

It strains credulity that RCA records sold in the *Life* package, RCA records sold in the *Reader's Digest* package, RCA records sold by the RCA Record Club and RCA records sold by dealers, department stores and racks, are all in different markets.

Another mail-order seller of some stature is Book-of-the-Month Club, which offered a package of folk records produced by Vanguard (RX 499); Pickwick (RX 538); and Concert Hall Society (RX 541).

In a footnote to CPF 425, the Government states that RX 345 shows that in 1962 the Columbia Club had 44% of all sales by direct mail. Later in the footnote, that sweeping statement is qualified by the statement that

RX 345 tends to be ambiguous on its face. The designation "Columbia Club" was intended to include some indeterminate non-Club mail order sales of Columbia and Epic records (Wright 8039).

Actually, that figure includes:

(1) Sales of Columbia, its subsidiary labels and of outside labels through the Columbia Record Club.

(2) Non-Club mail-order sales of Columbia and its own subsidiary labels by record dealers, mail-order specialty houses, etc.

(3) Packages sold by Columbia on a test basis.

(4) Packages pressed by Columbia for, and sold by, third parties.

The 44% figure represented sales for the first three quarters of 1962 and not the entire year, as indicated in the Government's proposed finding. Moreover, the figure represented a decline from the third and fourth quarters of 1961 (RX 450).

Otherwise, the record indicates that Columbia's share of all mail-order sales continued to slide during the rest of 1962. *Life*, for example, achieved its major sales volume on record packages at the end of 1962 (see RPF 273); BOMC increased its mail-order activity in and toward the end of 1962 (see RPF 274; RX 496, RX 502 *in camera*); and the RCA Clubs grew rapidly during the entire year (see RPF 437).

The Government notes "a high degree of concentration in direct mail sales" on the basis of RXs 345 and 450:

	<i>Percent</i>
Columbia	44
RCA Victor	20.8
Reader's Digest	18.2
Capitol	8.1
Total	91.1
All others	8.9

According to respondents, this conclusion of concentration is contrary to the facts. It refers to RX 451, which purports to show a decline in Columbia's share of the so-called club market. RX 451 shows Columbia's percentage share of total record club dollar purchases as declining from 66% in 1957 to 41.5% in 1961 (or possibly 50.5% as of May 1961).

Respondents also complain that the Government ignores the trend toward a dispersion of sales with the entry of new firms into this new field of mail order (see RPFs 273-78, 436-40).

Respondents also challenge the Government's statement that "there is no question that the Reader's Digest is the largest direct mail seller by far, apart from the record clubs" (citing Adler 4915).

Adler did testify that Reader's Digest was the largest direct-mail seller (Tr. 4915)—a fact acknowledged by Hitesman (Tr. 10143-45)—but without comparing its sales to those of record clubs.

In camera evidence shows that Reader's Digest sales are substantially higher than those of the Capitol Record Club (compare RX 700 *in camera* and CX 465 *in camera*; see also RPF 299).

The demonstrated fact that records sold by the Reader's Digest and the RCA Record Club sound similar is dismissed by Government counsel as "nothing more than a revelation that some classical and popular music is recorded from a standard written score. * * *" It is difficult to reconcile this argument with the Government's repeated insistence that performances by individual artists are "unique." The fact of the matter is that records may be artistically distinctive and yet compete with each other in the market place. "A man by the name of Rene Leibowitz" will hardly be credited with contributing to the Government's effort to draw a hard-and-fast line between club records and package records (compare CPF 443 with Exceptions, pages 388-89).

The opinion testimony of Marek and RCA as to claimed differences between record club members and buyers of record packages is contradicted by the business operations of his own organization (see respondents' Exceptions to CPFs 425 and 439).

The price structure used in the mail-order sale of packages is not "entirely different" from club prices. The per unit price, or the total dollar commitment, is similar.

The best selling Reader's Digest packages (in mono) have prices ranging from \$12.98 to \$22.89 (RXs 386c, 703a,b). New mono members of the RCA Record Club have obligated themselves to spend from \$16 to \$22 during the first year of membership

for enrollment and commitment records. (Both the Reader's Digest packages and the RCA Club payments are exclusive of mailing and handling charges, the amounts of which are not shown in this record.)

On a per-LP basis, prices of the Reader's Digest packages and the RCA Record Club are also similar. The average prices per LP for the Reader's Digest packages (mono) range from \$1.33 to \$2.33.

Prices charged by the RCA Record Club during the first year of membership have averaged from \$1.77 to \$2.18 per record.

Interestingly enough, the *Reader's Digest* offers a preferential price to members of the "*Reader's Digest Family*." The Government, in a footnote, identifies the Family as comprising *Reader's Digest* subscribers. Actually, the Family includes also active and cancelled members of the RCA Record Club (RX 386; Hitesman 10079; Adler 5008). This broadening of the Family to embrace both package buyers and club members ill comports with the Government's theory of separate markets.

OPINION OF THE COMMISSION

JULY 25, 1967

BY DIXON, *Commissioner*:

The complaint in this case, issued on June 25, 1962, charged that the Columbia Broadcasting System, Inc., and its wholly owned subsidiary, Columbia Record Club, Inc., had engaged in certain unfair business practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45,¹ including attempted monopolization, the "squeezing" of retail dealers with whom it competes, and the making of agreements with competing record manufacturers to fix noncompetitive record prices, fix and depress the prices paid to artists for their recording services (royalties), and cut off the supply of certain records to actual and potential competitors in the "club" sector of the phonograph record industry.² Hearings were held before a hearing examiner of the Commission, and approximately 11,000 pages of testimony and 1,400 exhibits in support of and in opposition to the allegations

¹ That section provides in part: "Unfair methods of competition in [interstate] commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

² The complaint also charged (Count II) that respondents had unfairly misrepresented, in certain of their advertising, the "savings" to be realized by the consumer in purchasing records from the Club. That charge was subsequently abandoned by counsel supporting the complaint.

of the complaint were received into the record. In an initial decision of 304 pages filed September 30, 1964, the examiner found that the allegations of the complaint had not been sustained by the evidence and ordered the dismissal of the proceeding.

We believe that decision was erroneous and hence must be reversed and set aside.

The charges in the complaint center around Columbia's formation and operation of its Columbia Record Club, an organization that distributes phonograph records direct to the consuming public through what is called the "club" or "subscription" form of mail order selling.³

Columbia entered the club market in August of 1955. One of its purposes in so doing was to prevent the entry of certain non-record firms, particularly the entry of mail order book-distributing organizations.⁴

Commencing in May 1958, Columbia decided that the Club could be more profitably operated if it sold not just its own (Columbia) records, but those of some of its competitors as well. However, instead of going to those manufacturers' wholesale distributors (the "open market") and buying the records at the same price paid by other record retailers (the Columbia Record Club is admittedly a "retailer," in that it sells directly to the ultimate consumer), the Club entered into a series of "licensing" agreements with nine (9) of its medium-sized and smaller competitors under which it gets their records for a total of some 87.5¢, versus a price of \$1.60 or more all competing retailers are required to pay for those same records. It also included in those "licensing" agreements provisions (a) fixing (depressing) the price (royalty) to be paid by those manufacturers to their artists on records sold through the Columbia Record Club,⁵ and (b) giving the Columbia Record Club the sole and "exclusive" right or "license" to make records from those nine competitors' "master"⁶ recordings (for a "royalty" of some 17.8¢ per record made from them), those competitors expressly promising not to engage in a club operation themselves, not to sell directly to anyone else who operates a club,

³ Finding 3.

⁴ Finding 5.

⁵ Two of the earlier contracts also contained provisions fixing the price at which the Columbia Record Club was to sell the competitors' records through the Club and fixing the price at which the competitors themselves were to sell the same records to their own distributors (nonclub channel). There is insufficient evidence to establish that those agreements are currently in effect, however, or that similar agreements were ever entered into with the other seven licensor-competitors. The evidence on the fixing of artists' royalties, on the other hand, is clearly set out in several of the contracts, including the later ones. Findings 10 and 11.

⁶ A master is an original recording or duplicate thereof, from which other phonograph records can be manufactured.

and not to allow anyone else to use their "masters" for the purpose of producing records to be sold through a club. In short, Columbia sought to assure itself that no one else would be able to sell the records of those nine producers through the mail in competition with the Columbia Record Club.

I

The Columbia Broadcasting System, Inc. (hereinafter CBS or Columbia) is a New York corporation with seven (7) operating divisions, one of which is Columbia Records,⁷ a manufacturer and seller of phonograph records. In 1961, CBS as a whole had sales of \$473.8 million and net assets of \$142.4 million. In 1961 and 1962, the Columbia Record Club had phonograph record sales of \$41.5 million and \$53 million, respectively; the company's nonclub sales of records (to wholesalers and retailers) was roughly the same in volume, making phonograph records somewhat less than 20% of CBS' total sales.

Columbia is the leading producer and seller of phonograph records in the United States. In 1960, total consumer expenditures for all kinds of records (including "LP's" and "singles" ^s), through all channels of distribution (including clubs, racks,⁹ juke boxes, and dealer stores), was an estimated \$521 million.

One of the principal issues to be determined in this proceeding is the "relevant market" in which the competitive effects of these challenged agreements with Columbia's nine competitors are to be evaluated. Respondent argues in favor of a broad "all-record" market. Counsel supporting the complaint, on the other hand, argues that the appropriate "relevant market" involved here is not the sale of all records through all channels of distribution but the sale of "LP" records only, through only one of the mail order channels, a method of selling by mail called the subscription of "club" technique.

The outer boundary of the relevant market is the broad, all-record market. This market, however, consists of four channels by which records are distributed to consumers: retail stores, racks,

⁷ The other six are: (1) CBS Television Network, (2) CBS Television Stations, (3) CBS Radio, (4) CBS Laboratories, (5) CBS International, and (6) CBS News.

⁸ "LP's" are the "long-playing," larger discs that have six performances on each side and retail for \$2 and up; "singles" are the smaller discs with one performance on each side, retailing for less than \$1. The LP's account for about 75% of all record sales, "singles" for the remaining 25%.

⁹ "Racks" are the familiar structures displaying the 50 or so current "hits" in supermarkets, drug stores, and other high traffic areas.

nonclub mail, and club mail.¹⁰ We find the club market to be a relevant submarket.

The very fact of these agreements excluding competitors from an equal opportunity to sell these records "through any mail order record club"¹¹ evidences Columbia's *own* conviction that the clubs are a sufficiently distinct market to make this restrictive arrangement economically worthwhile. As one text writer has put it, "the courts will take as the market, for the purposes of deciding cases, just that market which the concern itself takes for its field of activity; if a firm shows an intent to exclude competition from that field, it will be assumed that the field sufficiently describes a market, for otherwise what would be the point of the effort to exclude?"¹²

Furthermore, as discussed in some detail in the accompanying Findings As To The Facts, a number of economic factors operate to produce entirely different conditions of supply and demand in the sale of phonograph records through the various submarkets. Each of the relevant submarkets possesses different cost components and structures.¹³ On the demand side they offer consumers different sets of advantages and disadvantages. The clubs especially appeal to a group of customers that have certain distinctive characteristics.¹⁴ These supply and demand conditions are sufficiently different between the retail and club markets, for example, that each is capable of generating particular competitive forces which, in turn, can discipline one another.

The present arrangement is found to be a restriction upon competition in the club market as a relevant submarket. In addition, this practice lessens the competitive contribution of the club submarket to the broader, all-record market. In certain structural situations a given practice which occurs and is measured in a relevant submarket can have an adverse effect not only in that submarket but also upon the broader market itself. This is especially true—as in the instant case—where the submarket under question enjoys a cost advantage.¹⁵ The capacity of the other channels of distribution to discipline the club sector is limited by their cost disadvantages. In such an instance it is especially

¹⁰ Finding 13.

¹¹ CX 20.

¹² Neale, *The Antitrust Laws of the USA*, p. 125 (1960).

¹³ Finding 22.

¹⁴ Findings 19 and 20.

¹⁵ Findings 22 through 24. For a brief discussion of the significance of different cost structures upon competition among relevant submarkets (or "interindustry competition") see: (1) Kaysen and Turner, *Antitrust Policy*, p. 102, fn. 2 (1959) and (2) *United States v. Corn Products Refining Co.*, 234 Fed. 964, 975-977 (S.D.N.Y. 1916).

important to maintain the level of competition in the advantaged outlet.

II

Columbia maintains that the "licensing" agreements challenged in this proceeding were entered into with its nine competitors for the purpose of meeting the demands of its Club members for a greater "variety" of records to choose from. The evidence is very clear, however, that the relatively small number of records offered by the Columbia Record Club is not a matter of record shortage but a deliberate policy on the part of the Club's officials, in accordance with what they conceive to be the particular tastes of their Club members. The Columbia Record Club could offer an unlimited variety of phonograph records to its members if it thought such a policy would be more profitable than the narrower selection it now offers.¹⁶

III

The purposes and the effects of the "licensing" agreements at issue here are twofold, namely, (a) to give the Columbia Record Club a discriminatorily low price on the "hit" records of those nine competitors, and (b) to bar the entry of competing clubs into the market by denying them access to suitable records ("hits") on equally favorable terms, *i.e.*, at costs that would permit them to profitably compete with the Columbia Record Club.

It should be emphasized that, while these agreements are couched in terms of "exclusive" contracts, their immediate effect is not to deny other club operators access to those records altogether, but simply to make the newcomer pay a higher price for them. Thus, it was agreed between Mercury Records, one of the nine "licensors," and the Columbia Record Club, that "during the term of this agreement you [Mercury Records] will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control."¹⁷ The effect of this provision is not, however, to physically prevent other clubs from acquiring these records at all; rather, since anyone can buy any manufacturer's records on an "open market" at a going market price from the country's

¹⁶ See Findings 21, 25 and 28.

¹⁷ CX 34, p. 3, par. 7.