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May 18, 2000

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Public Comment on File No. 971-0070/In the Matter of Time Warner Inc.; In the Matter of Sony Music Entertainment Inc.; In the Matter of Capitol Records, Inc., d.b.a. "EMI Music Distribution"; In the Matter of Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and In the Matter of BMG Music, d.b.a. "BMG Entertainment"

Dear Sirs:

I am an entertainment attorney and a professor in the music business program at Belmont University. I have also previously worked for the distribution branch of one of the major record distributors and as the manager of a retail record store. Based on this experience, I feel qualified to comment on the proposed consent orders in the above-referenced matter.

Your "Analysis To Aid Public Comment on the Proposed Consent Order" (the "Analysis") makes some statements that I do not believe are entirely accurate. For example, the Analysis states that "the distributors' MAP policies provided no benefits to consumers," and "there was no plausible business justification for these programs." These statements fail to address the primary motivation which prompted the major record distributors to adopt their MAP policies.

The MAP policies adopted in 1995-1996 were a direct response to complaints from record retailers about certain retailers pricing recordings at, near, and sometimes even below cost to use as loss leaders. Certain retailers, most notably consumer electronics stores and mass merchandisers (Best Buy, etc.) had adopted the practice of offering compact discs for sale at prices of $9.99 (approximately equal to the wholesale price charged by record distributors to retailers). These retailers used coop advertising funds provided by the distributors to run print ads for popular recordings in order to increase customer traffic and sell items at much higher markups. Record retailers, who rely primarily on the sale of recorded music, could not match these prices and consequently complained to the distributors. The distributors were justifiably concerned with protecting record retailers since these retailers carry much deeper inventories than the consumer electronics and mass merchant accounts which generally only carry the hottest-selling titles. Further, record retailers often assist distributors in developing a market for new artists recordings (through promotions, etc.) which consumer electronics and mass merchants rarely carry. This certainly appears to contradict the Analysis' statement that "the new retailers that charged lower prices to consumers provided services that were as good as, and in some cases, superior to the services provided by the higher priced retailers." In fact, the only apparent advantage these retailers provided was lower price since their selection was much more limited and customer service in such stores is usually non-existent.

Quite simply, record retailers cannot compete in an environment where other retailers use recorded music as a loss leader in order to sell items at higher profit margins. The markup on recorded music (i.e, 30-50%) is already much lower than that of most retail items (i.e., 50-100% and up). If the practice of using recorded music as a loss leader becomes commonplace, this will likely result in record retailers going out of business. In fact, this was exactly what was beginning to happen prior to institution of MAP policies with several record retailer filing for bankruptcy. The practical result will be fewer retailers carrying anything other than the top-selling recordings and reduced choices for consumers. This scenario does provide a potential benefit to consumers and does provide a "plausible business justification" for the MAP policies which should have been addressed in your Analysis.

Although a retailer should have the right to sell a products as loss leaders, I do not believe that it is fair to a distributor to be put in a position of having to pay for advertising such loss leaders to the detriment of its other retail customers and its long-term business in general. If retailers really want to use recorded music as loss leaders, they should be allowed to do so, provided that they incur the loss themselves (i.e., by paying for the advertising) rather than obtaining the benefits (i.e., increased traffic and sales of higher profit margin items) while not suffering the loss (i.e., by passing the advertising expenses on to record distributors).

I would also point out that the prices of recorded music are not as artificially inflated as the general public seems to believe. Unfortunately, the general public does not understand the costs of producing and marketing recorded music. Although it may cost under $1.00 to physically manufacture a compact disc, the costs of producing and marketing the recording are much greater. A major record company's expenses in releasing a recording are usually at least $500,000 and few recordings sell enough to make back such investment. Although the elimination of MAP policies may result in lower retail prices for some recordings, the price reduction will likely come from retailers who are willing to sell recordings at very low or no profit margins. As previously mentioned, this may result in record retailers being unable to compete and going out of business as a result.

At a time when music is being devalued, both as a commodity and as a form of art, due to the ease of piracy on the Internet, I find it particularly distressing that the FTC appears to be taking the proposed action without fully considering (or at least publicly addressing) the potential consequences of such action. Although the elimination of MAP policies may result in cheaper prices for some recordings, it may also make it much harder for retailers that actually rely on income from sales of recorded music to stay in business and consequently result in less competition and choice for consumers.

Yours very truly,

David J. Moser