

The contract provision here cited (Paragraph 4, which was waived by the parties in February 1960) is one which is not found in any other outside label contract. It obviously originated in the circumstances peculiar to the Verve contract. It was feared that Verve might be compelled to dump its repertoire in such a manner as to depreciate the value of the Verve name (CX 82). In effect it provided that if Verve were to convert itself into a budget line label, thus depreciating the value of the Verve name, Columbia could offer the records on the Columbia label. The paragraph was carefully limited in its application to records from 12 specific Verve masters originally listed on Schedules A and B of the 1959 contract (CXs 23g-h, 24, 25). It merely reflected the concern of Club officials in 1958 about Verve's financial condition.

Verve was absolved from "responsibility" for pricing at the retail or dealer level (CX 23c), and thus the contract did not, in terms, prohibit dealers from selling Verve records at, below, or above the Club's retail price. However, if Verve chose to sell the records at "distress prices," or if the Verve label had depreciated at retail to the status of a "low price label," such as the Columbia "Harmony" and the RCA "Camden" budget lines, Columbia, under Paragraph 5 (CX 23i), could elect to release phonograph records manufactured from the Verve masters on the "Columbia" label after giving Verve "written notice." (Camden, for example, then had suggested list prices of \$1.98 and \$2.98 (CX 316, p. 256).)

The contract makes clear that the purpose of this clause was not to prevent competitive retail price reductions by Verve. Thus, sales which were "casual" or "inadvertent" were not to be considered "distress" sales (CX 23h-i). Nor were sales by Verve during sales programs, in accordance with practices "customary" in the record industry, to be deemed "distress" sales. Finally, Verve's limited agreement was with respect only to its prices to its distributors, and not with respect to retail selling prices (CX 23c).

The limited intent of the parties was further made clear in a contract clause which specified that the "distress selling" provision was not to be used to "frustrate the basic intent of the parties hereunder to utilize the 'Verve' label" (CX 23i-j). It was to be invoked only if the Verve name had become "depreciated" (CX 82b).

Despite its limited effect with respect to a handful of records, Paragraph 4 of the Verve contract was waived by a contract amendment dated February 17, 1960 (CX 32).

There is no evidence in the record as to what price those records were in fact sold by Verve to its distributors.

But Columbia failed to waive either Paragraph 1(f), defining

"distress price," or Paragraph 5, which was designed to discourage not only "distress selling" by Verve, but also

the consistent offering of records on the "Verve" label at retail prices comparable to the prices at which the present Columbia "Harmony" and RCA "Camden" records are being sold.

If Columbia determined that as a result, the Verve label had depreciated to the status of a low price label, Columbia could "release phonograph records manufactured from the Licensed Masters under the 'Columbia' label" after giving Verve written notice (CX 23i).

Respondents take the position that Paragraph 5 of the Verve contract was described by Paragraph 4 as being the "sole remedy" available to Columbia in case Verve breached the "distress price" provisions of Paragraph 4.

"Obviously," say respondents, "when Paragraph Four dealing with 'distress prices' was waived by the parties in February 1960, it was not also necessary to waive the 'definition' of 'distress prices' which is contained earlier in the contract (CX 23b-c), or the 'sole remedy' for the breach of waived Paragraph Four which appears in Paragraph Five."

The trouble with respondents' argument is that Paragraph 5 not only was the sole remedy for breach of Paragraph 4; it also stood on its own feet in providing a remedy for selling at budget line prices, as well as at distress prices.

Despite all the explanations and qualifications, the contract obviously had the capacity and tendency to influence and control Verve's prices.

The contract provision was in effect for eleven months. The record does not disclose Verve's actual selling prices to distributors before the February 1960 waiver.

It does not appear that any other contract had comparable provisions.

In CPF 120, Government counsel refer to an "extension" of the Verve agreement on March 14, 1962. Because the extension retained the terms and conditions of the 1959 agreement "except as herein expressly modified" (CX 287), Government counsel think it strange that Paragraph 5 was not rescinded at that time. Respondents' answer is that Paragraph 5 already was ineffective because of the 1960 waiver.

Regarding the extension, respondents explain that the Verve contract was about to expire in March 1962 unless Columbia exercised its option. But the parties had agreed in February 1962 that the contract was to be terminated (Maxim 1729), and re-

spondents say that some provision had to be made to permit a carrying on of operations pending agreement on the details of termination. The contract was in fact terminated as of June 1962 (CX 288).

The investigation in this matter commenced in 1960, and changes in the Caedmon contract were adopted after that time. A letter dated December 7, 1960, from counsel for respondents indicates on its face that the investigation had been in progress for a considerable period of time (CX 1a).

On April 15, 1961, the Caedmon contract of 1958 was rescinded and the explicit agreement about price (CPF 111) was removed. The new contract included a provision tying the royalty payment to "\*\*\* our [Columbia's] retail selling price \*\*\*" (CXs 22a, 22e). This was similar to the provision in the 1959 Verve contract (CX 236).

As indicated previously, an attempt had been made to replace the Caedmon contract considerably before the investigation began in this matter. (See p. 89, *supra*.) For reasons similar to those stated concerning the Verve agreement, Club officials, on advise of counsel, decided in 1960 to enter into an entirely new contract with Caedmon. It does not appear to be disputed that this was before the Commission's investigation started.

The new agreement was prepared, but was not immediately executed because of a pending lawsuit. A new contract was entered into (CX 22) by Columbia with Caedmon as of April 1961. (Keating 5172-84; RPF 192 (footnote).)

The new Caedmon contract eliminated the principal contractual provisions challenged by the complaint.

Government counsel have not disputed respondents' claim that the facts surrounding the revision of the Caedmon and Verve contracts were fully disclosed during the precomplaint investigation.

Respondents complain that "The early abandoned contracts are used here as a tactic to invalidate the later contracts although no connection was ever shown between them. \* \* \* The fact that complaint counsel rely so heavily on the two obsolete contracts merely highlights the sophistry and weaknesses of the attack on the later agreements" (Exceptions, page 15).

Of course, respondents claim too much when they deny any "connection" between the contracts. But there is enough truth in respondents' contention to provide a troublesome problem for the examiner. It is certainly true that the terms of the new Caedmon contract were substantially different from the terms of the

old contract, and that despite the efforts of Government counsel to view the Caedmon and Verve contracts as "precedents," the later contracts do not contain the challenged provisions.

Under the new Caedmon contract, as well as under the Verve, Mercury, Kapp and Warner Bros. contracts, royalties were to be paid by Columbia by applying the royalty formula in the contract to a base price—which was the Club's selling price. Except as the Government undertakes to color that arrangement by reference to the abandoned price-fixing provisions, the use of Columbia's selling price as the measure of royalty payments is legally unobjectionable.

Columbia sold Caedmon records through the Club at a price of \$4.98, and Caedmon maintained a suggested list price of \$5.95. In 1961, the Club offered many Caedmon records and consistently made the following representation:

. . . \$4.98 (regular list price \$5.95) (CX 564, pp. 4-7, 10-13; see also RX 134f, RX 135a-i).

As recently as Christmas of 1962, Columbia was representing that the Caedmon regular list price was \$5.95 and the Columbia price through the Club was \$4.98 (CX 593, pp. 16 and 17). The *Schwann* LP catalog for December 1962 shows that Caedmon has maintained its \$5.95 suggested list price (CX 319, page 282).

#### *The "Royalty Price" Provisions*

In CPF 124, Government counsel get carried away by their theory that "royalty price" is the key to a price-fixing agreement between Columbia and each of its licensors. Government counsel state:

Following the precedent of the Verve-CBS Agreement, CBS and Mercury agreed that payments to the Licensor shall be made on the basis of a "Royalty Price." This "Royalty Price" was defined by and related to the Club selling price and the Licensor's suggested list price.

Actually, the Mercury contract of 1960 did not follow any Verve precedent, and it is misleading to state that the royalty price was "defined by and related to the Club selling price and the Licensor's suggested list price."

Paragraph 1(d) does define royalty price as Columbia's "retail selling price" less certain deductions. Those deductions are described as follows:

- (1) Any excise or other similar tax.
- (2) The charge made by Columbia for any record container.
- (3) The charge made by Columbia for any "extraordinary librettos or program notes included with such records."

(4) The additional charge made by Columbia to the retail purchaser for postage and handling, provided any such additional charge is deemed to be included in the retail selling price.

The contract further provides that the charges for items (1) through (4) "shall be no greater than the same amount as we [Columbia] deduct in determining artist royalties for the leading Columbia recording artist whose records are sold by the Columbia Record Club."

The definition of royalty price concludes:

For purposes of calculating the royalties payable to you [Mercury] during the term of this agreement under the formula set forth in paragraph 11 hereof it is agreed that the royalty price on records with a suggested retail price in the United States of \$3.98, \$4.98 and \$5.98 shall be \$3.46, \$4.42, and \$5.26 respectively. The royalty price on records with a different suggested list price shall be determined by the general criteria outlined above (CX 34b).

In the Verve agreement, the royalty was to be paid on the base of the defined "royalty price" (CX 23L). In the Mercury agreement, however, the actual royalty payment provision (Paragraph 11 (a), CX 34d) contains no reference at all to the term "royalty price." Subject to specified qualifications, a base royalty of 5% is payable on 95% of Columbia's "net sales" of phonograph recordings manufactured from Mercury's master recordings. Net sales are defined as gross shipment less returns.

Paragraph 11 (b) contains the usual provision specifying that no royalty shall be payable with respect to "free" or "bonus" records.

The only references to "royalty price" in the Mercury contract appear in connection with paragraph 11 (c), which involves a complicated procedure in case the amount of free and bonus records exceeded certain amounts, and in connection with paragraph 11 (d), which provides for certain adjustments if records on which royalties were paid totaled less than one million (CX 34d-e).

The new language was apparently inserted in this contract for use in calculating the payments to be made under those provisions.

The contract language quoted in CPF 124 becomes the focal point of many of the Government's subsequent proposed findings. Government counsel argue that the "royalty price" means the licensor's suggested list price. Respondents deny this and say that the record shows that it refers to the Club's selling price.

Although the dispute involves a crucial legal issue, the difference is essentially one of semantics rather than actualities. This is be-

cause, as respondents themselves concede (Exceptions, page 91), the Club's selling price "is normally suggested list price."

But whether it refers to Club selling price or licensor's suggested list price, the question is whether the royalty clause amounts to an agreement between the parties as to the prices which the Club will charge.

Analysis of the contracts and the testimony shows that the "royalty price" is not necessarily related to the suggested list prices of the outside labels. There was no testimony to support such a construction of the contracts, and Government counsel cite none.

In their brief (page 343), Government counsel themselves seem dubious:

"It is the position of complaint counsel," they say, "that the Licensing Agreements have a specific formula requiring list price selling. But irrespective of the actual words used, the understandings of the parties and their actions show an unlawful combination. \* \* \*"

One gets the impression that their "position" is a shaky one and that they virtually concede that "the actual words used" are at least ambiguous. If so, the burden was on them to clarify them or otherwise prove the intent and meaning they have ascribed to them.

As a matter of fact, the contract clause emphasized in CPF 124 follows immediately after the generalized definition of "royalty price," and the reference is obviously to the Club's selling price less specified deductions. Again we note that the Club's selling price is normally suggested list price.

In the Liberty contract, then, the formula is applied in the contract itself, so that giving effect to the specified deductions, the royalty price is \$3.46 for a \$3.98 record, \$4.42 for a \$4.98 record and \$5.26 for a \$5.98 record.

Just how this contractual arrangement amounts to a price-fixing device is not made clear by the Government.

We are inclined to agree with the respondents that the diversity of the contractual provisions suggests that undisclosed business considerations, rather than any uniform pricing policy, are apparently involved. Thus, the Kapp contract, which was executed subsequent to the Mercury contract, does not contain the new clause quoted in CPF 124. Neither does it appear in the subsequent Caedmon, United Artists or Cameo contracts (CXs 22, 44 and 453), or in the first Warner Bros. contract (CX 39).

There is additional internal evidence from the contracts themselves that the language relied on by Government counsel was not

necessarily intended to refer to the suggested list prices of the outside labels. In their exceptions (page 92), respondents note the inclusion of suggested list prices inapplicable to specific licensors.

Although this may have been the result of careless draftsmanship, it is at least suggestive that the Government's interpretation is not well founded.

The fact that the complaint makes no reference at all to that contract clause, now claimed to be so important, also raises a question as to the validity of the Government's interpretation. Other specific contract clauses deemed restrictive were referred to or summarized in the complaint.

One wonders also why no attempt was made by Government counsel to develop, either through respondents or through the licensors or otherwise, why the contractual provisions demonstrated such substantial differences.

The important thing, however, is that even if the royalty price language could be construed as a reference to the list price of the outside label, it still did not establish an agreement by Columbia to sell at list price. The Club may lawfully use as the base for royalty payments to outside labels the selling price, the suggested list price, actual sales or the number of pages in the telephone book.

In the final analysis, the Mercury 7½% royalty for a \$3.98 LP is computed on a base of \$3.46—which amounts to 26¢ per record.

There is no evidence in this record to show that the agreement to pay Mercury 26¢ per record in any way fixes the Club selling price on \$3.98 LPs—either at \$3.98 or at any other figure.

Despite Government claims to the contrary (CPF 125), none of the provisions in the Mercury contract required Mercury to keep Columbia "informed about any prospective price changes," and there is no evidence that Mercury did so. The lone exhibit cited in support of this finding (CX 380) is hardly proof of any price fixing arrangement.

Subsequent Warner Bros. licensing agreements (CXs 514, 517, 519, 537) defined "Royalty Price" as Columbia's "retail selling price" less certain deductions, and further specifying the "present" royalty price as a stated amount applicable to records with a "suggested list price" of a designated amount. For example:

At present the royalty price of an album with a suggested list price of \$3.98 is \$3.46, and the royalty price of the stereo counterpart of such album with a suggested list price of \$4.98 is \$4.42 (CX 514a).

At present the royalty price of an album with a suggested list price of \$4.98 is \$4.42, and the royalty price of the stereo counterpart of such album with a suggested list price of \$5.98 is \$5.26 (CX 537b).

The fact that the contracts specify a royalty price in relationship to designated suggested list prices is hardly justification for the Government's statement (CPF 126) describing them as "further defining the royalty price as the Licensor's suggested list price less certain deductions."

That addition to the royalty provision merely mathematically defined the price base to which the royalty percentage set forth in Paragraph 8 of the contract was to be applied (CX 514c).

Without more, the examiner attaches no special or sinister significance to the fact that before Columbia and Warner Bros. entered into the agreement (CX 514) covering Club distribution of the album "Gone With the Wind," a Columbia official wrote that he understood that the suggested retail price of the album was \$3.98 mono and \$4.98 stereo (CX 183a).

It is a fact that the Club prices charged for the Warner Bros. album "Gone With the Wind" (CX 514) were the Warner Bros. suggested list prices: \$3.98 for mono (CX 405, Christmas Catalog, page 15); \$4.98 for stereo (CX 584, page 13).

A similar provision was also contained in the Liberty contract (CX 45) and the Vanguard contract (CX 43). It was not in the original Cameo-Parkway agreement (CX 453) but was added by amendment a month later (CX 452).

Thus, in some of the contracts, the specific figure is given as a statement of fact as to what the royalty price was at the time (*e.g.*, CX 43). In other instances (*e.g.*, CX 45), "it is agreed" that the royalty price on records bearing specified suggested retail prices shall be designated amounts.

According to the Government's analysis, the contracts thus relate the royalty price alternatively to the Club selling price and the licensors' suggested list price. Applying the mathematical theorem that things equal to the same thing are equal to each other, Government counsel propose this "formula":

Royalty Price = CBS retail selling price [less certain deductions].

Royalty Price = suggested list price [less certain deductions].

Therefore, CBS retail selling price = Licensors' suggested list price [less certain deductions] (CPF 128).

The formula as stated contradicts the very conclusion contended for. The Government is saying *not* that the "CBS retail selling price" is the licensors' suggested list price, but that the CBS price is that suggested list price *reduced by certain deductions*. Do they mean that CBS' selling price of \$3.98 is equal to the royalty price of \$3.46 (Mercury's list after deductions) (CPF 124)?



Even if this turns out to be the result of a misplaced footnote reference, it still points up the fallacious approach of Government counsel.

At any rate, assuming the "formula" to have been inadvertently misstated, there are at least two other flaws in the Government's theory.

Even if all the agreements had incorporated the identical language—and it is clear that such is not the case—the mechanical arithmetic formula advanced by Government counsel (CPF 128 and 129) is not established by the contracts. The royalties were to be based on the Club's selling price. That selling price was subject to the deduction of various charges such as taxes, packaging charges, extraordinary libretto charges and postage and handling charges. This, then, was the royalty price—the Club's retail selling price less certain deductions.

To illustrate how the formula would apply, several of the contracts, for reasons not developed at the trial by either party, specified that "at present" the royalty price is \$3.46 for an album with a suggested list price of \$3.98, and \$4.42 for an album with a suggested list price of \$4.98 (CX 43a). In other contracts, specific amounts are agreed on as the royalty price.

It is significant also that some of the contracts (*e.g.*, CX 45b) after specifying the royalty price for records with suggested retail prices of \$3.98, \$4.98 and \$5.98, provide further that "The royalty price on records with a different suggested list price shall be determined by the criteria outlined above."

Government counsel seek to bolster their price-fixing interpretation by cryptic references to an "exchange" of list price information (CPFs 125, 128 (footnote 72), 129). Not only is the proof cited insufficient; there is substance also in the suggestion of respondents that list price information is a matter of common knowledge in the industry and is regularly published in the *Schwann* catalog.

In CPF 129, the Government demonstrates the logic of its position that references in the licensing agreements to "suggested retail price" or "suggested list price" *must mean* the licensors' suggested prices for the licensors' records.

But that still proves nothing as to price fixing by agreement. The Government's position is weakened, rather than strengthened, by counsel's reference to the alleged exchange of information about the licensors' suggested list prices (CPF 129).

In the examiner's opinion, Government counsel have failed to carry their burden of proving that the royalty price provisions of

these contracts establish an agreement by Columbia to sell either at its own suggested list price or at the suggested list price of the outside label.

Despite the contention of Government counsel that both respondents' officials and licensors' officials were "hostile," it does appear that some effort might have been made to develop by testimony at the trial the purpose and intent of the parties in connection with this contractual language. The Government may argue that respondents also had an opportunity to explain these provisions, but the burden of proof is on the Government. The circumstances here are not such as to shift to respondents even the burden of going forward with evidence on this point.

Government counsel propose a finding (CPF 130) that

Mr. Keating testified that the Club prices are the suggested list prices of the "... record companies that may be offering them" (Keating 684, 686).

This is a classic example of misrepresentation of the record by tearing a statement out of context. This is not a fair representation of Keating's statement.

Keating was being asked to explain the meaning of the phraseology "\$3.98 to \$6.98 records" in the Club's advertisements. His complete answer was that those figures

refer to the Club price for the record when offered for sale during the period of his membership. They also refer to the suggested list price of these records by Columbia Records, or by any of the other record companies that may be offering them (Keating 684).

A little later, Keating was asked how he acquainted himself with the prices of the outside labels. Again his answer was that the price used in the Club advertising was "the club price or, in many cases, the suggested list price of these [outside] labels" (Keating 685-86).

According to Keating (Tr. 686), the suggested list price of other labels "is a matter of common knowledge in the industry from Schwann's Catalog, from charts, from almost anything you want to see."

The position of Columbia is epitomized in the testimony of Keating when he was recalled as a defense witness. This colloquy ensued (Tr. 5151-52) :

Q. Has the Columbia Record Club always sold at the manufacturer's suggested retail price?

A. We have sold at the manufacturer's suggested list price, with two exceptions.

Q. What were those two exceptions?

A. They were Caedmon and Verve. In each instance we felt that the suggested list price was high and we unilaterally made the decision to offer them at a lower price to club members.

Q. Do you have any agreement with any of your outside labels as to the price at which you will sell their records through the Columbia Record Club?

A. No.

In the course of an extended cross-examination, Keating was asked by Government counsel:

With respect to Caedmon, Verve, Cameo-Parkway, Kapp, Liberty and others, who sets the price for club members?

The answer was:

Columbia Record Club.

The Columbia Record Club "always" sets that price (Keating 5449-50).

Although Keating was called as a Government witness and was subjected to a lengthy cross-examination when he was called by respondents, that appeared to be the extent of his interrogation on the question of price fixing.

Keating was not asked why different royalty provisions were inserted in the different contracts. The burden of proof remaining with the Government, the examiner is inclined to agree with respondents that "Presumably there were valid business considerations" underlying the various royalty arrangements.

Despite the emphasis by Government counsel on the juxtaposition of royalty prices and suggested list prices in some of the contracts as proof of agreement that the Club's selling price would be the licensor's suggested list price, the "exclusion" of the suggested list price reference in a licensing agreement is also alleged to be consistent with an understanding that Columbia will maintain the licensor's suggested list price (CPF 131).

The Government concedes that the first Warner Bros. contract (CX 39) was entered into in September 1960, *after* the royalty price device allegedly had been used for price-fixing purposes. They emphasize that this was after the Mercury contract (CX 34), but the Warner Bros. agreement simply defined "royalty price" as Columbia's "retail selling price" less specified charges.

But, says the Government (CPF 131), "Even the exclusion of suggested list price reference in the Licensing Agreement does not alter the fact that the Agreements are signed by the Licensor and CBS with the understanding that CBS will maintain the Licensor's suggested list price."

To fill the void, Government counsel point to a precontract letter from the president of Warner Bros. commenting on the royalty price provision in the proposed contract. The letter stated in part:

Reference, paragraph 1(d). The first line refers to "our retail selling price". I would like to be certain that "our" (meaning Columbia Records) pricing of the Newhart album will not be less than our (Warner Bros.) suggested retail selling price. The first album is priced at \$3.98 monaural, and \$4.98 stereo. We don't know what the price of the second album will be. It will probably be the same, and certainly not less (CX 510b).

Government counsel cite the quotation without further comment except that the agreement was signed on September 15, 1960.

Perhaps Government counsel feel that the inference is inescapable. Or perhaps they are reluctant to point up the evidentiary inadequacy of these two circumstances as showing understanding and agreement.

CX 510b merely contains a statement by Conkling that he wanted assurances that the Club would not sell below Warner's suggested retail selling price, and he apparently wanted a change in the definition of Paragraph 1(d) of the contract.

Whatever Conkling wanted in this connection, there is no evidence that any such assurance was given to him, either in the correspondence or in the subsequent contract (CX 39). We are not cited to any other testimony or other evidence.

In a notable feat of draftsmanship, "the omission of any explicit reference to suggested list prices was also incorporated" into the Kapp contract of October 7, 1960 (CX 41) and the United Artists contract of July 1, 1961 (CX 44). Those contracts define royalty price in terms of Columbia's "retail selling price" and make no reference to anybody's suggested retail or suggested list price.

Undaunted by the omission of even the cryptic reference previously relied on, Government counsel now rely on the bare fact that Columbia "has in fact maintained the Licensors' suggested list prices in those instances where there was no explicit agreement \* \* \*" (CPF 133).

Respondents do not except to the proposed finding that Columbia actually charged the suggested list prices of Warner Bros., United Artists and Kapp.

As a matter of fact, respondents concede (Exceptions, page 96) that "Since 1960, the Club has generally sold outside label records at the regular Club price, which has generally been equivalent to the suggested retail price."

Respondents further cite the fact that the Club has in fact sold below suggested list prices, in the case of Caedmon and Verve, as "further proof that there was no express agreement of the parties to sell at list price."

Respondents justifiably accuse Government counsel of confusion and inconsistency. In footnote 78 to CPF 133, the Government says that the agreements on price "pertain only to records where there is a charge by the Club." There is a charge by the Club for the introductory records and yet Government counsel apparently take the position that the introductory price is unilaterally fixed by Columbia and without any agreement on the part of the outside labels. As a matter of fact, Government counsel chide the licensors as having "abdicated to CBS control over the form of the introductory offer" (see Kapp 1590-91).

At the same time, Government counsel explain that "The Licensor has no interest" in the terms of the introductory offer. Furthermore, Government counsel have taken the position that the outside label records being sold through the Club are completely the property of Columbia (CPF 33-34), and it is not clear what control is being abdicated.

The examiner is not convinced that the Club's price policy for licensors' records is so inconsistent with the "kind or type of music" appearing on such records as to compel an inference that the licensor's suggested list price is "the determinative factor."

Again, in proposing a finding to that effect, Government counsel exhume the Verve and Caedmon contracts as representing "Exceptions \* \* \* by *express agreement of the parties*" (CPF 134, footnote 79).

Without going into any details, it does appear that Club prices conform generally to the broad classifications reflected in this record—that is, "pop" records at \$3.98, classical records at \$4.98, original cast albums at \$5.98 (RPF 529). Within each such classification, however, there are and have been variations depending upon the material employed or other special circumstances.

Government counsel propose a general finding (CPF 134) that "The list price of most stereo pop albums is \$4.98," but "the Club has sold a Licensor's stereo records at \$3.98 when the Licensor's suggested list price deviated from the pattern." They point to Cameo-Parkway as an "example," but they cite no other instances, and the examiner is aware of none.

As evidence, presumably, of price fixing by agreement, the Government notes that unlike most companies, Cameo-Parkway has a stereo pop suggested list price of \$3.98 (Cohen 2634-35),

and CBS maintains the Cameo list price of \$3.98 as the Club's retail price. (Government counsel cite RX 308a, page 17, as support for this proposed finding; the citation is erroneous.)

In other words, we are asked to find Columbia guilty of price fixing because of the Club's failure to sell Cameo stereo records at \$4.98, a price \$1.00 higher than Cameo itself valued them, and \$1.00 higher than the prices of dealers selling Cameo records at list price.

But Government counsel invite us parenthetically to see a later proposed finding (CPF 136) "for *agreement* between Cameo-Parkway and CBS to deviate from the policy." It appears that this means an agreement to deviate from the deviation.

*The Curious Case of Allan Cohen*

Government counsel summarize the price-fixing allegations in this sweeping statement:

The significance of the connection between the royalty price provision, the suggested list price, and the CBS retail price in the Licensing Agreements, is perfectly clear to the Licensors. It means that CBS has agreed to charge the Licensor's suggested list price (CPF 135).

As the record support for such a serious allegation, Government counsel cite only the following testimony on cross-examination of a Cameo-Parkway officer appearing as a defense witness:

Q. Did you speak of some of the advantages to you of the Columbia Record Club, Mr. Cohen?

A. Yes.

Q. Is it your understanding that the Club sells Cameo and Parkway records after the introductory offer at your suggested list price?

A. Yes.

Q. What is that understanding based on?

A. On the contractual agreement.

Q. What part?

A. In the contract there is a definition of retail list price and it is spelled out in detail (Cohen 6760).

That testimony, of course, does not support the broad finding sought. Presumably, an agreement to fix prices might be reflected in an understanding independent of a written contract, or it might be incorporated into the written contract itself. But in the latter case, the contract must speak for itself.

Although the testimony quoted also speaks for itself, it is important, in view of the position of Government counsel, to determine what it does show and what it does not show. Cohen did not testify that there was an understanding about prices independent of the contract. He did not even testify that there was such an understanding about Club prices in the contract itself. He had

been asked by Government counsel the simple factual question whether the Club "sells Cameo and Parkway records after the introductory offer at your suggested list price?" Perhaps the phraseology was unfortunate; he was asked whether that was his "understanding." The Club, of course, in fact does sell Cameo and Parkway records at the suggested list price; Cohen, naturally, knew this, so he replied "Yes." He was then asked what his "understanding" was based on and he replied "On the contractual agreement."

"In the contract," he said, "there is a definition of retail list price and it is spelled out in detail" (Cohen 6760).

Government counsel did not ask Cohen to identify specifically the part of the contract to which he was referring. Presumably, Government counsel now ask the hearing examiner and the Commission to relate this testimony to the "royalty price" clause in the Cameo-Parkway licensing agreement (CX 453), as amended (CX 452).

But this attempted bootstrap operation cannot supply a "definition" that is not in the contract; nor can it warrant a finding that the price-fixing provision was "spelled out in detail."

Obviously, Cohen's "understanding" of the contract cannot as a matter of law vary what the contract said.

It is suggestive, however, of some doubt on the part of Government counsel with respect to their "formula" (CPF 128) that they think it necessary to rely on such testimony as this.

In his first appearance as a Commission witness, Cohen had indicated some lack of familiarity with the contractual provisions (Cohen 2652). It may be that Cohen misunderstood the contract, or perhaps he misunderstood the question. The latter seems likely in view of the facts referred to in the findings that follow immediately.

In the Government's view of the operation of the licensing agreements, Columbia and the licensor "reach an understanding" if Columbia wants "to deviate from the Licensor's suggested list price as the Club retail selling price" (CPF 136). In a footnote, they cite the Caedmon and Verve contracts. The only other evidence they refer to to support such a finding also comes from the cross-examination of Mr. Cohen of Cameo-Parkway

Q. Are there occasions in the course of your dealing with the club when officials from the club ask you questions respecting the price they are going to get for a particular Cameo or a particular Parkway record?

A. This has only happened this one time.

Q. What was the nature of that, sir?

\* \* \* \* \*

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## Initial Decision

A. A discussion was had with reference to a possible future release, and the official asked me if it was satisfactory if the retail list price would be \$4.98 stereo.

Q. What did you reply sir?

A. Yes (Cohen 6760-62).

Government counsel interpret this testimony to mean that a Columbia representative contacted Cameo-Parkway "For the purpose of offering Cameo-Parkway stereo at \$4.98 rather than at the Cameo-Parkway list price of \$3.98" (CPF 136).

It will be recalled that the testimony just quoted had been billed earlier (CPF 134) as proof of "agreement between Cameo-Parkway and CBS to deviate from the policy."

It will be noted also that this testimony is quoted in support of a general finding that "In the operation of the Licensing Agreements, CBS and the Licensor reach an understanding if CBS desires to deviate from the Licensor's suggested list price as the Club retail selling price" (CPF 136).

Thus, we find the Government undertaking to convert testimony relating to an alleged agreement between Columbia and Cameo-Parkway to raise the "retail list price" of a Cameo record into a finding that there was an agreement to "fix" the Club price of the record.

Government counsel have made this switch without any record support and under somewhat extraordinary circumstances that deserve to be set out in some detail.

Cohen, originally a Government witness, was called as a defense witness on June 4, 1963. On cross-examination by Government counsel, and over objection by respondents, Cohen testified, as we have seen, to the effect that a Club "official" (later identified as William Bell, the Club's director of artists and repertoire) had asked Cameo to change Cameo's "retail list price" of a particular stereo record from \$3.98 to \$4.98, and that Cohen had agreed to this (Tr. 6760-62; emphasis added).

Government counsel had undertaken to show that the conversation between Cohen and a Columbia Club official had to do "with a current club policy and current distribution of a Cameo or a Parkway record through the club" (Tr. 6756).

Government counsel did not, in the questioning of Cohen, establish the identity of the official or the identity of the record concerning which the agreement was allegedly made.

Government counsel sought to show that this particular conversation did "resemble previous conversations" that the witness had had with Columbia people "in a general way" (Tr. 6757-58).



It was not until redirect examination by respondents' counsel that the witness identified the record involved in the conversation. The witness stated: "It is a record that hasn't been released yet . . . I don't even know the name of it. The artist is Maynard Ferguson" (Cohen 6769).

It is important to compare the question put to Cohen with his answer. He was asked:

Are there occasions in the course of your dealing with the club when officials from the club ask you questions respecting *the price they are going to get* for a particular Cameo or a particular Parkway record? [Emphasis added.]

His answer was "This has only happened this one time" (Tr. 6760).

The next question was: "What was the nature of that, sir?"

Objection was noted; there was discussion; the question was re-read; the objection was overruled; and the witness was allowed to answer (Tr. 6760-62). His answer was:

A discussion was had with reference to a possible future release, and the official asked me if it was satisfactory if the retail list price would be \$4.98 stereo (Tr. 6762).

To the official's question, Cohen replied "Yes."

If this testimony were accepted at face value, it could be interpreted as evidence of a charge that Columbia and Cameo had agreed to fix *retail list prices*—and that is an allegation of the instant complaint.

In their Exceptions (page 101), respondents state:

The testimony took respondents' counsel by surprise. Under the rule in effect during the trial, respondents' counsel were not permitted to discuss the facts with Mr. Cohen before his redirect examination. Although the testimony was not credible, it had to be refuted after investigation.

Approximately two months later, respondents called their Mr. Bell. Over strenuous objections by Government counsel, Bell testified in substance as follows:

That in April 1963 he had first listened to a Cameo record entitled "New Sounds of Maynard Ferguson"; that this record had been previously released by Cameo at retail; that Bell had seen reports in the trade press about its commercial success; that it was selling at a suggested retail list price of \$3.98; that in all of his years in the record business, he knew of no instance where a record was released by a manufacturer at a particular suggested retail price which was then raised by the manufacturer within a few months; that Bell had not asked Cameo to raise its stereo "retail list price" from \$3.98 to \$4.98; that Cameo had not in fact

charged its retail list price; and that the Club had not released the record (Bell 10, 287-99).

There was an extended colloquy in which Government counsel claimed respondents were trying to impeach Mr. Cohen (Tr. 10, 291-96). In the course of this colloquy, Government counsel offered to stipulate in effect that Cohen had "intended" to testify about an agreement to raise and fix the *Club price* of the Cameo record (Tr. 10, 296-97).

Ironically (although there was no stipulation), counsel for the parties are actually in agreement on this point. Respondents' counsel stated (Tr. 10, 294): "I don't think the witness Cohen answered the question that was put to him or else the report of it was not accurate in the transcript."

Respondents' counsel further conceded that the conversation was with Mr. Bell and "related to the price at which the Columbia Record Club would sell a Cameo-Parkway record" (Tr. 10, 295).

Respondents' counsel quoted Cohen's answer, as recorded at Tr. 6762, and stated that "that answer could not have been responsive to the question that was asked"; the conversation "was related to the price at which the Columbia Record Club would sell the record" (Tr. 10, 296).

It was at this point that Government counsel expressed willingness to stipulate that "the words retail list price was intended by Mr. Cohen in the very context of that line of questioning to be the club price." Government counsel did not know whether it was "the fault of the reporter or Mr. Cohen," but the Government was "quite willing to say that the line of questioning indicated the club price" (Tr. 10, 296).

Respondents' counsel took the position, however, that he didn't know what was intended by Mr. Cohen and that it was necessary to "deal with the record as it stands now," with "a serious ambiguity" admitted by the Government.

Government counsel thus conceded that Cohen's testimony on this point was either wrong or wrongly reported. Nevertheless they cite that testimony, which stands otherwise uncorrected in the record, in support of a proposed finding (CPF 136) that a CBS representative contacted Cameo-Parkway for the purpose of offering Cameo-Parkway stereo records at \$4.98 rather than at the Cameo-Parkway list price of \$3.98.

For further support of their interpretation of the Cohen testimony, Government counsel cite (CPF 137) their cross-examination of Bell. They say that Bell "confirmed the fact that he had had

conversations with Mr. Cohen of Cameo-Parkway about the Club price for Cameo-Parkway stereo records." They cite Tr. 10, 298:

Q. Mr. Bell when you spoke to Mr. Cohen did the subject of the price the Club might charge for that Maynard Ferguson stereo record come up?

A. Yes, it did.

That was all he was asked. Bell was not asked how the subject had "come up," who had brought it up or, indeed, exactly what it was that had "come up." He was not asked to state the conversation. He was not asked who had initiated the call.

It is significant also that although Cohen did not identify the Club "official" and was not asked to identify him, Government counsel stated their "understanding that Mr. Bell was the man with whom Mr. Cohen spoke" (Tr. 10, 297). That was long after Cohen testified, and that understanding was not stated until the question was directly put to counsel by the hearing examiner (Tr. 10, 296).

Government counsel did not recall Cohen to correct what they have conceded was erroneous testimony, nor have they requested any correction of the transcript.

The inherent credibility of this episode may also be tested by considering the significance of the claim being made by Government counsel. We are asked to find that Bell was suggesting that the Club price be raised from \$3.98 to \$4.98. That would mean that the Club record would be priced at least \$1.00 higher than the same Cameo record at retail. That higher price, of course, also would have carried higher royalties payable by Columbia to Cameo.

This whole matter of Cohen's testimony may seem to occupy an inordinate amount of space in relation to its singular lack of probative significance.

It is gone into at some length, however, because it dramatically demonstrates the quantum and the quality of the "proof" relied on by Government counsel in support of the price-fixing allegations.

The Government's concluding proposed finding relating to price fixing (CPF 138) is somewhat extraordinary. Counsel cite unequivocal testimony by Columbia officials to the effect that the Club has always set the Club's selling price for licensor's records (Keating 5151; Gartenburg 8539-40).

Government counsel first propose a finding that, except for the instances of Caedmon and Verve records, Columbia has sold the records manufactured from the licensed masters at the licensors' suggested list prices. They cite the testimony of the Club's general manager (Keating 5151-52) in support of that finding, but scoff at his further statement that in the case of the Club's below-list

selling of Caedmon and Verve records, Columbia had "felt that the suggested list price was high" and "unilaterally made the decision to offer them at a lower price to club members."

Government counsel characterize that statement as "extraordinary." They contend also that Keating's further assertion that the Club has no agreement with any of its outside labels as to the price to which the Club will sell such records is "completely rebutted by the very terms of the Caedmon and Verve contracts," and by "other direct evidence."

In support of their claim of "other direct evidence" rebutting Keating's denials, the Government refers to CPFs 135 and 136, which relate to the discredited testimony of Allan Cohen.

In a footnote to CPF 138, Government counsel refer to the "completely unambiguous and clear language of the early Caedmon and Verve contracts."

One wonders whether Government counsel is here suggesting, in an inadvertent Freudian slip, that the other contracts relied on may not be so characterized; that they are ambiguous and unclear. Actually, of course, as we have seen, even the "unambiguous and clear language" of the Caedmon and Verve contracts required considerable explanation by Government counsel.

Finally, Government counsel ask the examiner and the Commission to interpret Keating's testimony "as a statement that nothing has changed since the 1958-1959 Caedmon and Verve Agreements, and that the precedents established then are presently operative."

This concluding statement by Government counsel, it seems to the examiner, constitutes an admission by the Government that its price-fixing charges, in the last analysis, rest solely on the Caedmon and Verve agreements, and that all the rest of the testimony and other evidence cited is just so much window-dressing. It tends to confirm the contention of respondents that the price-fixing charge would be completely groundless were it not for those two contracts.

While declining to admit that they were guilty of price fixing in those two instances, respondents do concede that the language is suspicious on its face and prompted them prior to complaint or investigation to initiate steps to eliminate any suggestion of price fixing.

Although the question is not without difficulty, the examiner has concluded that the challenged provisions in Columbia's initial contracts with Caedmon and Verve each did constitute horizontal price-fixing agreements in violation of law, but further, that there was complete, good faith abandonment by respondents, and that

the steps toward such abandonment were not taken simply to avoid prosecution.

Paragraph Ten (1) of the complaint alleged that the licensing agreements were being engaged in for the purpose, or with the effect, of creating in respondents the undue power to fix and maintain uniform prices of competitors' products at prices identical to those of respondents' own products, and that respondents had in fact regularly exercised such power.

That allegation is not supported by reliable, probative and substantial evidence.

#### *Artists' Royalties*

Government counsel devote some 23 pages of proposed findings to a subject entitled "Agreements Respecting Artists' Royalties." Although the complaint (subparagraph 3(3) of Paragraph Seven and subparagraph 4 of Paragraph Ten) makes references to such arrangements, the subject is one that was virtually ignored in the course of hearings, except as covered by documentary evidence.

Subparagraph 3(3) of Paragraph Seven alleges that in the licensing agreements:

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

According to Paragraph Ten (4), the licensing agreements have the purpose or effect of empowering respondents to

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

The antitrust significance of those challenged provisions of the licensing agreements is not made clear. The examiner is at something of a loss to find a connection between the matter of artists' royalties and the competitive injury alleged in this case.

CPF 86-110 do not enlighten us in that regard. It is not claimed (except perhaps in the most general terms) that the alleged agreements regarding artist royalties adversely affect dealers, or manufacturers, or competing record clubs, or publishers, or the public, or indeed anyone. It is suggested for the first time in the Government's brief—but not in the proposed findings—that the agreements adversely affect artists (Government brief, page 345).

The Government did not call a single performing artist to testify that those contractual provisions adversely affected him

or were otherwise unreasonable. Respondents called many artists as witnesses, but none of them was cross-examined by Government counsel on the subject.

The cases cited in the Government brief suggests only that this conduct is related to price fixing, but that appears to be the only basis on which the practice can be said to be illegal. On the basis of the sketchy evidence adduced, and under the circumstances here, that appears to be remote, and as far-fetched as respondents' defensive claim that the contracts are immune from antitrust prosecution as involving the labor of a human being. Although, obviously, royalties are an element of cost, the Government failed to show the relationship between artist royalties and ultimate price, or otherwise to prove that the matter constitutes price fixing.

The position of Government counsel, as borne out by the documentary evidence in the record, can be distilled as follows:

Columbia has maintained a policy of paying its own artists one-half their customary royalties with respect to records sold by the Club, and of paying no royalties with respect to "free" and "bonus" records distributed by the Club.

The licensing agreements covered the subject of artists' royalties and provided in general for licensors to follow a similar policy insofar as practicable.

There appears to be no real dispute as to those facts, but we are left in the dark as to the unlawful effect that may result. There is no charge or suggestion of coercion or other unfair practice by Columbia.

The concept of reduced royalties on club sales did not originate with Columbia's contracts with the outside labels. It did not originate with the record clubs. There is testimony that authors traditionally received something less than their regular royalty rates on sales of books through book clubs, (Conkling 6189). Similarly, there is evidence that it is traditional in the record industry that artists and publishers do not receive royalties on records distributed free by record clubs (Ackerman 4231; Wood 4138).

The evidence adduced by Government counsel is at best only suggestive. The record does not show the connection between the licensing agreements and the so-called "record club clauses" incorporated by record manufacturers into artists' contracts. In at least one case, such a clause was incorporated in artists' contracts by a licensor long before the existence of the licensing

agreement with Columbia (CPF 104 and Exceptions, pages 75-76).

Only four of Columbia's contracts with artists were put in evidence, and not a single one of the licensors' contracts with their artists.

Neither does the record show that Columbia had more than a casual interest, since the outside labels were obligated under the contracts to pay the artists' royalties in any event.

Much of the Government's argument with respect to royalties revolves around the Verve contract, now expired.

Whereas Ella Fitzgerald agreed with Verve to accept reduced royalties on record club sales (CX 28), it is also true that where Verve had agreed to pay a higher artist royalty, Columbia agreed to compensate Verve for this additional expense (CX 33). CPF 87 demonstrates that royalties were not reduced with respect to one Verve artist.

The Verve agreement contemplated that Verve would attempt to persuade its artists to accept typical club royalties, but where such consent could not be obtained, Columbia reimbursed Verve for the additional artists' royalties paid.

The view taken by the examiner makes it unnecessary to discuss in detail respondents' waiver of the royalty provisions. Suffice it to say that to whatever extent the contractual provisions regarding artists' royalties might be held to be illegal, Columbia was not relieved therefrom by its action in waiving such provisions subsequent to the issuance of the complaint. (Compare CPF 107-110 with respondents' Exceptions, pages 77-79.)

#### *Other "Concerted Activity"*

Under the heading "Other Concerted Activity," the Government has proposed some forty findings (CPF 139-181) intended to demonstrate that:

The Licensing Agreements establish a continuing and close-knit relationship between CBS and each of its Licensor-competitors, encouraging the exchange of confidential information (CPF 139).

The first section (CPF 139-148) is rather aptly described by respondents as follows:

These findings consist of a stringing together of a melange of innocuous documents dealing with a variety of matters which do not establish "concerted activity" in any meaningful antitrust sense. They are for the most part merely routine communications on various business matters.

Entitled "Communications about artists," CPF 149-154 suggests that the licensing agreements have led to non-competitive relationships in connection with the signing and retaining of artists.

The next section, entitled "Communications about repertoire and release schedule," suggests that Columbia obtains unfair access to the recording schedule and release information of its licensors, to its advantage and to the disadvantage of the licensor (CPF 155-62).

The Government also complains that "the Club regularly receives non-Club sales information from the Licensors" (CPF 163); that copyright information is exchanged (CPF 164-75); that the licensing agreements allow Columbia to exercise its influence over the licensor's selection of repertoire and artist material, and Columbia exercises such power and influence (176-77); and that Columbia obtains "special concessions" from the licensors, such as a waiver of artists' royalties for special records (CPF 178-80).

The matters adverted to by Government counsel in CPF 139-48 suggest, perhaps, that when competitors get together in a joint venture, the resulting "cooperation" may lead to some diminution of competition between them—or at least such an impression may be created.

But unless and until the relationship, the exchange of information or other cooperative activities ripen into agreements or combinations cognizable under the antitrust laws, the mere existence of friendly relations between competitors is not actionable. Government lawyers may be suspicious—indeed, they should be, but their suspicions cannot substitute for proof.

The nebulous nature of the Government's charges under this section is demonstrated by such statements as these:

The Licensing Agreements have come to serve as a vehicle for one competitor to convey confidential information to a second competitor about a third competitor (CPF 147).

\* \* \* \* \*

The Agreements encourage the alignment of CBS and the Licensors against the interests of other competitors (CPF 148).

The correspondence cited does not quite measure up to proof of those inflammatory accusations. The letters may be suggestive of a relationship on which Government counsel frown, but they do not constitute unlawful practices, and the Government actually does not make such a claim except by innuendo.

Interestingly enough, the order which the Commission said it had reason to believe should issue if the facts were found to be as alleged in the complaint, contained no prohibition against the



activities covered by this section of the Government's proposed findings.

However, Government counsel propose a new clause 1(g) that would forbid Columbia to enter into or maintain any contract or understanding with any other record manufacturer whereby respondents

Exchange, distribute, or relay to such manufacturer or producer any information relating to: future prices, price policies, negotiations with artists, recording schedules, and copyright or artist royalties or other cost factors.

*Communications About Artists*

CPF 149-154 bear the heading "Communications about artists." Respondents agree with Government counsel that it is important for record companies to be able to attract new artists and retain established artists. It is fair to say also that this record shows that recording artists generally want their records distributed through a record club (RPF 223-31).

As noted by respondents (Exceptions, page 109), this is a factor to be taken into account in weighing the relief sought here by Government counsel. Respondents contend that by forbidding Columbia to continue its distribution arrangements with the outside labels, the order proposed here would deny record club distribution to the smaller companies in the industry and would, therefore, "make it more difficult for those companies to retain and attract artists and bid for properties."

Except in the most general way, there is no evidence to support the Government's proposed finding (CPF 150) that Columbia received "commercial benefit" from otherwise confidential information about the relationship between the licensors and their recording artists. Despite the innuendo, there is no charge and no evidence that Columbia obtains or misuses confidential information about artists or other business data furnished by the licensors. The record establishes nothing unlawful in that respect.

In CPF 151-53, Government counsel attempt to show that, as a "quid pro quo" for the licensing agreements, Columbia refrains from competing with outside labels for artists. The record is to the contrary.

Billed as "a dramatic illustration of the genuine quid pro quo of the Licensing Agreements," the only instance cited relates to Gene McDaniels, a Liberty artist. As shown by quoted testimony (Linick 3669 *et seq*; Keating 5270-71, 5454-56), McDaniels had an exclusive contract with Liberty and was in the midst of a lawsuit with Liberty concerning that contract. (Also see Bennett

6518-20.) Despite the contract and the litigation, McDaniels' agent was going around and offering McDaniels' services to "various record companies," including Columbia (Keating 5454). The telephone call referred to in these findings occurred at that time—October 1962 (Keating 5433). McDaniels' exclusive contract with Liberty, which was to expire in April 1964 (CX 477c), still had over a year and a half to run.

The testimony quoted by the Government shows that Keating called Bennett to find out whether McDaniels was really free to negotiate with other record companies because Columbia (with specific knowledge of the contract's expiration date and trade-paper reports about the lawsuit) did not want to be liable for inducing breach of McDaniels' agreement. Far from showing cozy relations between Columbia and Liberty, the quoted testimony discloses that Bennett warned Keating "that anyone who signed Gene McDaniels would have a nice lawsuit on their hands" (Keating 5270-71).

Although Linick indicated that the call was a "fringe benefit" of the Liberty-Columbia contract, his basic position confirms Keating's testimony (emphasis added):

that Gene McDaniels' incident was one where *the artist was under contract* with us and the Record Club was aware that they were (*sic*) under contract.

Now, I wouldn't say that they would call us if *an artist that was not under contract* with us approached them.

\* \* \* \* \*

... [they called] in the case of Gene McDaniels, *since he was under contract* to Liberty at the time.

The testimony of Linick, Keating and Bennett negates the requested inference that there was an agreement not to compete for artists (Keating 5264; Bennett 6521; Linick 3674). Nor can such an understanding be inferred from Columbia's refusal to sign an artist who was under an exclusive contract that had over 1½ years to run and thus was not free to negotiate. It is not surprising to find a Columbia official seeking to avoid entanglement in a suit for inducing breach of contract. (See Bennett 6520.)

The record shows that Columbia and the outside labels do compete for artists who are free of prior contractual commitments. Thus, during the period of the licensing agreements, Patti Page and Nichols & May switched from Mercury to Columbia, and Steve Lawrence and Edie Gorme left United Artists for Columbia (Keating 5265; CX 803). Similarly, Columbia artists have gone to outside labels during the period of the licensing agreements.

Johnny Mathis, the most commercially successful artist to switch labels in many years, left Columbia for Mercury (see Exceptions, page 178). Kirby Stone, "a highly popular recording artist," switched from Columbia to Warner Bros.; and that company was apparently on the verge of signing Mathis before he was snared by Mercury (Friedman 6104-05). The Four Lads left Columbia for Kapp (Keating 5472). (Compare CX 265d, CX 318, page 197 and CX 320, page 213.) Gerry Mulligan left Columbia in 1959 (Hammond 7254)—and by 1961, had five new releases on Verve. (Compare CX 316, page 243, and CX 320, page 264.)

Government counsel seek to dismiss such evidence indicating competition for artists by remarking (CPF 154, footnote 87):

That certain artists may have left a Licensor to go with CBS raises a question, not involved herein, as to whether (1) that Licensor may have had no objection, (2) the artist was determined to leave in any case, (3) the artist was not commercially successful with the Licensor \* \* \*.

Such conjecture is no substitute for evidence.

The Adler memorandum (CX 81d) referred to in CPF 154 and in many other Government proposed findings, consists of Adler's speculation in 1958 about the possible results of the addition of outside labels. He pointed out that some outside labels might fear that artists would switch to Columbia because of the Club; or, conversely, that the outside labels might actually be in a better position to hold their artists because of Club distribution.

The record, five years later, shows what actually happened. All the outside label witnesses testified that their artists wanted club distribution and that such distribution enhanced their ability to retain and attract artists. Other manufacturer witnesses, called by the Government, also attested to the fact that the availability of record club distribution was important in negotiating with artists (see Exceptions, page 108). We have seen that various Columbia artists have in fact left Columbia for outside labels where they would still have club distribution and, at the same time, some artists from outside labels have switched to Columbia. In summary, there has been the normal switching of labels that is common in the record industry.

In here urging that Columbia agreed not to compete with its licensors for artists, Government counsel find themselves at odds with the position they have taken elsewhere in their proposed findings.

In CPF 394, they quote the same language from the Adler memorandum and state that Columbia officials welcomed the outside label contracts "as a method of obtaining more artists for

CBS, *even artists of the Licensors.*" Similarly, in CPF 213, Government counsel refer to 12 artists who switched to the Columbia label in the past few years—including four from outside labels (Patti Page, Steve Lawrence, Edie Gorme, and Nichols & May)—and cite this as an example of Columbia's "vigorous program of obtaining exclusive contracts with key recording artists."

Yet, in CPF 154, Government counsel claim that "ways had to be devised of assuaging" the alarm that outside label artists would switch to Columbia and that the Gene McDaniels incident shows that "when the chips were down . . . respondents backed up their assurances."

Thus we are asked to find (1) that Columbia uses the outside label agreements to raid outside label artists and (2) that Columbia assures the outside labels "overtly or covertly, that they would not find artists deserting them for CBS."

We are led, almost inevitably, to conclude that neither inconsistent finding is correct.

#### *Repertoire and Release Schedules*

CPF 155-162 deal with "Communications about repertoire and release schedules." It is not apparent, however, how this material resolves any of the issues in this case. In general, the correspondence cited merely shows that the outside labels wanted to obtain increased use of their repertoire by the Club. With thousands of new record releases each year, it is hardly surprising that they would want to call the Club's attention specifically to their current or proposed releases.

Contrary to the Government's proposed findings, the Club does not "regularly receive" detailed information about the "future plans"; the contracts did not so provide; and Keating did not so testify (compare Keating 718 with CPF 162; see also Keating 5264).

Keating's testimony was confirmed by the outside labels. Bohanan of Liberty denied that Liberty regularly advised the Club of its future recording plans; it did call the Club's attention to particular items and it did discuss the possible sales potential of such items, just as Liberty discussed this same subject with their other distributors (Bohanan 6378-79).

Although Green of Mercury pointed out that he supplied the data to the Club, not to Columbia Records, this would not be controlling if in fact there were anything illegal in the relationship. It is worth noting that Green said there never had been any use of the information by Columbia Records (Green 2545-46).

There was no proof of the disclosure of "trade secrets" to a competitor, or any indication that the outside labels were giving away valuable secrets which could be used against them at retail (the source of their major income). No evidence was introduced to show any disclosure of truly confidential information or any misuse.

It may be conceded that record producers do not "normally" make their future recording schedules known to competitors, but "release information" is regularly made available to distributors long before retail release.

Government counsel want a finding (CPF 157) that "Mercury regularly submits recording dates and locations for all records used by the Club," but we are left in the dark as to the significance of this. The implication, of course, is that this is data regarding *future* plans. But the examples cited relate to recording dates long since past.

#### *Sales Information*

The evidence does not support the broad finding (CPF 163) that the Club "regularly receives non-Club sales information."

Moreover, the characterization of the Club as a "clearinghouse" for detailed information is unfair, and is not supported by the record. A "clearinghouse," by dictionary definition, is an agency for the collection, classification and distribution of information. There was not one iota of proof at the trial of any "distribution" by the Club of any information conveyed to it at any time by any outside label.

The miscellaneous reference to sales figures of individual records by United Artists and Warner Bros. was clearly in the context of their touting the possible distribution of these particular records through the Club by indicating their popularity with the public (CXs 294a, 295, 527b, 533a-b). The Liberty data referred to was likewise unexceptionable.

None of the information was shown to give Columbia any advantage in its non-Club business.

CPF 163 "is much ado about nothing." If the Government must rely on Columbia's receipt of such information to support its claim of illegality, the case rests, indeed, on a shaky foundation.

#### *Copyright Information*

It is true, as urged by Government counsel (CPF 164), that the licensing agreements "cause communication between CBS and the Licensors of specific and general information about copyright royalty rates and payments to publishers and other copyright

owners by the Licensors." However, it is not apparent why this is sinister in the antitrust sense. It does appear, not surprisingly, that before the licensing agreements, Columbia did not know what the copyright arrangements were between licensors and publishers (Keating 737). But there was no showing that such royalties were confidential. The fact that the publishers do not regard this data as confidential, or as competitive data, is illustrated by the fact that only two agents (Harry Fox and Herman Starr) represent the bulk of all music publishers.

In view of the position taken by the Government (CPF 164-75), some brief summary of this matter seems called for. The record supports the following findings:

The record industry operates under a so-called "compulsory licensing provision." This means that if any record company has obtained a license from a publisher or other copyright owner and has recorded a particular selection, then any other company has an automatic right to do the same thing, subject only to making a payment of two cents to the copyright owner; this is called the "statutory rate" (L. Hartstone 1072). This relates to copyrights of musical and other compositions. A phonograph record is not copyrightable (Berman 8390).

Copyright royalties are payable to music publishers by the manufacturer of a record. Royalties are payable on each song used on a phonograph record, unless it is in the "public domain" (Berman 2124; Scopp 1662, 1676; CXs 395-96). The amount of royalties payable by a manufacturer on any specific selection varies, depending on a wide variety of circumstances (Scopp 1663):

(a) The copyright "statutory" rate is 2 cents per selection, and many selections bear this rate. Frequently, however, licenses are negotiated at rates of  $1\frac{3}{4}$  cents per selection,  $1\frac{1}{2}$  cents per selection, and even 1 cent per selection (Brown 1830; Scopp 1664-65);

(b) If a record manufacturer embodies on his record 12 songs from one publisher, he may be given a special reduced rate (Scopp 1665);

(c) Special rates may be given on records containing a medley of songs or on show albums (Starr 1686-87);

(d) The rate also varies with the suggested retail price of the record; records selling at a suggested retail price in excess of \$3.00 bear a higher royalty rate than lower-priced records (Berman 8381; Starr 1687);

(e) There are considerable variances in the rates charged by different music publishers (Starr 7711).

Government counsel proclaim (CPF 164) that the contracts themselves require that the licensor make available copyright agreements. The reason, never recognized, or at least never stated, by Government counsel, is also set forth in the contracts themselves. The explanation is that the licensors are not the manufacturers of the Club records. Under the agreements with the licensors and the arrangements with the publishers, Columbia Records is obligated to pay the copyright royalties on all outside label records distributed through the Columbia Record Club (Berman 8374). This obligation is specifically contained in the licensing agreements and directly precedes the agreement of the licensors to make available the copyright agreements relating to records used in the Club (see, *e.g.*, CXs 41d and 34c).

In view of the substantial differences in copyright payments, varying as they do from selection to selection, and from record to record, and from publisher to publisher, it is obvious that Columbia Records, which was reporting and paying the royalties, had to be supplied with the information concerning who was to be paid and how much. This explains the various communications with the outside labels referred to in CPF 164-175.

There was no evidence that the copyright information thus supplied was used or could be used for any purpose other than the compilation of the royalty reports and the payment of royalties.

Although this section of the findings is headed "Copyright information exchanged," there is no evidence to support the statement that any copyright information was "exchanged." The outside labels simply supplied the information needed by Columbia to pay the copyright royalties.

If Columbia was not kept "abreast" (CPF 169), the publishers would not be paid.

The record does not show, as suggested in CPF 165, that "before the Club will release any Licensor's record, it must have in its possession, at the very least, copies of copyright agreements." On the contrary, the very document quoted requests copies of the publisher agreements "on Mercury material *which we have used to date*" (CX 352a, emphasis added).

Two other examples of cryptic references to copyright matters will illustrate the nature of the Government's proposed findings in that area:

According to Government counsel (CPF 174), the Warner Bros. album "The Button Down Mind Strikes Back" presented a "special situation." They propose this further finding: "Shortly after the

Agreement respecting this album was signed Warner Bros. wrote the Club 'in connection with the license for' this album and stated:

our contractual relationship is such that we pay for *artist royalty and the material*. This is done by way of a lengthy [sic] contract and not a simple form. However, as in the case of the first LP, we are obligated to pay 15¢ for the license portion for the material itself (Emphasis added, CX 522). [Quotation corrected.] See also CX 548, 549, 555.

The significance of this to the issues eludes the examiner.

The so-called "special situation" referred to appears to be merely an instance where Warner Bros. did *not* supply the copyright agreement. As indicated, Warner Bros. explained that it had a lengthy contract with Bob Newhart covering both artist royalties and payments for the material used, and it preferred to supply only the copyright figures (CX 522). On Newhart material, Warner Bros. collected the copyright royalties on behalf of the publisher (CX 533c), so the Club, of course, had to know the amount of the royalty to be paid in this instance to Warner Bros.

The Government also proposes this finding: "The submission of copyright information is not always confined to the Licensor and the Club; occasions arise where the publisher discusses copyright arrangements for Club sales of a Licensor's record, *with the Club*, with the knowledge and concurrence of the Licensor" (CX 541).

The references to direct discussions of a publisher "with the Club, with the knowledge and concurrence of the Licensor" (CPF 175) hardly requires such obscurity of treatment. The exhibit dictates on its face that the "publisher" involved was Herman Starr (CX 541). Since 1961, Starr had responsibility for Warner Bros.' record subsidiary and Mike Maitland reported directly to him (Starr 1695, 7710).

Finally, CX 541, cited by Government counsel, concerns the record "The Music Man," and Starr had testified that he had personally negotiated the contract for Club distribution on behalf of Warner Bros. (Starr 1697). It was hardly surprising, therefore, that "publisher" and record manufacturer Starr had discussed arrangements "*with the Club*" (emphasis supplied by Government counsel), or that this had taken place "with the knowledge and concurrence of the Licensor" (Warner Bros., by whom Starr was employed).

Leading publishers and representatives of publishers and writers appeared as witnesses. None was questioned about any alleged misuse of claimed confidential information. No evidence was introduced as to any conceivable misuse. The complaint has no allegations on this point.



Like some of the other material extending the record and the Government's Proposed Findings, the inclusion of CPF 164-175 suggests a paucity of substantial proof.

*Influence Over Repertoire*

In substantially the same category are CPF 176-77, entitled "Influence over repertoire." They are as follows:

176. The Licensing Agreements allow CBS to exercise its influence over the Licensors' selection of repertoire and artist material and CBS does so exercise power and influence.

Mercury is receptive and responsive to this kind of influence. On December 5, 1961, the Executive Vice President of Mercury wrote to Mr. Bell:

"Would you please submit a summary to me concerning the recommendations for product change you made during your recent visit with us" (CX 429a).

177. When Mr. Keating submitted the first Agreement to Warner Bros. for execution on July 29, 1960, he mentioned "several additional points" among which were several strong suggestions designed to edit the content. Following these suggestions Mr. Keating wrote:

*"We are otherwise completely satisfied with the content and order of the record. If the above changes can be made, I would appreciate your having the necessary tape editing done at our expense so that when we obtain the lacquers or mothers from you they will reflect these changes"* (emphasis added, CX 509a-b).

It is interesting that although these changes were presented ostensibly in the form of a suggestion,—"subject to your approval"—Mr. Keating conditioned his direction that the tape editing be done at CBS expense on the "changes being made" (CX 509b).

Mr. Conkling was quick to comply. On August 10, 1960, he replied:

"I will work on the edits that you suggest. I don't think they will be any problem. One other line you might like us to take out (and I can work on this if you want) is the cemetery dedication in the Abe Lincoln track. Let me know" (CX 510c).

[Footnotes omitted.]

To put these "facts" in perspective, an abridged version of respondents' Exceptions (pages 122-24) is presented here:

These proposed findings do not stand completely on their own feet. Thus, in CPF 73, there had been an ominous warning that Columbia's "control" had lodged "inordinate power" in Columbia which "may carry over" to dictating repertoire. There then followed the claim that this "has already occurred in several instances and is likely to occur more regularly." Government counsel did not cite the "proof" in juxtaposition to the earlier allegation, but footnoted a cross reference to CPF 176 and 177 for the "proof."

The report of certain oral "recommendations" by Mr. Bell at the outset of the Club contract with Mercury (CX 429a), totally unexplained in this record, does not show any "influence" by

Columbia and does not represent any exercise of "power and influence" over Mercury's catalog or repertoire. The mere fact that Mercury expressed interest in Bell's unexplained repertoire suggestions hardly warrants the characterization that Mercury is "receptive and responsive to this kind of influence."

Government counsel's reference to Keating's comments on the Bob Newhart record has its amusing aspect. Counsel's failure to quote Keating's alleged "several strong suggestions" is, perhaps, understandable when we look at the record.

It appears from the exhibit that in referring to the proposed release by the Club of a Bob Newhart comedy album, Keating made two suggestions for change (which, of course, were "subject to your [Warner Bros.] approval") and for which the Club was prepared to pay (CX 509a-b). The proposed changes were in segments of what Mr. Keating tactfully described as "the john" portion of the record. Mr. Keating said in this connection:

Would it be possible to eliminate "hell" from the phrase "How the hell do they get back to it" and to eliminate the sentence, "Well, some poor clown walking down the street you know"?

Keating did not believe these suggestions would "alter the impact of the skit" (CX 509a-b).

According to CPF 177, Conkling was "quick to reply." Conkling's reply, written some 12 days later, indicated that it was no problem (CX 510c).

The references to the correspondence involving "the john" episode serve to illustrate the weakness inherent in the exaggerated positions taken in the Government's proposed findings.

Although CPF 178-81 are entitled "Concessions," the exhibits cited do not reflect "concessions" of any kind. The proposals are rejected as unwarranted and irrelevant.

#### V. Dual Pricing

The Government's proposed findings titled "Dual Pricing" (CPF's 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 (*infra*; see CPF's 314-27 and Exceptions). Moreover, the findings Government counsel proposed do not prove the dual pricing claim as to Columbia records. By disregard and distortion of the record, they misstate prices paid for Columbia records both by dealers and by Club members.

In computing the average price paid by Club members, Govern-

ment counsel omitted mailing and handling charges, and also erred in limiting their figure to the first-year average. The record also fails to support the allegations of the complaint, and the Government's proposed findings, with respect to the prices paid by dealers. Dealers pay far lower *average* prices than the range of prices set forth in the complaint.

The allegations concerning dual pricing—to the effect that Columbia discriminates in price by selling to consumers at lower prices than to dealers—appear in four separate paragraphs of the complaint.

After setting forth the *modus operandi* of the Club, involving an introductory offer of records at a special price, Paragraph Two of the complaint makes this allegation:

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

Paragraph Five reads in pertinent part as follows:

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

The conclusionary allegations respecting the practice of dual pricing are contained in Paragraph Eleven of the complaint, as follows:

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

the sale of phonograph records; and has the purpose or effect of monopolizing or attempting to monopolize in respondents the manufacture, sale and distribution of records generally, and the retail sale and distribution of LP's.

In addition, Paragraph Ten charges that the licensing agreements, individually and collectively, have been engaged in for the purpose or with the effect of empowering respondents to:

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

According to Paragraph Ten, such "undue power" has been "regularly exercised" by respondents.

Thus, the allegations of Paragraphs Two and Five embrace the pricing of both types of records—those produced from masters owned or controlled by Columbia as well as those produced from licensed masters.

However, the "effects" paragraph of the complaint (Par. Eleven) is limited to the sale of "LPs manufactured from respondents' original masters."

On the other hand, Paragraph Ten may be interpreted as charging that the following effects are attributable to respondents' alleged influence on the pricing of licensors' records:

Lessening competition between respondents and dealers in the sale of phonograph records, "including LPs produced under the licensors' labels by respondents and by the licensors from licensed masters or duplicates thereof."

Excluding or potentially excluding from the market "dealers who are regularly and customarily supplied, directly or indirectly, by respondents and by the licensors and who have been, and would be now, in actual and open competition with the Club were it not for the competitive disadvantage to which they are subjected" by respondents' practices under the licensing agreements.

There are several grounds that require rejection of the Government's proposed findings on dual pricing. The two basic deficiencies—which perhaps make academic the others—were foreshadowed in the complaint itself.

Literally, Paragraph Two of the complaint invites us to compare the price (unspecified, but amounting to about 31¢ per record) paid by a consumer accepting Columbia's offer of six records for \$1.89 with the prices (amounts unspecified) paid for the same phonograph records by dealers who compete with the Club in selling or attempting to sell to ultimate consumers. Actually, Government counsel do not rely on that approach, which ignores the further commitment on the part of the consumer to buy six additional

records "at regular list price." Although they do halfheartedly espouse such a theory in CPF 279, they essentially—and properly—rely on a comparison of dealers prices with the price paid by a Club member meeting his entire year's obligation.

That approach, of course, is in accord with the illustrative example used in Paragraph Five of the complaint, where reference is made to an "average" price of \$2.14 per LP paid by a Club member during the first twelve months of his membership. That is on the basis of the purchase of six \$3.98 LPs for an aggregate price of \$1.89 under the introductory offer, plus the purchase of six additional \$3.98 records for \$3.98 each, or a total of \$25.77 for twelve LPs, "exclusive of the advertised 'small mailing and handling charge.'"

Actually, the complaint sets forth an accurate means for measuring the average price paid by Club members in their first year of membership—except that it merely refers to, but refuses to add in, the mailing and handling charges paid by members. As might be expected, Government counsel stand on the \$2.14 figure and decline to add in the mailing and handling charges applicable to both the introductory offer and each of the additional six records that the new member is required to purchase.

(For discussion of the principles, legal and otherwise, underlying the determination that mailing and handling charges should be included, see Memorandum Opinion, *infra*.)

Thus arises the first basic deficiency in the allegations and proof under the dual pricing charge. By omission of mailing and handling charges, actual average first-year-member prices are understated by a substantial amount.

Additionally, in both pleadings and proof, the Government ignores the higher average prices paid by second-year Club members. Nor are there any allegations or proof as to the average prices paid by all Club members, new and old ones, during a typical year.

Just as the complaint and the proposed findings of the Government understate the prices paid by Club members, they also overstate the prices paid by dealers.

As we have seen, the complaint alleges that while first-year Club members were paying an average price of \$2.14 for \$3.98 LPs, dealers were at the same time

obliged to pay the price of \$2.47, or in the event of a special promotion of which they might avail themselves, prices ranging as low as \$2.22 each for records of the same grade and quality, exclusive of cost of delivery.

Even aside from question of the substantiality of the proof of that allegation, it is apparent that it is unfair to compare the *average* price paid by the consumer with the *highest* price paid by a dealer. Obviously, the only proper comparison with the *average* price paid by consumers is the *average* price paid by dealers.

Government counsel demonstrate their own partial acceptance of such a comparison in their so-called pricing survey (CX 219), showing an *average* gross dealer price of \$2.30—a price lower than the *average* price (including mailing and handling charges) paid by first-year Club members in either 1961 or 1962.

That *average* price is before the application of additional discounts shown to have been taken by the dealers. It is not necessary to resolve the dispute between the parties regarding the propriety of figuring in such discounts.

That is because the inclusion of mailing and handling charges in the *average* consumer price and comparison of that total amount with the *average* dealer price shown by the Government (CX 219) are enough to destroy the factual basis for the charge of discriminatory pricing on the part of Columbia.

However, against the possibility that the Commission may disapprove those adjustments, the examiner has included in an appendix additional findings that otherwise would require, in his opinion, dismissal of the dual pricing charges.

#### *Prices Paid by Club Members*

The Club is a mail-order business. As indicated in the Club's advertising, members must pay mailing and handling charges on their enrollment records and on all records purchased thereafter. The amount is not specified but is described as "small." Those charges are more than mere postage. They are an inseparable part of a member's cost and cannot be excluded in computing *average* prices (see, *e.g.*, Blincoe 5695-700; Inden 5570). In 1961 and 1962, mailing and handling charges were 55 cents for the introductory offer and 35 cents for each record purchased thereafter. These charges were increased in 1963 as postage rates rose (Keating 5142-45).

The Club's enrollment offer has varied from time to time, but the general formula has been constant. A new member is offered a particular shipment of records at a stated price, plus mailing and handling charges, in return for a contractual commitment to buy a specified number of additional records over the next twelve months at the regular Club prices, plus mailing and handling

charges (Keating 679-80, 691-92). After a member fulfills his original commitment, he receives one free record for every two which he purchases at regular Club prices, plus mailing and handling charges (Keating 5145; Blincoe 5699). The regular Club prices are generally \$3.98 for popular, \$4.98 for classical and \$5.98 for original-cast monaural albums (Keating 5144; Bien 7419-21). Stereophonic records generally cost \$1 more per record (Keating 685).

Under the terms of the basic introductory offer that prevailed in 1961, the Club offered new members five records for \$1.97, plus mailing and handling charges, in return for a contractual commitment to purchase five additional records during the year at the regular Club prices, plus mailing and handling charges (Keating 691-92). Under that offer, in 1961 a monaural division member paid an average of more than \$2.41 for each of the ten \$3.98 records which he purchased in his first year of his membership—as contrasted with the figure of \$2.14 alleged in the complaint.

Under the terms of the basic introductory offer that prevailed in 1962, which is specifically referred to in the complaint, new members received six records for \$1.89, plus mailing and handling charges, in return for a contractual commitment to buy six additional records at the regular Club prices, plus mailing and handling charges (Keating 679-80, 691-93). Under that offer, in 1962 a monaural division member paid an average price of about \$2.37 for each of the twelve \$3.98 records which he purchased in his first year of his membership—as contrasted with the figure of \$2.14 alleged in the complaint.

While the complaint (Pars. Two and Five) refers to the Club's 1962 introductory offer, which results in a slightly lower average price per record for a new member than the 1961 introductory offer, Government counsel at the trial sought to compare the average price paid by a member under the 1962 offer with average prices paid by dealers in 1961 (CX 219, footnote).

Since the Club began operations, the basic offer to members remaining in the Club after completing their contractual commitment has not varied. As noted above, for every two records purchased at regular Club prices, plus mailing and handling charges, the member receives a free record (Keating 5145; Blincoe 5699). Thus, in 1961 and 1962, a member remaining in the Club after completing his contractual commitment, paid an average price of \$2.88 for a \$3.98 record, including mailing and handling charges—as contrasted with the figure of \$2.14 alleged in the complaint.

The Government's argument in CPF 277 regarding mailing and handling charges is specious and is rejected.

Similarly, the halfhearted suggestion that the cost to Club members might be further reduced by deducting the value of various "free" goods is also rejected. Among other things, the advertisements cited were not properly applicable to 1961 Club offers. Moreover, such an adjustment is outside the pricing allegations of the complaint. It is obvious also that if the value of such items were deducted from the prices paid by Club members, fairness would require that similar treatment be accorded various merchandising aids and cooperative advertising furnished by Columbia to dealers (See RPFs 497-502).

Despite the fact that one of the crucial issues in connection with the dual pricing charge is whether or not the mailing and handling charges should be included in the price paid by the Columbia Record Club member, neither side availed itself of one area of proof provided in the licensing agreements themselves.

In several of the licensing agreements, there is a definition of "royalty price." It specified that the royalty price shall mean Columbia's retail selling price less certain deductions. Those deductions include "the additional charge made by us [Columbia] to the retail purchaser for postage and handling, provided *any such additional charge is deemed to be included in the retail selling price.*" (CX 22a; emphasis added.)

Evidence showing whether the postage and handling charge *was* deemed to be included in the retail selling price would have been highly relevant, but not necessarily conclusive, in resolving the appropriate basis of comparison between the Club price and the dealer price.

However, this is a matter to which neither side adverted in connection with the dual pricing charge, and the examiner's review of the record has failed to disclose any information on that subject.

In the Mercury contract (CX 34), for example, it was specified that the royalty price meant Columbia's retail selling price less (1) any excise or other similar tax, (2) record container charge, (3) the charge made for "extraordinary" librettos or program notes, and (4) postage and handling charges if "deemed to be included in the retail selling price."

Applying that formula, the Mercury contract set forth that the royalty price on records with a suggested retail price of \$3.98 shall be \$3.46; for \$4.98 records, \$4.42; and for \$5.98 records, \$5.26. That means total deductions for the four items listed of



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52¢ off \$3.98 records; 56¢ off \$4.98 records; and 72¢ off \$5.98 records.

Those deductions, of course, are large enough to include a 35¢ postage and handling charge, but that is about as far as the inference can be carried in the present state of the record.

*Prices Paid by Dealers for Columbia Records*

There is no dispute as to the basic price structure for Columbia LPs. That structure is as follows:

Suggested retail list price	Wholesale list price (dealer cost subject to discount)
\$3.98 (mono) .....	\$2.47
4.98 (mono) .....	3.09
4.98 (stereo).....	3.09
5.98 (mono).....	3.71
5.98 (stereo).....	3.71
6.98 (stereo).....	4.33

(CXs 51, 94, p. 1.)

Despite the reference in Paragraph Five of the complaint to the quoted dealer prices as being "exclusive of cost of delivery," neither party has proposed any findings, or cited any evidence regarding the presence or absence of delivery charges over and above the prices charged by the Columbia branch distributors. The parties have proceeded on the basis that the prices paid by dealers were delivered prices, and the examiner so understands and finds.

The examiner rejects the sweeping finding proposed by the Government in CPF 268. All that the record shows is that in the normal course of business, *some* (not many) dealers *sometimes* pay the full wholesale price (\$2.47, \$3.09 or \$3.71—see CPF 267) on a not inconsequential volume of purchases of Columbia LPs.

The base wholesale list prices set forth in CPF 267 are all subject to "programs" and discounts widely utilized by dealers, thereby reducing the prices they pay. (See RPF 497.) The Government's own exhibit (CX 219) demonstrates this fact by showing *average* prices actually paid by dealers.

But in CPF 268, the Government ignores the facts of record concerning average prices paid by dealers and, instead, proposes a finding that "many dealers pay the full wholesale price \* \* \* on a substantial volume of purchases of Columbia LPs." (But see CPF 271.)

Even if it could be found that the evidence supported that claim, it obviously would shed no light on the *average* prices paid by

dealers, and, as discussed *infra* (see CPF 278 and Exceptions), it would not resolve the dual pricing issue in the Government's favor.

But the evidence—the very testimony cited in the Government's proposed findings—does not even support that proposition.

(a) Stolon did not testify that Goody buys a “substantial volume” of Columbia LPs at full wholesale list prices. On the contrary, he testified, at the very transcript reference cited (Tr. 1284–85) that the “bulk” of Goody's purchases are at prices below the wholesale list prices. In 1961, Goody purchased 86% of his records from Columbia branches during program periods at less than full wholesale prices (RXs 390a–d); and on those purchases, as well as on other purchases, Goody took advantage of cash discounts, the bonus-to-sell, and the Christmas program to reduce prices below the full wholesale prices (RXs 390a–d; RFP 497).

(b) Maggid of The Record Hunter did not testify that he buys a “substantial volume” of Columbia LPs at full wholesale list prices. His invoices show that 72% of The Record Hunter's purchases from Columbia branches were made during program periods at lower prices (RXs 390a–d). Moreover, Maggid conceded that he thought that The Record Hunter regularly took the 2% cash discount and tried to take the 5% bonus-to-sell discount regularly, and that those items should be deducted in computing his average cost per record (Maggid 850–53).

(c) The proposed finding that Blincoe “usually pays \$2.47” is contrary to the record. Blincoe testified that he tries to “buy most of our bulk during the restocking plan” (Tr. 5687); that he makes most purchases at \$2.47 “*outside of the deals that I mentioned*” (Tr. 5705–06; emphasis added); and that “upwards of fifty percent” of his purchases are made during programs (Tr. 5712).

(d) Prince did not say that some dealers “usually” pay \$2.47. He testified that Doubleday probably paid \$2.47 “on occasion,” but that “there are a great many deals” whereby it can “buy a quantity of items or a quantity of one item at a better price” (Prince 5534–35).

(e) The record does not support the claim that Liepmann “usually” pays \$2.47. Liepmann testified that he pays \$2.47 outside of programs and lower prices during programs (Tr. 3392–93). The record fails to show the percentage of his purchases during and outside of programs.

The testimony of Dunlap is irrelevant because he buys from an “independent distributor” rather than a Columbia branch (Tr. 5898–99).

Even if the dealers cited in CPF 268-69 had given the testimony attributed to them by the Government, their experience would have been atypical. With respect to 43 dealer witnesses called by the Government who purchased records from Columbia branches in 1961, 77% of the 388,000 records they purchased that year from those branches were bought during program periods; and, on those records, as well as on purchases outside of programs, they took advantage of cash discounts, the bonus-to-sell, and the Christmas program to reduce their prices. (See RPF 497.)

The Government's pricing exhibit (CXs 218-19) can hardly be described as a "survey conducted at random of 18 Philadelphia dealers (and one in Chicago)," as suggested in CPF 270. CXs 218-19 are simply a tabulation that covers 16 dealers in Philadelphia (not 18), two in Chicago (not one), and one in New York who is ignored in CPF 270. It was not a survey—at random or otherwise. A random survey of dealer prices in New York, Chicago and Philadelphia would hardly end up with 16 Philadelphia dealers out of 19.

The only witness who testified in support of CXs 218-19 was a Commission statistician. His testimony was that he merely tabulated certain invoices given to him by complaint counsel; that he did not participate in the selection of the 19 dealers; that they were selected by Government counsel; that he did not know the basis for their selection or whether they were "representative" of anything; and that this was merely a tabulation and not a sampling (Wyckoff 260, 269-70, 284).

The "random" basis for selection turned out to be the fact that every retailer appearing on the tabulation was also on the Government's witness list (Tr. 289).

Even so, CX 219 shows that the 19 selected dealers purchased 71% of their records from branches during "program" periods in 1961—a figure somewhat lower than the 77% average for all 43 testifying dealers who bought from branches, as shown by RXs 388-90.

Aside from other defects, the first tabulation in CPF 271, based on CX 219, contains errors as to "Total units bought at full list." Instead of 5954 units bought at \$3.71, the figure should be 2527, and instead of 750 units bought at \$4.33, the figure should be 343.

In the second tabulation in CPF 271, the average gross price for LPs with a retail list price of \$5.98 should be \$3.42.

The fact that CX 219 is hardly representative of dealers generally, and not even representative of the 43 dealer-witnesses who

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purchased from Columbia branches in 1961, is shown by the fact that those 19 paid higher average prices in 1961 than the other 24 dealers. CX 219, therefore, is contrary to the record as a whole.

The parties are not too far apart on what might be called the average gross price paid by dealers in each price category. That fact may be shown as follows:

Retail list	CX 219	RX 388	RX 389	RX 390
\$3.98	\$2.30	\$2.31	\$2.30	\$2.27
4.98	2.83	2.86	2.81	2.82
5.98	3.40	3.41	3.42	3.37
6.98	4.02	4.03	4.05	3.96

As we shall see, there is no doubt, on the basis of that evidence, that the *average* price paid in 1961 by dealers was lower than the *average* amount paid by Columbia Record Club members in 1961 for the records received in their first year of membership. (See *infra*).

By selective use of respondents' own tabulations (RXs 388 and 389), Government counsel, in CPF 272-73, have set forth tabulations purporting to show the portion of total unit sales made at full wholesale list. In CPF 272, covering transactions with 18 of the 19 dealers listed on CX 219, it appears that of the total unit sales made by Columbia branches to those dealers,

33.07% were at \$2.47 (RX 389a),  
 30.14% were at \$3.09 (RX 389b),  
 30.16% were at \$3.71 (RX 389c),  
 39.83% were at \$4.33 (RX 389d).

Similarly, the tabulation (RX 388) showing prices paid by certain other dealers outside the New York area is said to show unit purchases at full list as follows:

33.69% at \$2.47 (RX 388a),  
 34.93% at \$3.09 (RX 388b),  
 32.76% at \$3.71 (RX 388c),  
 30.57% at \$4.33 (RX 388d).

Those proposed findings cannot be accepted at face value. Literally, the exhibits are open to the interpretation placed on them by the Government—for example, RX 389(a) shows 5,328 "Records Purchased at \$2.47" out of total units of 16,109, or 33.07%. However, the exhibits, when examined in their entirety in the light of the testimony, show that even on records purchased outside of restocking programs, dealers received various discounts

which had the effect of reducing prices below the stated wholesale list prices.

Moreover, the use of RXs 388 and 389 without reference to RX 390 gives a distorted picture. The three exhibits, taken together, show that only about 23% of the 388,000 records tabulated were purchased outside of restocking programs.

The Government arrived at those higher percentages by simply referring to two of those exhibits (RXs 388 and 389) and by ignoring RX 390, which reflects more than twice as many purchases as the other two exhibits. Neither side tabulated for RX 390 the percentages of records bought at full wholesale list in the various price categories. Such a computation shows:

18.88% at \$2.47 (RX 390a),  
16.43% at \$3.09 (RX 390b),  
16.68% at \$3.71 (RX 390c),  
15.87% at \$4.33 (RX 390d).

CPFs 275-82 must be largely disregarded because they are based on a false comparison. Having tabulated prices paid by dealers in 1961, Government counsel should have compared prices paid by Club members in 1961. Instead, however, the consumer prices relied on are based on the 1962 Club offer of six records for \$1.89 (plus commitment) and not on the 1961 offer of five for \$1.97 (plus commitment). (The "commitment" refers to the joining members' promise to buy additional records.)

The actual 1961 Club offer resulted in a higher average price (\$2.42) than the 1962 offer (\$2.37). (See CPF 319 and RPFs 491-94.)

Since the Government's proof as to dealer prices related to 1961, the only valid and proper comparison of Club prices to consumers must likewise be for 1961.

Even assuming *arguendo* that the introductory offer purportedly summarized in CPF 275 was in effect in 1961, the prices per record set forth in this proposed finding are still mathematically incorrect and are also improper because they do not include mailing and handling charges paid by members (see RPF 491).

CPF 275 cryptically observes that a Club member is "subsequently billed for mailing and handling." The evidence is that members pay for their records and for the mailing and handling charges at the same time—after the records have been shipped to them. On the basis of the 1962 Club offer, a member who bought six \$3.98 records at \$1.89 and then bought six more \$3.98 records for \$23.88, paid an average of \$2.15 for each of twelve

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## Initial Decision

\$3.98 LPs. When mailing and handling charges are included, the average price is \$2.37.

A member who purchased under the same offer but bought only \$4.98 records paid an average of \$2.65 for each of twelve \$4.98 records. That becomes \$2.87 when mailing and handling charges are included.

For a member who bought only \$5.98 records, the average price for each of twelve \$5.98 records was \$3.15, or \$3.37 with the inclusion of mailing and handling charges.

Comparing those prices with the Government's own average dealer cost figure (CX 219) results in a tabulation as follows:

Retail list price	Average price exclusive of mailing and handling charges	Average price including mailing and handling charges	Average gross dealer cost in 1961 (per CX 219)
\$3.98	\$2.15	\$2.37	\$2.30
4.98	2.65	2.87	2.83
5.98	3.15	3.37	3.40

Under the offer *actually* in effect in 1961 (five for \$1.97, buy five), the comparable tabulation would be as follows:

Retail list price	Average price exclusive of mailing and handling charges	Average price including mailing and handling charges	Average gross dealer cost in 1961 (per CX 219)
\$3.98	\$2.19	\$2.42	\$2.30
4.98	2.69	2.92	2.83
5.98	3.19	3.42	3.40

CPF 278, as a conclusionary finding based on CPF 267-77 must be rejected as involving the same deficiencies as the earlier findings on which it admittedly rests. Like those earlier findings, CPF 278 is contrary to the record because it overstates prices paid by dealers and understates prices paid by Club members (see Respondents' Exceptions to CPFs 267-73 and 275).

The reference to Epic records in CPF 278 is unwarranted. As conceded earlier by Government counsel (CPF 9), Epic records are distributed to dealers primarily by independent distributors rather than Columbia branches. The Government introduced no evidence concerning prices of Epic records to dealers and otherwise have requested no findings on that score. An attempted back-door inclusion of Epic in CPF 278 is rejected.

As suggested in the earlier proposed findings of the Government, CPF 278 introduces a theory of dual pricing different from that alleged in the complaint.

CPF 278 undertakes to compare the *average* prices paid by Club members, not with *average* prices paid by dealers, but with the prices which dealers allegedly pay for "a substantial part" of their purchases. It already has been shown that the evidence does not support the facts underlying the Government's so-called substantiality test.

In any event, if the test is to be the price paid for a "substantial part" of purchases, then that test should be applied to Club members as well as to dealers. Applying that theory, Club members purchase "a substantial part" (that is, 50%) of their records at full list price (that is, \$3.98, \$4.98, \$5.98, etc.) during their first year of membership; and 66 $\frac{2}{3}$ % at full list price thereafter.

On the other hand, dealers purchase only about 23% of their records outside of programs (that is, at \$2.47, \$3.09 and \$3.71) and receive various discounts even on those purchases.

CPF 279 is rejected as frivolous. That proposed finding is based on the fact that approximately 10% of the Club membership are delinquent (Keating 696). On the basis that those "delinquents" who paid \$1.98 for six records and then left the Club have paid a unit price of approximately 33¢ for records in all list price categories, CPF 279 then suggests that such a price is a "loss leader," and that no other record dealer can offer records at such a price.

CPF 280 is also rejected as unsupported by the evidence. Here the Government alleges that "CBS has the *power* as an integrated manufacturer-retailer to offer records at any price," particularly popular records constituting "the heart of the dealers' inventory." The flimsy basis for that charge is pointed up by the fact that the examples cited are wholly erroneous. A correction was later submitted, but only after the errors had been exposed by respondents' Exceptions.

CPF 281 is rejected. That proposal involves still another dual pricing theory. However, not only does that theory go beyond the dual pricing charge as alleged in the complaint, it also goes beyond the evidence in the record.

Those findings all rest on Government counsel's conjecture that if a consumer, "as can be expected," selects only high-price records in his enrollment offer and only low-price records thereafter, certain low average prices would result.

The evidence does not support Government counsel's speculation of what "can be expected" (see Gartenberg 8419-21).

CPF 281 is also unacceptable because of various other discrepancies (see Exceptions, pages 219-21).

The rejection of most of the Government's proposed findings under the dual pricing charge requires rejection of the conclusionary finding contained in CPF 282, as follows:

This basic price structure has produced its inevitable result: the dealer is compelled to compete with the retail arm of an *essential* supplier within the framework of a built-in differential insuring that the price he pays remains higher than the price paid by those consumers whose business he had sought to keep. In the circumstance of this intrinsic disparity, it surely was no surprise that dealer after dealer testified that he tries or would like to, *but cannot*, compete with the Club \* \* \*.

*Prices Paid by Dealers for Outside Label Records*

The proposed findings of the Government titled "Prices paid by dealers for Licensors' records" (CPFs 314-18) and "Unfair advantages \* \* \*" (CPFs 319-27), are rejected as outside the scope of the complaint.

The complaint charges, in effect, that respondents cause the outside labels to sell records to dealers at higher prices than the Club charges its members for the same records.

Specifically, Paragraph Five alleges 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." Paragraph Ten (2) alleges that the licensing agreements were engaged in for the purpose or with the effect of creating in respondents the undue power to "Cause the Licensors to sell LPs to dealers, directly, or indirectly, at prices that are regularly higher than the prices charged by respondents for identical LPs sold through the Club directly to consumers."

Thus, the complaint is directed against an alleged unfair disparity between prices paid by dealers on the one hand and by Club members on the other hand. In CPF 314-27, however, Government counsel have shifted their attack and have come up with a charge different from that contained in the complaint. In CPF 314-27 they contend that the Club itself, as distinguished from its members, acquires records of outside labels by purchase or by license at lower prices than are paid by dealers—a more or less conventional Robinson-Patman Act price discrimination



charge. The complaint contains no such charge, and the proposed findings are, therefore improper.

This variance between allegation and proof evidently stems from the failure of Government counsel to establish the dual pricing claim that is alleged in the complaint. The evidence does not show that dealers paid higher prices for records of outside labels than the prices paid by Club members (see RPF 491-95, 505-12).

In these proposed findings, Government counsel do not even make any claim with respect to the average price paid by dealers for records of outside labels or charge that the average price to dealers is higher than the prices to Club members.

Although Government counsel have not made such a concession, it appears that the dual pricing charge in the complaint, as far as outside labels are concerned, has thus been abandoned.

At any rate, there has been a failure of proof, and those allegations are dismissed.

(For further findings on this subject, applicable in the event of Commission disagreement with this ruling of the examiner, see Appendix.)

#### VI. Competitive Effects

The complaint (Pars. Ten through Twelve) accuses respondents of monopolizing or attempting to monopolize four allegedly separate markets or lines of commerce:

1. The manufacture, sale and distribution of phonograph records generally—in other words, the entire phonograph record market, consisting of all types of records sold through all types of outlets.
2. The manufacture, sale and distribution of LP's generally—in other words, the entire LP market, consisting of all LPs sold through all types of outlets.
3. The retail sale and distribution of LPs.
4. The manufacture, sale and distribution of LPs sold through the "subscription method"—in other words, the so-called record club market.

#### *The Relevant Market*

Thus, we must consider, first, whether there are, in fact, two product markets—one embracing all records and the other limited to LPs. Within each of those product markets, we are asked to find at least two lines of commerce—(1) their manufacture and (2) their sales and distribution generally.

Within the so-called LP market, the Government would have us look for effects in two further submarkets—(1) the retail sale and distribution of LPs and (2) the sale and distribution of LPs “through the subscription method”—*i.e.*, retail sales through record clubs.

In addition, the complaint (Par. Four) appears to suggest that each phonograph record constitutes a separate market unto itself by the allegation that each record is “unique, distinctive and non-substitutable.”

Before we can determine the effects of the licensing agreements, we must first determine the market or markets in which such effects appropriately may be measured.

We shall first consider the facts as to the existence of an LP market separate from the phonograph record market. Essentially, this means distinguishing LPs from 45 r.p.m. singles.

Next, assuming there is an LP market, we shall look at the functional lines of commerce and determine whether there is a “record club market” for LPs separate from the retail market generally for LPs.

In addition to consideration of markets as such, the case poses issues requiring us to examine the state of competition between Columbia and (1) the licensors; (2) other record manufacturers; (3) retail record dealers; and (4) other “subscription method” sellers—*i.e.*, record clubs.

Here too, definition of a relevant market is desirable, if not necessary, in assessing the nature of competition and the effect of respondents’ practices.

#### *LPs Not a Separate Market*

The finding of the examiner is that LPs and record clubs are not separate markets. The examiner also rejects the contention that each phonograph record is a unique market for antitrust purposes.

The only relevant market or line of commerce in this proceeding consists of all types of phonograph records distributed through all types of outlets.

The examiner gave consideration to whether LPs might be viewed as a “submarket” within the total record market. Some of the facts may point in that direction, but on balance, the examiner cannot find sufficient distinctions between LPs and 45 singles to hold that LPs constitute a well-defined submarket that is itself an appropriate market for antitrust purposes. (See Memorandum Opinion, *infra*.)

(Technically, the elimination of LPs as a separate product market disposes of the issue as to a record club market, since, literally, that market is referred to only as a segment of the LP market. However, we shall consider whether club distribution is a submarket of the total record market.)

*LPs and Singles*—The question whether LPs and 45 singles are different is dramatized by the opposing viewpoints of two witnesses:

To Mitch Miller, “an LP is nothing but a long single” (Tr. 7161).

To Samuel Stolon, of Sam Goody, Inc., LPs are different from 45s:

Well, by sight they are different. They are different in size, different in speed, and different in the element of sales.

\* \* \* \* \*

Well, they have two different markets. The 45's will tend towards a teen market, while the LP's will tend towards a general market (Tr. 1264).

The facts, pro and con, may be summarized as follows:

Singles and LPs are different physical products in the sense that a single is a smaller object than a long-playing record. An LP is a disc, usually 12 inches in diameter, that revolves at a speed of  $33\frac{1}{3}$  revolutions per minute; it is this circumstance from which is derived its description as a 33 or  $33\frac{1}{3}$  (Lieberson 78). An LP usually contains between 25 and 30 minutes of playing time on each side and is known also as an album.

Generally speaking, a single is seven inches in diameter and revolves at 45 revolutions per minute. (However, there are  $33\frac{1}{3}$  r.p.m. singles.) The single we are concerned with here, sometimes known as the “45,” normally contains one selection per side. This single usually has about two to three minutes of playing time on each side.

An LP contains (on both sides) the equivalent of six to eight 78 r.p.m. records. An LP may contain 12 different songs as distinguished from the two songs ordinarily appearing on a single.

There are also 45 r.p.m. EP's (extended play), as well as 16 r.p.m. and 78 r.p.m. records. Recently, prerecorded tape has been put on the market.

Over 95% of phonographs in use today play  $33\frac{1}{3}$ , 45 and 78 r.p.m. records—and frequently other speeds as well (see RPF 402). Most consumers can play all speeds on the same machine.

The great bulk of records are sold to consumers in the form of LPs and singles. Of approximately 172 million records sold in

stores covered by the *Billboard* survey, more than 100 million were singles; 70 million were LPs; and more than one million were EPs (RX 311, pages VII-VIII, *in camera*).

In dollar volume, the breakdown in 1961 was LPs, 75%; singles, 24%; and EPs, 1% (CX 199a).

Although Government counsel propose a finding (CPF 355) that the "kinds of music" sold on LPs are different from the "kinds of music" sold on singles, the record fails to support such a sweeping generalization.

The broad category of "popular" music accounts for some 80% to 90% of total industry sales. This type of "pop" music, recorded by leading pop artists, appears on records of all speeds.

Singles, EPs, 78s and prerecorded tape, as well as LPs, offer all categories of "popular" music, including such forms as dance music, background music, ballads, Latin music, compositions from Broadway plays and Hollywood motion pictures, country and western music, rhythm and blues, standard tunes of Tin Pan Alley, "pop" hits of the day, rock and roll and the twist (see RPF 391).

The leading popular recording artists perform the same type of material on both 33 $\frac{1}{3}$  r.p.m. and 45 r.p.m. records, as well as on prerecorded tape. The identical performance of a popular song by a particular artist is frequently available to consumers on both speeds at the same time. It has become standard industry practice to follow a successful single by a particular artist with an LP that includes the rendition appearing on the single, together with eleven other performances by the artist, also appearing on singles. Such LPs typically use the same title as the hit single.

Conversely, selections are often taken from LPs and released on single records.

Some companies base virtually their entire output of LPs on singles and release on LPs all performances which appear on singles, whether or not those singles are "hits."

Companies issue LPs following, not only their own, but also their rivals' hit singles; and they sometimes license masters of singles released by other firms for incorporation into LP's (see RPF 392).

Government witness Wood of Dot Records summarized this trend with the testimony (Tr. 4106) that hit singles create a "tremendous amount of sales excitement" and, therefore, "you can make a wonderful long-playing album using the single as the title and as the lead song." Similarly, Archie Bleyer testified (Tr. 6970) that the best way to have a successful LP is to "hook it to a

single." United Artists stated that a "smash" single "is the greatest sales tool in the world for the [follow-up] album" (CX 293h).

A great deal of serious music is simultaneously available on 45s, LPs and tapes. Columbia, for example, has issued successful singles by the Mormon Tabernacle Choir and the Philadelphia Orchestra conducted by Eugene Ormandy. One of those singles "The Battle Hymn of the Republic," taken from an LP, sold approximately 500,000 copies. In addition, Columbia has released other successful singles containing classical themes.

The RCA catalog lists a great number of classical EPs and more than 125 singles containing works by Brahms, Haydn and other masters performed by the Chicago Symphony Orchestra, the Boston Pops Orchestra, Mario Lanza, Jan Peerce and other well-known classical artists. RCA's singles of "Claire de Lune," Ravel's "Bolero," "Jalousie," "Malaguena" and light concert music have had great commercial acceptance over the years.

In addition, Mahalia Jackson and other performers have recorded religious, spiritual, gospel and inspirational music on all speeds. Government witness Ackerman stated (in an article in an RCA Record Club magazine): "In the pop singles category, for instance, the past year has seen any number of moderate hits of a religious or inspirational nature, and several really big ones \* \* \*" (see RPF 397; compare CPF 355).

It is true that the introduction of the LP was important to the reproduction of jazz, but it is not true that jazz is sold "primarily" on LPs (CPF 356).

The record contains a long list of jazz musicians (and folk singers as well) who have had successful 33 $\frac{1}{3}$  r.p.m. and 45 r.p.m. records. Their hit singles have generally been taken from, or later incorporated into, LPs.

While in the past jazz and folk artists rarely had hit singles, today many such artists enjoy large sales volume on both speeds. This is true, for example, of jazz artists like Dave Brubeck, Ray Charles, Stan Getz, and Ella Fitzgerald; and of folk singers like Burl Ives, the Kingston Trio and Peter, Paul & Mary (see RPF 395).

Government counsel claim too much (CPF 357) when they characterize original Broadway cast and motion picture soundtrack music as "sold almost entirely on LPs."

There are many examples of hit singles and LPs containing songs from Broadway plays and motion pictures (see RPF 394). Teicher, for example, testified that he and Ferrante record dual piano performances of motion picture themes and lighter classical

material and that "Whatever we do on a single we will do on an LP and vice versa" (Tr. 7019, 7027).

Novelty and humorous material is also available on singles and is not "almost entirely sold on LPs."

Artists in this field, such as Allan Sherman, Stan Freberg, Spike Jones, Homer and Jethro, Lou Monte, The Chipmunks and many others, release both 33 $\frac{1}{3}$  r.p.m. and 45 r.p.m. records.

Sherman, whose LP "My Son the Folksinger" was one of 1962's best-sellers, subsequently released a single entitled "Hello Mudduh, Hello Fadduh." Similarly, London Records followed its humorous single "Monster Mash," which it claimed was the number one single in the country, with an LP of the same title. A Chipmunks' novelty single on the Liberty label, which sold over 6 million copies, also appeared on an LP. (Compare CPF 358, RPF 396.)

The Government relies heavily on the testimony of an RCA representative (Marek) in urging that LPs constitute a separate market (CPF 360). However, even though he did testify that "essentially, by and large," LPs and 45s constitute "two different markets," he recognized "an overlapping of the frontier between LP and 45." (Marek 1861; and see respondents' Exceptions, pages 300-01.)

(Marek is vice president and general manager of the RCA Victor Record Division, Radio Corporation of America.)

Although there are differences in the kind of popular music on LPs and that on singles, it is also true that the same kind of popular music appears on both types of records. It is an over-simplification to say that most popular LPs are background music, but that such is not the case with singles (CPF 361; compare respondents' Exceptions). Nor does the record support the claim that the singles market is "primarily rock and roll."

Trade paper popularity charts list LPs separately from singles. Similarly, separate charts are published for various types of music, and separate statistics are published showing sales through various types of outlets.

The so-called "break-outs" and sales life of many LPs and singles are quite similar. The longevity of popularity depends on the artistic performance and public taste—not the speed of the record. Both singles and LPs have become standard sellers or "evergreens," enjoying continued popularity for many years. On the other hand, both singles and LPs may follow an abbreviated sales pattern. Different generalizations might be drawn as to those aspects of LPs and singles, but they do not represent truly distinguishing characteristics.

The record fails to support CPF 364. There are differences in the promotional techniques used for singles and LPs, but radio stations are used for both (see RPF 404).

Both 33 $\frac{1}{3}$  r.p.m. records and 45 r.p.m. records have their birth at a recording session in the same studios, with the same A&R directors, musicians, engineers, microphones, quality controls, tape and equipment. They are generally manufactured in the same plant, sometimes on the very same machines using the very same raw material. Although Columbia now presses out LPs by a compression method using vinyl and generally produces singles from polystyrene by injection molding, this later process was developed by Columbia and is not used by all companies. Where different machines are used, the machines used to press LPs can, within a matter of a few hours and at little expense, be converted to produce singles.

The same distributors and the same retail outlets normally carry records on both speeds. Singles, LPs and EPs are all sold by mail order.

Some singles are manufactured of vinyl, as are LPs. All LPs are not made of the same type of vinyl.

There are variances in the packaging of the two types of records.

Columbia has indicated some recognition of LPs and singles as separate markets, characterized by differences in the kinds and number of manufacturers and type of music. The 1958 CBS Annual Report stated:

Columbia Record sales in the single 45 rpm record market have declined for two reasons: first, the production by many small independent manufacturers of popular recordings with relatively unknown artists have [sic] claimed a larger share of the market; and second, the Division has not attempted so far to meet the large demand for rock and roll recordings (CX 652, page 43).

Respondents, of course, point out that businessmen frequently use the term "market" in broad marketing or merchandising terms and do not generally have in mind a court-approved definition. Actually, the paragraph of the annual report relied on by the Government illustrates how loosely the term was used. The paragraph begins: "In the popular music market, the long-playing record has shown particularly impressive growth, now accounting for two-thirds of total dollar sales in the popular record category."

The Government here is not contending that there is a "popular music market."

The Government also relies on the use of the term "market" by

Columbia officials in their testimony regarding LPs and singles (CPF 367), but this is hardly more than a makeweight.

It is significant that the very subject of this legal controversy—the licensing agreements—expressly limit the coverage to “so-called 12” LP albums as that phrase is commonly understood in the phonograph record industry” (CX 23a).

Research reports on the record industry cover LPs and singles separately. Again, however, there are also separate research reports on monaural sales, stereo sales, sales by rack, sales by price categories, and perhaps other variations. Incidentally, the *Billboard* study lists singles and EPs separately, although both revolve at a speed of 45 r.p.m.

Despite the proposed finding (CPF 370) of Government counsel that the purchasers of singles “are the youthful, teenage consumers,” while LPs “are sold to a wider range of consumers,” the examiner must agree with respondents when in their Exceptions (page 308) they say: “The purchasing public for records cannot be classified into rigid and distinctive age groups. All age groups purchase records on all speeds. Consumers under 21 and in their early 20’s are the heaviest purchasers of both singles and LP’s \* \* \*” (see RPFs 398–401).

Even the quotations reproduced in CPF 370 from the transcript show the unwarranted sweep of the Government’s contention. For example, the statement that “The 45s will tend toward a teen market, while the LPs will tend towards a general market” (Stolon 1264) obviously permits no inference of a sharp line of leavage. Many of the answers also were qualified by such terms as “generally,” “generally speaking,” “primarily,” etc.

The evidence concerning age as a differentiating factor between the 45 and the LP is not too persuasive.

The complete overlap of buying habits among the different age groups was dramatically illustrated by one of the industry’s most successful singles, “The Twist” by Chubby Checker. According to the Government’s marketing expert, that single was originally purchased primarily by young record buyers, but adults then revived its popularity by even heavier purchases (Noonan 645–46).

The type of consumer to whom a particular record appeals depends on the artist and his material, not on the size of the record or the speed at which it spins on a phonograph turntable. For example, Mitch Miller, who was Columbia’s A&R director for many years, testified that the audience for a particular record depends on what is “in the groove”—“what comes out”—when the record is played and “not how fast it is played” (Tr. 7166).



While the singles and LPs of some young or so-called rock-and-roll artists, like RCA's Elvis Presley, appeal primarily to record buyers with youthful tastes, most successful artists attract a wide audience made up of diverse individuals of all levels of maturity.

Government witness Wood testified that "Dot's singles are directed at all age groups"—"the youngest buyer and the oldest" (Tr. 4159)—and that Dot's hit singles of "champagne music" by Lawrence Welk have universal attraction for kids and adults (Tr. 4142-43).

Percy Faith testified that his LPs and singles are directed to age groups from 16 to 60 (Tr. 6479).

Jimmy Dean testified that his LPs and singles appeal both to a "grandma in Dubuque and a six-year old from Brooklyn" and that his fan mail comes from all age groups (Tr. 7586).

Martin Denny's manager testified that his LPs and singles are purchased by all age groups (Mills 6445-46).

And Mitch Miller testified that in making singles and LPs he seeks "as broad a base as possible"; that it would be "ridiculous" to limit the field to any narrow segment of the public (Tr. 7160-61, 7185-86).

There is, of course, a price differential between LPs and singles. The basic price structure for LPs, as summarized in CPF 371, is approximately as follows:

Suggested list	Basic price to retailer	Basic price to wholesaler
\$3.98	\$2.47	\$1.89-\$1.92
4.98	3.09	2.36- 2.45
5.98	3.70-3.72	2.83- 2.98

The basic price structure for singles is substantially as follows:

Suggested list	Basic price to retailer	Basic price to wholesaler
\$ .98	\$ .60	\$ .46-\$ .48

(The basic prices to retailers and wholesalers are subject to further discount.)

It is obvious that because of the variation in size and speed, LPs and singles do not contain the same amount of musical material. If you buy two songs, you obviously pay less than if you buy 12.

There is no definitive evidence that changes in the price of one type of record affect the other.

Columbia's marketing director testified in effect that list prices for singles had remained fairly constant for 10 years but did state that such prices had gone up from 89¢ to 99¢ (Gallagher 9139-40). During this same period of time, the price of the LP had gone down (Gallagher 8800-01, 8803-04). Gallagher further testified (Tr. 9141) that on sales by distributors to dealers (as contrasted with suggested list prices), prices for singles have gone down in recent years to meet competition.

Respondents further contend that prices charged on one speed do affect the other speed. As LP prices have come down, consumers have switched from singles to LPs. Thus, as Noonan testified, teenagers can now afford to buy LPs "out of their allowance" (Noonan 6919).

Most established record companies now market both types of record. Of the 24 record firms which furnished witnesses for this proceeding, all but 4 produce both speeds. Some companies started in business by producing both 33 $\frac{1}{3}$ s and 45s; others began with 45s and then developed 33 $\frac{1}{3}$  catalogs; and still others began with 33 $\frac{1}{3}$ s and later branched out into 45s.

Individual companies, moreover, often experience great fluctuations in product mix between the two speeds. For example, Cadence, with 10 times more singles than LPs in its catalog, nevertheless issued the best-selling LP in the history of the industry, while Vanguard, which primarily releases LPs, recently issued one of the industry's best-selling folk singles (see RPF 405).

There is no substantial evidence as to any significant difference between the investment of an LP manufacturer as compared to that of a singles manufacturer. It takes relatively little capital to enter either field. (See RPFs 32, 405; *cf.* CPF 376.)

There are both differences and similarities in manufacturers' policies and practices respecting distribution of LPs and singles, but the record does not support the broad claim (CPF 377) that manufacturers have "separate and distinct policies" for distribution of each type of product. The Government's claim (CPF 377) that "Separate LP catalogs are maintained" is rejected as contrary to the record. (See Exceptions, page 320.)

While there are differences, the respective periods of commercial acceptance of LPs and singles are not so different as to constitute a significant distinguishing characteristic. Generally speaking, it might be said that LP records, typically, have a longer span of commercial acceptance than singles, and there is

authority for the proposition that the perishability of LPs and singles is "completely different." Columbia's Gallagher so testified (Tr. 9167-68); however, that testimony was taken out of context by Government counsel, and his general statement is put in perspective by the full colloquy. Among other things, Gallagher said that "the life of the single, particularly if an album is released with that same title, is short-lived." (See also CPF 363 and Exceptions.)

The reason singles are not sold through the Columbia Record Club is "the basic economic ground that it would not be profitable to do so, and on the secondary ground that the volatility of single records did not allow the lead time required by the club in printing magazines and brochures and preparing ads for a six-month period of time" (Keating 725-26).

Keating also said that "there is a much bigger market for LPs and we would have more product available to us in the LP market" (Tr. 727).

(For clubs and mail order vendors who do sell singles as well as LPs, see RPF 403.)

Finally, the only economic expert to testify in the case gave as his opinion that, in any meaningful economic analysis of the effectiveness of competition in the record industry, LPs and singles should be included in the same product market (Max 9698-703; RPFs 457-60).

#### *Individual Records Not Separate Markets*

An artist's performance embodied in a phonograph record is "unique" (Lieberson 77-78). It also is true that particular recorded performances are available only on particular labels (Lieberson 145, 4870). The record also supports a finding that dealers, on occasion, find it essential to buy particular performances on particular labels in order to satisfy customer demand (Stolon 1263; Rubinstein 2194-97; Wilf 2699; Stone 8571).

Thus, the complaint's allegation (Par. Four) that each phonograph record is "unique, distinctive and nonsubstitutable" is not merely a "fanciful suggestion," as claimed by respondents (RPF 406). However, this is not to say that individual records constitute a separate market for antitrust purposes or that a record is a "monopoly" in the legal sense. The record may be a "little monopoly \* \* \* in the sense that there is only one like it, it is made by a particular artist, it is made in a particular arrangement" (Rubinstein 2194, 2239).

However, the fact that a particular performance by a particular artist is not identical to a rendition by another artist does not mean that different artists and different records do not compete.

While records may sometimes be artistically distinctive, Mr. Lieberson and other witnesses testified that they compete with each other for the consumer's dollar (RPFs 406-11).

"To illustrate the monopoly enjoyed by a major label," according to CPF 265, Columbia's original cast version of "My Fair Lady is not interchangeable with other versions of the same score."

There is no basis for the reference to "the monopoly enjoyed by a major label." To the extent that a particular performance is artistically distinctive, that is true whether the label be "major" or minor.

Moreover, the record references (Previn 6047-48; Levin 457) do not wholly support the findings with respect to "My Fair Lady." The two witnesses cited merely testified that the original cast version of the play is not interchangeable with an Andre Previn "purely instrumental improvisation jazz version" that was "made with a different goal in mind" (Previn 6047), or a Billy Taylor jazz recording of the score that the witness recognized as "an entirely different version" (Levin 457).

Interestingly enough, when Government counsel sought to show the uniqueness and nonsubstitutability of the Verve LP of the Stan Getz record of the bossa nova, the witness Levin indicated that when he was temporarily out of that particular album, he attempted to switch customers to another bossa nova but that he was "not always" successful in so doing (Tr. 456). The inference to be drawn from that answer is obvious.

Although Columbia's contracts with its artists also attest to the uniqueness of their performances (for example, CX 172a), that does not add up to a monopoly in the legal sense of the word.

The record shows that a performer competes with other artists in the same field who have recorded the same or similar repertoire—and that even recordings in different fields often vie with each other for public acceptance (Lieberson 4816-17; Previn 6036-37). Andre Previn, for example, testified that when he makes a jazz record, he competes with every other jazz pianist; that when he makes a classical record as a pianist, he competes with every other classical pianist; and that when he records as a classical conductor, he competes with every other conductor (Tr. 6037).

The practice of imitation and copying also creates competition between different records. A fad introduced by one company, such as the twist, the bossa nova or so-called surfing music, spawns

many similar recordings by other firms seeking to jump on the bandwagon. A hit single or LP is invariably "covered" by many recordings of the identical musical material by other companies. There were, for example, many different recordings of "Moon River," "Cleopatra" and "What Kind Of Fool Am I." The original recording and its "cover" records frequently compete neck-and-neck, and sometimes the later versions actually enjoy the greater popularity. (See, generally, RPFs 406-411.)

The evidence supports a finding that Columbia is a major label, and that it is important that dealers stock Columbia records. The references cited by the Government in CPF 266 do not support a finding that Columbia is included among the "essential labels" referred to in CPF 265.

Nevertheless, on the basis of the record as a whole, it may be inferred that consumer demand would require a dealer to stock for sale some records bearing the Columbia label. It would be a rare dealer indeed who could afford to refuse to sell Columbia records. (See, for example, RXs 25, 26a, 26b, 31b; March 2566-67; Metcalfe 2901.)

#### *Record Clubs Not a Separate Line of Commerce*

In the Government's proposed findings (CPFs 420-48) is a section entitled "Clubs as a relevant market." The evidence establishes, however, that clubs are not a separate market or line of commerce, but constitute a segment of a broader retail market that includes clubs, other mail-order sellers, record stores, racked outlets and other retail establishments. Each of those methods of selling records to consumers is in the same line of commerce.

In its insistence on considering clubs as a separate market for retail purposes, the Government overlooks its earlier position (CPFs 249-64) that "The Club competes directly with retail dealers," and its description (RPF 10; brief, page 347) of the Columbia Record Club as "a retailer."

CPFs 420-48 constitute primarily an effort to show differences, actual and fanciful, between the sale of phonograph records through clubs and through other mail-order channels, primarily Reader's Digest-RCA. The fact is that even if record clubs should be held to constitute a market separate from other retail outlets, economic reality would require that they be grouped with other mail-order sellers.

Although in the licensing agreements Columbia and the licensors recognize that there is a "club" method of distribution, that is not, in fact or in law, an admission that clubs constitute a "rel-

evant sub-market" for antitrust purposes, as urged in CPF 420. It is evidence to be considered, but in the very quotation cited by the Government the parties refer to the "subscription" or "club" plan as being a "merchandising method known and understood in the mail order business" (emphasis added).

As the complaint alleges (*e.g.*, Pars. Two, Five and Seven), Columbia and the other record clubs offer consumers the same records that are sold by dealers and other retail outlets. The complaint further alleges that record clubs compete with, and take sales away from, over-the-counter outlets (*e.g.*, Pars. Three, Ten, Eleven and Twelve). On the other hand, respondents introduced evidence indicating that record clubs actually stimulate consumer interest in record buying through all outlets and, therefore, have a beneficial effect on dealers. In light of those positions, it can hardly be maintained that, on the one hand, record clubs compete with and affect dealers and that, on the other hand, record clubs are in a line of commerce wholly separate from dealers and other retail outlets.

Whether or not clubs are "beneficial" to dealers, the fact is that consumers simultaneously use clubs and other outlets as sources of supply for records. That was established, not only by the testimony of various dealer and consumer witnesses (*e.g.*, Del Padre 5649; Blincoe 5690; Dunlap 5906-07; Schlang 6716-22; Karol 5590-92; Zenger 6311-14; Dreyer 6415-16; Anderson 6458-59; Jackson 7197-98; Miller 7190), but also by a series of market research studies undertaken from time to time from 1957 to 1962. Data collected by Alfred Politz, Inc., Stewart-Dougall & Associates, National Family Opinion Inc. (NFO) and Eldridge Foskett show that the vast majority of record club members purchase records in retail stores during the term of their membership; that they purchase more records in such stores than through clubs; and that they purchase more records in such stores than persons who do not belong to record clubs (RXs 338, 444-45; Foskett 7104-07, 7113-20). A survey conducted by rack-jobber Schlang also revealed that the great majority of record purchasers at locations which he services were members or ex-members of record clubs (Tr. 6716-21). The record also shows the extremely high turnover rate of Club membership, with 50% or more drop-outs each year.

The inter-relationship between stores and clubs as sources of supply is further demonstrated by an analysis of consumer buying habits and store locations. The evidence indicates that where record stores are plentiful, consumers tend to rely more

on such outlets and less on clubs; and that where record stores are relatively scarce, consumers (although still purchasing primarily through stores) significantly increase their purchases through clubs (see RPF 415). There is no doubt that many consumers rely on clubs and non-club outlets as inter-related sources of supply.

Market research reports further demonstrate that consumers regard clubs and stores as comparable distribution channels. Thus, in expressing opinions concerning the advantages and disadvantages of record club membership, consumers compare clubs with retail stores (RXs 341-42, 482, 493; Skelley 8260-67, 8284-86, 8319).

The inter-relationship between dealers and clubs is also shown by the very activities relied on by the Government in CPFs 233-64. Columbia has paid over \$1,240,000 to dealers since 1955 as commissions on purchases by Club members. In addition, under the dealer redemption center plan, members redeem bonus certificates in dealers' stores, thereby creating store traffic (*e.g.*, Karol 5590-92; Zenger 6311-15; Blincoe 5689; Dunlap 5906-07). Those cross-merchandising techniques further demonstrate the close inter-relationship between clubs and over-the-counter outlets.

Industry research undertakes to measure record sales through various retail stores and clubs as channels of distribution through which the goods moved. Again, this is an element to be taken into account in determining the existence of relevant markets or submarkets, but the mere fact that there is separate statistical research on the results of a given method of distribution is not conclusive evidence of the existence of a separate "market."

Record clubs and over-the-counter retailers employ different merchandising techniques, but this does not mean that they operate in separate markets. The key factor is not differences in "special techniques" of selling; the crucial element is that clubs and all other outlets offer the same products to consumers.

Contrary to the proposed findings of the Government (CPF 423), record dealers do not necessarily make sales in a "circumscribed geographic area," and all club operations are not necessarily national or regional in scope. Some dealers sell throughout the Nation by mail order, and many dealers operate local record clubs.

Although at any given time, the membership of record clubs may have special characteristics, it is too much to say, as does the Government (CPF 435), that record club members "constitute

a special segment of the buying public that can be approached, solicited, sold and retained on a special basis." The fact that the negative option method of selling is the cornerstone of the club plan (Adler 4960-61; see CPF 13) does not build a wall around record club members; in fact there is evidence indicating that club members buy more records from non-club outlets than do non-members (see RPF 293).

The fact that on occasion club members are given or sold records not available to the general public does not constitute them "a special segment of the buying public," as urged in CPF 436. This proposed finding by the Government is inconsistent with the insistence in other proposed findings that the Columbia Record Club concentrates on "hit" records.

The guidance offered to consumers is not unique to the club operation. Both over-the-counter sellers and mail-order sellers utilize guidance as a sales tool (RXs 515b-517c; Prince 5506-07; Karol 5578).

The promotional methods used by the club to get new members, including the encouragement of existing customers to interest their friends, do not convert club members into a "special segment of the buying public" or a "peculiar market."

As already indicated, record clubs are in the same line of commerce as other mail-order sellers of records, including package-sellers like Reader's Digest-RCA, BOMC and Life, as well as record stores, department stores and mail-order houses which sell records via mail. Both record clubs and other types of mail-order vendors offer consumers the convenience of purchasing through the mail, usually on credit. They both rely on media advertising and direct mail solicitations, frequently using identical media and mailing lists. They offer consumers identical, or highly similar, products. Club members are especially singled out for, and are particularly receptive to, solicitations for mail-order record packages.

Respondents' economic expert was of the opinion that record clubs are not a separate market but merely a part of a single retail market that embraces all types of retail outlets selling records to the consumer (Max 9703-09; RPFs 461-66).

In summary, the record does not support the allegation that record clubs are a separate line of commerce, nor the claims that LPs or individual records are separate markets.

On the contrary, it shows that phonograph records of all types sold through all channels of distribution constitute the only relevant market in this proceeding.



Thus, in weighing the charges of monopolization, attempted monopolization, and also a claimed "dangerous tendency to create in respondents a monopoly," the examiner will look primarily to the structure of the total record industry, not just the segments (LPs and clubs) urged by the Government.

(Note: In view of the findings respecting the relevant market, it is unnecessary for the examiner to make further findings respecting the so-called LP and record club markets.

(However, against the possibility that the Commission may take a different view, he has incorporated certain findings on those subjects in an appendix.)

#### *Monopoly Charges*

The Government failed to prove its sweeping allegations that Columbia had monopolized or attempted or tended to monopolize either the phonograph record industry, the so-called LP market or the so-called club market.

The record indicates that the industry is dynamic and competitive at all levels. The Government failed to prove that Columbia possesses either the purpose or power to monopolize. There was no evidence of any unlawful intent on the part of Columbia.

(Despite the finding that the record industry is the relevant market for testing the monopoly charges, and the corollary finding that neither LPs nor clubs constitute appropriate separate markets, this section includes some references to those segments of the industry. Detailed findings regarding those so-called submarkets have been relegated to an appendix.)

#### *Industry Growth*

Total sales of the record industry have increased more than 20 times since Columbia's entry into the field in 1938 (CX 199b). It does not appear that the formation of the Columbia Record Club in 1955 and its distribution of outside labels have retarded that growth.

On the contrary, since 1955, the industry's rate of growth has accelerated sharply. Industry sales were relatively stable from 1946 to 1955, but they grew at a phenomenal rate thereafter (RX 434). That rapid expansion occurred, not only on an absolute dollar basis (RX 434), but also in comparison to other yardsticks of economic growth, such as gross national product and personal disposable income (RX 435).

While the industry's expansion generally failed to keep pace with the growth of the Nation's population from 1946 to 1955, it subsequently expanded far more rapidly (RX 436).

*Per capita* record sales had been on a 10-year downward trend, but increased almost two and one-half times between 1955 and 1961 (RX 436).

Dynamic growth of that kind is hardly consistent with the sluggish performance typically found in an industry dominated by a monopolist or oligopolists (Max 9727-28, 9749).

#### *Ease of Entry*

The record reveals an industry characterized by a high and effective rate of entry at every level. The evidence does not establish that Columbia has excluded, has the power to exclude, or has displayed any intent to exclude new entrants. Without such a showing, the complaint's allegations of monopolization and attempt or tendency to monopolize must fail.

When Columbia entered the record industry in 1938, there were only a few record companies. Today, there are many hundreds of firms in the United States; and many more firms throughout the world whose records are distributed in the United States. The increase in the number of competitors indicates the absence of any significant barriers to entry.

The influx of new competitors has led to a significant dispersal of economic concentration. In 1938, two companies, RCA and Decca, controlled 75% of the industry's sales (Liebersohn 4775, 4778-79). By 1951, they were sharing that percentage of total sales with two newcomers, Columbia and Capitol (RX 427; also see RX 437).

Thereafter, as additional new firms became successful entrants into the industry (see, *e.g.*, RX 437), the market share accounted for by those four companies steadily declined as the relative position of all other firms improved (RX 427).

The aggregate market shares of Columbia, RCA, Capitol and Decca fell markedly between 1951 and mid-1961, from 75% to about 51%; and the share of their rivals virtually doubled, increasing from 25% to almost 49% (RX 427). That growth of the smaller firms occurred during a period when the industry's total sales more than tripled (CX 199b). Accordingly, in that ten-year period, those smaller companies obtained twice as great a slice of a pie that was three times larger.

Such a pattern is contrary to the behavior of an industry controlled by a monopolist or oligopolists.

The dynamic growth of the smaller companies is also reflected by the *Billboard* store survey, which measures sales of records in nonrack retail stores. A series of *in camera* tables and graphs

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(RXs 428-29, 431, 433), based on the *Billboard* survey, shows that from the commencement of that study in mid-1957 through 1962, the aggregate share of retail sales of all records accounted for by companies other than Columbia, RCA and Capitol rose substantially and, conversely, that the combined share of those three companies declined. (In the alleged LP market, the smaller companies grew, and the aggregate share of those three companies fell by an even greater amount).

Regarding sales of all records in the stores measured by the *Billboard* survey, the results for 1961 (CXs 244s-v *in camera*) and 1962 (RX 311 *in camera*, pages 1a-1d) were as follows:

	1961	1962
Columbia .....	14.5	15.0
RCA Victor .....	14.2	12.1
Capitol .....	10.9	10.7
Decca .....	4.7	4.5
Total .....	44.3	42.3

[Each of the above totals includes a subsidiary label: Epic (Columbia); Camden (RCA Victor); Angel (Capitol); and Coral (Decca).]

Another series of *in camera* graphs (RXs 430, 432), based on the *Billboard* store survey, shows the competition that exists between Columbia, RCA and Capitol. There have been sharp fluctuations in the relative sales of the records of those companies since mid-1957 by nonrack retail outlets, with constant "ups" and "downs" in their respective shares. Not one of those three companies has been able to maintain leadership over the other two for any protracted period of time. This constant competitive battle and volatility is inconsistent with oligopolistic behavior (Max 9726-28).

The distributional level of the record industry also has been characterized by a high and effective rate of entry. There has been a ten-fold increase in the number of over-the-counter retailers since 1955.

The mail-order channel of distribution likewise has experienced substantial entry. Ten years ago, there were only a few record clubs. Today, there are many.

The new entrants in the club and nonclub mail-order field, besides Columbia, RCA and Capitol, includes Reader's Digest, BOMC, Life, Pickwick, Golden Records, and Disneyland. In addition, the

outside labels have, in effect, entered the mail-order field as a result of their licensing agreements with Columbia.

Entry into the record club field requires relatively large financial resources, substantial advertising, a complex organization and a high degree of expertise. The licensing agreements have given the outside labels an opportunity to participate in that channel of distribution.

There are, moreover, many substantial record companies with adequate financial resources to organize record clubs (*e.g.*, RX 487; Max 9789-90). There also are many companies now engaged in nonclub mail-order selling of records which possess the know-how and finances to expand into club activities on their own—including such firms as Doubleday, BOMC, Montgomery Ward, Aldens, and Sears, Roebuck, not to mention Reader's Digest (if it were not tied to a long-term contract with the RCA Club) (Adler 4919-21). There are also hundreds of smaller record companies not now directly engaged in selling records through the mail which could enter the club or nonclub mail-order channel of distribution through licensing agreements with present mail-order vendors or potential new entrants into the mail-order field.

#### *Columbia's Share of Sales*

The influx of new competitors into the record industry has led to a substantial long-range decline in Columbia's share of the market. In 1962, Columbia's share of total industry sales of records of all types distributed through all channels of distribution was at a level more than 25% below its 1945 level (RX 418 *in camera*).

Between 1951 and mid-1961, Columbia's share of *total* record sales, despite some intervening fluctuations, remained virtually unchanged at 20%; RCA's share fell from 30% to 17.5%; Capitol's share remained virtually unchanged at about 11%; and Decca had fallen from 14% to less than 4%.

Meanwhile, the share of sales of "all other" companies virtually doubled, rising from 25% to more than 48% (RXs 349-51, 417, 427).

RCA was the leading label in eight of the eleven years reported; Decca led Capitol through 1956; and the "all other" group increased its market share in nine of the eleven years reported (RXs 349-51).

Between 1957 and 1962, Columbia's share of sales in the stores measured by the *Billboard* survey has remained fairly stable. It was just shy of 13% in 1957; it registered 15% in 1962 (RX 420 *in camera*).

During the same period, all companies other than the so-called "Big Three" (Columbia, RCA and Capitol) increased their aggregate share of such sales in those stores from 56.7% to 62.2% (RX 428 *in camera*).

The percentage of sales of all records and of LP records through all channels of distribution accounted for by sales of the Columbia Record Club rose in the early years of the Club's operation between 1955 and 1958 (RXs 422, 424 *in camera*). Thereafter, as competitors successfully entered the field, the percentage of total record sales and of LP sales accounted for by the Club grew at a much slower rate and, in 1961 (the last year of available data), remained static (RXs 422, 424 *in camera*).

That pattern occurred even though the Club had taken on outside labels. The Club's sales of records of outside labels began to grow in 1959 (RX 425 *in camera*). Despite that growth, Columbia's share of the claimed LP market did not show any perceptible change (RX 419). In 1959 the percentage of total record sales and of LP sales through all channels accounted for by the Columbia Record Club began to grow at a slower rate than in the past; and in 1961 actually remained static (RXs 422, 424 *in camera*).

According to RXs 425-26 *in camera*, the sales of the licensors' records through the Club—the primary issue in this case—have never amounted to more than a small fraction of total retail sales of records of all types or of total LP sales.

The record shows a decline in Columbia's over-all market position. The initial growth in Columbia's percentage of club and mail-order sales during its head start in that field was followed by a period of decline, despite the addition of outside labels.

None of this adds up to monopoly or attempt or tendency to monopolize. In fact, the pattern is contrary to the existence of monopolistic power or intent. No matter how the market is defined, there has been a failure to show monopoly size or power vested in Columbia.

#### *Price and Other Competition*

With the entry of many new manufacturers and retail outlets, the record industry reflects price competition at all levels, with lower prices to consumers as the result. There is not the type of high, rigid price structure found in an industry dominated by a monopolist or oligopolists.

Manufacturers generally establish "base" prices to distributors, who in turn set base prices on sales to dealers and other accounts. Base prices are subject to reductions by so-called "programs"

offered by manufacturers to distributors, and generally passed on by distributors to dealers.

There is evidence of restocking plans two or three times a year offering all or substantial portions of entire catalogs at discounts of 10% to 25% or more; special discounts on new releases; extra discounts on older releases; additional discounts on stereophonic records; quantity discounts; special discounts on the records of particular artists; distribution of free records; cash discounts for timely payment; extended credit; a variety of plans for the exchange and return of records, ranging from 10% up to 100% exchange rights; discounts in lieu of the exercise of some of those privileges; many different programs for cooperative advertising; and free merchandising aids.

The evidence in the record on these different programs is voluminous. (See record citations in RPF 442.)

Such evidence confirms, the testimony of William Gallagher, Columbia's vice president for sales (Tr. 9172-75), and Peter Max, an economist who reviewed trade-paper announcements of such programs over a three-year period (Tr. 9758, 9761, 9767-68), that there are generally wide and substantial variations among the different programs being offered at any one time by different manufacturers and distributors.

The pattern was summarized by record producer Dave Kapp, who testified (Tr. 5863, 5866): "The whole record industry today is programs \* \* \* there is a program on practically every record sold." Government witness Shocket, a distributor, could not even give his price for a particular type of LP because he had "so many prices in my mind and so many deals going on" (Tr. 202). (See RPFs 497-512.)

The prices Columbia charges distributors, and the prices Columbia's branch distributors charge dealers, have declined in the past three or four years in order to meet competition—during a period when Columbia's costs have been going up (Gallagher 8791, 8801-02; also see Lorenz 8733). Since 1958, Columbia's branches have substantially expanded and liberalized restocking programs, thereby offering distributors and dealers more favorable opportunities to buy at lower prices (Gallagher 8791-93; Max 9755-56).

Additional price competition has been interjected into the industry by one-stops and rack jobbers who sometimes sell to dealers in competition with their distributors, and by distributors and subdistributors who transship outside of their territories at low prices. Dealers often purchase Columbia, outside label and other records from out-of-town "connections" (*e.g.*, Levin 487, 496, 498)

at substantially lower prices than are offered by local distributors. (See RPF 445 for record citations.)

Prices to consumers have declined over the past 15 years. The introduction of long-playing records virtually reduced by one-half the suggested list price for records.

Dealers in many areas sell at list price. On the other hand, many stores sell records at discount. Such retailers frequently under-sell, not only nearby stores, but record clubs and other mail-order vendors. For example, in 1962, while a new member of the Columbia Record Club paid an average price for a \$3.98 record of approximately \$2.37 and a member in his second year paid \$2.88, retail stores frequently sold at far lower prices (RPF 337).

The existence of price competition among different record clubs and other mail-order sellers is indicated by the variety of offers being made to the public. In 1962, for example, Columbia was offering new members six records for \$1.89, plus mailing and handling charges, with a commitment to purchase six additional records at list price, plus mailing and handling charges (Keating 691-93).

Capitol was offering seven records for 97¢, with a commitment to purchase six at list price (RX 179). RCA was offering one record for 10¢, four more which could be purchased for \$1 after a 10-day trial, with a commitment to buy an additional five records at list price (RX 157). The Jazz Club of America was offering the RCA-Victor Encyclopedia of Recorded Jazz at 99¢ per record (RX 203). The Living Shakespeare Club was offering a "free gift" of Hamlet, without any obligation to purchase the other complete Shakespeare plays (featuring performances by well-known actors like John Gielgud) that were available for \$2.98 (RX 204).

The Citadel Record Club was offering singles and LPs at 40% or more off list and claimed to have available virtually any artist on any label (RXs 205, 206, 568, 691). Music Treasures of the World offered classical music with an introductory offer of 10¢ for one classical LP, with no obligation to purchase further records (RX 571). The Family Record Club was offering inspirational records at five for \$2.67 (RX 570). The 99¢ Record Club was offering all labels at 99¢ each (RX 194b). The Universal Record Club offered all labels at 50% off manufacturer's list price (RX 195). The Music Appreciation Record Club was offering records at \$1 each (RXs 197, 192).

Mail-order package sellers, like Reader's Digest-RCA, were generally charging \$2 or less per LP, plus mailing and handling, with prices sometimes as low as \$1.33.

Prices to consumers through record clubs have declined steadily over the years. When the Columbia Record Club was started in 1955, a member who joined and fulfilled his commitment in the first year of membership paid an average price (including mailing and handling charges) of \$2.89 for records with suggested list prices of \$3.98 (Max 9756-57). On the other hand, a member fulfilling his initial commitment in 1962, paid an average price of \$2.37 (including mailing and handling charges) for the same type of records.

In the area of nonprice competition, Columbia developed the LP, and RCA introduced the single, thereby precipitating the competitive "battle of the speeds" and bringing consumers a superior product at lower prices.

Various members of the industry, including certain smaller companies, have played an important role in the development of stereophonic records, which provide still better sound reproduction. As a result of competition, consumers have a wider selection of repertoire in every field of music.

Competition also has led to major marketing innovations redounding to the public's benefit. The relatively recent development of record clubs and other direct mail-order sellers of records, as well as rack jobbing, has made record-buying far more convenient and outlets more accessible for consumers.

Record clubs, in effect, introduced consumer advertising to the record industry, and thereby awakened consumer interest in that field of home entertainment.

#### *Other Competitive Effects*

In addition to the monopoly charges, the complaint also contains allegations that respondents' practices hinder, lessen or suppress competition, or have a "dangerous tendency" to bring about such a result. The competition allegedly threatened is between Columbia and: (1) dealers, (2) manufacturers and (3) mail-orders sellers, including clubs. We shall consider each field *seriatim*.

#### *Dealers*

The dubious evidentiary support for the Government's sweeping claims that the effect of the licensing agreements has been substantially to lessen the ability of retail dealers to compete, is perhaps illustrated by the fact that the claim of dealer injury covers only a few pages in the Government's proposed findings. Even the presumed "star" witnesses referred to there, do not pro-



vide substantial evidence of injury to competition. The bulk of the dealer testimony has been relegated to an appendix in what the Government calls "summary" form; however, see respondents' appendix in its Exceptions.

The examiner is inclined to agree with respondents that the Government's so-called summary is more in the nature of a series of excerpts of testimony and does not represent a well-rounded condensation of the record in that regard.

Regardless of the Government's theory of the case, it is apparent that to most of the Government's dealer and distributor witnesses, the outside label question is only an incidental matter. That is virtually conceded by the Government when in CPF 328, counsel refers to testimony that long-established record dealers "are unable, profitably, to match the Club price of Columbia and Epic records," and that the disadvantage to such a dealer "is extended by his inability to match, profitably, the Club price of the Licensors' records."

That concession is made even more plain in the Government's Appendix A when licensing is identified as an "Aggravated Effect Of Club."

Generalization is always risky, but it is a fair generalization that most of the Government's dealer-witnesses are opposed to record clubs in general, regardless of the outside label issue, and that Government counsel have been frank, if not consistent, in identifying the matter of licensing as a secondary "aggravating" effect of Club competition.

The Government's claim that there was a cause-and-effect relationship between the licensing agreements and asserted instances of dealer injury may be tested by checking out the testimony of six witnesses featured in the Government's Proposed Findings (CPF 329). Since their testimony was not relegated to Appendix A (Vol. II of the Government's submittals), they presumably are "star" witnesses—supplying the best available evidence of the actuality or potentiality of competitive injury *resulting from the outside label arrangements*. (Presumably, Government counsel were not making an invidious comparison when they referred to "relevant" dealer testimony as appearing in Appendix A at the same time they titled that in the text (CPF 329) as "*Other dealer testimony*" (emphasis added).)

Here we shall quote the Government's summary of each witness and follow it with a "comment" providing additional evidentiary facts that destroy, or materially weaken, the point sought to be

made. (These comments are quoted or adapted from respondents' Exceptions.)

(1) A dealer from Flint, Michigan, whose profit in 1962 on sales of \$18,000 (Liepmann 3387) was \$504 (Liepmann 3389), testified about the adverse effect of the Club on his business (Liepmann 3388-89), and how this was compounded by the offer of Licensors' records (Liepmann 3403-04).

*Comment*—Liepmann, a full-time fireman, entered the record business about two years ago, long after the advent of clubs and outside labels. His 12' x 27' store sells at list in competition with 30 discounters in Flint. He objects to discounters and to record clubs and wants "retail prices in the area stabilized" (Liepmann 3384-87, 3394-96, 3402, 3406-09).

(2) A dealer whose volume of business had increased by \$2,000 in 1962 (Morlitz 2315) testified about the difficulty of competing against the Club in price (Morlitz 2304). This dealer illustrated a recurring problem of record dealers: that the effect of the Club is to reduce the sales volume of popular artists who are expected to sell in even larger quantities (Morlitz 2300 \* \* \*).

*Comment*—This finding refers to Morlitz's sales for one year, although he testified to a five-year period (Morlitz 2315-16):

1958	.....	\$38,000
1959	.....	45,000
1960	.....	46,000
1961	.....	52,000
1962	.....	54,000

Morlitz achieved that steady growth since the Club's addition of outside labels, despite the fact he did no advertising; his store was in a deteriorating neighborhood; he faced competition from many new discounters in Philadelphia who sold at lower prices; Korvette and Gimbels often sold at below cost; and his distributor of Kapp records, Government witness Rosen, discriminated against him, prompting Morlitz to "hide" Kapp records behind the counter. Records offered by the Club have remained successful sellers in his store (Morlitz 2301, 2304, 2316-17, 2320, 2322, 2326-33).

(3) An Ardmore, Pennsylvania, dealer testified that a sales increase in 1962 can be attributed to the fact that certain albums including Warner Bros.' "Peter, Paul and Mary" had not been used as part of initial offers of the Columbia Record Club (Balaity 2800-01).

*Comment*—This is a particularly curious example for the Government to cite. Its use indicates a lack of probative evidence in support of the allegations of dealer injury.

Balaity, who has enjoyed rising sales since his entry into the record business in Philadelphia in 1960 (Balaity 2795), did not testify, as implied in CPF 329, that sales increased *because* of

records not offered by the Club. For example, he named various outside labels and artists that sold well in his store (Balaity 2803). He listed "Peter, Paul & Mary" as among records that "are good in [his] store" when he testified on February 12, 1963 (Balaity 2800-01). The Club had offered that record in January 1963 (CX 790, RX 642).

(Government counsel, apparently seeking to soften the impact of Balaity's satisfaction with sales of "Peter, Paul & Mary" in mid-February 1963, imply in footnote 133 to this finding that the Club did not offer that record as part of an initial offer of six for \$1.99 *until* February 1963. But in footnote 8 on page 10, in order to prove a different point, they state that it was offered as early as January 1963. It was, in fact, offered in January (CX 790, RX 642). In the two months prior to Club use, Warner Bros. sold only about 2,000 copies per month; thereafter, in the month of Club use and the following three months (the latest data in the record), sales were between 15,000 and 46,000 per month (CX 790).)

While Balaity had "an opinion" about the Club, he "had no knowledge \* \* \* no basis to say that this is true" (Balaity 2803). Indeed, he did not even know what records had been offered by the Club (Balaity 2802, 2804). (*Cf.* RPF 335(g).)

(4) One Philadelphia dealer testified that his record business had declined by 30% in 1962 and the Columbia Record Club was a major factor responsible for this decline (J. Rosen 2770-71).

*Comment*—While Rosen said on direct examination that the Club was a major factor for the decline in his 1962 sales (Tr. 2770-71), he admitted on cross-examination that his sales rose from \$60,000 in 1959 to \$71,000 in 1961 (Tr. 2781-84); that he could not "say" what the Club had done differently in 1962 to cause a reversal in his growth (Tr. 2784); and that the drop-off may have been caused by competition from Korvette and Gimbels, which provided particularly rugged price competition in Philadelphia in 1962 (Tr. 2784-85). On the outside label issue, Rosen could not say that it made any difference to him that the Club took on such labels (Tr. 2773).

(5) [A]nother Philadelphia dealer whose volume of business had declined from \$70,000 in 1961 to \$60,000 in 1962 testified that the offer of certain Licensors' records was responsible for the decline in sales (March 2557-61).

*Comment*—Contrary to that proposed finding, March did not attribute the alleged \$10,000 drop in sales to outside label offers by the Club. At Tr. 2554, he referred to his 1961 and 1962 sales.

Seven pages later, in a completely different context, he replied, in response to two leading questions, that he thought that his sales of two particular outside label records may have declined partially because of Club sales. One of the records he cited was Kapp's "Music for Trumpet." The Club sold a grand total of 123 copies. (See RPF 335(e).) The other record he mentioned was Roger Williams' "Greatest Hits." The Philadelphia distributor from whom March purchased Kapp records (March 2568) testified that Roger Williams is a "big seller" in Philadelphia and "has been a continuous seller right down the line with everything he has ever come out with" (Rosen 2259).

On cross-examination, March testified that his business "is largely esoteric, off-the-beat" and unlike most material sold by record clubs (March 2574-75). March complained about a host of business problems: His partner and Government witness Bialek conspired to throw his record shop into bankruptcy (March 2567); he carried very few Columbia records because the local branch, to whom he refused a financial statement, regarded him as a credit problem (March 2555, 2566-68); he was surrounded by record dealers, some selling at lower prices (March 2556-57, 2569); and Korvette was "generally" selling at lower prices than his costs (March 2569).

(6) And a New York dealer testified that the offer of "war horses" on the Columbia and Licensors' labels had reduced his sales on this important classical product (Kutscher 1162-63, see also Prince 5511-12, Rubinstein 2199, Morlitz 2300, Jolley 2366-68, Fischer 2446, Rubin 1904-07, Fink 1441-42).

In a footnote, it was stated:

Club ads (*e.g.*, CX 100, 105) emphasized "war horse" material, *i.e.*, standard classical repertoire that dealer must sell in large volume to sustain purchases of low volume "esoteric" records (Kutscher 1159-62, F. Hartstone 1775). In the classical "war horse" field, even an excellent seller ranges between 10,000 and 20,000 units nationally over two or three years while a non-war horse item can be expected to do half as well (Chapin 7396-97). The major early emphasis of the Club was classical music (Lieberson 4854-55) and this was the source of its earliest successes (CPF 245).

*Comment*—Government counsel showed Kutscher three Club advertisements featuring classical material (CXs 99, 100, 105). After looking at those advertisements, Kutscher testified that classical war horses are "the main part" of offers by "record clubs." All those ads were tests, some running as long as four years ago (Raybar 6807; also see the ads themselves). Kutscher did not refer to the offer of war horses on "Licensors' labels." He referred only to records in the advertisements shown to him,

picking out about a dozen on the Columbia and Epic labels (Kutscher 1159-60).

As a matter of fact, the ads contain only four outside label records out of almost 90 depicted. The four are Kapp's "Music for Trumpet" (Vol. I), and Mercury's "1812 Overture," "Strauss Family," and "Schuman Symphony No. 3." No Club injury to retail sales of those records is shown (see RPFs 301-02, 335 (e); Exceptions, pages 265-66).

Kutscher's testimony is followed by "see also" citations to the testimony of seven other witnesses. None of the cited transcript references for those witnesses support the finding that the "offer of 'war horses' on the Columbia and Licensor's labels had reduced \* \* \* sales on this important classical product."

*Dealers "Driven Out of Business"*—CPF's 330-32 purport to show three dealers "driven out of business" by the licensing agreements. The record does not support a finding that the Club or its sale of outside labels drove those three dealers or any other dealers out of business.

Even ignoring the facts respecting the huge increase in the number of retailers, the new store openings of retailers who testified in this case constitute facts helping to put in perspective the dealer failures cited in CPF's 330-32. (See Exceptions, pages 266-69.)

The testimony of the three dealers referred to in CPF's 330-32, moreover, does not stand for the proposition that the Club drove them out of business.

The store of Huntington, one of those cited, was not "driven out of business." It is still in operation. Huntington sold the store to his manager and joined the family's oil business which "wanted some new blood" (Huntington 3155, 3160, 3167, 3176). Huntington testified that "there has been a large increase in the number of retailers in town" since 1956 (Huntington 3171).

The two other dealers referred to in these findings, Barwis and Sonnheim, left the record business in Philadelphia in 1961, after Korvette, Goody, Gimbels and others invaded that city and launched price wars which drove prices as low as \$1.39 and \$1.59 (see RPFs 337-38; Barwis 2452, 2454, 2462, 2468-71; Sonnheim 2666-67, 2672-74, 2683-84). The new wave of discount stores influenced their decisions to close shop (Sonnheim 2684; Barwis 2480).

While Barwis and Sonnheim claimed that their volume was declining, sales of outside labels and other records by one of their distributors to other dealers in Philadelphia were rising (Rosen

2251, 2256, 2259). The fact that this distributor gave "better prices" to Korvette, Gimbels, Goody and to everybody "except the poor, small retailer" (Rosen 2257-58) also may have influenced their decision to leave the record business.

While Barwis and Sonnheim are pictured in the Government's proposed findings as centering their attack on the outside label issue, they in fact expressed blanket opposition to all record clubs (Barwis 2452, 2455, 2472-73; Sonnheim 2664, 2681). Sonnheim opposed "record clubs right from the beginning" (Tr. 2676)—long before Columbia took on outside labels.

Sonnheim's testimony about Club prices should be evaluated in light of the fact that he began discounting, not in 1955 when the Club began, but in 1958 after Korvette opened its first store in Philadelphia (Sonnheim 2667-68). Sonnheim's testimony that the Club was the first discounter in Philadelphia (Sonnheim 2668) was contradicted both by Government witnesses Barwis, who began discounting in about 1950 (Barwis 2453, 2467), and Fischer who began even earlier (Fischer 2438).

"Views" versus Facts—Considering the record as a whole, we find that Government counsel presented nearly 50 record dealers who testified, in the main, that record clubs in general, and the Columbia Record Club in particular, hurt dealers.

Despite the volume of such testimony, however, it failed to establish that record clubs have injured retailers, or that such injury is probable. Contrary to the largely uncorroborated "views" of Government counsel's dealer witnesses, there were uncontradicted statistical and scientific data—much of it from evidence introduced or supported by Government counsel.

The claim that clubs eliminated retailers was demolished by Government counsel's chief industry expert, Thomas Noonan. He testified that in 1955 (when the Columbia Record Club started in business) there were approximately 15,000 outlets in the United States selling records at retail—and that by 1962 there were 150,000 (Noonan 6867).

The "view" that record clubs in general, or the Columbia Record Club in particular, had brought about a substantial decrease in the sale of records at retail was also refuted statistically. Sales of records by dealers, far from decreasing, have boomed. Noonan testified that sales by dealers have increased substantially since 1955 (Noonan 6867, 6952)—a fact fully corroborated by the *Billboard* store survey, upon which Government counsel relied. That survey shows that, since mid-1957, record sales in nonrack outlets have increased at a tremendous rate (RX 311 *in camera*,

page VII); and that LP sales, in particular, have grown rapidly (RX 311 *in camera*, page VIII).

Similarly, sales in outlets serviced by rack jobbers have zoomed since the formation of the Columbia Record Club in 1955. Such sales increased from virtually zero in 1955 to \$200,000,000 by 1962 (CX 199d; Noonan 6865-68).

Such uncontradicted statistics fully confirmed the testimony of William Gallagher, head of marketing at Columbia, concerning the growth of Columbia's retail sales. The bulk of the records distributed by the Club have been Columbia records; and if the contentions made in the case-in-chief were correct, Columbia's non-Club sales should have been adversely affected. Instead, Columbia's non-Club LP sales to distributors increased 230% between 1955 and 1962 (Gallagher 8895-98).

A series of exhibits (RXs 454-69 *in camera*), based on the *Billboard* store survey, further refutes the "views" of dealer witnesses about retail injury, and generally supports testimony and statistics by outside labels that the Club had not hurt their store sales (see RPF 286).

Other uncontradicted statistics dispute the "views" of the anti-Club dealers in still another exhibit (RX 470 *in camera*), based on the *Billboard* store survey. That exhibit measures the changes which took place in the share of LP sales of each of the outside labels, since the date of its licensing agreement, in nonracked retail stores located in two markets, New York and Philadelphia. The exhibit shows ten instances of increase, two of no change, and only four of decrease (RX 470 *in camera*; see RPF 287).

Columbia Records also registered substantial increases in sales in the very areas of the country where Government counsel's dealer witnesses were claiming that there had been a diminution of sales. According to Gallagher (Tr. 8895-98), Columbia's non-Club LP sales had grown as follows since 1955:

- New York, up 218%.
- Hartford-Albany area, up 193%.
- Washington, D.C., up 288%.
- Boston area, up 438%.
- Chicago area, up 205%.
- Los Angeles area, up 435%.

The record does not show fully comparable figures limited to LP sales in the Philadelphia area. However, it does show that Columbia's branch sales of all types of records to retail outlets rose substantially in Philadelphia in recent years (RX 472 *in camera*; RPF 288).

The sales experience of the outside label companies in those geographical areas since the distribution of their records through the Columbia Record Club was similar to that of Columbia Records. The pattern is inconsistent with any claim of dealer injury (see RPF 289).

Further refutation of the claim of dealer injury comes from statistical evidence and related testimony on the subject of the long time-gap between the retail release of a record and its use in the Club—a lag frequently referred to in the testimony as “lead time.” The evidence shows that while there are some records which have healthy sales lives for long periods, the vast majority of records have their maximum sale at retail shortly after their release.

Columbia and Epic records generally reach their peak sale at retail within two months after release (Gallagher 8896). The average “lead time” of records offered by the Club is between six months and a year; and in many instances, some of the best and most attractive records on the introductory offer list have been available at retail for from five to eight years (Keating 5150). The Club’s advertising schedule virtually insures in most instances a minimum of six months from retail release because the records appearing in an advertisement have to be selected six months in advance.

In the case of the outside labels, the “lead time” exhibits and related testimony also tended to rebut the claim of dealer injury (see RPF 292).

Basic to the claim of dealer injury was the contention that the Columbia Record Club, and other record clubs, took purchasers out of record stores. But no Government witness even purported to have conducted a scientific survey of any kind to establish what had really happened.

Generally, the witnesses made no effort to, or were unable to, name allegedly “lost” customers. One witness, Hollander, gave the names of six specific customers whom he thought he had lost permanently as customers. Of the three who could be located, two were no longer members of the Columbia Record Club at the time of the trial (Gartenberg 10,359); and all three had moved out of Hollander’s neighborhood (Stipulation 10,489-90).

The evidence submitted by respondents, however, established that the clubs did not take purchasers out of the stores permanently, or even temporarily, and this evidence was offered generally in the form of scientific surveys or otherwise uncontradicted statistical data:



(a) National Family Opinion (NFO) keeps track of record purchasers by a consumer panel representing a cross-section of the nation's families. In 1962, NFO found that club families, on the average, purchased 60% more LPs from record dealers and other non-club sources than did non-club families (RXs 347a, 444).

(b) Eldridge Foskett, a marketing expert who originally designed the *Billboard* store survey, made a survey for the RCA clubs which showed that 73% of RCA club members bought records at retail during the tenure of their club membership; and that they bought more records in retail stores than did the non-club members (Foskett 7118-20).

(c) As early as 1957, Politz had found that Club members, during their last year of membership, purchased more records from dealers than they bought from the Club (RX 445). Moreover, Club members in the six months preceding the survey had bought as many records from retailers as they had purchased from the Club during the last year of their membership (RXs 445, 446).

(d) In 1960 Stewart-Dougall found that 74.8% of the Club members were simultaneously buying records from non-Club sources (RX 338). In 1963, this was confirmed at the trial. Each of the Club member witnesses called by respondents with respect to the Count II issues was familiar with prices at the discount stores because he or she was also purchasing records simultaneously from retailers (Anderson 6458-59; Dreyer 6416-17; Bien 7418-21; Miller 7190-93; Riley 7098-99, 7102-03; Halderman 7476-79; Jackson 7197-7200; Barlow 7671-75; Lutz 7882-83).

(e) As a result of the high rate of drop-outs among Club members, many record buyers, accustomed to regular and systematic record purchasing, become available to retail outlets each year upon the termination of their membership, assuming *arguendo* that they had not been so available previously.

*Classics and "Cream"*—One of the most repeated lines of attack at the trial was that the Columbia Record Club had a detrimental effect on the sale of classical records by dealers. As it turned out, that line of testimony had no relevance to the supposedly central issue in this case—the sale of outside labels. The Club's offer of classical records has consisted almost exclusively of Columbia and Epic material, with very little representation of outside label material (Keating 5257; CX 780). Relatively few classical records on outside labels were even referred to at the trial.

The anti-Club testimony on classical sales was contradicted by an exhibit based on the *Billboard* store survey—a survey vouched

for by complaint counsel. That exhibit (RX 483 *in camera*) shows that the sale of classical records in retail stores almost tripled between 1958 and 1962; and that, indeed, classical sales grew at a faster rate than popular sales.

Columbia's classical sales at retail, far from declining, increased 11 times between 1955 and 1962 (Chapin 7322, 7393). This occurred at the same time that the Club was offering Columbia classical records to its members. (See also RPFs 299-305.)

Still another claim of dealer injury was that the Club sold only "hits" or "cream" (see, *e.g.*, Hurst 3189; F. Hartstone 1773-74). That charge likewise was refuted by statistics and live testimony.

The lead-time studies definitely show that the Club offers records after their peak sales in record stores—after the "cream" has been skimmed off (RPFs 290-92).

Moreover, Keating and Gallagher cited numerous specific examples of records offered through the Club which were never hits at retail, or which had ceased to sell at retail and resumed selling at retail only after they were offered through the Club (Gallagher 8920-24; Keating 5256-57). Such testimony was fully corroborated with respect to outside label records sold in the Club by Dave Kapp of Kapp Records (Kapp 5780-85, 5798), Julie London's business manager (Ginter 6062-67), Irving Green of Mercury (Green 10207, 10209, 10210-11), Art Talmadge of United Artists (Talmadge 7823-25) and Bohanan of Liberty (Bohanan 6360-62), among others. Those witnesses testified that the outside label records offered in the Club included many old records which had never been successful at retail, or whose success had come years ago.

Statistics as to the location of Club members and their buying habits further undercut the claim of dealer injury. Record retailers are primarily clustered in the large cities and their environs (Adler 4927, 5103-04; Pierce 6749; Max 9557-61; RXs 447-49). For the most part, the Government's dealer witnesses came from the large metropolitan areas, primarily Philadelphia.

Nearly 21% of the Club's membership lived in areas not serviced by dealers (Gartenberg 8496). Similarly, the percentage of dollars spent by members of record clubs for club purchases, as contrasted with non-club purchases, is highest in the rural areas and smaller population centers, and lowest in the very areas from which the Government's witnesses came (RPF 415).

In the light of the claims by certain Government witnesses that they lost sales on particular Columbia records, a statistical analysis was made of the cumulative growth-rate of 17 Columbia classical

and popular records. The study was designed to measure the effect, if any, of Club use on the cumulative growth-rate of the records at retail. Certain of the records demonstrated an impressive increase in their cumulative growth-rate after Club use. The charts of the other records showed that their cumulative growth-rate at retail had been consistent, thus establishing statistically that Club usage had not had an adverse effect on retail sales. Gallagher corroborated that the charts and sales patterns set forth in the exhibits established that the Club offer had no adverse effect on the retail sales of the records involved (Gallagher 8112-13). Earlier, Gallagher had testified that Club sales had had "no effect" on retail sales; but the apparent inconsistency is understandable when viewed in context (see RPFs 309-12).

In mid-trial, respondents went out into the field to test the testimony of Government counsel's dealer witnesses that the Club deprived them of consumer sales of records of the outside labels that were distributed by the Club. Respondents sent shoppers to the stores of those witnesses to shop for outside label records, not theretofore used by the Club, which were to be offered for the first time by the Club in the next several months. The stores shopped were those of dealer witnesses in Philadelphia and the Mid-West. The proof in the City of Brotherly Love showed that 61% of the records were not even stocked in the dealer's place of business. In the Chicago stores, 72% of the records were not available (RXs 327, 328).

There also was opinion testimony by Goddard Lieberson of Columbia Records, George Marek of RCA Victor, Daniel Bonbright of Capitol and Walter Hitesman of the Reader's Digest that record clubs have affirmatively assisted retailers and have not adversely affected retail sales (Lieberson 4845-47; Marek 1885; Bonbright 3526-27; Hitesman 10,139).

It is not without significance that this was also the official view of *Billboard*, whose subscribers are primarily retailers. *Billboard* has consistently supported the Columbia Club and other record clubs in its editorials. In 1955, a *Billboard* editorial predicted that the Club would benefit record dealers (RX 113). Again in late 1957, *Billboard* hailed the proposed entry of RCA and Capitol into the record club business, correctly predicting that this would broaden the base of record purchasing, bring long-range benefits to all, and specifically benefit retailers (RX 114). In 1958, *Billboard* frankly advised its dealer readers that "no information has come to our attention to support the claim that clubs are harmful to dealers."

At the time of the trial, there was still available "no information" which supports the claim of dealer injury. Noonan, *Billboard's* chief researcher, when he appeared as Government counsel's marketing expert, admitted on cross-examination that he did not believe that record clubs had an adverse effect on retail sales (Noonan 590). By way of contrast, Noonan was of the view that the growth of rack jobbers and large discount department stores did have an adverse effect on many retailers (Noonan 591).

Respondents called as witnesses a number of record retailers with stores of varying sizes and locations. Their testimony directly contradicted the testimony of those dealers called by Government counsel who claimed injury. In evaluating the conflicting opinion evidence offered by dealer witnesses called by both sides, it is highly significant that in general, the statistical evidence supports respondents' witnesses and contradicts Government counsel's witnesses.

Respondents also called two rack jobbers as witnesses. It is significant that complaint counsel refrained from calling any rack jobber on the issue of retail injury, despite the fact that 25% of all retail sales are accounted for by outlets serviced by racks, which represent the fastest growing means of distribution in the industry. Testimony of the rack jobbers directly contradicted the testimony elicited by Government counsel from many dealers.

Respondents presented a wide variety of dealer witnesses. Some were small retailers operating single stores (*e.g.*, Blincoe (5681), Zenger (6294), Dunlap (5895)); others were operating several retail stores (*e.g.*, Karol (5572), Inden (5541), Del Padre (5629)); one represented a well-known chain of 31 stores in major cities throughout the United States (Prince (5502)); one serviced 4,000 accounts in at least 500 cities (Schlang (6702)); another, previously called as a witness by the Government, sold to 90 stores throughout the nation (Arlen (762, 5717)).

Those dealers and rack jobbers showed a substantial increase in sales and were expanding their operations. They were doing this in the face of competition from the Korvettes, the Goodys, the other discount houses and presumably from anyone else selling records. (See, *e.g.*, sellers listed in RPF 320.) The witnesses called by Columbia testified that the record clubs affirmatively assisted retailers and had not adversely affected sales; that intensive Club advertising and promotion introduced the consuming public to records and stimulated their store traffic; and that the Club's dealer-redemption-center plan also stimulated store traffic and led to extra sales (RPF 321).

Finally, specific Columbia and outside label records that the Club had sold in large quantities—and one or more of which were alleged by Commission dealer witnesses to be poor retail sellers due to the Club—were found by these witnesses to be excellent sellers in their stores (RPF 322).

Statistical evidence from the Government's own witnesses, and Government counsel's failure to elicit financial data from other witnesses, further deflated the already punctured contention that dealers were financially injured by record clubs generally, or by the Columbia Club in particular. RPF 327 shows the following:

(a) Of more than 40 dealer witnesses presented by the Government, 25 clearly admitted a positive increase in sales or (in a few instances) no significant decline in a comfortable sales volume.

(b) Eight other witnesses who offered some statistics on sales provided no comparative figures for other years which would establish any decline in volume. It may be inferred from the failure of Government counsel to establish such data that those witnesses had suffered no decline.

(c) Only approximately 12 dealer witnesses—eight of them from Philadelphia—could claim, on the basis of their own unaudited statistics, any real decline in retail sales volume. Even accepting those figures at face value, the statistical evidence as to all dealers throughout the nation showed how atypical the experience of those few dealers really was.

(d) Government counsel called as witnesses many representatives of long-established New York department stores, many of which sold records in large volume. Those witnesses represented no less than a total of 123 important retail outlets for records (including Arlen, who serviced rack locations in various areas of the nation). They testified, generally, that record sales had either increased or had remained at a constant respectable level. Significantly, not a single one of those witnesses was questioned on the issue of alleged dealer injury.

The testimony of many Government dealer witnesses had no real relevance at all to the question of the propriety of the sale by the Club of outside labels—which was described in the prehearing conference as the central issue in this case (Prehearing conference, September 12, 1962, Tr. 8). To the contrary, witness after witness frankly admitted that he had formed his adverse "views" about clubs long before the sale of outside labels by Columbia (see *e.g.*, Metcalfe 2928; Hollander 3132-33; Schaps 3338-39; Fischer 2435; Morlitz 2323-24; Sonnheim 2681).

Those witnesses were exemplified by Metcalfe of Arkansas who,

until his expulsion from the Society of Record Dealers (SORD), led a boycott to eliminate the Columbia Record Club from the record business, to destroy the other clubs as well, and to make them "vanish from the scene" (Metcalf 2928; RXs 25-31, 34). Metcalfe saw nothing wrong in a little "collusion among the dealers" to achieve this goal (RX 33).

That the outside label issue was extraneous to key Government witnesses, is illustrated by the actions taken by SORD, a group of Chicago dealers, some of whom testified as Government witnesses at the Chicago hearings. SORD in 1961 represented 250 retail outlets (Winograd 3065).

In 1959, SORD financed a lawsuit against the RCA, Columbia and Capitol record clubs in the United States District Court for the Northern District of Illinois. That action did not single out Columbia for separate treatment. Instead, SORD sought to have the Court declare illegal the basic operations of all three record clubs. There was no mention in the complaint of the sale of outside labels by the Club (Winograd 3066-67) and the complaint was never at any time amended to include it. Indeed, as late as 1961, while the case was still pending, the president of SORD still regarded the problem as one of record clubs in general (RX 32).

It may be reasonably inferred that if the sale of outside labels had in fact been an important factor to the SORD group financing the lawsuit—as it was in their testimony—it would have been included in the original complaint or in some amendment that could have been made during the three-year pendency of the suit (which proceeded simultaneously with the investigation herein). The SORD case was dismissed with prejudice in 1962.

Further persuasive evidence that it was not the sale of outside labels by the Club that engendered dealer opposition appears from the grudging admission of many witnesses, usually on cross-examination, that the RCA, Capitol and Angel clubs had an "identical" adverse effect or "some" adverse affect (see RPF 330).

Since RCA and Capitol did not regularly sell outside labels, the testimony of those witnesses obviously rests on the premise that the very existence of record clubs is undesirable to their own operations. Their real objective was to see that all record clubs were "dissolved" (Metcalf 2933, 2938).

The bulk of the records which have been offered through the Club consists of Columbia records. Accordingly, if the dealers' general claim of injury as a result of Club sales were correct, they should have been able to establish statistically that those Columbia

records were not successful in their stores. Yet, witness after witness conceded on cross-examination that Columbia records that had been distributed in large quantities through the Club remained among their best sellers (RPF 331).

Along the same line, despite claims of injury on the outside label issue expressed by some Government witnesses, cross-examination developed that the various outside label artists and records offered by the Club remained large sellers in their stores (see RPF 332).

For facts and circumstances tending to discredit the claims of Government dealer witnesses that the sale of specific records had been adversely affected by the Club, see RPFs 333-35.

Some dealers claimed that specific records were not good sellers due to the Club, whereas, others named the same records as among their best sellers.

The evidence relating to Kapp's "Music for Trumpet" (RPF 335(e)) is particularly instructive. (See also RPF 335(f).)

On direct examination, the dealers and distributors called by the Government were asked about the effects on their business of the Columbia Record Club. Frequently, the implication was left that that was the only or principal source of their grievances. But most of the dealers and distributors stated, on cross-examination, that their businesses had been adversely affected by discounters (including particularly Korvette and Sam Goody) and rack jobbers (see RPF 336). It is not without significance that while some small retailers in Philadelphia complained that their volume was reduced, Korvette's sales in Philadelphia were increasing (Rothfeld 3981).

In those circumstances, there is no solid basis for findings that the principal fault lay at the doorstep of the Columbia Record Club.

*Other Competitive Problems*—The impact of the discount houses is highlighted by the advertisements in the record. Whereas Club members paid an average price of \$2.41 in 1961 and \$2.37 in 1962 for a \$3.98 LP in their first year of Club membership, and \$2.88 per record during their second year of Club membership, they could have purchased at least some of the same records from Sam Goody, Korvette and other discounters at lower prices. The discounters offered regular programs of discounts, sometimes euphemistically referred to as sales, lasting four or five consecutive months, week in and week out (see RPF 337).

Thus, Korvette was offering current best-selling catalog material like "The First Family" and "My Son, the Folksinger" at regular intervals at prices ranging from \$1.39 to \$1.97 (see RXs 4, 5, 143,

146, 284, 286; Freedman 2596-97; Smith 2171). Sam Goody was regularly offering catalog material to customers at a price per record usually below \$2 (RXs 1, 9, 12, 13b, 14, 6, 285, 287, 144). Gimbels sold at comparably low prices (Doctor 784-88; Freedman 2596-97; R. Smith 2171; Sonnheim 2674). Other retailers were offering records at such prices as four for \$6 and three for \$4.29 (RXs 267, 268). Abraham & Straus sold at prices ranging from \$1.29 to \$1.93 (Goldfinger 1135). Klein's sold at prices as low as \$1.87 (Germain 992). Alexander's sold at prices as low as \$1.66 (Rosner 812).

Outside New York, variety stores and large discount houses were selling at even lower prices ranging from 77¢ per record up to \$2.17 per record (Schaps 3357-60, 3367-68; F. Hartstone 1795-97; RXs 141-42, 147, 266).

There was even a certain element of the "pot calling the kettle black." Korvette, which had ringed Philadelphia with discount stores and triggered off a "price war" with Gimbels—and had thereby become the subject of vigorous dealer complaint—professed to have been adversely affected by the Columbia Record Club and by rack jobbers (Rothfeld 3968, 3980). Sam Goody, on the other hand, complained that the Columbia Record Club and Korvette had adversely affected his business (Stolon 1276-77, 1287). (Compare CPFs 340-41 with respondents' Exceptions, pages 275-79.)

In assessing the Philadelphia dealer picture, it is fair to note that this was the home of an aggressive dealer organization compelled to dissolve in 1951 by virtue of Department of Justice anti-trust prosecution (Fischer 2430; RXs 22a-b, 36, 38). Moreover, there had been a huge increase in the past few years in the number of large discounters in Philadelphia. Korvette in that period had ringed the city with five stores. Gimbels opened four stores. And, Sam Goody and Litt Brothers, among others, opened discount operations. All were using records as loss-leaders on some occasions. Gimbels and Korvette's climaxed this competition with a vigorous price war which had its effect on all retailers (see RPF 338).

There were other incidents that undoubtedly induced some dealers to feel competitive problems. Thus, there were charges of "unexplainable purchases" by large-sized dealers at more favorable prices than those given to small dealers (Collins 3005-06, 3013, 3018-19; Rubinstein 2217). Government counsel unexplainably produced the witnesses who could explain the "unexplainable." In Philadelphia, distributor Harry Rosen, an important supplier



to all the Government's Philadelphia witnesses, testified on cross-examination that he gave all of the large discount houses and dealers better prices than their smaller competitors (Rosen 2257).

Meanwhile, back in New York, Fink, a supplier of all the Government's New York witnesses, conceded on cross-examination that he sold records to large retailers at lower prices than he sold to smaller retailers (Fink 1460-61). Other distributors had similar pricing programs.

With such testimony available, there is no foundation for attributing alleged dealer injury to the Club.

*Distributor Witnesses*—Although some of the Government's distributor witnesses indicated that their dealers suffered injury from Club competition, two of them—one billed as "typical" (Tr. 174)—made no claim of injury due to record clubs (Keenholtz 1423 and Shocket 166). All of them, moreover, conceded that their competitive problems arose from sources other than record clubs, and also that their businesses were growing. They complained bitterly about the alleged effects on their business of the large discount houses and rack jobbers (Hartstone 3467-71; L. Smith 1408-09; Fink 1467-68; Roskin 2106; Rosen 2258; Shocket 254). At the same time, some of them simultaneously operated as rack jobbers on the side and serviced locations that undersold their regular dealer customers (e.g., L. Smith 1406, 1415).

Distributors also complained about the effects of transshipping into their area by outside distributors and others at lower prices than they were charging, to the point where they were not even the largest suppliers of records to retailers in their areas (Shocket 206, 211-12, 217, 235-36; Keenholtz 1425-26; 1430-33; L. Smith 1407, 1418-20; Roskin 2118-19, 2121; Fink 1455-60; Rosen 2260; Winograd 3074). On cross-examination, distributor Smith also admitted that it was detrimental to his business that his manager embezzled his funds while his warehousemen stole his records (Tr. 1418).

On the other hand, many of the distributor witnesses were themselves expert in the practice of transshipping (Smith 1405-08; Keenholtz 1426, 1430-33; Roskin 2118-19, 2121). For example, Sam Keenholtz, who acts as both a distributor and "one-stop" in the New York area, was facile enough also to function simultaneously as both a transshipper and transshippee—he transships to "anybody and anyone" and buys from most transshippers into his area (Tr. 1426, 1423). He testified that "the 49 states are shipping to the 50th, and New York is the 50th" (Keenholtz 1431-32). Government witness Shocket, a neighboring distributor in "the

50th" state, takes a different view about transshipping. He instituted legal action to prevent transshipping and in fact "inhibited" some transshippers (Shocket 236).

Despite the problems, distributor Hartstone's business in Los Angeles, Boston and San Francisco was shown to be increasing each year, including particularly his sales at retail of Liberty records (G. Hartstone 3463, 3474); his accounts had not decreased in four years (G. Hartstone 3463); and the Hartstones had just opened a new distributorship in Cleveland (Gallagher 8791-94). Distributor Fink's sale of outside label records, particularly Kapp and United Artists, were higher in 1962 than 1961 (Fink 1464-65). Distributor Roskin's dollar sales to retailers also had increased from 1955 to 1962 (Roskin 2104-17). Distributor Rosen's business increased \$1 million in 1962 (Rosen 2251). And, distributor Shocket's sales rose \$100,000 in 1962 (Shocket 216). As far as the injury testimony given by Roskin and Smith is concerned, it must be considered against their background as apparently disgruntled exdistributors for Columbia. (See also respondents' Exceptions, pages 269-75.)

The record thus supports no claim of distributor injury, and certainly no claim that the Club caused whatever injury there might have been.

According to CPF 342, "The adverse effect on retail dealers of the Licensing Agreements was anticipated by the Licensors' themselves."

The fact is that a number of record manufacturers, for different reasons, and at different times, have published advertisements or brochures in which reference has been made to clubs.

Although respondents argue (Exceptions, page 279) that "None of these advertisements or brochures, and none of the testimony establishes that these manufacturers anticipated that club distribution would have an 'adverse effect' on retail dealers," it is clear that the ads were designed to suggest that clubs were injurious to dealers.

At any rate, even if the licensors or others did anticipate that clubs would have an adverse effect, such advance speculation would be immaterial. The evidence (statistical and other) showed that Club distribution had no adverse effect on actual retail sales (see CPFs 342-46 and Exceptions thereto).

#### *Manufacturers*

According to the complaint (Par. Ten (5)), the licensing agreements, individually and collectively, not only threaten generally

to hinder competition or tend to monopoly, but they also "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:

\*            \*            \*            \*            \*            \*

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

The examiner already has determined, in effect, that the licensing agreements do not *per se* constitute agreements in unlawful restraint of trade. Here we consider further their competitive impact on the outside labels and on other record manufacturers.

The agreements neither had the purpose, nor have they had the effect, of creating in respondents the "undue power" alleged in the complaint. Assuming *arguendo* the existence of such power, the examiner finds no substantial evidence of its exercise, "regularly" or otherwise.

*Outside Labels*—Looking first at competition between Columbia and the outside labels, the examiner finds that the evidence fails to prove that the agreements hindered, lessened or suppressed such competition.

In fact, the contracts stimulated competition. The manufacturers of outside labels obtained access to club distribution and advertising, with the result that they became stronger competitors at retail.

In addition, between 1958 and June 30, 1962, the Club paid large royalties to the outside labels (CX 660 *in camera*). Each of the outside labels, of course, benefited directly by the receipt of such additional revenues.

Representatives of the outside labels were called as witnesses, both by Government counsel and by respondents. They testified to the business reasons which had motivated them to enter into the contracts. None indicated any disappointment with the results.

They also testified as to the extraordinary benefits that Club distribution had brought to them. They stressed the obvious advantage of additional income which they would not otherwise have earned. They uniformly praised the Club's introductory offer, advertising and promotion of their artists, records and trade names, all of which improved their label image in the minds of the consumer and thus stimulated demand for the records in all distribution channels. They stressed that the Club had broadened the audience for their records.

They testified that Club distribution was important to and desired by their artists. They testified that Club distribution

helped them both to retain their existing artists and to bid competitively for new artists. They regarded the shipment of Club records in jackets which referred to other of their records which were available only at retail as an additional sales tool.

Club distribution had enabled them to expand the scope of their recording activities and to take risks and gambles which they would ordinarily shirk. They testified that they had become stronger competitors at retail as a result of Club distribution. (With respect to Caedmon—see Mantell 6687-89; Verve—see Osten 3552, 3541-42, 3556 and CX 638; Mercury—see Green 10,183-85, 10,206-16, RXs 536, 537; Kapp—see Kapp 5780-98, 5801-03; United Artists—see Talmadge 7823-28, 7830; Liberty—see Bennett 6509-12, CXs 503, 504, Bohanan 6362, 6367-74, 6411, RX 252; Warner Bros.—see Freidman 6090-6100, Maitland 3754-55, Conkling 6187-90, 6197-99; Cameo-Parkway—see Cohen 6750-52.)

The outside label manufacturers were also vitally interested in their retail sales, since by far the bulk of their revenues came from that source. They unanimously testified that Club distribution had not adversely affected these retail sales. Indeed, many gave specific examples of how Club distribution had in fact specifically stimulated store sales (see RPFs 219-22).

*Other Manufacturers*—Concerning the charges relating to “other manufacturers,” the record fails to show that either the agreements with outside labels or respondents’ activities in connection therewith have hindered, lessened or suppressed competition between respondents and other manufacturers of records.

The “proof” offered on this issue amounted to nothing more than attack by indirection and innuendo. Thus, it consisted mainly of generalized opinion testimony that record clubs hurt manufacturers by eliminating retailers or by causing retailers to lose sales—claims refuted by the statistical evidence.

The significance of the manufacturers’ testimony elicited by Government counsel can best be tested in the light of the history of the industry and the statistics. As already discussed, the record industry has grown from a handful of manufacturers to many hundreds. Newcomers have entered the industry, and many have achieved success overnight. Moreover, the market shares of these small companies have been steadily rising at the expense of the larger companies. But the principal Government witnesses were not the newcomers; they were mainly old line manufacturers, who, according to respondents, had “esoteric catalogs and antiquated conceptions of the meaning of competition” (RPF 343).

Among the record companies from which the Government called no witnesses was Am-Par, an important company owned by American Broadcasting-Paramount Theatres, Inc., which controls a television network, television stations, radio networks, radio stations, and theatres. In 1960, ABC's revenues exceeded \$334,000,000, and Am-Par had its best year in the record industry (RX 292, pages 2, 4). Nor did Government counsel call Decca, a leading company which was recently purchased by the powerful Music Corporation of America (MCA) (Liebersohn 4813-14). Another example was MGM, called by the Government for limited purposes only. By 1962, MGM had achieved strength and stability, and through acquisitions and distribution arrangements, had achieved "major status in classical and popular music, jazz and comedy" (RX 293, page 11).

In 1961, before this complaint was issued, Government counsel circulated questionnaires to more than 100 companies seeking statistical evidence relating to any claim of damage due to record clubs (Prehearing Conference, pages 163-66). From this group they called 14 manufacturer witnesses (exclusive of Columbia and the outside labels). The companies represented by witnesses were Folkways, Pacific Enterprises, Capitol, Carlton, Artia-Parliament, Audio Fidelity, London, Contemporary, RCA, MGM, Reprise, Monitor, Everest and Dot.

Artia-Parliament was in bankruptcy due to undercapitalization and the high cost of financing (Frankel 2092). Otherwise, the only manufacturer whose statistics showed a decline in sales was Contemporary (Lester Koenig).

Large manufacturers like RCA, Capitol and MGM made no claim of competitive injury. Representatives of smaller companies like Reprise and Pacific Enterprises merely testified that outside labels obtained advantages through Club distribution (Ostin 3542, 3556) or that record clubs were a factor in the changing methods of merchandising in the industry (Bock 3598-99). Reprise had enjoyed a huge financial success in a very brief period (Ostin 3563-64). Dot's sales had risen from approximately \$6,000,000 in 1957 to over \$16,000,000 in 1961 (Wood 4133; RX 110). Folkways' sales in 1962 were more than ten times higher than in 1947 (Asch 2083, 2069).

If a few of the group of 14 manufacturers selected by Government counsel had not done as well as they perhaps hoped, their problems appeared explainable, at least in part, by their catalogs and merchandising methods:

Rose Rubin, specializing in Russian, Polish, Philippine, Romanian and Icelandic music, was, understandably, one of the smallest American record manufacturers (Rubin 1904, 1913; CX 310).

Asch was very strong in ethnic mountain music (Asch 2054, 2069).

Koenig was a specialist in "far-out" jazz, which had simply gone out of style (Previn 6035; Noonan 6879).

Moreover, these manufacturer witnesses turned out to be the ones who, as Mrs. Rubin put it, did not "like to break [their] price" (Rubin 1908). Similar views were held by Asch and Koenig, who testified that they "had" to get their "full price" from retailers and consumers—a price which was higher than that of their competitors (Asch 2059, 2068–69; Koenig 3619–21; Hammond 7234).

One of the Government's witnesses, Sidney Frey, seemed particularly sensitive about reduced prices. He used the phrase "malicious price cutting" and leveled this charge at the Columbia Record Club. Several years previously, Frey had published a series of advertisements condemning "malicious price cutting" by discount houses. Frey was promptly sued by the Department of Justice for price fixing, and he and his company accepted a decree prohibiting the enforcement or establishing of resale prices (Frey 2039–42; RXs 17, 18; *United States v. Audio Fidelity, Inc. and Sidney Frey*, 1960 Trade Cases §69,760 (S.D. N.Y.) 1960).

Some of the Government's manufacturer witnesses, far from eschewing club distribution, had in fact sought it and in many cases obtained it. The list included Carlton, London, MGM, Monitor, Everest, Dot, Reprise, not to mention RCA and Capitol (see, e.g., Wood 4145–52; Keating 5228–34; Rubin 1926–30; RXs 77, 79).

The Hartstone family contributed three witnesses to this litigation—a dealer, a distributor and a manufacturer. Leon Hartstone, the manufacturer, had a short-lived term as president of London Records (L. Hartstone 1175). London had negotiated with several record clubs (L. Hartstone 1073, 1078–79, 1175–80). Hartstone blamed poor sales of imported records of foreign classical artists on the fact that the classical market had been "saturated." Hartstone's theory of "saturation" assumed that sales of classical records at retail were going down, when the uncontradicted *Billboard* statistical evidence showed that they were booming (RPF 296).

The Hartstone family's complaints regarding "saturation" may be weighed against their contemporaneous business expansion. In

California, they expanded their distributorship by buying out the London branches in Los Angeles and San Francisco and by acquiring an interest in another San Francisco distributor (G. Hartstone 3460-62). In the Boston area, they opened two new retail stores in 1961 (F. Hartstone 1791). Most recently, they opened a new distributorship in Cleveland (Gallagher 8791).

Some of the "outside labels" illustrated how small companies could successfully create, merchandise and compete. Respondents also called two small record manufacturers, Don Pierce of Starday Records and Archie Bleyer of Cadence Records. Starday was originated by Pierce in 1952. In a few years, Pierce succeeded in assembling a significant catalog of country and western music (Pierce 5741, 5746). Although he found it difficult to get retailers to merchandise his products, Starday's sales rose from approximately \$100,000 in 1959 to about \$600,000 in 1962 (Pierce 5744, 5748).

Pierce recognized that the record industry, as a competitive industry, was undergoing change with the creation of new means of distributing records to the consumer. Accordingly, when distribution arrangements proved unsatisfactory, he changed them (Pierce 5742-47). He did not rely on old-fashioned methods of selling, but, instead, pioneered in the selling of records by radio mail order and was highly successful, substantially increasing this segment of his business in 1962 (Pierce 5747-49). Pierce made no claim of competitive injury of any kind. He strongly believed that record clubs broadened the base of record purchasers, helped to make the record industry larger and enabled more people to participate in this field (Pierce 5749-51).

Archie Bleyer of Cadence organized his own record company in 1952 and assembled a catalog of 40 LPs and 400 singles. Cadence, although a small company, had been successful and profitable. Bleyer, however, recognized that past successes in the record industry did not assure continued growth, and that there can be no certainty in the record business because success is dependent upon the creative elements fusing into something which will be acceptable to the public.

Bleyer made no claim of any competitive injury to his company. Indeed, as shown elsewhere, Bleyer's company recorded and, with a sales staff consisting solely of a sales manager and a secretary, sold four million copies of the record, "The First Family," the best-selling LP in the industry's history (Bleyer 6959-62).

Based upon his extensive experience as a record manufacturer and as a record retailer, Bleyer testified that the record clubs, with their advertising and promotion, had not hurt retailers or

manufacturers but had a helpful effect on the entire record business (Bleyer 6972-73).

CPF 393 as to the purpose of the licensing agreements is rejected insofar as it implies any predatory purpose. The internal memorandum relied on (CX 81a,d) reflects the concern of Columbia's Adler over lack of variety of both artists and repertoire as the major weakness of any single label club. Adler felt that "judicious and selective use of minor labels" would "strengthen the Club's over-all position." However, in context, the examiner finds no predatory motivation reflected in this communication.

The same memorandum is relied on by the Government to support a finding (CPF 394) that "The growth of the Club through Licensing Agreements, is welcomed by officials of CBS as a method of obtaining more artists for CBS, *even artists of the Licensors.*"

In the excerpt quoted by the Government, Adler undertook to counter the suggestion, made by other Columbia officials, that it would be the outside labels who would most benefit from their Club contract and would thus be in a stronger position to hold or attract artists. Adler conceded this was a possibility but that exactly the opposite consequence was also possible. The text does not support the proposed finding in its reference to the "growth" of the Club through licensing agreements nor does it indicate that CBS "welcomed" either of the possible effects described by Adler.

It is worthy of note that the Government here pictures the licensing agreements as a device to raid outside label artists, while in CPFs 151-54 the agreements are painted as preventing Columbia from bidding for those same artists.

Although one record manufacturer expressed the opinion that the licensing agreements were advantageous to Columbia, he did not testify that the addition of outside labels "made the Club stronger" or "added to the power of CBS" (Ostin 3542).

Ostin, representing Reprise Records, also expressed the opinion that the outside labels gained many advantages as a result of the licensing agreements (Ostin 3541-42).

It is relevant to note also that since its organization two years previously, Reprise had "enjoyed considerable success" and had "become one of the more important record companies in the industry" (Ostin 3563). (See CPF 395 and Exceptions.)

*Copyright Royalties*—One of the costs of producing a record is the royalty payable to the copyright owner of the published songs that are to be recorded. The owner of a copyright on a musical composition may license the right to reproduce mechanical performances embodying that composition. There is evidence that the



customary or "statutory" rate charged by music publishers is 2¢ per selection. However, there are exceptions when lower rates for particular compositions may be negotiated between the copyright owner and a record club. There is evidence of a tradition that record manufacturers pay no royalties at all on free records, but this is a tradition that publishers apparently have undertaken to oppose.

The dollar amount of copyright-royalty payments made each year for the right to make mechanical reproductions of musical compositions is substantial.

The Columbia Record Club, in common with other record clubs and mail-order sellers, pays a rate of 75% of the full rate on all records they distribute, whether sold or given away. It is hardly accurate for Government counsel to contend (CPF 397) that "CBS does receive a preferential rate for Club records."

The Club royalty rate was given by music publishers because they believed the Club would be a stimulant to the record industry (Starr 1690); because they believed the Club would reach sales not touched before without adversely affecting retail sales (Scopp 1674); because the Club represents more sales and increases the sale of music (Brown 1832-33); and because it was necessary to compromise between the view that traditionally no royalties were payable on free and bonus sales (Ackerman 4231; Wood 4138); and the publishers' position that they should be.

Under the compromise, the Club agreed to pay royalties on all records whether sold or given away. Since the average price at which the records were sold, taking into account the "mix" and free and bonus records, was less than list price on each record, the rate was set at 75% of the regular rate (Adler 4931-36; Berman 8378-81).

All record clubs and mail-order sellers receive the same rate (Starr 1687-88; Berman 8380).

Although Government counsel propose a finding (CPF 397) that Columbia "refuses to include records in the Club for which they cannot obtain a special copyright rate," the only record reference cited (CX 547) does not provide reliable proof of that statement (see respondents' Exceptions, page 335; CXs 527b, 523a).

There is no substantial or reliable proof of any competitive injury, actual or potential, based on the so-called preferential copyright rate allegedly received by the record clubs. The evidence presented by the Government in that regard is simply suggestive and speculative.

Additionally, there may be a question whether or not such a charge is embraced within the confines of the complaint. Presumably, a preferential rate might be viewed as "an unfair competitive advantage" enjoyed by Columbia "that is not the natural result of free and open competition," as alleged in Paragraph Nine of the complaint. In any event, the allegation remains unproved.

Government counsel propose a finding (CPF 398) that "The power of CBS and the Club is such that music publishers are merely informed of the Club's 'usual rate' and this preferential fee is *assumed* without prior consultation with the purchasers."

That sweeping statement is not supported either by the cited record references or any other evidence in the record. As previously noted, the evidence indicates that Columbia conducted extensive negotiations with publishers and that it received the same rate as other club and other mail-order sellers.

The letter relied on by the Government (CX 237) told a questioning publisher:

This adjustment [75% of the rate] was made by us on the basis of an agreement reached with the major music publishers, and is applied uniformly in respect of all records issued through our Record Club.

That was in response to an inquiry from the publisher asking the Club to check into royalties paid to it.

The Government did not introduce any evidence to illuminate this matter, did not produce the license agreement on the song involved, and did not present any information as to the publisher's agreement, disagreement or any other reaction to the reply it received. It appears that the Government would have introduced such evidence if it were available, since it was Bernard Solomon, an officer of the publishing company, who furnished the letters. Solomon testified, but was merely asked to identify the documents.

*"Cumulative" Effects*—It is doubtless true that the sale of outside labels to the Club has prompted some other manufacturers to give consideration to seeking such distribution themselves as a means of increasing sales. However, such an exercise of business judgment on the part of a variety of record manufacturers does not, in the examiner's opinion, add up to any kind of "cumulative effect" significant from an antitrust standpoint.

The Government proposes an inference that the cumulative effect of the licensing agreements is to encourage many independent record manufacturers to seek affiliation with the Columbia Record Club. The facts relied on are open also to the inference

that the cumulative effect may be to encourage such manufacturers to take other steps in response to the competitive situation presented.

It may be noted in passing that the record references relied on by the Government in CPFs 401-02 lend scant support, if any, to the contentions made, and some of them are wholly irrelevant.

Oddly enough, the Government proposes a finding here (CPF 402) that "Independents have begun to view Club affiliation as an advantage enjoyed by the Licensors in acquiring properties and new artists." If such a "view" is to be relied on—and that is what the Government seeks here—it suggests that the licensing agreements, instead of injuriously affecting competition, have had the effect of strengthening the competitive position of those manufacturers who have entered into such agreements. To that extent the Government has adopted the views urged by respondents.

The Government proposes a finding (CPF 403) that because the licensing agreements have impaired the vitality of record dealers as a channel of distribution, there has been a corresponding adverse effect on manufacturers dependent on dealer distribution.

That proposed finding is rejected, first, on the basis that the record does not support the claim that the vitality of the dealer as a channel of distribution has been impaired; and second, that even assuming an adverse effect on the dealer, there has been no showing that it results from the operation of the licensing agreements.

The testimony of only one witness (Winograd 3047-48) is cited in support of CPF 403, but it hardly measures up to proof of the facts alleged.

CPF 404 is revealing in its contention that manufacturer testimony, confirming and supporting dealer testimony, "showed how the effect of the Club and the aggravating effect of the Licensing Agreements on the dealer level works its way up to manufacturing level \* \* \*."

As previously noted, that is a curious position for the Government to take. In view of the fact that the Club method of distribution is not challenged by the complaint (and this was conceded by the Government at the Prehearing Conference of September 12, 1962, Tr. 38), it is difficult to predicate a finding of illegality with respect to something alleged to aggravate the effect of something that is completely lawful.

It must be said that that was indeed the purport of the manufacturer testimony relied on by the Government. To the

extent that manufacturers complained, their testimony was directed primarily to the principle, operation and functioning of all record clubs. Moreover, such testimony of Messrs. Wood, Hartstone and Asch was more in the nature of opinions and views than it was, or even purported to be, factual. The claim of manufacturer injury, actual or potential, is hardly supported by the testimony relied on by the Government. (See respondents' Exceptions, pages 340-48.)

In the first three sentences of CPF 405, the Government synthesizes the theory of its case against the licensing agreements. It proposes an ultimate finding that the licensing agreements "have a cyclical effect," with the "adverse effect on the dealer" affecting in turn the manufacturer who then must "contemplate Licensing which must inevitably further affect dealers."

That proposed finding is not supported by the record citations given or by the record as a whole. The expression of beliefs and opinions as to possibilities by one record manufacturer does not constitute reliable, probative or substantial evidence of the claim here made. Actually, the purport of Wood's testimony did not concern the licensing agreements but the operation of record clubs.

Another proposed finding (CPF 406) crucial to the Government's position in this case is to the effect that Columbia's use of outside labels "encourages" the other two members of the "Big Three" to "engage in the same practices." Both RCA Victor and Capitol Records have made some limited use in their clubs of records produced by others, but this has been on a different basis from that utilized by Columbia. The records were distributed under the RCA and Capitol labels, respectively.

Both RCA and Capitol have had discussions or negotiations concerning the possibility of distributing outside labels through their Clubs.

The record fails to support the claim of the Government that RCA Victor "is poised and ready to enter into Licensing Agreements with several important labels \* \* \*." That is too broad an inference to be drawn from the testimony cited, although there was recognition by an RCA official that the distribution of outside labels by the RCA Victor Record Club would "help" that Club and make it "more successful."

With respect to Capitol, the Government concedes that the vice chairman of the Board of Capitol, who is also president of the Capitol Record Club, testified that the offering of outside labels is not "essential" for the Capitol Record Club. It probably is not

too much to say that the idea of distributing outside labels interests the Capitol Record Club. (Compare CPFs 406-07 and Exceptions; see also RPFs 191-196a.)

On the basis of the record, it is possible, perhaps even likely, that RCA or Capitol, or both, might engage in the record club distribution of outside labels, at such time as the legal status of such arrangements has been clarified. The effect on the competitive picture stemming from such a development is wholly speculative and conjectural.

CPFs 408-14 represent an effort by the Government to paint a picture of the "Big Three"—Columbia, RCA and Capitol—as "dominant forces in all aspects of the record industry," with Big Three "unanimity" and with the rest of the industry accepting "Big Three decisions as the standard." The only record support advanced for the proposed finding that those three companies are "dominant," is a Capitol Records annual report stating that the Capitol and Angel labels continue to rank in the industry's "Big Three" (RX 290).

It would unduly extend this initial decision to discuss fully the opposing contentions of the parties in this regard and to put all the evidence of record in perspective. Whether or not the industry is competitive or oligopolistic is a relevant matter, but the Government claims too much in CPFs 408-14.

Without rehashing the detailed evidence, it is fair to say that each of the so-called Big Three is a part of a larger corporate complex engaged in diversified activities. Each is a major factor in the record industry, but it cannot be found that they are "dominant" in all aspects of the record industry, separately or collectively.

The record catalogs of RCA, Columbia and Capitol are among the largest in the United States. That is not firmly or specifically supported by the record but probably is a fair estimate (see Bonbright 3536).

RCA Victor is a part of Radio Corporation of America. The parent corporation is an important factor in radio and television, data processing, consumer goods, defense and space electronics, as well as phonograph records and other products. Current assets in 1961 were \$618 million, and aggregate sales were more than \$1.5 billion (CX 308), more than triple those of CBS. RCA Victor is a major factor in classical, popular, original Broadway cast, and jazz albums, as well as in singles (CX 308). (See CPF 410 and Exceptions.)

Capitol is owned by Electrical and Music Industries, Ltd. (EMI) (Bonbright 3484), which boasts that one out of every four records sold in the world is on an EMI label (RX 39a). EMI is a large, diversified, internationally active corporation, whose aggregate sales in 1961 amounted to £82,440,000. This company is active in radio and television, scientific research, household appliances, industrial manufacture and computers, as well as phonograph records and other products. EMI and Capitol have been active in virtually all subject areas of the record industry, with success in all these fields, including LPs and singles. (See RXs 39-44; Bonbright 3847-89, 3517-18; CPF 411 and Exceptions.)

The examiner rejects CPF 413 as unsupported by the record. To the extent that the allegation that "Big Three unanimity is predictable" constitutes a charge of combination, conspiracy or conscious parallelism, it will be noted that Government counsel have stated (Brief, page 303, footnote 167) that they "did not undertake to prove" a conspiracy. Likewise, at page 325 of their Brief (footnote 179), they say of the so-called Big Three that "each, at this time, competes vigorously with the other two."

Other factual aspects of CPF 413 are treated elsewhere in the examiner's findings.

CX 81d does not support CPF 414 to the effect that Columbia "anticipated from almost the inception of the Licensing Agreements that the Big Three would align other labels." The memorandum cited recognizes that RCA or Capitol might "seek to acquire material from other minor labels" and notes that Columbia had "a monopoly neither on the Club concept nor on the idea of distributing minor label repertoire through a club plan" (CX 81c).

*Reciprocity*—The examiner rejects CPFs 415-19, alleging "reciprocity" to be an effect of the licensing agreements, as being outside the scope of the complaint. Moreover, the examiner declines to find or infer (CPF 417) that "the Licensing Agreements are, minimally, conducive to a kind of reciprocal arrangement whereby CBS puts Licensors' records in the Club, and CBS also gets a larger share of the Licensors' non-Club pressings."

Of the nine "licensors" listed on CX 668c, three (Verve, Caedmon and Mercury) did no pressing business at all with Columbia, while three (Cameo, Kapp and Vanguard) did more pressing business with Columbia before entering into their licensing agreements than they did subsequently.

The Government relies in large measure for its claim of reciprocity on a proposed contract provision never agreed upon

by the parties and relating to a record company (Caedmon) which has never pressed its non-Club records with Columbia. (Compare CPFs 415-19 with respondents' Exceptions.)

*Clubs and Other Mail-Order Sellers*

The record does not support the complaint's charges (Par. Ten (6)) that the Club's arrangements with outside labels were engaged in for the purpose or with the effect of empowering respondents to "[h]inder, lessen or suppress competition between respondents and other companies engaged in the subscription method of selling phonograph records," and that respondents have "regularly exercised" such "undue power."

There are many hundreds of record manufacturers not affiliated with any major record club, among them Decca, MGM, Verve, London, Dot, Reprise, Atlantic, Am-Par, Twentieth Century Fox, Cadence (Adler 4920; Bonbright 3490, 3517; Marek 1863-69). Most of the 57 companies listed on CX 246 had no club arrangements. Virtually all the record manufacturers listed by *Billboard* (RX 310) are available for club distribution.

At the time of trial, Columbia had catalog arrangements with six record companies; arrangements on six individual records with another company; and a nonexclusive contract on twelve records with another. Each licensor is a relatively small company with a small share of retail sales (RX 453 *in camera*). The contracts are short-term agreements. Four contracts permit the outside labels to offer particular records to competitors of the Club when the Club does not use them. Three of those contracts give the outside labels the power to take their entire catalogs to any competitive record club making a better offer even during the limited period of exclusivity—and Columbia does not even have the right to match that better offer.

Neither George Marek of RCA Victor nor Daniel Bonbright of Capitol made any claim that Columbia had hindered, lessened or suppressed competition. It was, of course, natural that the Columbia Record Club would enjoy a considerable competitive advantage over RCA and Capitol, since it had almost three years of experience in the record club business before RCA and Capitol moved into that method of distribution. By that time, the Columbia Record Club already had almost 700,000 members (CX 8).

The examiner sees no necessity to make findings on the comparative merits of the Columbia, RCA and Capitol Record Clubs, as proposed in RPFs 359-64. At the least, however, it can be said

that counsel for respondents display a competitive spirit *vis-a-vis* RCA and Capitol.

In any event, despite what Columbia views as "self-imposed handicaps," the RCA clubs showed enormous growth. The initial Toscanini offer attracted 324,000 new members in 1958 (RX 649). By the end of that year, RCA had 575,000 club members (RX 648a). Thus, the record establishes that RCA's club sales have grown rapidly and have reached substantial proportions (RXs 645a; 645b *in camera*)—just like its package sales with Reader's Digest. RCA showed a huge increase in royalties payable to publishers during the year 1962, almost \$1 million higher than in 1961 (CX 231, RX 363). This was confirmed by Herman Starr, who believed that the largest single source of royalty payments to him in 1962 came from RCA Victor (Starr 7721-22).

In light of those 1962 figures *in camera*, it is hardly surprising that Mr. Marek made no claim that his company was injured by any of the activities of the Columbia Record Club. He also conceded that there were many companies not under contract to the Club whose catalogs would be "appropriate" for club distribution (Marek 1863-70). The lengthy negotiations that RCA had had with various prospective outside labels indicated that the catalogs of such companies were not merely "appropriate," but also "available."

Having available the vast repertoire of the EMI-owned or -controlled foreign catalogs, Bonbright of Capitol felt it was not "essential" for Capitol to handle "other labels" (Bonbright 3492). He felt, however, that it would be desirable to offer "artists" whom the club members wanted whether or not they recorded for other "labels" (Bonbright 3491). Shortly before the date of Mr. Bonbright's appearance, Capitol had concluded a contract to sell the Warner Bros. LP of the "Gypsy" soundtrack through the Capitol Record Club on the Capitol label (Friedman 6103-04).

As with RCA, Capitol was at some competitive disadvantage initially in the club field since it made a belated entry. But limited data furnished by Capitol show that net sales of the Capitol and Angel Record Clubs are substantial. Capitol furnished only sales data in broad ranges, with the low and high figures about 30% apart, to show an "approximate area of sales" (Tr. 3499). Those figures reflect a substantial "range" of sales (CX 465 *in camera*)—a "range" that has not grown smaller.

Both RCA and Capitol have distributed some outside label merchandise without identifying it as such (see RPFs 191-95).



RCA has conducted discussions and conversations concerning record club distribution with Dot Records (Wood 4109, 4124, 4154, 4148; Marek 1866), MGM (Marek 1861), London (Marek 1866), Caedmon (Montell 6692) and Vanguard (Solomon 1945-46).

Capitol conducted conversations about possible club distribution with Atlantic, Cadence, World Pacific, MGM, Dot, Warner Bros., Carlton and Vanguard (Bonbright 3490, 3517; Conkling 6189; Carlton 1334; Maynard Solomon 1946).

Numerous other clubs were identified in the record. Their advertising and promotion indicate that they were offering to the public Columbia's records, licensors' records and many other labels. The Citadel Record Club, for example, represented that it could offer to the public "virtually any record or album, by any artist on any label" (RX 205c); its direct mail solicitations depicted current RCA, Capitol, Angel, 20th Century Fox and Mercury material (RXs 568b, 206, 205d). The Universal Record Club in advertisements offered "every record on every label" including particularly Columbia, Capitol, RCA, Verve, Angel, United Artists, Liberty, Mercury, London, Vanguard, Dot, Monitor and Audio Fidelity records (RX 195). Music of the Month Club offered in advertisements Columbia, Capitol, Mercury, MGM and London material (RX 196). The 99¢ Record Club offered, among others, Columbia and RCA Victor material (RX 194b).

*Diners' Record Club*—Against that background, Government counsel produced only one record club or mail-order seller who even "claimed" injury—Bernard Solomon and his Diners' Record Club. Solomon's testimony can hardly be credited. He was contradicted by contemporaneous documents from his own files and by virtually every witness who had crossed his path. The real reasons for his problems, apparent from the record, were far different from those he advanced from the witness stand.

Solomon had attempted to launch a nationwide mail-order business with a smaller cash investment than is normally made by someone who wishes to open a small record shop in a quiet suburb, and his operation reflected it. Thus, in 1958, Solomon and five friends invested \$5,000 to start a multi-label record club designed to purchase finished records from manufacturers, distributors and other suppliers (Solomon 3783, 3904-05; Bennett 6524-26; RX 50). His membership never ran much above 10,000 (RX 54d). His staff never exceeded 20 employees (Solomon 3907). Solomon was the operating head of the club and, at the same time, he was running four or five other business enterprises (Solomon

3781-83, 3793, 3806, 3906). Total sales were less than the mail-order sales of some record dealers (RXs 49, 51-53; Stolon 1260).

For the right to use the name "Diners'," Solomon had to agree, among other things, to limit his membership to the approximately 1 million credit-card holders of the Diners' Club (RX 46a; Solomon 3889, 3905)—a restriction he acknowledged meant that he would not "be in competition" with other record clubs (RXs 68-69).

In addition, Solomon was required to spend most of his advertising funds in the Diners' Club magazine sent to those credit-card holders (RXs 46a-c, 54a; Solomon 3889; Bennett 6524-25). Although at some later date he opened his membership to the general public, Solomon had to continue to spend most of his advertising funds in that magazine (Bennett 6524-25; Solomon 3889; RX 54a). There was testimony that the Diners' Club magazine was an ineffective medium for attracting new members (Wunderman 6577-79).

Since it was understandably difficult to operate a national mail-order business with only \$5,000, Solomon set out to raise additional capital. In the first year of operations, he induced a group of record manufacturers to contribute more than \$30,000 to an advertising fund in return for having their records selected as the club's records-of-the-month by a panel of "leading musical experts" (RXs 46, 65a; Solomon 3905).

The contributors soon began to complain to Solomon about "negligible sales," "little or no progress," failure to receive "record-of-the-month picks," improper advertising, failure to pay his bills or send IOU's, "fantastic misuse of the term defective" in excessive returns of merchandise, failure to return phone calls and to answer letters, sloppy management, and a whole string of unkept promises (RXs 74-105).

Although Solomon's agreements with his outside labels gave him the right to demand additional advertising contributions in future years (RX 46c), he was understandably reluctant to do so (Solomon 3905).

In February 1960, after about only six months of actual operations, four of the six founders of the Diners' Record Club disposed of their investment in the venture by selling their holdings to Solomon (Bennett 6525; RX 50). One of them, Alvin Bennett of Liberty, testified that he had originally conceived the idea for the club and brought Solomon in to run it; but that Bennett and the three other selling stockholders soon concluded that the club could

not succeed because it was under-capitalized and lacked sufficient funds for advertising (Bennett 6523-26).

No claim was made that Bennett and the other investors pulled out because of any repertoire problems or because of the Columbia Record Club's contracts with outside labels. Indeed, at the time of the departure of those investors in February 1960 (RX 50b), Columbia had agreements with only two outside labels, Caedmon and Verve. Solomon had refused to deal with Caedmon and made no claim at the trial that he ever sought to deal with Verve. Bennett's disposition of his interest in the Diners' Record Club was more than 1 year and 8 months before Liberty's contract with Columbia (CX 45).

Solomon's hearsay testimony (Tr. 3937) that Bennett and another Liberty executive sold their stock holdings in the Diners' Record Club because Liberty was about to go public and the underwriters required them "to divest themselves of all outside interests in the record business," was flatly denied by Bennett (Tr. 6531-34). Moreover, Solomon did not attempt to find an excuse for the disposition of the stock in his record club by the other two resigning investors, who were officials of Challenge Records, a company which Solomon represented as accountant and business manager (CX 506; Tr. 3793, 3905, 6523-25).

Early in 1961, Solomon set out to find capital for advertising. He approached Decca and stated that, due to "limited capital," his club had always been short of advertising funds and that a mere investment of \$85,000 for that purpose would generate sales of \$5 million and net profits up to \$500,000 (RXs 54-55). That modest investment, according to Solomon, would have multiplied his club's sales 10 to 15 times (RXs 49a, 52a, 55b). Decca did not make the investment (Solomon 3931).

Bennett, who reviewed the business problems of the Diners' Record Club with Solomon, testified that Solomon never once attributed any of his difficulties to the Columbia Record Club (Tr. 6526-27). And Government counsel did not produce any witnesses to such complaints or even corroborating documentation from Solomon's files.

Solomon's attempt to put part of the blame for his difficulties on Columbia must be weighed in the light of other circumstances shown by this record.

In the spring of 1962, Solomon had made an indirect attempt to interest the Columbia Record Club in distributing the catalog of Everest, his own record company (Keating 5161-63, 5421-29;

CXs 786-87; see also Solomon 3781-82, 3916). The Club replied that it was not interested.

Shortly after the filing of the complaint in this proceeding, the corporation operating the Diners' Record Club brought an anti-trust treble-damage action against CBS and certain of its licensees (Solomon 3843), which respondents say is almost a word-for-word copy of the Commission's complaint [*The Record Club Inc. v. Columbia Broadcasting System, Inc.* (S.D. Cal., No. 62-1238)]; also see Prehearing Conference, September 12, 1962, Tr. 22-23]. Solomon furnished a copy of his pretrial deposition in that case to complaint counsel many months before the trial of this action (Solomon 3808-10).

Even if Solomon's credibility had not already been called into question, his complaints about lack of repertoire could not be taken seriously in view of the evidence to the contrary. He had complete access to the catalog of his own record company (Solomon 3781-82, 3916-17), plus many outside labels. He made heavy purchases directly from Decca, one of the oldest and largest companies in the industry with an enormous catalog (Solomon 3859-61; RX 54c). He also had formal agreements or other direct arrangements with more than 20 other outside labels (Solomon 3811-16, 3857-68), which he described as "top independent record companies" (RXs 68-69). His advertisements and literature stated that he offered the "widest selection of albums from more record companies than all the other record clubs combined" (RX 65a); "thousands of records of every kind by all the finest record companies" (RX 586); the "great performers of our time on the top labels of all time" (RX 63a-b); and the "newest recording \* \* \* top selling labels \* \* \* favorite recording artists" (RXs 56-57, 66-67). Indeed, Solomon told Decca that he felt "very strongly about the future of the Club"; and that "average annual sales per member is over twice as high as any other record club" (RXs 54d, 55a-b).

To the extent, however, that apparently he could not buy direct from Columbia, RCA or Capitol, he suffered some hardship. But that is not a charge in this proceeding.

Any claim that Columbia's agreements with a half-dozen or so outside labels could have created a product shortage for Solomon is contradicted by his own contemporaneous statements. Such a claim is also absurd in view of the hundreds of record companies, including many important firms that were not affiliated with any record club, and, most significantly, in light of Solomon's own experience with Columbia's outside labels: