IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Petitioner,	Misc. Action No. 94-338 HHG
v.	
TIME WARNER, INC., et al.,	
Respondents.	

UNITED STATES' MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF PETITION TO ENFORCE CIDS

The United States moves the Court for the issuance of an order granting leave to file a Supplemental Memorandum in Further Support of the Petition to Enforce the Civil Investigative Demands, attached hereto as Exhibit 1. In support of the motion, the United States states as follows:

1. On January 18, 1995, Respondents Time Warner, Inc., PolyGram Holding, Inc., Bertelsmann, Inc., EMI MUSIC Inc. and Sony Corporation of America moved to file a Sur-Reply in further opposition to the petition to enforce civil investigative demands filed November 3, 1994.

2. The United States does not oppose the motion to file said Sur-Reply.

3. The limited purposes of the proposed supplemental submission, seven pages in length, are (1) to file under seal a document produced by PolyGram on January 6, 1995, which document contradicts contentions first raised in the Sur-Reply; and (2) to address the reformulated position taken by the majors in the Sur-Reply.

4. Granting leave to file the Supplemental Memorandum will further sharpen the issues to be decided by the Court and is otherwise in the interest of justice.

5. Should the Court decide not to grant this motion in full, the United States respectfully requests that the Court nevertheless order that the document produced by PolyGram be filed under seal pursuant to the Agreement, Stipulation and Protective Order filed December 22, 1994.

Respectfully submitted,

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dated: January 26, 1995

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TIME WARNER, INC., et al.,	
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SUPPLEMENTAL MEMORANDUM IN
FURTHER SUPPORT OF PETITION TO ENFORCE CIDS

The United States respectfully submits this supplemental Memorandum in response to the Sur-Reply filed January 18, 1995 by Respondents Time Warner, Inc., PolyGram Holding, Inc., Bertelsmann, Inc., EMI MUSIC Inc. and Sony Corporation of America (collectively the "majors"). The principal purpose of this supplemental submission is to file and explain a document produced by PolyGram on January 6, 1995, which document is relevant to certain contentions raised in the Sur-Reply. The Memorandum also makes a limited response to the reformulated jurisdictional arguments set forth in the Sur-Reply.

ARGUMENT

1. The Foreign and Domestic Price-Fixing Schemes May Be Interconnected. In their Sur-Reply, the majors disparage the allegation that their domestic joint ventures, *i.e.*, VIVA US (music video) and DCR (digital radio), may share a common price-fixing purpose and effect with their foreign copyright societies. Sur-Reply at 8-9 ns.13 & 14. In particular, they (1)

ignore the price-fixing aspects of the existing DCR joint venture;[1] (2) chide the United States for relying on a 20% license fee (identical in substance to the demand in Europe) contained in a superseded draft of the partnership agreement; and (3) claim that, under the executed partnership agreement, all license fee negotiations will remain confidential. See id.

Any claim that the intent to fix or raise prices in the U.S. disappeared after antitrust counsel sanitized the formal partnership agreement is called into substantial question by a document produced by PolyGram in a supplemental production submitted January 6, 1995. This document is filed under seal as Exhibit A.[2] Created by one of the majors but found in the files of another major, the document appears to reflect a continuing agreement on price well *after* the formal partnership agreement was executed. At the very least, it evidences a post-agreement sharing among competitors of license fee "assumptions" and detailed projections that appear to have no basis in U.S. market dynamics[3] but a substantial basis in European practice. Such

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[1] As we alleged in our Opening Brief, the majors have in Europe created copyright societies that fix license fees for performance rights in sound recordings to the detriment of DMX, an American digital radio programmer and exporter. As with music video licenses, the license fee demanded is typically 20 percent of revenues. In the United States, three of the majors (with others invited to join) have entered into a joint venture with DCR, the only competitor of DMX. These majors have agreed to set "license" fees based on a formula.

Rather than address our price-fixing concerns (both here and in Europe), the majors emphasize that U.S. copyright laws do not protect performance rights. This statement, in addition to raising questions about what exactly is being "licensed" to DCR in the United States, ignores the fact that the majors are currently fixing the price of such "licenses" to DCR and are simultaneously seeking legislation that would give them the ability to exclude DMX if it refused to pay a similar price.

[2] See Agreement, Stipulation and Protective Order filed December 22, 1994.

[3] The record companies do not receive compensation for U.S. rights licensed to *any* programmer except Viacom (which has paid fees in some instances where it could obtain some exclusive rights) and DCR, which pays a license fee collectively set by the majors.

(continued...)

sharing of price information also renders virtually irrelevant the claim that price negotiations will be "individually negotiated" or kept "confidential" by the joint venture itself.

2. The Majors' Claimed Exemption For Foreign Price-Fixing is Defective in Numerous Respects. The majors have now distilled the numerous arguments raised in their opposition briefs to a remarkable proposition. They propose that this Court should look to one sentence of legislative history and rule, as a matter of law, that otherwise direct, substantial and reasonably foreseeable effects, "no matter how large or how small," on U.S. export commerce do not confer U.S. antitrust jurisdiction if they result from run-of-the-mill "price-fixing in foreign lands." Sur-Reply at 3. The supposedly dispositive sentence is highlighted in the following passage:

> *Thus, a price-fixing conspiracy directed solely to exported products or services, absent a spillover effect on the domestic marketplace . . . would normally not have the requisite effects on domestic or import commerce*. Foreign buyers injured by such export conduct would have to seek recourse in their home courts.
>
> If such solely export-oriented conduct affects export commerce of another person doing business in the United States,

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(...continued)

This fact of the American market also casts substantial doubt on the assertion that the originally planned 20-percent license fee reflects "nothing more than the inherent economic effects of adding additional players to markets now monopsonized by MTV . . . ." Sur-Reply at 9. With the already-noted exception of Viacom, no programmer not affiliated with the majors has ever paid a cent for its music programming in the United States, and the majors may even be paying some programmers. See Richard Katz, TCI-BMG Breakdown May Foster Viacom Talk, 15 Multichannel News 16 (June 13, 1994) ("Les Garland, executive vice president of The Box points out that labels have paid $650,000 this year for The Box to play their videos in its 'Playola' segments"). Given this fact, as well as the majors' assertion that the record companies are starved for music video outlets to promote their records, W-S-B Brief at 6-7, there is no reason to believe a truly independent entrant would pay any license fee at all, let alone the massive fees contemplated both before and after the execution of the partnership agreement.

> both the Sherman and FTC Act amendments preserve jurisdiction insofar as there is injury to that person.

H.R. Rep. 97-686, 97th Cong., 2d Sess., at 10 (emphasis added).

The defects in this argument are manifest and manifold. First, it ignores various allegations made by the United States that do not relate solely to foreign price-fixing.[4] Second, it is based on the incorrect premise that Congress sought to "contract" U.S. antitrust jurisdiction when it passed the FTAIA. Third, it asks the Court to disregard the plain language of the statute, which does not identify particular categories of exempted conduct. Fourth, the argument proceeds without benefit of any supporting authority. Fifth, the entire discussion in which the purportedly dispositive passage appears refers to the standing of injured foreign buyers, not injured U.S. exporters. Sixth, the majors' argument misconstrues "directed solely to exports"

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[4] The majors consistently ignore or misconstrue the allegations of conspiracy to fix prices, conspiracy to monopolize, and concerted refusal to deal. In the latter regard, the United States has clearly alleged that boycott activity forms part of the conspiracy. First, a plan to grant exclusive music video rights to a commonly controlled joint venture is a group boycott that may violate the antitrust laws. See United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412 (S.D.N.Y. 1980). Second, a horizontal agreement not to provide licenses to foreign intellectual property rights is a group boycott, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969), and a collective decision not to provide such licenses in several countries would seem equally, if not more, suspect. Third, the fact that other boycott activity is used to implement and support a price-fixing arrangement, far from exonerating the boycott or rendering it irrelevant for jurisdictional purposes, confirms the boycott's status as per se illegal. See F.T.C. v. Superior Court Trial Lawyers Ass'n, 110 S.Ct. 768, 775 (1990). Thus, the alleged collective decision not to deal unilaterally with programmers, concerted attempts to prevent recalcitrant programmers from entering new markets, and collective refusals to grant licenses to programmers who will not pay the fixed price all constitute "boycott" activity. If the majors are arguing that any connection between a boycott and price obviates jurisdiction, then that is simply another reason to reject their narrow reading of the FTAIA.

into a broad-based statement concerning all "price-fixing in foreign lands."[5] Seventh, it ignores factual issues that are in dispute, such as whether there are "spillover effects" resulting from the foreign price-fixing and whether this particular price-fixing scheme is sufficiently unique to confer jurisdiction even under the majors' narrow reading of the FTAIA.[6] Eighth, the majors inappropriately attempt to narrow the meaning of the paragraph immediately following their favored passage, which paragraph affirmatively states that U.S. exporters injured by "such" conduct would have access to U.S. courts. Ninth, the majors continue to rely on references to antitrust injury cases in the legislative history as if that helps their case. To the contrary, the direct purchaser of a price-fixed article clearly has standing to sue, see Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977) (direct purchasers may bring private antitrust claim for horizontal price-fixing), whether or not it uses the article to fashion a complement. See

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[5] The phrase "directed solely to exports" can only refer to a price fix imposed by American firms solely *on their exported products* that are bought solely by *foreign purchasers*. So understood, the passage is completely consistent with the statutory language, which in some circumstances denies foreign buyers who are not themselves "engaged in such [export] trade or commerce" relief under U.S. law. 15 U.S.C. § 6a(1)(B). The highlighted passage clearly does not mean that a cartel may price-fix goods sold to American exporters when the competitive harm to U.S. domestic or export commerce is direct, substantial and reasonably foreseeable.

[6] The majors, realizing that even the one sentence of legislative history they cite creates factual issues, attempt to construe the phrases "spillover effect" and "normally" into non-existence. Sur-Reply at 4. Here, the United States has alleged domestic effects, including (1) the use of the foreign price fix as a benchmark for the setting of U.S. prices with respect to VIVA US, MTV-Latino (which encompasses the U.S. market) and the U.S. music programming industry as a whole; and (2) the artificially inflated "premium" price attributable to the United State market that programmers may pay for a world-wide license. The United States has also alleged that other aspects of the case (*e.g.*, interconnections with domestic anticompetitive activity, group boycotts, the use of penalty contracts to foreclose original programming, the majors' emerging status as direct competitors of U.S. programmers, the fact that the price-fixed licenses are a necessary prerequisite to doing business at all in foreign lands, and the targeting of American exports) take this case out of the range of a "normal" price fix.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). Tenth, when Congress in the past has wanted to exempt a particular category of conduct, it has done so expressly; had the legislature intended the sweeping result suggested by the majors, one would expect clear statutory language to that effect.

All this just goes to show that the majors' only argument violates the *Oklahoma Press* doctrine, settled principles of statutory interpretation, and common sense.

WHEREFORE, the United States respectfully requests that the Court grant its Petition to Enforce Civil Investigative Demands in all respects.

Respectfully submitted,

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ORDER

Good cause appearing therefor, and being fully advised in the premises, IT IS HEREBY ORDERED that the motion of the United States for leave to file a Supplemental Memorandum in Further Support of the Petition to Enforce the Civil Investigative Demands is GRANTED.

The District of Columbia, this ___ day of _____, 1995.

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UNITED STATES DISTRICT JUDGE