35, 147). In addition, the public has been apprised of the availability of records at discount through the nationally disseminated advertising of many mail-order sellers, including Goody and The Record Hunter (G. Hartstone 3439; Inden 5544; Ackerman 4222–23; RX 266).

The Columbia Record Club advertising is placed almost entirely in such national magazines as Life, Look, The Saturday Evening Post, McCall's and The Ladies' Home Journal (Rabar 6848–49; Keating 5148; *e.g.*, CXs 331, 322, 120, 737). The Club's direct-mail solicitations to members similarly go to Club members located all over the country.

The Club makes relatively little use of advertising in media that appeal primarily to a single trading area. For example, although the New York Times is, in a sense, a national newspaper, its circulation in cities other than New York is numerically small compared to that of local media (Rabar 6828–29; 6831–35). The Club has placed only a very small proportion of its advertising in the Times (Rabar 6848); and in 1961 spent only $10,000 to $15,000 for advertising in that newspaper (Rabar 6849). Club ads have appeared in Sunday newspaper magazine sections such as Parade and This Week.

The Government offered no evidence to establish that respondents had failed to make an honest estimate of prevailing retail prices in their nationwide trading area. Respondents, in their own behalf, sought to present evidence respecting the prevailing retail price situation throughout the Nation, but some of this testimony, offered through respondents' vice president for sales, was excluded, and an offer of proof was made (Gallagher 8977–94; 9005–07). (The Government's case was presented and the evidentiary rulings were made before the Commission issued its new "Guides Against Deceptive Pricing" (January 8, 1964).)

Evidence *was* admitted to the effect that substantial, and not isolated or insignificant sales, were being made at list prices throughout the country. In a substantial number of representative areas, the principal retailers who did not primarily conduct their business as discounters were, in fact, selling records at suggested list prices.

Respondents offered the testimony of five district sales managers in charge of distributing Columbia records. Their sales territories covered all or parts of 30 of the 50 States, including some of the most populous. Their testimony showed that in most States, the majority of retail record dealers sold Columbia records at list prices. The few exceptions were states whose major cities were among the largest in the country. In those States too, the majority of retail dealers outside the major cities were selling at list prices. Outside the very large cities, list-price sales accounted by far for the substantial portion of total record volume.

Even in major cities where discounting had become most prevalent, substantial numbers of retail outlets did a substantial volume of business at list prices in competition with discounters. In many important population centers, moreover, discount operations had never gotten a foothold, and list prices prevailed in virtually all retail outlets. (See Block 10,426; Smith 10,400; Hill 10,301; Farr 10,453; Craigo 10,566; RPF 544).

Many of the Government's dealer witnesses conceded that they or their competitors sold at list prices. Metcalfe and his principal competitor in Fayetteville, Arkansas, and Mrs. Rothstein and her principal competitor in St. Joseph, Missouri, sold at list prices (Metcalfe 2911–12; Rothstein 3307–08; 3316). So did Mrs. Hurst (Hurst 3203); she reported that department stores in Cleveland sold classical records at list prices (Hurst 3222–23). Bialek's nearest competitor in Washington, D.C., sold at list (Bialek 1374). Other Government witnesses selling at list included Liepmann, in Flint, Michigan; Anderson, Hollander and Winograd, Chicago; and Randy Wood, Gallatin, Tennessee (Liepmann 3386, 3398–99; Hollander 3141, 3117–18; Wood 4126–27).

Two dealer witnesses from Philadelphia, where price wars between Sam Goody, Korvette and Gimbel's had had a competitive impact on the entire market, were nevertheless still selling at list prices in 1962 (Rossi 2275; Scatchard 2810).

In New York, the home town of Goody, Korvette and a host of competing department stores, the four Liberty music stores, which did $532,000 of business in records in 1961, were still charging list prices when the complaint in this proceeding was filed (Brigati 884). So were the Doubleday chain and G. Schirmer, Inc.; they were still selling at list prices at the time of trial (Brigati 885). Like Doubleday, Liberty did a mail-order business as well as selling records in its stores at list prices.

Similar testimony came from the Government's distributor witnesses. L. Smith conceded that among his three largest customers, two, located in Pittsfield, Massachusetts, and Albany, New York, were selling at list, while the third was his own wholly owned rack (Smith 1407–08). The testimony of George Hartstone established that even in large cities where discount record houses proliferate, many important retail record dealers have continued to sell records at list prices. Among them was Los Angeles, where Wallich's Music City, identified as one of the principal record retailers, regularly sold at list. Hartstone also stated that in San Francisco, the other major city in the country's most populous state, a lot of dealers sold records at list prices (G. Hartstone 3464–66).

Respondents also produced a number of dealer witnesses who sold records at list prices in various parts of the country and testified to similar sales by others. Doubleday sold records at list prices in 1962 through 31 retail stores located in major cities throughout the country and through regular mailings of 90,000 to 100,000. Doubleday did over $1 million worth of record business at those prices in the fiscal year ending April 30, 1963 (Prince 5502–07).

Blincoe sold records at suggested list prices in Louisville, Kentucky, where list prices prevailed in the sale of records generally (Tr. 5681–85). Blincoe testified that seven or eight retailers in Louisville sold records at list prices, including one retailer who also discounted records at another, less important retail outlet (Tr. 5703).

Zenger, who carried the largest selection of records of any dealer in Salt Lake City and the Utah area, sold records at full list prices. He testified that within the metropolitan area of Salt Lake City alone, where rack jobbers featured the cream of the catalog in drug stores, shopping areas and grocery stores, most dealers sold at list (Tr. 6314). Moreover, most retail dealers in the Rocky Mountain area, including Utah, Idaho, Wyoming, Nevada, and part of Montana, did likewise (Tr. 6314).

Dunlap, who sold $50,000 worth of records in Oklahoma in 1962, also sold at list prices (Tr. 5898). He and two of three principal competitors, as well as other Oklahoma City retailers, sold at list prices throughout 1962 in competition with discount mail-order houses and the GEX discount chain which specialized in quick merchandising of noncatalog material (Gallagher 9096–97).

As late as August 1963, Hi-Fi Stereo Review, a 50 cent magazine of special appeal to music lovers throughout the United States (Rabar 6836), was selling records on a nationwide basis through a newly formed mail-order record service at list prices (RX 693, pages 55–98).

The examiner has reviewed the proposed findings submitted by the parties concerning the pricing of records in various parts of the country (compare RPFs 544–552 with CPFs 467–89; and see respondents' Exceptions).

Without undertaking to resolve all the factual differences in those detailed proposed findings, the examiner can state in summary that:

There is a substantial basis for finding that in the metropolitan New York area, respondents' records and the records of the licensors are not usually sold at list prices of $3.98, $4.98, $5.98, $6.98.

There is evidence also to support a finding that there are many other areas throughout the country, particularly the larger metropolitan areas, where respondents' records and those of the licensors are sold below such list prices.

The evidence supports a finding also that a substantial number of sales of the records of respondents and the licensors *are* made at list prices.

In the record industry, there has been widespread failure to observe manufacturers' suggested or list prices. There has been the advent of retail discounting on a wide scale. In many areas, such retail discounting has seriously undermined the dependability of list prices as indicators of the exact prices at which records have been and are, in fact, generally sold at retail.

There are many areas, however, where records are sold at list prices in the principal retail outlets which do not conduct their business on a discount basis.

In a substantial number of representative communities, the principal retail outlets are selling records at list prices in the regular course of business and in substantial volume. In the country as a whole, and in many subordinate areas, substantial sales, as distinguished from isolated or insignificant sales, are made at list prices.

The Government's detailed retail price evidence related primarily to New York and Philadelphia—hardly representative or typical (Exceptions, pages 405–20, 423–26).

Another deficiency in the Government's proof under the standards of the new *Guides* is the failure (except in New York) to show actual prices in instances of below-list selling. In instances where such evidence is available, it appears that the list prices here involved are not significantly in excess of the highest prices at which substantial sales are made.

There is no evidence that Columbia advertised its list prices other than in good faith—as an honest estimate of the actual retail prices. There *is* evidence from which it may be inferred that in describing records as $3.98 or $4.98 records, Columbia was reasonably certain that such prices did not appreciably exceed the price at which substantial sales of the article were being made throughout the country, and, indeed, in a substantial number of trading areas. As a matter of fact, the evidence does not show that the list prices advertised by respondents, whether so designated or not, were in excess of the highest prices at which substantial sales of records were being made in every area where the advertisements were disseminated. In fact the contrary is indicated.

There is no showing of any intention on the part of Columbia to establish a basis, or to create an instrumentality, for a deceptive comparison in any local or other trade area.

Not only are records sold at list prices by retailers, but it has been demonstrated that Columbia itself sells a substantial volume of records through the Club at the advertised list prices.

The discounting of records began in the early 1950's. In 1959, the Federal Trade Commission began an investigation of the Club's advertising (Keating 5303). Apparently a survey of actual prices was made at that time by the Commission (Prehearing Conference, pages 165–66; Wunderman 6590). Between 1959 and the filing of the complaint herein, however, mail-order distributors of all kinds, including retail discounters, the sellers of packages, and the RCA and Capitol Clubs, were widely disseminating advertisements that described records offered on special terms or at discount rates by references to their "list," "catalog," "regular retail prices," "retail value" or "nationally advertised prices" (see RPF 553).

Reader's Digest, which packaged "specially recorded" material unavailable in retail stores, referred to the list prices of RCA records in claiming that its prices were less than the public "might expect to pay" (Hitesman 1053–55). The prices to which they referred in each package were the usual list prices for records of the particular type—*i.e.*, popular or classical—which were offered. (See RXs 514b,d,e, 515b,d, 516b,c,f, 517a,c, 518b,c,d, 524b, 519b,c, 554, 555b; *cf. The Reader's Digest Association, Inc.*, Docket C–626, Decision and Order (Consent), December 10, 1963.)

Such advertising by competitive record clubs, sometimes expressly identifying list prices with dealer prices, persisted well after the complaint was filed in this proceeding, continuing even during the trial period (RXs 629, 568b, 691, 205, 206, 195, 570). In July and August 1962, for example, the RCA Club expressly identified the sum of the list prices of records in its introductory offer as the totals of "prices charged by many dealers" (RXs 155, 626, 629, 630).

If list price references have any significance in attracting customers (but see RPF 541), Columbia alone could not have dropped such references in its advertising without sustaining a competitive disadvantage relative to the other clubs and mail-order sellers. However, before the present complaint was filed, Columbia decided it would change its format if other record clubs would change theirs as well. This decision was communicated to representatives of the Federal Trade Commission by counsel for the Columbia Record Club (Wunderman 6590–6600). Columbia's offer was not accepted.

The present complaint was filed against Columbia alone in June 1962. As respondents say (RPF 556), "The record does not reflect that any similar action was taken against any record club competitor of Columbia"; but see *The Reader's Digest Association, Inc.*, Docket C–626, Decision and Order (Consent), December 10, 1963. Beginning, apparently, in 1963, Columbia has generally omitted the references to "$3.98 to $6.98 records" and "retail value" in preparing new Club advertisements (Klemes 7015–16; see RXs 307, 308, 305, 547, 549).

The foregoing Findings, comprising Sections I through VII, set forth the facts as found by the examiner. The legal principles underlying some of the factual findings and the rationale and authority supporting the examiner's ultimate conclusions are set forth in the Memorandum Opinion that follows.

MEMORANDUM OPINION

A. Introduction

This case involves an industry where the semantics "are absolutely terrifying." For example:

> Serious music is very often funny and popular music is very often unpopular, and * * * so-called classical music * * * is not classical * * *. (Lieberson 116)

That testimony came on the very first day of hearing from an official of respondent Columbia Broadcasting System, Inc. The semantics *have* been "terrifying" ever since.

In such an industry—the phonograph record industry—it is not surprising that a searching antitrust inquiry would reveal other anomalies. It is not surprising that counsel were—and are—in violent disagreement as to the meaning of words, figures and conduct.

For example, Count I of the complaint accuses Columbia of selling records directly to consumers at such low prices as to be unfair to its record-dealer customers who compete with the Columbia Record Club. At the same time, Columbia is accused, in Count II, of falsely advertising the savings available to consumers. Regarding charges of price fixing the position of the Government emerges as equivocal, if not wholly self-contradictory.

Columbia, according to the Government, is one of the "Big Three" manufacturers that dominate the record industry. Yet the complaint challenges Columbia's activities in acting, in effect, as distributor, in the so-called "club market," for the records of some of its smaller competitors.

In that connection, a great many antitrust cases have involved requirements by a supplier that distributors deal exclusively in the supplier's product. Here we have a case where the distributor (Columbia) imposes exclusivity on its supplier.

Respondents can claim, with some justification, that Government counsel have centered their attack on practices that "aggravated" something that was not alleged to be illegal in the first place.

Although Government counsel strenuously argue (Argument, page 320; Reply, page 15) that the licensing agreements are "a series of acquisitions which may substantially lessen competition or tend to create a monopoly," thereby seeking to come under the "reasonable probability" standard of § 7 of the Clayton Act, the complaint actually alleges that the licensing agreements "have a *dangerous tendency unduly to hinder competition* or tend to create a monopoly" (Par. Ten); that dual pricing has a *"dangerous tendency unduly to hinder competition"* between respondents and dealers, as well as the purpose or effect of monopolizing or attempting to monopolize (Par. Eleven); and, finally (Par. Twelve), that all the practices have a *"dangerous tendency"* to lessen, restrain and eliminate competition and a *"dangerous tendency"* to create a monopoly in respondents (emphasis added).

The question arises, then, whether the complaint, under § 5 of the Federal Trade Commission Act, has imposed on Government counsel a heavier burden of proof than they would carry had the complaint been brought in terms of § 7 of the Clayton Act. If the Government should prove that the effect "may be substantially to lessen competition, or to tend to create a monopoly" (§ 7, Clayton Act), is that equivalent to proving a "dangerous tendency unduly to hinder competition" and a "dangerous tendency to create in respondents a monopoly * * * "?

Finally, in the realm of anomaly, counsel for both parties demonstrate a certain amount of ambivalence.

Although attacking Columbia as a predatory monopolist, Government counsel point to its outstanding achievements in the record industry. Counsel for Columbia, on the other hand, are modest about those achievements and find it necessary to deprecate occasional boasts of pre-eminence found in corporate annual reports. At the same time that Columbia's counsel point to shortcomings on the part of competitors, they are constrained to emphasize the strength of those competitors.

So much for some of the less troublesome paradoxes.

Summary of the Facts

Despite the apparent prolixity of the Findings of Fact, the essential facts can be briefly outlined. The facts have been set forth in considerable detail because of certain conflicts in the evidence and, more particularly, because of conflicts between counsel as to the existence of certain facts and the interpretations to be placed on them. For example, Government counsel filed Proposed Findings of Fact numbering more than 300 pages (including Appendices), to which respondents filed Exceptions totaling more than 450 pages, in addition to their own Proposed Findings of 200 pages—all that plus briefs and reply briefs.

Additionally, as is true so often of legal controversies, many of the apparent legal issues have been resolved in whole or in part by virtue of the factual conclusions reached.

At any rate, before undertaking to apply the law to the facts of this case, a brief factual summary may be useful.

Columbia Broadcasting System, Inc., a vast communications complex, is, through its Columbia Records Division, a major factor in all phases of the phonograph record industry, from production to retailing. Since 1955, it has operated the Columbia Record Club, selling LP records directly to consumers in a mail-order operation. Columbia is engaged at the same time in selling records indirectly through ordinary retail channels: It sells to dealers and other resellers both directly, through wholly owned wholesale distributors, and indirectly, through independent wholesale distributors.

Beginning in 1958, Columbia entered into contractual arrangements with several other LP manufacturers whereby the Club began selling "outside labels" in addition to its own Columbia and Epic LPs. Briefly stated, the contracts were licensing agreements whereby Columbia was granted the exclusive use for up to 3½ years of the licensors' "master recordings" from which to manufacture records on the licensors' labels for sale through the Club. Columbia does *not* sell outside labels through any other channel of distribution.

Most of the charges in the complaint revolve around those licensing agreements. It may be helpful to outline those allegations. as well as the allegations not directly related to the licensing agreements.

The Allegations of the Complaint

Licensing Agreements—The licensing agreements are attacked as unlawful because of the following circumstances:

1. The licensors are competitors of Columbia.

2. The records covered by the licensing agreements are "among the most popular * * * in the industry" and are included among the records that dealers are "obliged to stock."

3. The exclusivity provisions preclude the licensors from (a) offering or selling LPs by direct mail to consumers, and (b) offering or selling LPs, or licensing any of their masters to any third party for the purpose of selling by direct mail to consumers. (Note, however, that identical records may be sold, directly or indirectly, by the licensors to dealers for resale to consumers.)

4. It is agreed that Columbia shall pay no royalty on records included in the enrollment offer or distributed as "bonus" or "free" records.

5. It is agreed that the Club records produced from licensed masters shall bear the label or labels of each of the licensors.

6. The licensors "recognize" that it is Columbia's policy to pay only half the customary artist royalty on records sold by the Club and "agree in general to conform to this policy."

7. The license agreements impose restrictions on the parties with respect to release dates of records, prices and distribution channels, as follows:

(a) The licensor is restricted with respect to release dates of records distributed through dealers.

(b) The licensor may not offer records to distributors "at distress prices."

(c) Club records manufactured from licensed masters are required to be sold at prices "not less than the price at which a similar" Columbia record is being sold by the Club.

(d) The licensor may not reduce suggested list prices on LPs sold "through normal retail channels" without giving six months' written notice to Columbia.

(e) The licensor agrees not to sell to certain specified subscription-method sellers.

The complaint (Par. Ten) alleges that the licensing agreements, individually and collectively, "have a dangerous tendency unduly to hinder competition or tend to create a monopoly." It says further that the licensing agreements "are being engaged in for the purpose, or with the effect, of creating in respondents the undue power, and respondents have in fact regularly exercised the power," to:

1. Fix and maintain uniform prices of competitors' records at prices identical to those of Columbia's own records.

2. Cause the licensors to sell LPs to dealers at prices regularly higher than the prices charged for identical LPs sold through the Columbia Record Club directly to consumers.

3. Divide or allocate various markets and channels of distribution in connection with the sale of LPs produced under licensors' labels.

4. Establish, and compel the licensors to adhere to, a "fixed differential" in artist royalties payable on records sold through the Club and records sold through dealers.

5. Hinder, lessen or suppress competition between respondents and the licensors, as well as between respondents and other record manufacturers.

6. Hinder, lessen or suppress competition between respondents and other record clubs.

7. Hinder, lessen or suppress competition between respondents and dealers in the sale of all phonograph records.

8. Exclude from the market, or potentially to exclude, dealers as a result of "the competitive disadvantage to which they are subjected" by the acts and practices of Columbia engaged in pursuant to the licensing agreements.

9. "Monopolize or attempt to monopolize the manufacture, sale and distribution of LPs generally, and of LPs sold through the subscription method of distribution"—that is, through record clubs.

The complaint (Par. Nine) further alleges generally that the acts and practices of Columbia in connection with the licensing agreements, separately and cumulatively, "have had and now have the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition."

Other allegations are that:

The long-playing record market has been and is "dominated" by Columbia, RCA Victor Record Division of Radio Corporation of America (RCA), and Capitol Records, Inc. (Capitol). Each has a record club.

The three major record clubs account for approximately 20% of the money spent by members of the purchasing public for records. Of that percentage figure, Columbia's share is approximately half.

Increases in net sales and membership of the Club are due to "respondents' extensive promotional campaign, together with the wide choice of recordings afforded the consumer by reason of respondents' control of the works of numerous artists pursuant to licensing arrangements."

Duel Pricing—The complaint (Par. Five) also challenges a practice that has come to be known as "dual pricing." The charge is to the effect that dealers are compelled to stock a substantial number of records produced from masters owned or controlled by Columbia, as well as from masters owned or controlled by competitors of Columbia but licensed to Columbia for Club use, so that dealers compete with the Club for consumer sales, but in buying records for such resale, they are "compelled" to pay higher prices than those paid by consumers purchasing through the Club.

That allegation is based in part on the price offered by the Club in its initial enrollment offer—for example, 6 LPs for $1.89 (complaint, Par. Two). However, the complaint also alleges that a consumer who takes advantage of that initial offer *and* lives up to his commitment to purchase, during the next 12 months, 6 additional records "at regular list price" likewise pays prices that are lower per record than those paid by dealers.

The complaint says that a consumer obtaining 6 LPs for $1.89, plus 6 additional LPs at $3.98 each, pays an average of $2.14 for each record, exclusive of mailing and handling charges. It alleges that dealers are obliged to pay from $2.22 to $2.47 for records of the same grade and quality.

The practice of selling LPs under Columbia's own labels to dealers at prices higher than those charged to consumer-customers of the Club is branded "unfair" by the complaint (Par. Eleven). Its effects are alleged to be as follows:

It has the capacity, tendency and purpose or effect of establishing and maintaining a competitive advantage to the Club over the dealer.

It has the dangerous tendency unduly to hinder competition between respondents and dealers in the sale of phonograph records.

It has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally and the retail sale and distribution of LPs.

Finally, the acts, practices, methods and agreements of respondents, separately and cumulatively, as alleged in Count I of the complaint, are attacked on these grounds:

They are all to the prejudice of competitors of respondents.

They have a dangerous tendency to frustrate, hinder, suppress, lessen, restrain and eliminate, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated, competition and opportunity to compete in the manufacture, sale and distribution in commerce of phonograph records.

They have resulted in an unfair competitive advantage to the Club over dealers and over subscription method competitors.

They have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs.

They have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of long-playing phonograph records and in the manufacture, sale and distribution of all phonograph records.

They constitute unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Price Representations—Count II of the complaint challenges as "false, misleading and deceptive" the price representations contained in Columbia Record Club advertising regarding Columbia, Epic and outside label records. The charges are outlined in detail in the Findings (Part VII).

Respondents' representations and practices are alleged to have the "capacity and tendency to mislead" consumers into buying "substantial quantities" of records, with consequent unfair diversion of trade to Columbia.

Whether by design or oversight, the conclusions proposed by Government counsel (Argument, Vol. II, pages 298–99) are far less sweeping than the conclusions set forth in Paragraphs Ten, Eleven and Twelve of the complaint.

Unlike the complaint, the proposed conclusions do not view Columbia as having the power, purpose or effect of monopolizing or attempting to monopolize.

Now Government counsel apparently would have us conclude as to Count I that the licensing agreements "have a dangerous tendency unduly to hinder competition"; that respondents' sale of LPs "to dealers at prices higher than those charged to consumer-customers of the Club" is "unfair"; and that those practices and agreements, separately and cumulatively, (1) are all to the prejudice of Columbia's competitors; (2) have a dangerous tendency to lessen, restrain and eliminate, and have actually lessened, restrained and eliminated, competition and opportunity to compete in the manufacture, sale and distribution of phonograph records; (3) have resulted in an unfair competitive advantage to the Columbia Record Club over dealers and over other record clubs; (4) have a dangerous tendency to destroy, hinder and prevent competition between dealers and subscription method sellers with respondents in the sale of LPs; (5) have a dangerous tendency to create in respondents a monopoly in the manufacture, sale and distribution of LPs and of all phonograph records.

Regardless of the Government's apparent abandonment—never explicitly stated (see Tr. 9695–96, 11,129; cf. Reply, pages 54–59) —of some of the more sweeping allegations, there still remained troublesome problems for the examiner.

The charges in this case reflect virtually the whole spectrum of antitrust jurisprudence. Government counsel have gone to the antitrust storehouse and have come up with a whole dormitory full of Procrustean beds bearing such familiar labels as price fixing, division of markets, leverage, monopolization, boycott, exclusive dealing and mergers, plus a few fairly new labels like dual distribution and reciprocity.

Where the facts do not fit the law, or where the law does not fit the facts, Government counsel have ingeniously emulated Procrustes and have either cut off the facts or the law or stretched them to fit the particular concept involved.

Thus, if the licensing agreements do not have the permanence associated with mergers, they "partake" of acquisitions.

Conspiracy is not really charged, but we can "borrow" from the law of conspiracy.

This is not a group boycott case, but we can pretend that it is.

And so it goes. In their brief, Government counsel have pulled together a tremendous amount of antitrust law and principles. They have dug into the cases and have shown commendable ingenuity.

The trouble is, the law does not fit the facts, or prehaps it's a case of the facts not fitting the molds fashioned by counsel.

With such a melange of charges, a plethora of evidence and a respondent denominated as belonging to the industry's "Big

Three," there is a strong temptation to say that there must be an antitrust violation here. But such an attitude is even less defensible than the fallacy of considering challenged practices completely *in vacuo*. The examiner has looked at the totality of respondents' practices, but at the same time, it was necessary to look at them *seriatim* for proper analysis.

We celebrate this year the fiftieth anniversary of the passage of the Federal Trade Commission Act, under which these charges are laid, and also of the Clayton Act, the spirit of which, if not the letter of which, has been invoked by Government counsel. We are referred also to the even more venerable Sherman Act, passed nearly 75 years ago. But despite all the case law and all the commentaries, the application of that law to the facts of this case presented the examiner with no easy task.

That suggests both the strength and the weakness of antitrust jurisprudence. Because it is economic freedom that those statutes are designed to preserve, they do not contain clear-cut or detailed rules and regulations. Except for certain industrial or commercial practices condemned as *per se* unlawful, the quest for certainty continues to be illusory. If we had such certainty, if the vast expanse of gray area were changed to black "and/or" white, we would no longer enjoy economic freedom.

Chief Justice Hughes wrote that the Sherman Antitrust Act, as "a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Appalachian Coals, Inc.* v. *U.S.*, 288 U.S. 344, 359–60 (1933).

Let us measure respondents' practices against that essential standard.

B. Dual Pricing ("The Price Squeeze")

The "main thrust" of this case originally was said to deal with the licensing agreements, which were to be the central issue (Prehearing Conference, September 12, 1962, Tr. 8, 30). Most of the testimony, however, actually focused on a broader aspect of Columbia's operation—the practice of "dual distribution," which antedated the outside label contracts.

The term "dual distribution" refers, generally, to an arrangement whereby a manufacturer or other supplier competes with its own reseller-customers. Thus, as in the case of Columbia, a manufacturer may sell to wholesalers for resale to retailers, and, at the same time, sell to retailers itself. Or, carrying the process a step farther—again, as in the case of Columbia—the manufacturer may also sell directly to consumers at the same time it sells to retailers.

Despite the attention the subject has been receiving in the press and in Congress in recent years, dual distribution is not a separate, identifiable antitrust problem. It is not prohibited by the antitrust laws or by the Federal Trade Commission Act.

The practice may involve or lead to activities or effects cognizable under those statutes, of course. It may be accompanied, as alleged here, by restrictive trade practices, price fixing, price discrimination, monopolization or attempted monopolization.

Dual distribution may or may not be anti-competitive, depending upon the context in which it appears. In this proceeding, it is alleged to be an antitrust problem in the context of a market in which integrated firms hold substantial market power. In the absence of demonstrated anti-competitive impact, or of such factors as those mentioned above, dual distribution is not subject to attack under existing antitrust laws.

The complaint's charges in the dual distribution area involve allegations of both price fixing and price discrimination.

Paragraph Ten of the complaint charges, in effect, that Columbia causes "the Licensors to sell LPs to dealers, directly or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers."

Paragraph Eleven brands as "unfair" Columbia's alleged practice of selling Columbia LPs to dealers at prices higher than those charged to consumer-customers of the Club.

Both Paragraphs Ten and Eleven apparently refer back to Paragraph Five of the complaint, where it is alleged that "dealers are compelled to pay higher prices than those paid by ultimate consumers purchasing through the Club for LPs manufactured and distributed by CBS and for records manufactured and distributed by the licensors * * * ."

The factual determinations made by the examiner respecting the dual pricing allegations make it unnecessary for him to discuss the complications of law and policy inherent in the Government's theory as to the so-called "Price Squeeze" (Argument, pages 346–52; Reply, pages 118–26; CPFs 265–82). Despite pretrial disclaimers (Prehearing Conference, January 3, 1963, Tr. 242), there are at least overtones, or perhaps undertones, of Robinson-Patman in the Government's position.

As shown by the examiners's Findings, however, Columbia has not discriminated against dealers by selling to Club members at lower prices; nor has it "caused" the licensors to sell to dealers at prices higher than Columbia sells to Club members.

The Government's proposed findings titled "Dual Pricing" (CPFs 265–82) refer only to Columbia records. No reference is made to outside labels. The dual pricing claim alleged in the complaint apparently has been abandoned with respect to outside labels. (See CPFs 314–27 and Exceptions; also Appendix, *infra.*)

Regarding Columbia's sales of its own records, the examiner has concluded that the Government failed to prove that Columbia charged dealers higher prices than it charged Club members. The charge of violation is based on an understatement of prices paid by Club members and an overstatement of prices paid by dealers.

Both the complaint and the Government's Proposed Findings improperly and unfairly compare the *average* price paid by Club members during their first year of membership ($2.14) with the *range* of prices ($2.22 to $2.47) that dealers allegedly were "obliged to pay."

In computing the average price paid by Club members, Government counsel also omit mailing and handling charges, as well as the higher average prices paid by members after the first year of membership. Moreover, no attempt was made by the Government to establish the average price at which the Club sells records to *all* its members—its first year members as well as members who have completed their initial commitment—during a typical year.

The record also fails to support the allegations of the complaint concerning the prices paid by dealers. The record shows that dealers paid far lower *average* prices than the prices set forth in the complaint.

When *average* prices paid by Club members, adjusted to include mailing and handling charges are compared with *average prices* paid by dealers [as shown by the Government's own so-called "survey" (CX219)], the factual basis for the charge of discriminatory pricing is destroyed.

There remains only the necessity to justify the examiner's conclusion (1) that in any computation of prices paid by Club members, for comparison with prices paid by dealers, mailing and handling charges should be included, and (2) that for such comparison, average dealer prices should be "net"—reflecting all applicable discounts, rebates and allowances.

Regarding the elements of price, it is not necessary, fortunately, for us to delve into the intricacies of the delivered-price controversy that raged before the Robinson-Patman Act was passed and was renewed in the wake of the Supreme Court's *Cement Institute* decision, 333 U.S. 683 (1948).

As a point of departure, pertinent Commission rulings on the subject indicate that price discrimination is to be measured by reference to "actual" prices charged by sellers. *Clay Products Ass'n*, 47 F.T.C. 1256, 1273 (1951); *National Lead Co.*, 49 F.T.C. 791, 881–82 (1953); *Chain Institute, Inc.*, 49 F.T.C. 1041, 1105 (1953).

Despite some ambiguous and confusing language (which apparently misled Government counsel), such a prevailing concept of "price" is also reflected in the 1956 Report of the Commission's Advisory Committee on Cost Justification:

> * * * In general, the price * * * is measured by the value of the consideration which passes from buyer to seller in the exchange: it is the amount which the buyer agrees to pay and the seller agrees to take.
>
> In all instances of "geographic" or "delivered" pricing the intent of the parties must be considered—what they mean the price to be. * * * In finding price it is reality that counts, not form * * * (pages 2–3).

The matter is made somewhat clearer in the Report of the Attorney General's National Committee to Study the Antitrust Laws. In the operation of business, as well as in the operation of the law, what counts is "the actual, laid down price" that the buyer must pay out when invoiced for the purchased goods (*Report*, pages 216–17).

Accordingly, under the Commission's "actual price" criterion, the measurement of alleged discrimination between two *competing* buyers in a Robinson-Patman case would be disparities in laid-down cost. In undertaking to determine the existence of "unfairness" in the prices charged by Columbia to Record Club members, on the one hand, and to retail dealers, on the other, it is reasonable to compare the "laid-down" cost to each class of customer.

Mailing and Handling Charges

Neither counsel has cited us to any case law or other clear-cut authority on the question of mailing and handling charges as such, and the examiner's limited research failed to yield any more definitive answer than that already indicated.

Black's Law Dictionary (4th Edition) defines price as "Something which one ordinarily accepts voluntarily in exchange for something else" and as "The consideration given for the purchase of a thing."

Black's goes on to explain price as the "Sum of money which an article is sold for"; the amount "which a prospective seller indicates as the sum for which he is willing to sell."

Black's further notes that "The term may be synonymous with cost * * * ."

Finally, *Black's* points out that "price" under the ceiling price regulations of the Office of Price Administration was "the amount paid by the purchaser."

American Jurisprudence and *Corpus Juris Secundum* are somewhat more verbose, of course, but are in general agreement with the definition in *Black's*.

The purist may argue, of course, that Columbia itself recognizes that the mailing and handling charge is something other than price when it represents that the charge to the customers is $1.89 "*plus*" small mailing and handling charge, or $3.98 "*plus*" small mailing and handling charge. Nevertheless, if we look to reality and the intent of the parties, it is plain that Columbia intends to be paid an amount that includes not only the quoted "price," but also the mailing and handling charge. Likewise, the customer has been advised that in addition to the "price," his laid-down cost will include a mailing and handling charge. (*Cf. Fingerhut Manufacturing Company,* Docket 8565 (May 27, 1964).)

Under the Record Club arrangement, the price is the amount that the buyer agrees to pay Columbia for the goods, including as "goods" the transportation and handling that Columbia furnishes. The fact that the mailing and handling charge is separately stated does not warrant its exclusion in any meaningful comparison of Club prices with dealer prices.

"Net Prices"

Concerning other aspects of price, the price for measurement under Robinson-Patman criteria is computed *net* of any discounts or offsets which the buyer can deduct from the seller's invoice price. Again quoting the Commission's Advisory Committee on Cost Justification (Report, page 3):

> The price, in any instance, is net of all applicable allowances, discounts, and rebates which the buyer receives or is entitled to receive in view of the quantities and methods of his purchases.

(*Cf. Sano Petroleum Corp.* v. *American Oil Company,* 187 F. Supp. 345, 356 (E.D.N.Y. 1960).)

The net price concept has been frequently reflected in Commission orders to cease and desist in pricing cases. For example, the *Firestone Tire & Rubber* case, invalidating a variety of discriminatory allowances and discounts, culminated in an order enjoining discriminations in net prices, broadly defined as taking "into account rebates, allowances, commission[s], discounts, terms and conditions of sale, and other forms of direct or indirect price reductions, by which net prices are affected" (55 F.T.C. 1759, 1764 (1959); see also *Morton Salt Company*, 45 F.T.C. 328, 329 (1948); *U.S. Rubber Company*, 28 F.T.C. 1489, 1504 (1939)).

Likewise, the Commission said in *Fruitvale Canning Company*, 52 F.T.C. 1504, 1520 (1956), "It is the actual amount paid by the purchaser to the seller after taking into consideration all discounts, rebates, or other allowances with which we are concerned here."

Accordingly, the Government's failure to reflect discounts or rebates such as the "bonus-to-sell" and a "special program" at Christmas, resulted in a gross overstatement of average prices paid by dealers (see Appendix, *infra*).

The view that the examiner has taken of the dual pricing issue here makes it unnecessary for him to rule definitively on the appropriate handling of the cash discount in arriving at the net prices paid by dealers.

Again, there are no conclusive precedents, but it appears that the cash discount offered by Columbia was one which all dealers could claim as a practical matter and to that extent it is appropriate to deduct such discount from Columbia's dealer prices for purposes of measuring those prices against the prices charged consumer members of the Columbia Record Club. If the comparison were between prices of dealers, all of whom could theoretically qualify for the discount, that probably would justify disregarding it (see *National Lead Company*, 49 FTC 791, 852, 874 (1953); *U.S. Rubber Company*, 28 FTC 1489, 1504 (1939)). But here it was a price reduction available to dealers and *not* to Club members.

The charges of dual pricing, or what Government counsel call the "Price Squeeze," must be dismissed for failure of proof.

C. The Licensing Agreements

The Government's attack on the licensing agreements centers around allegations that (1) they operate to fix prices, (2) involve "other concerted activity" and (3) are unlawfully exclusionary. Each charge will be considered *seriatim*.

Preliminarily, however, it should be noted that despite the generality of the allegations in the fourth paragraph of Paragraph Seven of the complaint, the contract provisions cited in the subparagraphs numbered 1 through 5 on page 35 (summarized in the Introduction, *supra* (pages 257–58, Par. 7a–e)) were found only in the first two licensing contracts negotiated by Columbia in 1958 and 1959 (Verve and Caedmon). It appears that, for all practical purposes, the elimination of those provisions was under way before the Commission's investigation began. No contract executed since 1959 has contained such provisions.

Price Fixing

The examiner has found that except for the obsolete Verve and Caedmon contracts, the licensing agreements between Columbia and the outside labels were not intended to, and did not in fact, fix prices either in the club field or in the field of conventional distribution.

(It is important to note that the complaint does not charge, and there is no evidence to show, any price-fixing agreement independent of the contracts.)

Even in the case of the Verve and Caedmon agreements, the examiner ventures to suggest that in the circumstances shown by this record, it is a very long jump from those contract provisions, without more, to an inference that they resulted in

> a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity * * *.

within the contemplation of the *Socony-Vacuum* case, 310 U.S. 150, 221–23 (1940). The evidence indicates—the very blatancy of the contracts suggests—that they were technical violations, sporadic and of questionable effect.

The much discussed "restriction" in the Verve contract was designed to discourage the sale of records from a handful of Verve masters to distributors at "distress prices." It was, in terms, a price-fixing agreement, but there was no evidence that Verve ever issued the records or that the agreement was enforced. If Verve sold at "distress prices," the contract provided that Columbia might offer the records to Club members on the Columbia label. Finally, the provisions were waived by contract amendment in February 1960—three years before trial.

In the case of the Verve contract, respondents are persuasive in their defense of the "most favored nations" clause, whereby Columbia simply agreed it would not sell Verve's $4.98 records at a price lower than similar-type Columbia records were being sold through the Club. This did permit, however, Club sales at prices below Verve's $4.98 list price.

In *U.S.* v. *Columbia Pictures*, 189 F. Supp. 153 (S.D. N.Y. 1960), a distribution contract between companies similarly situated was upheld against a Sherman Act charge. But other provisions of the

Verve contract are more troublesome, as shown in the findings, *supra*.

The original Caedmon contract fixed the Club price of Caedmon records at $4.98 and required Caedmon to give the Club notice before lowering *its* suggested retail list price ($5.95). That provision was removed in April 1961.

The record shows that the Columbia Club has, in fact, sold Caedmon $5.95 list records at $4.98, and Verve $4.98 list records at $3.98.

The findings set forth in some detail the circumstances surrounding the negotiation and precomplaint abandonment of the price-fixing aspects of the Verve and Caedmon contracts. On that basis, and in view of the disposition of the other charges, the examiner is of the opinion that the public interest does not require issuance of an order to cease and desist from price fixing. Under all the circumstances disclosed by the record, it is, in his opinion, unnecessary to issue an order predicated on practices long discontinued.

Such a determination, of course, is based on the further finding that none of the other contracts contained any provisions fixing either Club or retail prices. What the Government insisted was a price-fixing scheme in other contracts has been found to be simply a method governing royalty payments. The Club's royalties to outside labels are determined by applying an agreed percentage royalty rate to a base which was the Club's selling price, less certain complicated deductions. If the intent of the parties was to agree that Columbia would sell through the Club at licensors' list prices, such a complicated formula would hardly be required.

To Government counsel, the Caedmon and Verve contracts were somehow "precedents" for price fixing in all subsequent contracts (*e.g.*, CPF 111).

There may be some logic in the approach of Government counsel, but it is one of the anomalies marking this case that in support of their theory that Columbia and the licensors have agreed "that suggested list prices are to be maintained" (Argument, page 342), they point primarily to contracts specifically providing that Columbia need not maintain the list prices of Verve and Caedmon.

That is not the only anomaly. The position of the Government with respect to the price-fixing charges is otherwise equivocal, if not self-contradictory. The complaint (Par. Ten (1)) charges that, as the result of the licensing agreements, Columbia has exercised the power to fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products. Plainly, that accuses Columbia of fixing the sales prices of competitors (the licensors) at a uniform level matching Columbia's own prices. But it still raises more questions than the evidence supplies answers.

In their Argument (page 341), Government counsel contend that the licensing agreements "consist of contracts and produce concomitant understandings affecting the *prices of the contracting competitors*" (emphasis added). They say that "Some of the contracts set prices in both club and non-club channels of distribution," and others "merely constitute agreements about the club price."

Aside from the fact that the only evidence tending to support those sweeping claims consists of the abandoned Verve and Caedmon provisions, there are other complications. Government counsel make it clear that the main thrust of their price-fixing contentions relates to parallel contracts whereby Columbia and the licensors "agree that suggested list prices of the Licensors are to be maintained" (Argument, page 342; see also page 343: "CBS has agreed to maintain the suggested list prices of a *group* of its competitors by parallel contracts").

So now, the agreement is for Columbia to adhere to the list prices of the licensors!

That is a curious departure from the allegation of the complaint that the agreements fix and maintain the prices of competitors' products to match Columbia's prices.

There is an inconsistency also in the charge in Paragraph Ten (2) that Columbia causes the licensors to sell LPs to dealers at prices higher than the prices charged by the Club in sales to consumers. If Columbia were, in fact, complying with an agreement to maintain, in Club sales, the suggested list prices of the licensors ($3.98, $4.98, etc.), it is obvious that Columbia was not at the same time causing the licensors to sell to dealers at prices higher than those suggested list prices!

Here, the semantics indeed get "terrifying"—or at least frustrating. The Government has failed to prove what price was being fixed and by whom. (See "The Curious Case of Allan Cohen", *supra*, page 125.)

It appears from the evidence that basically, the decision by the Columbia Record Club to sell at list price was a unilateral decision made in 1955, before the sale of outside labels. It was unilaterally followed thereafter, with such exceptions as Caedmon and Verve. The Club thus sells at the same prices as list price record dealers throughout the country. The RCA and Capitol clubs also sell at list prices (without any claim by the Government of collusion), and they do not offer outside labels. The existing contracts do not set prices, and no price-fixing arrangements can be inferred from the mere sale of records by the Club at list prices.

Moreover, from time to time the Club unilaterally has changed the terms of the introductory offer which, in turn, establishes the average Club price to members. The Government concedes that this action has been unilateral. Each of the outside label manufacturers has unilaterally determined its own pricing system for conventional distribution, and Columbia has done the same. There is no evidence to the contrary (except for Caedmon and Verve).

Artists' Royalties—Although objecting to contract provisions regarding artists' royalties, neither the complaint nor the Government's posttrial submittals make clear the nature of the violation claimed. There is a vague suggestion—but no proof—of presumed injury to artists.

Government counsel cite no cases to establish that such an activity would be "price fixing" under the antitrust laws; indeed in the Government's Proposed Findings, the subject is treated separately from "Agreements Restricting Competition" and "Agreements Respecting Price."

At any rate, there is no showing that the royalty provisions constitute price fixing in purpose or effect. The character or effect of the conduct is equivocal, and further evidence is required before we can decide whether such behavior amounts to price fixing. There is no evidence of what effect, if any, the practice may have on price formation. (*Cf. Board of Trade* v. *U.S.*, 246 U.S. 231 (1918).) The record here is barren of any showing that the artists' royalty provisions contemplated or necessarily involved the control of market prices or that they otherwise unlawfully restrained trade or were injurious to competition.

Finally, it is noted that the challenged royalty provisions were waived by Columbia shortly after this complaint was issued (CPFs 107–10).

Other "Concerted Activity"

In its Argument (pages 339–41), the Government contends that:

> The Licensing Agreements create other horizontal restraints on, and lessen competition among, manufacturers.

Government counsel rely on the matters set forth in CPFs 139–81. On the basis of his Findings of Fact on the subject of "Other

Concerted Activity" (page 134, *supra*), the examiner rejects the contentions of Government counsel that:

> The Licensing Agreements create a relationship between competitors demanding exchange of intimate details of their businesses which must inevitably reduce their zeal for competition and that "Already this is evident" (Argument, page 341).

The facts do not support the claim.

The examiner's conclusions on this aspect of the case have been reached in the face of his recognition that the probability of competition being substantially lessened by conduct specified in the antitrust statutes need not be established by direct evidence; inferences that competitive restrictions will probably result are acceptable if supported by adequate evidence. However, as was stated by the District Court as to a similar aspect of the *Penn-Olin* case (not considered by the Supreme Court):

> Here the proof shows only an opportunity for illegal activities. That is not enough. To equate opportunity for wrongdoing with likelihood of its occurrence reflects a cynicism toward business behavior which is without warrant. Presumption of probable wrongdoing cannot be a substitute for its proof. *U.S.* v. *Penn-Olin Chemical Co.*, 217 F. Supp. 110, 134 (D. Del. 1963), *rev'd on other grounds*, 378 U.S. 158 (1964).

Exclusionary Provisions

With the allegations of price fixing held to be unproved, the exclusive-dealing aspects of the agreements pose one of the most troublesome aspects from an antitrust standpoint. They do preclude the outside labels from competing with Columbia in the club or mail-order sales of records, and do set up a barrier to the use by other clubs and mail-order sellers of the records covered by the licensing agreements.

On the first reading, the baldly stated agreement of each licensor not to compete with Columbia in the club method of distribution or other mail-order sale of records looks like a sure basis for a cease-and-desist order. But research tempers such an instinctive reaction.

Statutory Tests

Exclusive dealing, in which a buyer is obligated to deal exclusively with a seller, is governed by Section 3 of the Clayton Act, and there is a wealth of literature, as well as case law, on the subject. This case falls into the category of an exclusive-selling arrangement, which is not such a familiar subject.

Typically, the restraint of a seller at the behest of a buyer takes the form of an exclusive franchise or a "full output" contract. In either case, the seller is foreclosed from competing, directly or indirectly, with his customers. The licensing agreements do not fit squarely into either category, but partake of both.

In the absence of any exclusive-selling counterpart of Section 3, the legality of the seller's covenant is measured by the general prohibitions of the Sherman Act and is, a here, also subject to attack under Section 5 of the Federal Trade Commission Act (see *Hershey Chocolate Corp.* v. *F.T.C.*, 121 F. 2d 968 (3rd Cir. 1941)). Virtually all of the Federal cases involving exclusive-selling agreements have been brought under the Sherman Act. In any case, the statutory prohibitions derived their content from the antecedent common law. (For discussion regarding Section 7 of the Clayton Act, see *infra.*)

Superficially, it does appear that the purpose and effect of the exclusionary clause in the licensing agreements are the elimination of competition, at least on a temporary basis. On the face of it, that would appear to require condemnation without further inquiry.

Nevertheless, because such an arrangement is not specifically outlawed by the antitrust acts, nor clearly made a *per se* offense by the decisions, further inquiry is open to us, and it appears that such restrictive agreements may be permissible under the well-established doctrine of ancillary restraints.

However shocking such exclusionary provisions may be initially, they are familiar in the law of contracts and in antitrust jurisprudence. Contracts by which a business, a professional practice or some other property is sold or otherwise transferred are frequently accompanied by ancillary covenants which have involved a complete or partial elimination of the vendor as a competitor of the purchaser.

Agreements not to compete were generally regarded as unenforceable restraints of trade at early common law and void as against public policy. 17 C.J.S. Contracts, § 239. However, the leading English case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), qualified the doctrine by distinguishing between general and partial restraints of trade. Partial restraints of trade were enforceable if reasonably limited as to the time and area restricted. Ultimately, the courts came to reject any formal or fixed rules. The modern rule determines the validity of a covenant in restraint of trade by its reasonableness in the light of the particular circumstances.

An agreement imposing a restraint in trade or occupation must be (1) ancillary to the sale of a business or similar arrangement, and (2) must be reasonable both as to the territorial extent of the restraint and the period for which it is imposed. 17 C.J.S. Contracts, § 246.

It is not necessary to the validity of a restrictive covenant that it be ancillary to the sale of a business only; it may be valid if ancillary to a sale or lease of property, to a contract of employment, to a pledge of corporate stock, to a license agreement, or to any other lawful contract. 17 C.J.S. Contracts, § 241.

It is essential that the covenant or contract by which the restraint is imposed be incidental to and in support of another lawful contract or sale by which the covenantee acquires some interest warranting protection. Although good motives will not save an unreasonable restraint, a contract merely for the purpose of removing a competitor is unlawful under all circumstances.

Because the general rule is one of reasonableness, and hence relative in character, the result of each case must rest upon the particular facts and circumstances of that case.

In considering what is reasonable, several basic concepts are generally applied: (1) the restraint must be necessary for the protection of some legitimate interest of the promisee; (2) the restraint must not impose undue hardship upon the person restrained; and (3) the restraint must not be injurious to the public as a whole. See Annot., 46 A.L.R. 2d 119, 149–51 (1956); 5 Williston, Contracts, § 1636.

The instant contracts may be held valid as meeting those specifications.

The leading American case on the subject is *Addyston Pipe & Steel Co.* v. *U.S.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), in which the lower court decision was written by Circuit Judge, later Chief Justice, William Howard Taft.

The pre-Sherman Act authorities were carefully reviewed by Judge Taft in the *Addyston* case. According to his synthesis, the common law sustained an agreement "by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold." (85 Fed., at 281; Accord.: Restatement Contracts, § 516(a) (1932).) The restriction was required to be limited; it could be "such only as to afford a fair protection to the interests of the party in favor of whom it * * * [was] given, and not so large as to interfere with the interests of the public" (at 282).

In applying this test, the public interest criterion has been equated with the absence of monopoly. The restriction is not countenanced where the seller has a monopoly of the product or where the buyer is endeavoring to corner the market.

On the other hand, if there are other suppliers to whom competing buyers can turn, the rule is "virtually one of *per se* legality." *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418, 420 (D.C. Cir.), *cert. denied* 355 U.S. 822 (1957).

Taft's formulation of the rule of reason applicable to exclusive selling was applied to the sale of chattels: *U.S.* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398 (S.D.N.Y. 1942), *aff'd by an equally divided Court*, 321 U.S. 707 (1944); *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331, 335 (2nd Cir.), *cert. denied* 345 U.S. 994 (1953).

Of particular significance to the instant matter, the rule also was extended to the licensing of motion pictures in *U.S.* v. *Paramount Pictures, Inc.*, 66 F. Supp. 323, 341 (S.D.N.Y. 1946), *aff'd in pertinent part*, 334 U.S. 131 (1948).

In the *Bascom* case, *supra*, it was held that "the Sherman Act was not violated, because the manufacturer had no monopoly of the product, and the 'restraint of trade' was (a) ancillary to a reasonable main purpose—a source of supply to the distributor—and (b) fairly protective of that distributor's interest but not so large as to interfere with the interests of the public."

Exclusive-selling arrangements have been sustained in numerous other cases under the Sherman Act (see respondents' Memorandum, page 11).

Restrictions on Columbia—By the terms of the licensing agreements, Columbia and each licensor have agreed that Columbia will sell the records manufactured from the licensed masters through one channel of distribution only, a record club. Government view these provisions as "restrictions on CBS."

Actually, the contracts contain no specific agreement by Columbia and the licensors that Columbia shall sell the records through one channel of distribution only—namely, a record club. The result may be the same, but there is more than a technical difference. Under the contracts, the sole rights licensed by the outside label manufacturers to the Club were for record club distribution, but there was no specific agreement by Columbia not to offer the records in other channels. (Compare CPF 66, where Government counsel appear to complain because Columbia did not feel that the contract prevented an offer by the Club through Encyclopedia Brittanica, which is not a record club.)

The Verve contract, for example, licensed Columbia to manufacture records from Verve masters "solely for the purpose of sale by direct mail in accordance with the merchandising method known and understood, in the mail order business, as the 'subscription' or 'club' plan * * *" (CX 23c).

Even if this contractual arrangement be viewed as an agreement by Columbia to sell only through Club channels, there is respectable authority upholding that kind of restraint also.

Just as the common law authorized a seller to agree, ancillary to a sale of property, not to compete with the purchaser, so too it permitted an agreement "by the buyer of property not to use the same in competition with the business retained by the seller." *U.S.* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 281 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). Accord: Restatement, Contracts § 516(b) (1932). See *Oregon Steam Nav. Co.* v. *Winsor,* 87 U.S. (20 Wall) 64 (1874); *Tri-Continental Financial Corp.* v. *Tropical Marine Enterprises Inc.,* 265 F. 2d 619 (5th Cir. 1959).

Two other precedents cited by respondents are especially persuasive. They are: *Doubleday, Inc.,* Docket 5897, 50 F.T.C. 263 (1953), 52 F.T.C. 169 (1955); *U.S.* v. *Columbia Pictures Corp.,* 189 F. Supp. 153 (S.D.N.Y. 1960). The parallels between those cases and the instant proceeding are so striking as to warrant calling them "bay horse cases." They are discussed at length in the briefs. One excerpt from *Doubleday,* involving book clubs, is quoted here:

> The question for decision is whether this competitive situation results from practices which are violative of the law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail book seller has lost sales to a book club or can not successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission* v. *Paramount Famous-Lasky Corp.* (C.A. 2, 1932) 47 F. 2d 152, 157. "Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face." *Federal Trade Commission* v. *Curtis Publishing Co.,* 260 U.S. 568, 582. 50 F.T.C. at 266.
>
> * * * Disadvantage to retail book sellers may be perpetuated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs, and a large section of the reading public. On balance, the overriding public interest (as well as the law) seems to be with the views held by the Hearing Examiner. 50 F.T.C. at 267.

Government counsel now argue in their Brief that the licensing agreements constitute *per se* violations of the law. This viewpoint is hardly consistent with that taken at the trial, when the Government paraded to the stand, as witnesses, numerous dealers and manufacturers in an effort to show adverse effect.

At that time, Government counsel evidently either did not espouse the *per se* theory or perhaps had little or no faith in it. Otherwise, there would have been no point to all the testimony and other evidence designed to show adverse effect stemming from the licensing agreements.

Ironically, the Government might have been in a stronger position if it had rested originally on the *per se* doctrine, or if, perhaps, it had left to inference the anti-competitive effects of patently restrictive agreements. Belated use of the *per se* rule at this stage makes it suspect, and, moreover, the very evidence adduced by the Government as a sort of safety measure tends to undermine acceptance of a presumed injury to competition in the face of facts indicating the contrary.

The *Motion Picture Advertising* case, 344 U.S. 392 (1953) is of substantial precedental value here. It is more often cited for what the Court said as to the broad sweep of Section 5 of the Federal Trade Commission Act than for what it held.

What is often overlooked is that the Court *held* that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore 'an unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act." 344 U.S. at 395. It is worth noting, however, that no *per se* rule was applied. Long-term exclusivity (as long as 5 years) was held bad, but such contracts were allowed for 1-year terms.

In the heading preceding CPF 30, Government counsel refer to the licensing contracts in this case as "long-term agreements." However, there was no testimony or other evidence offered regarding the reasonableness or unreasonableness of the terms. Certainly it is not established that the agreements may properly be denominated as "long-term." All the indications are to the contrary.

Brief comment should be made at this point respecting the position of the Government that the licensing agreement would be unlawful even absent the exclusive-dealing arrangements or so-called price-fixing arrangements.

Even assuming that it has been shown, or that we may properly infer, an adverse competitive effect stemming from those arrangements, the examiner is still of the view that there must be something "unfair" about the practice itself. As noted in *Doubleday, supra*, the fact that a practice has the effect of hindering competition, without more, does not make it an unfair method of competition.

It may be worth noting at this point also that there is no showing whatever of any oppression, coercion or threats on the part of Columbia in the negotiation or execution of the licensing agreements. There was no claim on the part of any of the licensors of any overreaching on the part of Columbia. The transactions eventuated as a result of arm's length bargaining.

Review of the authorities, therefore, shows that the legality of Columbia's licensing agreements with outside labels is governed by the Rule of Reason and long established antitrust principles with respect to ancillary restraints, and not by any rules prescribing *per se* illegality.

Finally, we reach the question whether the licensing agreements constitute violations of Section 7 of the Clayton Act. It is not necessary to make a definitive determination whether Section 7 applies to short-term distribution contracts of the type involved in this proceeding. There is authority for the proposition that an exclusive long-term license distribution arrangement such as was involved in the *Screen Gems* case (*U.S.* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D. N.Y. 1960)) would constitute an "asset" within the purview of Section 7 because it "had substantial economic value for a long term" (189 F. Supp. at 183). The instant case is distinguishable from *Screen Gems.*

From the legislative history, as well as the authoritative discussion in *Brown Shoe Co., Inc.* v. *U.S.*, 370 U.S. 294 (1962), respondents have extracted language indicating strongly that the amended Section 7 was never intended to cover distribution contracts of the type involved in this case (see respondents' Memorandum, pages 44–47).

However, it is not inappropriate, perhaps, to apply Section 7 standards to some degree in testing the legality of the licensing agreements. Thus, we have undertaken to determine whether the effect may be substantially to lessen competition or tend to monopoly. We are not requiring that the Government prove a "dangerous tendency" toward those results.

Before reviewing briefly the competitive picture in the wake of the licensing agreements, an explanation of the relevant market considerations is in order. To that subject we now turn.

Relevant Market

Whether the effects of the respondents' practices are to be tested as involving monopolizing, attempting to monopolize, tending dangerously to monopolize or substantially lessening competition, the determination in any case must be made in terms of one or more relevant markets. That is true regardless of the statute under which a particular practice or the totality of respondents' practices may be considered.

The question whether a particular practice may substantially lessen competition or tend to create a monopoly can be answered only with respect to some line of commerce or some product market. The existence or non-existence of the prohibited competitive effect must be considered in connection with a market, which has both product and geographical boundaries.

Here there is no particular problem as to geographic boundaries. We are concerned essentially with a national market from the geographic standpoint. However, the parties violently disagree concerning product market or line of commerce.

Our first task, then, is to determine an appropriate market in which to measure the competitive effect. The determination of the relevant market is a necessary predicate to a finding of a violation. *U.S.* v. *E. I. du Pont de Nemours and Co.*, 353 U.S. 586 (1957).

The market to be considered, both with respect to product line and geographic area, is "the area of effective competition. *U.S.* v. *E. I. du Pont de Nemours and Co., supra.* The "area of effective competition" includes the line or lines of commerce and the section or sections of the country in which the effects may be felt.

Although the market for testing a merger or acquisition under § 7 of the Clayton Act is not necessarily the same as the market concept for the purpose of other sections of the antitrust laws, nor is it necessarily the same as the economist's concept of market, *U.S.* v. *Bethlehem Steel Corporation,* 168 F. Supp. 576 (D.C. N.Y. 1958), any such distinctions are academic with respect to the relatively uncomplicated structure of the record industry. Also, with the monopoly charges out of the way, there is no reason for not relying basically on the § 7 criteria.

This already lengthy exposition might be even further extended by an erudite review of the many cases in which the Commission and the courts have discussed relevant markets.

Such a review does yield certain guiding principles, but the determination is essentially a pragmatic one. Extended discussion of the varying standards applied in other cases might be academically interesting, but would contribute little to the resolution of the problem in the instant case. The matter is authoritatively considered at some length in *U.S.* v. *Brown Shoe Co., Inc.*, 370 U.S.

294 (1962). It is interesting that both sides rely on that case to support their opposing contentions.

The factual basis for the examiner's determination that the appropriate market here consists of all phonograph records sold through all channels of distribution has been set out at length in the Findings. It remains only to indicate briefly the rationale of the rejection of LPs and record clubs as appropriate markets or lines of commerce.

The examiner has undertaken a pragmatic, factual approach to the definition of the relevant market rather than a formal, legalistic one. The all-records market corresponds to the commercial realities of the industry.

In the examiner's opinion, it is unrealistic to break the all-records market down according to the speed at which a record revolves, or the manner of its retail sale. The boundaries of the relevant market must be drawn with sufficient breadth to include *competing* products and to recognize competition where, in fact, competition exists. The determination of whether or not there is a reasonable probability of a substantial lessening of competition requires an examination into economic realities. All competition must be considered, including competition faced by the product in question from other products.

LPs and 45–r.p.m. singles do in fact compete. So do record dealers and record clubs.

Despite all the references to precedent and principle, the dispute between the parties is a pragmatic one. The Government wants the breakdown because the "sub-market" statistics tend to show greater concentration and give Columbia a greater market share. Conversely, respondents want to define the market broadly because the all-records statistics indicate a lower concentration index and a lesser market share for Columbia.

Further division of the record market does not really aid us in analyzing the effects of Columbia's practices. It would tend to distort the economic actualities.

Neither LPs, as a product market, nor record clubs, as a line of commerce, are sufficiently inclusive to be meaningful in terms of trade realities. They are not distinct and substantial markets. It cannot be said that LPs have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other phonograph records so as to make them a line of commerce within the meaning of the Clayton Act.

The boundaries of the product market are determined by reasonable interchangeability of use and cross-elasticity of demand between the LPs and singles. LPs and singles do not constitute well-defined submarkets that in themselves constitute appropriate product markets for antitrust purposes.

The basic facts are that, except for certain types of serious music which are lengthy, precisely the same music and the same artists appear on singles and LPs. Singles and LPs are made in the same factories, sold through the same conventional channels and to similar consumers. They operate on the same phonographs. Knowledgeable record people like Government witness Wood and respondents' witness Mitch Miller aim their singles for as broad a base as possible, and the artists they promote appeal broadly to all consumers. Small wonder that Mitch Miller properly characterized the LP as a "long single." The appeal of an artist depends upon the artist himself and his material, and not on the speed at which the record revolves. Such differences as there are between singles and LPs are not substantive.

A precedent especially pertinent to the instant case is *U.S.* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D. N.Y. 1960). There, all forms of television programming material (including syndicated films produced specifically for television, video-taped and live shows, cartoons and shorts), rather than feature motion films for television exhibition alone, constituted the relevant product market for the purpose of determining the legality of the acquisition of exclusive distribution rights to feature films for television exhibition.

Feature films faced a high degree of competition from other forms of television programming material; they did not have peculiar characteristics or uses that were significant for television purposes; and they were reasonably interchangeable with, and competed against, all other types of television programming material.

Just as short Westerns were found to compete with long Westerns, so here, an LP is a "long single."

Records are sold to consumers by many means including traditional retailers, discount houses, department stores, supermarkets, clubs and direct mail sellers. There obviously are certain differences in their merchandising techniques. But they are all offering the same product, and thus are in general competition for the favor, and the dollars, of consumers. Indeed, the whole theory on which Government counsel tried this case was that the clubs sold the identical product in competition with retailers and actively took customers and sales away from these competitors. In the face of this, can it be seriously contended now that clubs are in a market separate from those retailers?

Just as supermarkets do not constitute a separate line of commerce, *The Grand Union Co.* (Docket 8458, Initial Decision, October 4, 1963), neither do record clubs. A line of commerce is not a store or a particular method of selling products, but consists of a product or group of products offered for sale and sold in the market place. Particular types of sellers do not constitute separate lines of commerce.

Government counsel have labored mightily to separate out LPs and record clubs from the manufacture and sale of records generally. They have made the most of what they have. But it is not enough. To the examiner, the differences the Government emphasizes do not warrant viewing LPs or clubs as separate submarkets.

Monopoly Charges

It is easy to inveigh against monopoly; it is not so easy to define it. This is a problem that continues to perplex the courts.

It was not quite twenty years ago that Judge Learned Hand laid down his oft-quoted dictum that ninety percent "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *U.S.* v. *Aluminum Co. of America,* 148 F. 2d 416, 424 (2nd Cir. 1945); *cf. U.S.* v. *Columbia Steel Co.* 334 U.S. 495, 527–28 (1948).

Under that kind of approach, monopoly cases became a baffling game of numbers. The test resolved itself into that degree of market control which, ultimately, the Supreme Court believed could properly be vested in a single enterprise.

Obviously, the percentage had to be something less than 100 if the prohibition was to mean anything. The question was—and still is—how much less.

Subsequent cases, together with a growing sophistication, both economic and legal, have provided a better frame of reference, but a satisfactory answer remains elusive.

The test currently being applied sounds deceptively simple. Monopoly is now judicially defined as the "power to control prices or exclude competition." *U.S.* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956) (*Cellophane*).

Whether we apply the *Alcoa* test or the *Du Pont* test, and regardless of the product or functional market that we look at, the conclusion must be that Columbia does not have a monopoly and has not monopolized.

Despite some vacillation (*cf.* Tr. 9695–96, 11,129), it appears that Government counsel have abandoned the monopolization charges in the complaint and now rest their case essentially on the probability of a substantial lessening of competition or a tendency toward monopoly.

Even though the Government's Reply (pages 54–59) suggests continued reliance on the charge that Columbia attempted to monopolize the club distribution of LPs, there is no occasion for any extended discussion of that subject. There is no real claim that the Government proved the requisite specific intent to accomplish an unlawful result. *Swift & Co.* v. *U.S.*, 276 U.S. 311 (1928); *U.S.* v. *Columbia Steel,* 334 U.S. 495, 532 (1948).

The evidence does not begin to support any claim of monopoly, monopolization or attempted monopolization.

Competitive Effects

With monopoly, monopolization and attempt to monopolize out of the way, as well as price fixing and allegedly discriminatory "dual pricing," we come now to a consideration of the competitive effects of the licensing agreements as such, without extraneous factors.

The factual conclusions are set forth in Section VI of the Findings of Fact, *supra,* and there is no point in repetition here, except in the most general terms. Similarly, there is a vast body of case law on the subjects embraced herein. It would unduly extend this already lengthy opinion to discuss here even a small percentage of the cases cited in the briefs and reply briefs of the parties.

However, before concluding, there should be set forth some observations that may touch on both the facts and the law, but with a minimum of repetition.

Government counsel contend that all of the licensing contracts, whether exclusive or nonexclusive, are illegal. It is the position of the examiner that (aside from price fixing) the only real antitrust question stems from the exclusionary clauses barring each licensor from competing with Columbia, directly or indirectly, in the club or mail-order sale of records.

The recent inclusion of provisions for partial or complete release of exclusivity would not, in the opinion of this examiner, save the contracts (*Alles Corp.* v. *Senco Products Inc.*, 329 F. 2d 567 (6th Cir. 1964)) if in fact it had been shown that the effect of the contracts is actually or potentially injurious to competition.

No such showing was made in this record. It has been amply demonstrated that to whatever extent dealers may have been suffering injuries as a result of club operation, there was no bridge of causation linking such injury with the exclusive-dealing clauses or, as a matter of fact, with the licensing agreements in general.

There was no showing that any existing record clubs or mail-order sellers, or any potential entrants into either of those fields, had suffered competitive injury as a result of the barriers, or that competition is otherwise threatened as a result of the outside label arrangements.

Whether or not exclusive selling arrangements of the kind in issue here enjoy "almost *per se* legality," there can be no doubt that there must be a showing that the exclusivity is likely to result in a substantial lessening of competition. The complaint recognizes that burden, but it is a burden that has not been met by Government counsel.

The failure of the prosecution was not due to any want of zeal on the part of Government counsel. They were earnest and diligent, but the facts simply fail to support the allegations of the complaint.

Similarly, it may be conceded that the record dealers and other witnesses who testified in support of the complaint were earnest and sincere in their belief that record clubs are injurious to their business. Some of the dealer witnesses espoused competition of a type inconsistent with the public policy enunciated by the antitrust laws.

The flaw in the case as presented by the dealer witnesses is twofold: (1) their claims of injury generally fail to stand up under inquiry, and (2) in any event, whatever their injury, it was not shown to be properly attributable to the licensing agreements between Columbia and the outside labels.

A plausible argument can be made that the pricing policies and practices of the Club have had an adverse impact on some record dealers, but there has been shown no relationship between the licensing agreements and such competitive pricing.

No Pre-Emption—There is no charge, and no evidence, that Columbia pre-empted, or attempted to pre-empt, the field by signing up any large number of companies. Over a period of four years it entered into only a few contracts with a handful of the many hundreds of record companies in active operation. Competitive record clubs were free to make competitive bids.

The Club's sale of outside label records has never amounted to more than a small fraction of either total industry sales of records or of LP records (RX 425–26 *in camera;* RPF 100).

Although CPF 30 refers to 17 licensing agreements between Columbia and 12 different companies, there were in effect at the time of trial only six full catalog contracts (Caedmon, Mercury, Kapp, United Artists, Liberty and Cameo), the outside term of which varied from 1 year to approximately 3 years. Of these six full catalog contracts, four contained partial exclusivity release clauses pursuant to which the outside labels might sell individual records through other mail-order sellers; three of those four contained complete exclusivity-release clauses pursuant to which the outside labels could take their entire catalog to a competitive record club; one of the six was a one-year contract (Cameo—CX 453).

A distinction must be drawn between power to exclude competitors from a particular source of supply, or even a group of suppliers, for a short term, and power to exclude competitors from the *market*, even temporarily.

It is logical, of course, that such competitive injury as might develop would involve other record clubs or other mail-order sellers. Proof of that nature, however, was limited to the Diner's Record Club, and the facts concerning that operation do not add up to a showing of cause and effect or of injury to competition.

For the most part, the injury testimony came from dealers. It is apparent that the exclusivity provisions in the licensing agreements would be immaterial to them. As a matter of fact, they presumably would welcome any restrictions that limited club or mail-order competition.

It is a fair test of the legality of the exclusive arrangements to inquire where other prospective purchasers could practicably turn for supplies. Since the restriction applied only with respect to club and other mail-order sellers, our inquiry is narrowed accordingly.

The availability of other supplies is usually a question raised with respect to the geographic boundaries of the market, *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963), but it is raised here without respect to any narrow geographic boundaries.

The fact is that to whatever extent prospective competitors of Columbia in the record club or mail-order field may be handicapped, that disadvantage is not attributable to the nonavailability of the records of the licensors.

Those records, as well as those of the so-called "Big Three," are actually available in the market. Despite the provisions in the contracts restricting the licensors from knowingly selling their records for resale through club or other mail-order channels, it is apparent that there is no absolute barrier to prevent such records from finding their way into those channels of distribution. As a matter of fact, that is what happened.

Just as in the case of the records of the Big Three, the problem is the acquisition of those records bearing the labels of the licensors at a price permitting resale through club or mail-order channels at prices competitive with the major record clubs. The complaint here does not attack the root of that problem, and the proposed order against exclusivity would not solve it.

It is true that the blanket prohibition against Columbia's engaging in such licensing agreements would have some impact, but we have also seen that there is no valid basis provided by this record for such a sweeping prohibition.

Chain Reaction Theory—The argument of Government counsel that Columbia must be restrained here because its competitors might emulate its practices has some precedent in the *Revlon* case (*Revlon Products Corp.*, Docket 5685, 51 F.T.C. 260, 279 (1954), motion to reopen denied, 51 F.T.C. 466 (1953)). There, commissioner Mason intimated that the possibility that competitors might emulate the respondent in the future was a relevant consideration. This is the same "chain reaction" theory later articulated in *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D. N.Y. 1958).

In some of the exclusive-dealing cases, there has been reference to the fact that the seller's competitors likewise adhered to exclusive-dealing policies. The significance of that is not altogether clear. The cumulative effect of such adherence has been mentioned by the courts and the Commission on numerous occasions—for example, *Standard Oil Co. of Cal.* v. *U.S.*, 337 U.S. 293 (1949); *Dictograph Products, Inc.*, Docket 5655, 50 F.T.C. 281 (1953), *aff'd*, 217 F. 2d 821 (2nd Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); *Beltone Hearing Aid Co.*, Docket 5825, 52 F.T.C. 830 (1956); *Signode Steel Strapping Co.* v. *F.T.C.*, 132 F. 2d 48, 54 (4th Cir. 1942); see also *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). Such cumulative effect, however, does not appear to have been made the basis for decision, except possibly in the *Signode* case.

To posit a finding of illegality on the basis of what a respondent's competitors independently *are doing* is dubious. To make the legality of his practices dependent on what competitors independently *might do* is even more questionable.

The examiner recognizes, of course, that a respondent's practices must be considered in the setting and context in which they exist. He recognizes also that in general, we are concerned with probabilities and not certainties. Nevertheless, to predicate a finding of unlawful conduct on the basis of what competitors might independently do is offensive to one's sense of justice.

In that connection, let us consider, finally, the basic issue ultimately posed here—whether or not the agreements are anticompetitive because of undue industry concentration. On that issue, we have recent guidance from the Commission in the case of *The Procter & Gamble Co.*, Docket 6901, 63 F.T.C. 1465 (1963).

Section 7 and "First Principles"—The examiner has decided to apply to the licensing agreements the tests of legality applicable under Section 7, not because the contracts or their results really involve mergers or acquisitions, but because, in the words of *P&G* (p. 1549), "Section 7 deals with the fundamentals of a free competitive economic system." Instead of a lengthy review of other pertinent case authority, we shall limit the discussion to the "first principles" expounded in *P&G*.

Procter & Gamble involved a challenge by the Commission under Section 7 of the Clayton Act to the acquisition by P&G of the assets of Clorox Chemical Co. This was the first case involving a so-called conglomerate merger.

In its comprehensive discussion of the coverage of Section 7, the opinion by Commissioner Elman is instructive as to the proper disposition of the instant case, which has been analogized by the Government to a Section 7 proceeding.

To the extent that the licensing agreements we are concerned with might be considered to constitute an acquisition or a "temporary merger," the results may be viewed as those of a horizontal merger, because the arrangements are between firms that make and sell the same product.

In another sense, the licensing agreements might be viewed as in the nature of what the *Procter & Gamble* opinion called "a market extension merger" (p. 1543). That is on the basis that Columbia and the licensors are selling to different customer classes; *cf. Brillo Manufacturing Co.*, Docket 6557, 64 F.T.C. 245 (1964); see also *Foremost Dairies, Inc.*, Docket 6495, 60 F.T.C. 944 (1962). In the instant case, the licensor (viewed as the "acquired firm") sells the same product as Columbia ("the acquiring firm") and may be a prospective entrant into the so-called club market.

The analogy obviously is imperfect, but it does provide a conceptual framework in which to test the legality of the licensing agreements. It must be borne in mind that the "assets" are Columbia's only in part, and only temporarily. No assets disappeared;

nobody went out of business. As respondents say (Memorandum, page 47):

> To call these arrangements "acquisitions" (subject to Section 7) is to play a game of semantics in an ivory tower.

The *P&G* opinion lays down certain basic principles for the interpretation and application of Section 7—principles that may govern, at least to a degree, the instant case.

First, "All mergers are within the reach of the amended § 7, whether they be classified as horizontal, vertical, or conglomerate, and all are to be tested by the same standard. * * *.

"* * * The legal test of every merger, of whatever kind, is whether its effect may be to substantially lessen competition or tend to create a monopoly, in any line of commerce, in any section of the country."

Recognizing that "competition is our fundamental national policy," the opinion notes next that this policy "informs all the federal antitrust laws, but some more explicitly than others." Illegality is predicated specifically on the probability of a substantial anticompetitive effect.

The important point, for our purposes, is that like the other sections of the Clayton Act, Section 7 singles out a particular class of business practice—corporate acquisitions—for especially strict antitrust scrutiny. Thus, a very practical question arises concerning the Government's effort to force the licensing agreements into the merger mold.

In a proper Section 7 case, it is plain that if the adverse effects on competition specified in the statute are proved, respondents normally will not be heard to say that redeeming social or economic benefits will flow from the acquisition. *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 371.

The Commission emphasized that "While a broad Rule of Reason may not be read into Section 7, it is clear that mergers are not to be judged according to a so-called *per se* standard." The Commission went on to explain:

> In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probably anti-competitive effect. * * * In every case the determination of illegality, if made, must rest upon specific facts. * * *

The following excerpt 63 F.T.C. at 1548 is particularly pertinent:

The concept of competition which underlies the amended Section 7 has no simple or obvious meaning, and was defined by Congress neither in the statute itself nor in the course of the deliberations that led to its enactment.

That concept, however, involves a congressional "fear of what was considered to be a rising tide of economic concentration in the American economy." And Congress' emphasis on concentration reflected its deep concern with what economists would call the problem of oligopoly—a problem that centers on undue or excessive market concentration. Accordingly, the Commission, in *P&G,* stated:

Indeed, the relationship between concentration (and related market-structure characteristics) and lessened competition is clearly, we think, at the core of Section 7. For this reason, the specific issues of this case must be placed in a larger frame of reference. Section 7 deals with the fundamentals of a free competitive economic system, and it is in the context of first principles that we must approach this case. (*Id.*)

So, likewise, the instant case must be viewed "in the context of first principles."

After contrasting a market of 100 sellers of approximately equal size with a market of three sellers, each of equal size, the P&G opinion points out that in the former, "each seller is likely to establish his business policies in disregard of the actions of any individual competitor," whereas in the latter oligopolistic market, each seller "is likely tacitly to renounce price competition, and perhaps other forms of rivalry as well."

This description of so-called "perfect competition" and oligopoly appears to be in accord with classic economic theory.

In the instant case, although Government counsel have in effect alleged the presence of oligopoly, their proof does not show a renunciation of price competition and other rivalry. On the contrary, despite the superficial sameness of list prices, there appears to be price competition, together with other forms of rivalry.

According to *P&G,* "The consequence of each firm's refraining from price competition is likely to be an unnaturally high price level in the market and a general deadening of competition." That is not the picture of the record industry reflected by the evidence in this case.

Other "symptoms of oligopoly" are said to be price leadership, conscious parallelism, excess capacity, emphasis on heavy advertising in lieu of technological innovation, and administered prices.

Again, the record industry does not appear to be suffering from such symptoms as those, despite the belated, back-handed suggestion of "administered prices" in the Government's Argument (page 316, n. 175).

Other symptoms of oligopoly discussed in *P&G* were not shown to be present in the record industry. The examiner has specifically found ease of entry. There appears to be vigorous competition; there was no evidence that smaller firms pursue the "quiet life."

Contrast conditions in the record industry with those the Commission found in the bleach industry—where Clorox was the only national seller of bleach, and the only other firm that could be regarded as a significant competitive factor (Purex) did not compete with Clorox at all in about half the country. In addition, there were "formidable barriers to new entry."

We cannot find here, as the Commission found in P&G, that the "market structure" of the industry is "significantly less conducive to competition" than it was before.

Discussing the size disparity between P&G and existing bleach companies, the Commission observed that the practical tendency of the instant merger was "to transform the liquid bleach industry into an arena of big business competition only, with the few small firms that have not disappeared through merger eventually falling by the wayside, unable to compete with their giant rivals" (*Id.* at 55).

The Commission pointed to the *Brown Shoe* decision as "holding unlawful a merger that did not itself create or aggravate an oligopolistic market structure, but, rather, was feared to be the first step in the transformation of a traditionally small-business, atomistic industry into one dominated by corporate giants" (*Id.* at 56).

The reverse of that situation is shown in the record industry. It is too much to say that this industry has been transformed from a big-business industry to a small-business industry, but the role and the dominance of the big-business factors have been eroded.

The picture of the phonograph record industry that emerges from a review of all the words and all the statistics can be highlighted as follows:

(1) The growth of new record companies, the decline in the market position of established firms, and the volatility of the relative market positions of the larger firms, are all inconsistent with any theory of monopoly or oligopoly at the manufacturing level of the industry.

(2) At the retail level, there is a high degree of dispersion in the number of outlets, with well in excess of 100,000, and no retailer or group of retailers dominates the market place. There has

been an exceedingly high rate of effective and successful entry into the record industry at the manufacturing level.

(3) Entry in over-the-counter retailing of records, as shown by the tremendous growth of new outlets, has also been at an exceedingly high rate and is relatively easy. The record club and mail-order fields have also witnessed a high degree of entry. And there are other potential entrants with adequate resources.

(4) The record industry is a growth industry, not a stagnant industry. There has been a significant growth in the diversity of product alternatives available to consumers.

(5) There has been product innovation, generally characteristic of a highly competitive industry, and also important marketing innovations, including the advent of rack jobbing, clubs and other mail-order outlets offering products to consumers with increased convenience.

(6) Columbia's growth has been internally generated and not the result of merger or acquisition. The competitive innovation of the LP gave Columbia a temporary jump on the industry, but that advantage did not last long. Columbia was the first full catalog company to start a record club and had a head start of several years. This is another factor responsible in part for its growth, but here again, it now faces vigorous competition.

(7) The charge of deceptive advertising of "list prices" in this very case points up the existence of a high degree of price rivalry.

(8) There is a significant degree of nonprice competition in the record industry, such as technical innovations (e.g., LPs and 45s), the development of new artists, the "covering" and imitation of successful records, the development of new musical styles or "sounds," and the creation of album covers. There is also significant nonprice competition at the retail level.

(9) Record clubs, including Columbia's Club, have had a favorable and positive impact on the effectiveness of competition in the record industry, stimulating sales through all channels of distribution, broadening the base of the record-buying public and giving consumers an additional source of supply. The over-all expansion of record sales has afforded greater opportunities for all rival firms.

(10) The distribution of the records of outside label manufacturers through the Columbia Record Club also has had a positive effect on competition in the record industry. Although we may emotionally resent the aura of paternalism displayed here and elsewhere by Columbia, we must recognize such an arrangement as constituting a form of entry, permitting smaller companies to

offer their records to consumers via a new channel of distribution, which might not otherwise have been open to them since club operations require substantial capital and expertise. Club distribution has given the outside labels additional income and advertising, thereby making them stronger competitors in all distributional channels.

Even considering Columbia as "dominant," or at least as one of the "dominant Big Three," and recognizing the jaundiced view that must be taken of restrictive agreements in such a setting, nevertheless, we must also be realistic and recognize that what may be good law when market agreements are used as an oppressive economic weapon may not be good law when such agreements are employed by a dominant seller in such a way as to grant smaller producers access to a channel of distribution otherwise closed to them.

Finally, a word on the subject of big business, small business and the antitrust laws. The examiner is not unsympathetic with the problems of small, independent businessmen in meeting the rigors of competition from other business, big and small. He is aware, too, of a general public policy designed "to perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other," *U.S.* v. *Aluminum Co. of America,* 148 F. 2d 416, 429 (2d Cir. 1945) : and "to promote competition through the protection of viable, small, locally owned businesses," *Brown Shoe, supra,* 370 U.S. 294, 344.

However, he must be mindful that the Commission has said that there is no warrant "for subordinating the protection of *competition* to the protection of small-business *competitors*."

In applying the law to the facts of this case, the examiner has viewed the antitrust laws as a general charter of competition, with basic provisions designed to promote competitive practices, and with no special class of business singled out for favored treatment. The antitrust laws were intended not to promote the interests of any one group but to safeguard the health of the competitive process itself. If resources are allocated in response to consumer preference, as reflected in the operation of free markets, the rationale is that all business is spurred to operate in such manner that consumer wants are best satisfied.

To say that much thinking on the relation of bigness to competition is outdated and unrealistic, is hardly heretical today. Rapidly changing technology and the growing importance of industrial research are among the factors that tend to increase in many industries the size that is needed to enable enterprises to compete—and to survive in competition.

Historically, it is doubtless true that some industrial giants were the outgrowth of competitive ruthlessness, but to carry over the emotional prejudices of the last century to today's industrial bigness is not only futile but harmful. It is unfortunate that Government counsel here have resorted to such obsolete emotionalism in their attack on Columbia.

The Supreme Court told us in 1920 that corporate bigness alone is not condemned by the antitrust law. *U.S.* v. *U.S. Steel Corp.*, 251 U.S. 417 (1920). It repeated the message at least as recently as 1948. *U.S.* v. *Griffith,* 334 U.S. 100 (1948). Only recently, as we have seen, the Commission, in its decision in *The Proctor & Gamble Company* case (Docket 6901, Final Order Nov. 26, 1963, at page 1574), was careful to point out that in its emphasis on the size of P&G as a pertinent consideration in the decision of that case, it was "most emphatically *not* adopting any view that bigness *per se* is anti-competitive or undesirable and should be attacked under Section 7 or any other antitrust statute."

It is natural, perhaps, to yearn for a bygone day, a day when business, labor and government all operated on a smaller scale than they do today, a day when we were, perhaps, a nation of small shopkeepers.

To be realistic about today's economy and the size it has achieved does not require any abandonment of our basic antitrust philosophy.

We still give lip service to the proposition that bigness is not bad *per se,* but there is a tendency to view smallness as good *per se,* and there is almost an unspoken corollary that bigness *is* bad *per se.*

Size does carry with it an opportunity for abuse, but we do not have to operate on the presumption that that opportunity always has been or always will be availed of. Yes, big business can restrain competition and often does. Perhaps it has a proclivity for collusion. But those can be dealt with under the antitrust laws. Large enterprises can also provide vigorous and dynamic competition.

It is necessary to keep in mind also that competition is a contest, and this means winners and losers. The fact that the winner is big and the loser is small does not necessarily mean that the contest was unfair.

All competitive effort is burdensome and harmful to those who cannot keep pace, but if we said it must stop short before it hurts anyone, we would completely abandon the policy of competition.

Although subject to some limitations, perhaps, there is much to be said for the observation of the late Mr. Justice Jackson, dissenting in *Standard Oil Co. of California* v. *U.S.*, 337 U.S. 293, 423 (1949):

> If the courts are to apply the lash of the antitrust laws to the backs of businessmen to make them compete, we cannot in fairness also apply the lash whenever they hit upon a successful method of competing. * * *

In that spirit, the hearing examiner has concluded that the Government has failed to prove that the effect of the challenged licensing agreements may be substantially to lessen competition, or to tend to monopoly.

Economic opportunity has not been foreclosed in the record industry. It has not been demonstrated that the practices challenged by the complaint have conferred on Columbia, or are likely to confer on Columbia, economic power that is incompatible with the maintenance of competitive conditions in the record industry or any substantial segment thereof.

D. Price Representations

The allegations of deceptive pricing contained in Count II of the complaint are essentially disposed of by comparing the Findings of Fact with the standards established by the Commission's revised *"Guides Against Deceptive Pricing,"* adopted December 20, 1963, and effective January 8, 1964 (superseding *Guides Against Deceptive Pricing* adopted October 2, 1958).

Before the adoption of those new Guides, the examiner appropriately might have found, in the words of the complaint (Count II, Par. Three) that—

> Through the use of the aforesaid statements and the amounts in connection with the terms "retail value," "regular list price" and "usual list price," respondents have represented and now represent that said amounts are the prices at which the merchandise referred to is usually and customarily sold at retail in the trade areas where such representations are made, and through the use of said amounts and the lesser amounts that the difference between said amounts represents a saving to the purchaser from the price at which said merchandise is usually and customarily sold in said trade areas. (*Coro, Inc.*, Docket 8346, Final Order, November 6, 1963, and cases there cited.)

A finding, likewise substantially in the words of the complaint (Par. Four), also could have been made on this record that:

In truth and in fact, the amounts set out in connection with the aforesaid statements and the terms "retail value," "regular list price" and "usual list price," were not and are not now the prices at which the merchandise referred to is usually and customarily sold at retail in *many of* the trade areas where such representations are made, but *frequently* are in excess of the price or prices at which the merchandise is generally sold in said trade areas, and purchasers of respondents' merchandise would not *always* realize a saving of the difference between the said higher and lower price amounts. (Except for the italicized words the foregoing is the language of Count II, Par. Four. The italicized words have been inserted by the examiner in the complaint's allegation to reflect the facts shown by the evidence.)

Even without the complications introduced by the revised *Guides*, there would have been some problems of variance between pleading and proof. As indicated, consumers *could* buy from the Club six so-called \$3.98 to \$6.98 LPs for \$1.89 (plus commitment), and this did indeed represent a saving from the prices at which such records were usually and customarily sold—even by discounters.

The examiner is bound by the *Guides* as "administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices" (FTC *Organization, Procedures, Rules of Practice*, etc., August 1963 (§ 1.55, General Procedures); see also *Majestic Electric Supply Co., Inc.*, Docket 8449 (February 28, 1964); *Clinton Watch Company*, Docket 7434, Order Denying Petition to Reopen, (February 17, 1964); *Gimbel Brothers, Inc.*, Docket 7834, (July 26, 1962)).

No lengthy discussion is required. The facts concerning respondents' practices (as found in Part VII, *supra*) need only be measured against applicable standards set forth in the *Guides*. The Commission has determined, in the exercise of its expertise, that—

> Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.
>
> * * * * * * *
>
> * * * the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at

which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare case are *all* sales of an article at the manufacturer's suggested retail or list price.

But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

This general principle applies whether the advertiser is a national or regional manufacturer (or other non-retail distributor), a mail-order or catalog distributor who deals directly with the consuming public, or a local retailer. But certain differences in the responsibility of these various types of businessmen should be noted. * * *

* * * * * * *

* * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice. * * *

* * * * * * *

It bears repeating that the manufacturer, distributor or retailer must in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area. * * * (Guide III)

The evidence as to certain of the matters adverted to is not so complete or clear-cut as it might have been if the new *Guides* had been in effect at the time of trial. Nevertheless, it is the conclusion of the hearing examiner that applying the law as interpreted in the new *Guides*, there has been failure of proof as to the violation charged in Court II of the complaint.

E. Conclusion

On the basis of the Findings of Fact and the application of the law to those facts, the examiner concludes that the allegations of the complaint have not been sustained so as to warrant any order to cease and desist. Appropriate Conclusions of Law and an Order dismissing the complaint accordingly follow:

CONCLUSIONS OF LAW

On the basis of the facts found after consideration of the whole record, and in the light of the legal principles expounded in the Memorandum Opinion, the examiner has concluded that the reliable, probative and substantial evidence fails to support the allegations that:

1. Respondents have fixed and maintained uniform prices of competitors' products at prices identical to those of respondents' own products.

2. Respondents have caused the licensors to sell LPs to dealers, directly or indirecly, at prices that are regularly higher than the prices charged by respondents for records sold through the club.

3. Respondents have divided or allocated various markets and channels of distribution in connection with the sale of records.

4. Respondents have established, or compelled licensors to adhere to, a fixed differential on royalty rates to artists.

5. Respondents have hindered, lessened or suppressed competition between themselves and the licensors and between themselves and other manufacturers of phonograph records.

6. Respondents have hindered, lessened or suppressed competition between themselves and other companies engaged in record club distribution.

7. Respondents have hindered, lessened or suppressed competition between themselves and dealers.

8. Respondents have excluded from the market, or potentially excluded, dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the licensors.

9. Respondents have monopolized or attempted or tended to monopolize the manufacture, sale and distribution of records, of long-playing records generally, or of long-playing records sold through record clubs.

10. The licensing agreements were engaged in with the purpose or effect of creating in respondents, the undue power to do the things set forth in paragraphs 1 through 9, above, and respondents have regularly exercised such power.

11. The practices of respondents in connection with the licensing agreements have had the purpose or effect of giving respondents an unfair competitive advantage that is not the natural result of free and open competition.

12. The Club has sold phonograph records to consumers at prices lower than those paid by retailers.

13. The Club's advertising has the capacity and tendency to mislead members of the purchasing public.

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

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

APPENDIX

SUPPLEMENTAL FINDINGS

As a result of conclusions of fact and law reached by the hearing examiner, it became unnecessary, for purposes of this initial decision, to make findings of fact as to certain matters treated as issues during the trial and also in the submittals of the parties. However, recognizing that the Commission, on review, may take a different view as to one or more of such questions, the examiner has here made supplemental findings concerning facts that would be relevant if a different ruling were to be made on a particular subject. If any of the examiner's rulings should be reversed, the inclusion of these supplemental findings in this appendix should avoid the necessity for a possible remand for further findings of fact by the hearing examiner.

The supplemental findings are included in this appendix under the headings of the main topics in the primary Findings of Fact to which they relate, and with appropriate subheads, as follows:

V. Dual Pricing
  Prices Paid by Dealers for Columbia Records
    Average Net Prices
  Prices Paid by Dealers for Outside Label Records
    Columbia's Alleged Cost Advantage
VI. Competitive Effects
  LPs Viewed as a Separate Market
    Concentration on Manufacturing Level
    Concentration in Retail Market
    Concentration in Club Market
  Record Clubs Treated as Separate Line of Commerce
    Club Sales and Mail-Order Sales

Accordingly, the examiner makes Supplemental Findings of Fact on those subjects as follows:

V. Dual Pricing

In Section V of his primary Findings of Fact, the examiner ruled that the dual pricing charge collapsed under the weight of the appropriate price comparisons—that is, when the average Club price to consumers, including mailing and handling charges, was compared to the average gross price paid by dealers, as shown by the Government's own exhibit (CX 219). Should the Commission disagree with the rationale of that determination by the examiner, the following findings would be pertinent:

Prices Paid by Dealers for Columbia Records

Average Net Prices

On the basis of the record as a whole, it is found that in 1961 dealers generally paid average net prices of about $2.13, and often substantially less, for $3.98 records which Club members allegedly were buying at an average price of $2.14, exclusive of mailing and handling charges.

The average prices paid by the Government's 43 dealer witnesses for $3.98 list price LPs purchased from Columbia branches are set forth on three separate pricing exhibits (RXs 388a, 389a and 390a). One of those exhibits (RX 390) covers New York dealers; another (RX 389) relates to all dealers listed on CX 219, except The Record Hunter, which was included with other New York dealers (RX 390); and a third exhibit (RX 388) covers all other Government dealer witnesses who bought from Columbia branches. While the three exhibits (RXs 388a, 389a and 390a) show average prices of $2.13, $2.17 and $2.12, respectively, the average price for all purchases reflected on the three exhibits is \$2.13. That is computed, not by averaging the foregoing three figures, but by tallying all of the sales reported on the exhibits.

Prices of many of the Government's dealer witnesses were under \$2.10—in one case, as low as \$2.04 (RXs 388a, 389a, 390a).

In 1961, the general base price for a \$3.98 list LP from a Columbia branch distributor to a dealer was \$2.47 (Lorenz 8640–41; RXs 388a, 389a, 390a). That base price was substantially reduced in practice, however, by an assortment of discounts and programs which were widely utilized by dealers. The 1961 programs and discounts reflected in the record are as follows:

(a) Dealers were offered restocking programs during different periods in 1961. Columbia has increased the number of such programs and liberalized their terms to meet competition (Gallagher 8792, 8801; Max 9755–56). In 1961, there were two regular restocking programs, each approximately two months in duration, one in the spring, the other in the fall. One restocking program offered a 10% discount off the base dealer price for both monaural and stereophonic LPs. The other program allowed 10% on monaural and 20% on stereophonic records (CX 666; Lorenz 8641; also see Max 9347, 9350). In addition, there were certain special programs at other times during 1961 (Lorenz 8641). One program, for example, offered a 10% discount on certain LPs of Broadway casts (CX 666a); another offered a 10% discount on all Mitch Miller LPs (CX 666b). Dealers took advantage of those programs (Gallagher 8809; Max 9380–82). The extent to which dealers, both large and small, purchased during such programs is shown on RXs 388–90, based on an analysis of all 1961 purchases by the Government's 43 dealer witnesses who purchased records from Columbia branches. Those exhibits show that of the more than 388,000 records included on the exhibits, over 77% were purchased during one of the various programs in effect in 1961. Indeed, during the two major restocking programs alone, Columbia branches made 70% of their annual sales (Gallagher 8809).

(b) Dealers were also offered throughout all of 1961 a "bonus-to-sell" program, which gave them an opportunity to exchange 10% of their purchases for other merchandise, or take a 5% cash discount based on the dollar volume of their total purchases in lieu of such exchanges, or to take part of both alternatives on a *pro rata* basis (Lorenz 8642; Gallagher 8792, 8801; Max 9347). The bonus-to-sell discount was computed in 1961 on the basis of total net dollar purchases of records and not separately broken down by records in particular price categories (Lorenz 8650, 8667, 8739–40). Delaers took advantage of that discount (RXs 388–90).

(c) In addition to the right to "exchange" one record for another record, a dealer had the right in 1961 to "return" for a cash credit records which were defective, shipped to him by mistake, etc. In 1961, upon such a "return," a dealer received a cash credit based on the prevailing price for the record at the time it was returned. There is some confusion regarding that adjustment, but it appears that the credit was sometimes higher than the price which the dealer had originally paid for the record (Lorenz 8666, 8670, 8772–73, 8729, 8731–32; also see Max 9363–64). "Returns" thus had the effect in some cases of reducing a dealer's average cost (RXs 388–90).

(d) Dealers were offered a special program at Christmas, their busiest season (Noonan 6943), which permitted them to return 25% of the Christmas LPs and new releases purchased in a period of approximately two months before Christmas, or to take a 12½% cash credit in lieu of such returns, or to take advantage of the return privilege on certain purchases and the cash credit on the balance (CX 666b–c; Lorenz 8641–42; also see Max 9363–66). Dealers took advantage of that program to a great extent (Gallagher 8809).

(e) Dealers were offered a 2% cash discount for timely payment (Lorenz 8642; Gallagher 8792). Columbia has found that the vast majority of dealers take advantage of this discount (Lorenz 8651–52; Gallagher 8808), and that virtually all of the dealer witnesses called by Government counsel did so (Lorenz 8651–53).

Based on over-all sales by Columbia branches to dealers, the average effective rate actually taken for the cash discount is 1.51% (Lorenz 8669). Most dealer witnesses who were questioned about the 2% cash discount testified that they generally took advantage of it on all or most of their purchases (see, *e.g.*, Barwis 2479; Bialek 1376; Freedman 2601; Levin 498–99; Rosen 2787; Winograd 3052; Balaity 2796; Maggid 834, 851; Press 1245; Kutscher 1166; Morlitz 2333–35; Pitkow 2403; Rossi 2292; Sarkisian 1346; Walsh 983; H. R. Smith 2167).

Respondents also refer to "free credit," cooperative advertising and various merchandising aids as having the effect of reducing dealer costs, but they propose no specific adjustment to average prices charged dealers by Columbia branches. For present purposes, such possible adjustments may be considered to "wash out" the possible adjustment of Club prices based on "free goods," etc., offered members (*Cf.* CPF 277).

Respondents introduced a series of carefully prepared and detailed exhibits establishing the average prices paid in 1961 by the Government's 43 dealer witnesses who purchased from Columbia's branches (RXs 388–90; Lorenz 8646–48). Preparation of those exhibits required approximately 1,000 man-hours and examination of 80,000 invoices (Lorenz 8647–48). Those exhibits compute the average dealer price for an LP in a series of steps, starting with average gross price; then taking into account the changes in that price resulting from returns of records; then taking into account the changes resulting from the extent to which a dealer took advantage of the 5% cash bonus-to-sell and the 12½% Christmas discount programs; and finally taking into account the 2% cash discount (RXs 388–90; Lorenz 8648–52). All of those factors must be taken into account to reflect the dealer's ultimate price (see, *e.g.*, Gallagher 8791–93; Lorenz 8736; Max 9380–82; Fink 1438–46; Maggid 850–53; Roskin 2102, 2115; Zenger 6322–23, 6331–32).

Respondents' study of the 1961 invoices (totaling 80,000) of all the Government's dealer witnesses, 43 in number, who purchased from Columbia branches shows average prices as follows (RXs 388–90):

Suggested retail list price	Wholesale list price (dealer cost subject to discount)	Average net price to dealer
$3.98	$2.47	$2.13
4.98	3.09	2.64
5.98	3.71	3.15
6.98	4.33	3.72

These average prices are not determined by simply adding together the "average prices" appearing on RXs 388–90 for each price category and then dividing by three. They are determined by adding together for each price category the units purchased shown on RXs 388–90 and then determining an average price by means of the steps outlined in the testimony of Lorenz at Tr. 8649–51.

RXs 388a, 389a and 390a show that the Government's dealer witnesses paid average prices of $2.13 in 1961 to Columbia's branches for $3.98 list price records. Almost one quarter of the dealers paid $2.10 or less, with average prices going as low as $2.04 and $2.06 (RXs 388a, 389a, 390a). Thus, the dealers paid less than the average prices paid by record club members in 1961, even when mailing and handling charges are ignored.

In 1962, the average price charged for a current $3.98 list price

LP by Columbia branches, taking into account cash discounts, the bonus-to-sell, the Christmas program and the restocking programs, was $2.12 (Gallagher 8809–17).

The evidence on dual pricing fails to support the allegations of the complaint.

The Government's pricing "survey" (CXs 218–19) purporting to show dealer costs for Columbia records in 1961 was unpersuasive. While the heading on that "survey" states that it analyzes prices charged by Columbia branches in "Philadelphia, Chicago and New York," the fact is that 16 of the 19 dealers on that exhibit come from the Philadelphia area, only 2 from Chicago, and only 1 from New York.

The "survey" failed to include four Philadelphia dealers included on RX 388. The four missing dealers paid average prices of $2.04 to $2.14 (RX 388)—prices lower than the prices generally paid by the sixteen Philadelphia witnesses who do appear on CX 219. (Compare the four Philadelphia witnesses on RX 388a with the sixteen on RX 389a.)

In the case of several dealers, the collection of invoices on which the study relied was obviously incomplete. The most significant, omission, however, was the failure to take into account the 2% cash discount, returns, and the 5% bonus-to-sell and 12½% Christmas bonus, although the 19 dealers listed took advantage of them (see footnotes, RPF 503).

In view of the basic reason for the examiner's dismissal of the dual pricing charge, it is neither necessary nor desirable to engage in any extended discussion of the possible alternative bases on which the same result might be reached—namely, the application of discounts and other adjustments ignored by the Government in CX 219.

The Government's objections to the application of those discounts and adjustments are set forth in footnote 113 to CPF 271. The following comments are applicable to those objections:

Returns—To the extent that returns did *not* affect prices, RXs 388–90 reflect that fact; and to the extent that they *did* sometimes affect prices, the exhibits also reflect that fact. On the other hand, CX 219 simply ignored returns, whether or not they happened to affect prices in particular instances.

Bonus-to-Sell—The claim that a "ratio" was "specially contrived" to reflect the bonus-to-sell discount on respondents' pricing exhibits is contrary to the record. In actual practice, the bonus-to-sell is given to dealers on the basis of their total dollar volume of purchases, with no separate breakdown being made as to purchases of records in particular price categories (Lorenz 8650). Thus, in the words of footnote 113, the bonus-to-sell is actually granted "irrespective of actual purchases in [each] category." The bonus is an over-all credit based on total purchases—and thus, in effect, amounts to a proportionate reduction in the price of each record purchased in each price category. Accordingly, the application of the bonus-to-sell in respondents' pricing exhibits is an accurate reflection of the way it is applied in practice. It does not represent a "contrived" formula. Respondents simply divided the total dollar credit *actually* given to each of the Government's 43 dealer witnesses by each dealer's net purchases to arrive at an average effective rate of discount, and then applied that rate uniformly to all purchases made in each price category (Lorenz 8560). CX 219 simply ignored the bonus-to-sell discount.

Cash Discount—The claim that respondents deducted the cash discount "whether the dealer took it or not" is contrary to the entire record and to the testimony of Lorenz here cited for that proposition. Virtually every dealer witness took the discount (see RPF 497).

Industry members view the 2% cash discount and the bonus-to-sell pragmatically as forms of price reduction. They are so viewed by manufacturers (Gallagher 8791–93), accountants (Lorenz 8736), distributors (e.g., Fink 1438–46; Maggid 850–53).

Contrary to footnote 113 to CPF 271, Winograd did not testify that "what [he] earns in lieu of the exchange" is not a discount. He testified that when he exchanges one record for another record, no discount is involved (Tr. 3054); but that Columbia's bonus-to-sell is "a special discount deal" (Tr. 3052). Nor did Hollander testify that "what [he] earns in lieu of the exchange" is not a discount. He merely testified that he usually exchanges records (Tr. 3113). The fact is that he actually received an average discount of 3.6% in 1961 in lieu of exchanges (RX 389). Stolon of Goody was the only one of the three witnesses cited by Government counsel who claimed that the bonus-to-sell was not a discount—although Goody's effective rate was 5.17% in 1961 (RX 390).

Because a discount may benefit the giver as well as the recipient is no reason to disregard it as a price reduction.

Finally, even aside from the foregoing considerations, the cash discount and bonus-to-sell should be deducted in any comparison between prices paid by dealers and by Club members. If a dealer pays his bills on time and does not exchange certain records, he receives cash credit; on the other hand, if a Club member pays promptly and fails to exchange records, he receives no monetary benefit. None of Government counsel's theoretical arguments provides a reason for disregarding the dollar saving realized by dealers.

Prices Paid by Dealers for Outside Label Records

There follow certain findings relating to "Prices Paid by Dealers for Outside Label Records" in the event the Commission rejects the primary findings on this subject in Section V.

As noted in the primary findings, the complaint alleges (Par. Ten (2)) that, as a result of the licensing agreements between the outside labels and the Columbia Record Club, respondents have the power to cause, and have caused, the outside label manufacturers to sell LPs to dealers at prices that are regularly higher than the prices charged by the Club for identical LPs sold to its members. No element of that charge was established at the trial.

Although the licensing agreements give Columbia certain rights with respect to Club distribution of the outside labels, they do not in any way affect the distribution of outside label records to dealers or other non-Club outlets.

The allegations of the complaint on this point are also defective because the outside labels, with few exceptions, do not sell records directly to dealers. They sell primarily to hundreds of independent distributors who, in turn, sell to record dealers (Gallagher 8780–82; Cohen 6745–49; Mantell 6685–86; Kapp 5772; Talmadge 7828–30, 7849; Green 2524; M. Solomon 1942; Maitland 3718).

Finally, the evidence does not establish that record dealers pay to distributors higher prices for records of outside labels than Club members pay for such records through the Club. In 1961 Club members paid an average of $2.41 for a $3.98 list LP in their first year of membership, and an average of $2.88 thereafter, with mailing and handling charges added to the stated price.

In the case of outside label records, Government counsel did not even attempt to make a "survey" of average prices. Instead, they typically asked witnesses to state the "range" of prices charged for records of outside labels—the "high" and the "low" (see RPF 509). Evidence about a "range" obviously does not show the average price paid. It does not show how many records were purchased at the top of the range, how many at the bottom, or how many at intervals between the two extremes. There was, therefore, a complete failure of proof on this point.

Like Columbia and other manufacturers, the outside label companies offer their distributors a wide assortment of different discounts and programs, which are passed on to dealers and which have the effect of substantially reducing the prices which dealers pay for records. Just as dealers took full advantage of the various programs offered by Columbia, the evidence shows that they also took full advantage of programs offered by the outside labels. To the extent that the record does reflect average prices paid by dealers for outside labels—as opposed to "ranges"—it shows that those dealers in fact pay less than the average price paid, or alleged to have been paid, by Club members.

The most informative evidence on this point comes from various of the Government's distributor witnesses who service large numbers of dealers—including most of the Government's dealer witnesses—in their respective trading areas (see Fink 1446, 1456–57, 1460–62; Rosen 2245–46, 2257–58, 2260; Leonard Smith 1401–06, 1419; Keenholtz 1424–33; Roskin 2102, 2115, 2118–19; Shocket 185–86, 229–35; their testimony is summarized in RPF 511).

Testimony from the few dealer witnesses who gave average prices—and not merely isolated "highs" and "lows"—confirmed that their actual prices for records of outside labels were below prices paid by Club members (*e.g.*, Sarkisian 1342; Maggid 837; Stolon 1273; Press 1240).

Despite the examiner's opinion that CPF 314–17 are outside the scope of the complaint, it may be argued that such proposed findings are proper under subparagraph 2 of Paragraph Nine:

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

That such may be the position of Government counsel is suggested by the topic heading at CPF 319: "Unfair advantages obtained by CBS over record dealers in the acquisition of Licensors' records."

Considering the practices set forth in the complaint, the examiner rules that that allegation of Paragraph Nine still does not bring CPF 314–27 within the scope of the complaint. The complaint does not charge that Columbia has been the unlawful recipient of price discriminations from the licensors as a result of licensing agreements.

Nevertheless, it appears to be sound procedure for the examiner to make at least truncated findings of fact regarding this matter in the event the Commission should disagree with the examiner's interpretation of the complaint.

In CPF 314, the Government contradicts its own charge (complaint, Par. Ten (2)) that Columbia sets the prices that dealers must pay for licensors' records. Here the Government says that "Prices paid by record dealers for Licensors' records are established in the first instance by the Licensors." Even here, the claim that the "price structure" set forth in CPF 314 is "established" by the licensors, does not find support in the record. Generally, it appears that the licensors do not sell records directly to dealers but through independent distributors (Gallagher 8780–82; Cohen 6745–49; Mantell 6685–86; Kapp 5772; Talmadge 7828–30, 7849; Green 2524; M. Solomon 1942; Maitland 3718).

The record does show that the outside labels do have suggested price schedules, but we are cited to no evidence that they "establish" the prices which their distributors actually charge dealers or that they seek to force compliance with those schedules. However, the following may be taken as illustrative of the basic dealer price structure of four of the licensors:

	Suggested list price	Dealer cost
Mercury	$3.98 mono	$2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71
Kapp	$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71
Liberty	$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.70
United Artists	$3.98 mono	2.47
	4.98 mono	3.09
	4.98 stereo	3.09
	5.98 stereo	3.71

(CX 401a, CX 268a, CX 475, CX 292.)

Similarly, the basic dealer cost for Cameo-Parkway records is $2.47, and for Warner Bros., $2.47, $3.09 and $3.71 (Rothstein 3302). The cost to dealers of Caedmon records is $3.69 (L Smith 1402).

The so-called "dealer cost" figures are base prices and do not reflect the lower prices actually paid by dealers much of the time as a result of various discounts, restocking programs, etc. (see RPF 509–12).

Although the record contains exhibits (CX 218–19) purporting to show average prices paid by dealers for Columbia records, Government counsel did not introduce any tabulation or other evidence purporting to show average prices paid by dealers for records of outside labels. In fact, they propose no finding as to average prices.

The evidence does not warrant a finding that many dealers "actually paid prices of $2.47, $3.09, and $3.71 for a substantial volume of purchases" (CPF 316). At most, it may be said that some dealers sometimes paid such prices. (Compare CPF 316 with Exceptions, pages 243–46.)

According to CPF 317, the "range" of prices paid by dealers is as follows:

Suggested list price	Dealer cost (range)
$3.98	$1.80–$2.47
$4.98	$2.37–$3.09
$5.98	$2.83–$3.71

There are indications that average prices for many dealers would fall near the bottom of those ranges.

Columbia's Alleged Cost Advantage

The examiner rejects CPF 319 on the basis that not only is the subject matter of CPF 314–27 outside the scope of the complaint, but that this set of "facts," in particular, does violence to the theory of the complaint and to the facts contained in the record. The Government claims here that although the licensing agreements provide that Columbia shall be given a "master" from which to press records itself, it is also contemplated that licensors "shall sell 'substantial quantities' of finished product to the Club whenever the Club wants them." CPF 319 goes on to say that the transactions there cited "illustrate the price advantages contemplated by the Licensing Agreements." The Government's own exhibit (CX 659 *in camera*) shows that 99% of the outside label records used by the Club have been pressed by Columbia and not purchased from the outside labels. The amounts involved are *de minimis* and the facts and circumstances are not such as to warrant a finding of any violation of law (see respondents' Exceptions, pages 247–51). The price data cited in CPF 319 are not reliable for the purposes intended.

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In support of its alternative or additional contention that Columbia "does not forfeit its cost advantage" when it obtains a master rather than finished product, the Government elicited testimony that records can be produced at a cost ranging from about 30¢ to 40¢ (CPF 320). One manufacturer testified that the cost of acquiring a finished record, including pressing, jacket, artist and copyright royalties and AFM fee is approximately 96¢ (L. Hartstone 1083–88). However, the information developed concerning those costs to other companies for producing other records for other than record club purposes is not such as to permit any definitive finding concerning the fairness of the licensing agreements *vis-a-vis* record dealers.

By stipulation of counsel, evidence was received that Columbia's average unit cost "per net record shipped" of an outside label is less than $1, whereas its average unit cost "per net invoiced record" of an outside label is nearer $2 (Tr. 10467–70; CX 821, RX 686 *in camera*).

The lower figure is, of course, espoused by the Government as properly reflecting the unit cost of all records of outside labels shipped by the Club, including net invoiced, enrollment and bonus records.

The higher figure is advocated by respondents as the proper unit cost for each record of an outside label sold by the Club at $3.98, $4.98, $5.98, etc., less returns, and does not include enrollment and bonus records.

The dispute centers on which figure is the proper figure to use in comparing Columbia's alleged costs of producing outside label records, with prices paid by dealers for such records. Even assuming that this is a matter properly in issue in this proceeding, it is the finding of the examiner that neither figure, standing alone, may appropriately be used in comparison with prices paid by dealers.

As far as the accounting controversy between the parties is concerned, the Government failed to carry its burden. In opposition to the position taken by respondents' witnesses, the Government presented the stipulated testimony of Melbourne C. Steele, then the Commission's Assistant Chief Accountant. Such testimony was simply to the effect that in order to determine the unit cost of records shipped, it is necessary to divide the cost of units shipped by the actual number of units shipped (Tr. 10937, 10955). There is no dispute on that point. The dispute is whether or not such a unit figure affords a proper basis for comparing Club costs and dealer costs to determine whether the pricing pattern involves actionable unfairness. Mr. Steele's stipulated testimony does not purport to resolve that question.

The propriety of determining unit costs on the basis of records shipped or on the basis of net invoiced records depends on a variety of factors, and particularly on the purpose for which the computation is to be used. The Government's purpose—that is, to show the claimed "Unfair advantages obtained by CBS over record dealers in the acquisition of Licensors' records" (CPF 319)—makes the "net invoiced" method mandatory.

When a dealer purchases a record, he ordinarily can sell that record without having to purchase additional products to be given away in connection with the sale. That record is a "net invoiced record" to the dealer; and the cost for the record ordinarily is the dealer's only product cost for that "net invoiced" record. On the other hand, when the Club sells a record at $3.98, $4.98, etc., it also, in effect, gives away other records—either enrollment records or bonus records. That has been basic to the Club plan. Thus, in the first year of membership, for every record bought at full price, there is generally one enrollment record; and thereafter, one record given free for every two purchased.

Accordingly, if costs to dealers are to be compared with costs to the Club, it is not unreasonable to add to the Club's cost of each "net invoiced record" its expenses for records and other products given away together with that "net invoiced record."

To put it another way, since the cost to a dealer relates to an item which produces income—that is, an "invoiced record"—it is necessary to determine the actual cost to the Club of *its* income-producing items. That is what RX 686 does and what CX 821 does not do.

A meaningful comparison of Club and dealer costs would not necessarily even stop with RX 686. It appears that fairness would dictate consideration of other *special* costs incurred by the Club as a mail-order business, such as bad debts, returns, advertising, sales promotion and other operating and distribution costs.

The Government needs more and better evidence than is here presented in order to prevail on the theory underlying CPFs 319–27 (see Exceptions, pages 247–61). Such a concept should be more than an afterthought substitute for a different charge as to which there was also failure of proof.

VI. Competitive Effects

In Section VI of his primary findings, the examiner ruled that the appropriate market for measuring effects consisted of all phonograph records sold through all channels of distribution. He thereby ruled out LPs as a separate market and record clubs as a separate line of commerce. The following supplemental findings would be relevant if a contrary determination were to be made as to the appropriate market and line of commerce.

LPs Viewed as a Separate Market

Concentration on Manufacturing Level

As a share-of-market gauge of the LP market on the manufacturing level, Government counsel rely on a study (RX 354) of label (manufacturer) share of consumer dollar purchases of LPs through all channels of distribution. In 1960, the last year this was done for all channels of distribution, the breakdown was as follows:

Columbia	25.4
RCA Victor	17.5
Capitol	13.6
	56.5

On the basis of those and other data, the Government refers to those companies as the "Big Three." The company with the fourth largest share was Decca, with 3.3%.

Respondents object, of course, to limiting the statistics to the so-called LP market. They argue that all types of records constitute the only relevant market.

Even assuming *arguendo* a separate LP market, respondents properly call for the 1960 data to be put in perspective.

An examination of all the MRCA data of which RX 354 is a part shows a definite pattern of deconcentration in the LP market. Thus, between 1951 and mid-1961, Columbia's share of LP sales fell 9.5 percentage points (more than that of any other company) from 33% to 23.5%; RCA, from 29% to 20.2%; and Decca, from 12% to 3.9%. Capitol increased its share from 8% to 12.6%. The share of "all other companies," including many recent entrants, increased 21.8 percentage points, from 18% to 39.8% (see RXs 352–55, 419).

From 1956, the first full year of the Club's operation, until mid-1961, Columbia's share of the LP market fell 1.5 percentage points—from 25% to 23.5% (RXs 352, 355). Since the Club began adding outside labels in 1958, its share of the LP market rose by 1 percentage point (RXs 353–55).

Government counsel object to the use of RX 355 showing cumulative sales for 1961 only through May 20, when the MRCA research project came to an end. They point out that the year-end figures, of course, may be different from the mid-year figures. They prefer to use figures as of the end of 1960, which give Columbia 25.4%, as against 23.5% in May 1961.

In 1961, no study was made of all channels of distribution for the full year, but, as noted, RXs 351 and 355 cover the period up to May 20, 1961.

The trade magazine, *Billboard,* did conduct a study, on a sampling basis, of manufacturers' share of sales through retail record stores. The *Billboard* survey, although relied on by both sides, gives only a partial picture of the retail market, since it omits club sales, as well as sales through racks, one-stops and chain stores' central buying offices.

The *Billboard* store survey for 1961 (CX 244) and 1962 (RX 311) produced these results:

	1961	1962
	Percent	Percent
Columbia (incl. Epic)	17.4	17.7
RCA-Victor (incl. Camden)	16.3	13.8
Capitol (incl. Angel)	13.1	13.1
Total "Big Three"	46.8	44.6
Decca (incl. Coral)	5.1	4.8
All others	48.1	50.6

Of the total LP dollar sales in stores measured by *Billboard* in 1961, 27 manufacturers accounted for 84.1% (CX 241a, b). Of total LP sales in stores measured by *Billboard* in 1962, 23 companies accounted for 83% of total sales (RX 311 *in camera,* pp. 4a, c).

Respondents object to the Government's emphasis on only those two years. Among other things, they note that in the stores surveyed by *Billboard,* the share of LP sales accounted for by all companies other than the "Big Three" rose almost 10 percentage points—from 45.8% to 55.4%—from mid-1957 to 1962 (RX 429 *in camera*). This shows a pattern of deconcentration.

Examination of other data from *Billboard's* store survey of LP sales shows certain other facts inconsistent with the Government's position. There has been volatility in the relative positions of Columbia, RCA and Capitol (RX 430 *in camera*)—a fact tending to negate the notion of oligopoly (Max 9727–28) urged in the Government's brief.

While Columbia's share of LP sales in those stores included in the survey rose slightly between mid-1957 and 1962, the shares of RCA and Capitol declined (RXs 421 and 433 *in camera*). That is inconsistent with the theory that the Columbia Record Club and its sales of outside labels injured retail sales. On the basis of testimony to that effect by the Government's dealer witnesses, Columbia's share of LP sales in stores should have declined—and more so than that of RCA and Capitol, which had smaller clubs.

The suggestion in CPF 384 that in 1961 and 1962, some 20 to 30 companies had over 80% of LP sales in stores surveyed by *Billboard,* is also misleading in any analysis of concentration on the manufacturing level. Government counsel introduced other evidence—which is here ignored—that 57 companies accounted for 90% of LP sales through *all* of the various channels of distribution (CX 246; Noonan 414, 515). Ackerman said that there are perhaps as many as 75 "significant LP companies" (Ackerman 4234). And Noonan testified that there were approximately 50 significant companies producing LPs that accounted for 83% of LP sales in stores in 1962, plus many other LP labels (Noonan 6940).

While the Government refers to the *Billboard* study as "only a *limited* index of respondents' strength," respondents note that the survey tends to exaggerate Columbia's position because it admittedly omits rack outlets. Rack outlets accounted for 25% of 1961 over-the-counter sales (CX 199a) and 40% by mid-1963 (Noonan 10900). Such outlets account for the bulk of budget line sales, and Columbia's status in the sale of that type record is lower than in full-price lines (see RPF 36).

Concentration in Retail Market

CPFs 347–52 appear under the heading "Concentration in retail market" and refer to sales through all types of outlets. They thus recognize the existence of a *single* retail market. However, since those findings are limited to data with respect to LP sales and exclude sales of other types of records, they are not relevant. The examiner has held that all types of records are in the relevant "retail market." However, findings are made on the subject on an *arguendo* basis to avoid the necessity for remand if the Commission should rule otherwise.

The mention in the heading of "Concentration" in the retail market and the repeated references in the findings themselves to the Club's "leading position" in that market are wholly meaningless. There is no concentration in the retail market. As Government counsel themselves recognize in their Argument (page 334), the "retailing of records" is "now atomistic." There are 150,000 retail outlets scattered across the nation. In each local area, consumers may purchase from one or more record dealers, discount houses, rack locations and/or mail-order sellers. The Club is obviously a small factor, and not in a so-called "leading position," since consumers may buy through a multitude of different outlets. It is undoubtedly the smallest factor in most areas. Indeed, in areas where there is the greatest availability of retail outlets, record clubs have the smallest relative share of sales (see RPF 415). The fact that the Club's total sales appear large in comparison to the sales of a dealer is not strange since the Club sells throughout the nation and not just in one or more local trading areas.

According to CPF 347, Columbia "has achieved a leading position in the sale of LPs to consumers, and this leadership has increased as a result of the Licensing Agreements." No record reference is given, and the record fails to support that finding.

The Club's share of total industry LP sales has been as follows (RX 424 *in camera*):

	Percent
1958	7.72
1959	7.26
1960	9.45
1961	9.42

Comparison with the Club's dollar sales of outside labels (RX 425 *in camera*) shows that although there has been an increase in the Club's share of LP sales since the addition of outside labels, nevertheless, in 1961, when outside label sales rose sharply in volume, the Club share of the industry's growing LP sales remained stationary in comparison with the preceding year.

Using the same methodology employed in RX 424, Government counsel aver (CPF 347) that Columbia's largest Club competitor, RCA-Victor, had 3.4% of all LP sales to consumers (CX 305); the largest direct-mail company, Reader's Digest, had 2.7% of all LP sales to consumers (RX 700); and the largest retail record dealer, E. J. Korvette, had 1.8% (Rothfeld 746–47).

Those figures they compare with 1961 Club sales of licensors' records, amounting to 2.91% of all LPs sold to consumers (RX 426 *in camera*). Thus, Club sales of licensors' records alone in 1961 exceeded the total sales of any retail store and were exceeded

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by only one other distributor to consumers, that is, RCA-Victor Record Club. The comparison fails to withstand analysis.

Respondents point out that the Club share of total LP sales in 1961 is overstated, and not understated as suggested by the Government in footnote 141. The base figure of 440,800,000 for total LP sales which Government counsel now argue is too high, comes from *Billboard's Buyer's Guide* (CX 199a), introduced by the Government. That exhibit sets forth LP sales via stores, rack jobbers and clubs, but omits nonclub mail-order sales.

The record does not support the percentage shown in this finding for Reader's Digest in 1961. It is impossible to compute a 1961 percentage for Reader's Digest since that company did not disclose actual sales for that year (RX 700 *in camera*). Instead, it gave a figure for 1960 and average annual sales for 1960–62. Although no 1961 figure was given, it is possible to compute the average sales for 1961 and 1962 (see RPF 299, *in camera* appendix). That two-year average (3.2%) is higher than the three-year average, but Government counsel use here the lower three-year average figure.

The Korvette figure is dubious because the testimony was not that Korvette was the largest dealer in *1961*, but that it was at the time of hearing in *1963* (Gallagher 9086). Korvette's sales took an enormous leap upwards in 1962 (see Exceptions, pages 275–77).

CPF 347 focuses only on 1961 data, thereby ignoring the more rapid growth of Columbia's competitors in 1962. As shown in RPF 437 (*in camera* appendix), club and other mail-order competitors grew at a more rapid rate in 1962. Korvette expanded its record sales from $8 million to $14 million between 1961 and 1962—an increase of 75% (Rothfeld 746–47, 3974).

When thus corrected and put in perspective, CPF 347 loses its impact.

Concentration in Club Market

The examiner has found that there is no separate "club market" or "subscription method" submarket appropriate for measurement of the competitive impact of the licensing agreements. Obviously, clubs do represent a specialized channel of distribution, but they are in the same market as the other channels of distribution, such as other mail-order sellers and all types of over-the-counter retailers.

Despite that position of the examiner, the findings to follow will deal with certain statistics applicable to what might be called the club market if the Commission disagrees with the examiner's analysis. These findings are included on an *arguendo* basis against the possibility that the Commission may find that clubs do constitute a separate market.

Referring to RXs 356, 357 and 451, the Government credits Columbia with 55% of the club market in 1959, and 56.1% in 1960. On the basis of RX 357, the Government proposes a finding that the "Big Three" (Columbia, RCA and Capitol) had over 90% of the club market in 1960. The exhibit so shows.

Respondents complain, however, that the Government's proposed finding (CPF 449) gives an incomplete and misleading picture of what all the evidence shows as to Columbia's share of such a market.

Government counsel refer to research data of Market Research Corporation of America (MRCA) for only the two years, 1959 and 1960, although the record contains MRCA figures and other data for a longer and more recent time period. Those data show that Columbia's share of the alleged club market has been declining (see Exceptions, pages 391–93, and *in camera* reply appendix, pages 12–13).

RX 451 *in camera* shows that Columbia's share of total record club sales reached its high point in 1957—one year before its addition of outside labels—and thereafter fell sharply through 1961, the last year of complete data. By 1961, the drop was to a level in the range of 24% to 37% below the Club's 1957 high.

The record lacks complete information as to all record club sales in 1962, but it is apparent that Columbia's relative position in the claimed club market continued to slide in that year. The sales of the RCA Record Club rose from 1961 to 1962 at a rate greater than the sales of the Columbia Record Club during the same period (RX 645a; RX 645b *in camera*; CXs 256 and 783e *in camera*; see RPFs 437-39, respondents' *in camera* appendix).

Columbia's share of all mail-order record sales, both club and non-club, also has been on the decline as the result of the entry and growth of competitors. RX 450 and the underlying data (RX 345) measure mail-order sales of records (whether made by record clubs, direct-package sellers, retail stores, mail-order houses or others) on a label-by-label basis—Columbia, RCA, Reader's Digest, Capitol and "all others"—and not by the identity of the mail-order seller who made the sales. Between the last two quarters of 1961 and the first three quarters of 1962, the share of mail-order sales consisting of Columbia records declined, whereas the share of sales accounted for by records of Reader's Digest, RCA and "all others" rose. The aggregate mail-order sales of RCA and Reader's Digest increased to almost 40% (RX 450; see RPF 438).

Mail-order package sales by BOMC (RX 502 *in camera*) and by *Life* (RXs 507a–b and 508 *in camera*) increased between 1961 and 1962 at a rate in excess of the Club's sales. Between 1960 and either or both of 1961 and 1962, the substantial mail-order sales of the Reader's Digest-RCA packages (RX 700 *in camera*) grew at a rate greater than sales by the Columbia Record Club (CXs 256 and 783e *in camera*). (See RPF 439.)

The 1961 figures relied on by respondents are condemned as "unreliable" by the Government (CPF 449). Government counsel contend that the partial 1961 figure of 50.5% as of May 1961 bears no relationship to end-of- year figures. They purportedly base this conclusion on testimony by Kirkpatrick at Tr. 8195–96. Actually, Kirkpatrick simply stated the obvious fact that year-to-date data can fluctuate between May and the end of a year. The figure was presented as of May 20, 1961, because that was the most recent information compiled by MRCA before it terminated ten years of market research in the record industry (Kirkpatrick 8003–04, 8141–42). The figure for mid-1961 has not been represented as an end-of-the-year figure. Incidentally, the May 1961 share-of-market figure used by respondents is higher than the percentage figure for any reporting period earlier in 1961 (RX 358). For instance, the year-to-date figure as of January 28, 1961 (covering the previous 12 weeks), was 43.7% (RX 358).

In 1960, when MRCA conducted research for the full year, Columbia's share of dollar purchases through clubs was virtually identical on May 20 and December 31 (RX 357).

In any event, it should be noted that although Government counsel initially objected to the MRCA exhibits herein in question, they were admitted in evidence after withdrawal of the objections. Moreover, Government counsel can hardly be heard to complain, in principle, about the use of "partial" annual data when they themselves have relied on such data, even when full-year information was available. For example, CX 242 *in camera* presents year-to-date data from the *Billboard* store survey for only part of 1962; yet Government counsel now request findings on the basis of that exhibit (CPF 300), even though the record contains figures for the full year (RX 311 *in camera*). Likewise, Government counsel request findings (CPF 425 and 451) on the basis of NFO research covering less than a full year (RXs 345, 347).

Record Clubs Treated as Separate Line of Commerce

If, contrary to the examiner's findings, it should be determined that record clubs are in a separate line of commerce, then the further question arises whether such line of commerce should be limited to record clubs (what the Government calls the "subscription method") or whether it should embrace mail-order selling of records generally (including the so-called "package" business).

The examiner finds that the two methods compete and should be considered together.

The findings that follow relate to the relationship between club selling and mail-order selling.

Club Sales and Mail-Order Sales

Considerable space is devoted in the Government's proposals (CPFs 425–448) to various alleged differences between the ways in which clubs, particularly the RCA Victor Record Club, and the Reader's Digest-RCA package business are operated. Such differences were advanced by Reader's Digest in resisting a subpoena issued at the behest of the respondents, but the very witness who described these differences also testified that the Reader's Digest record packages "compete generally * * * with the amount of money that anyone is willing to invest in records," and "are generally competing in the whole area of the individual consumer's ability to buy a certain number of records." This colloquy then ensued:

Q. Do you mean, sir, that they compete with every other form of distribution in terms of sales to the consumer?

A. Yes, I think so. In other words, if a person can afford to pay $50 a year for records, whatever method they receive them through, in that general sense we are competing with everybody else. (Hitesman 10140.)

Thus, Reader's Digest, with record packages that compete "with everybody else" selling records, is in the same market as "everybody else."

The claim that the RCA Club involves "the sale of single LP's," as opposed to the Reader's Digest packages which generally contain "8 or more records," is at the least an oversimplification.

The packages have contained anywhere from 3 to more than 9 LPs, with the majority containing over 9 (CXs 514–23). Under the various RCA Club offers, members have received anywhere from 5 to 12 records (enrollment plus commitment records) during their first year of membership. Thus, RCA Club members receive over a year approximately the same number of records as contained in Reader's Digest-RCA packages.

Moreover, the RCA Club itself offers packages containing anywhere from 2 to 7 LPs (for example, RXs 120, 171, 552, 553, 601, 603, 615–19, 678).

The package operation is not, as claimed, a simple "one-time operation." Many purchases are made on credit, with installment payments frequently spread over 4 months (Hitesman 10141). The package purchaser, like the club member, continues to receive promotional literature respecting records.

The Government's attempt to distinguish the record club business and the mail-order package business on the basis of the type of musical content, and particularly the presence or absence of "stars" among the performers, is hardly borne out by the record (see Exceptions, pages 366–74).

The examiner specifically rejects the contention that the Reader's Digest packages "have no stars and are merely an offering of favorite music."

The Government also espouses a distinction without a difference in its contention that Reader's Digest packages are not offered in the RCA Victor Record Club, and that RCA Victor single LP records are not offered by Reader's Digest in direct mail (see Exceptions, pages 372–74).

The Government contends (CPF 425) that the "only significant record company in direct mail, apart from the 'Big Three' record clubs, is the Reader's Digest." Thus does the Government ignore other mail-order sellers.

In identifying Reader's Digest as a "record company," Government counsel take a position different from their statements in the course of hearings (Tr. 4289–92, 4352–56). This belated recognition of Reader's Digest and its role in the record industry requires a re-evaluation of the Government's position and proposed findings regarding the "configuration" of the record industry because, generally, they do not include Reader's Digest. This would result, of course, in exaggeration of the market share of Columbia. Similarly, 1961 figures as to total industry sales in the *Billboard Buyer's Guide* (CXs 199a,b) are understated since they do not include mail-order sales by Reader's Digest and others.

Other "significant" record companies and mail-order vendors include Sam Goody who, along with other dealers, sells by direct mail the most popular records by the most popular artists (for example, RXs 6, 9, 12, 13b, 14, 144, 285, 287).

The "Music of Life" package presented by RCA and sold by *Life Magazine*, can hardly be called "merely an offering of favorite music" without any "stars" (see RX 509).