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.	

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO SET A HEARING DATE

The United States respectfully submits this reply memorandum in support of its motion to set a hearing date in the above-captioned proceeding. Although respondents Time Warner Inc., PolyGram Holding, Inc., Sony Corporation of America, Bertelsmann, Inc. and EMI Music Inc. (collectively the "majors") "neither support nor oppose the hearing requested by DOJ,"[1] in their brief they make several factual and legal assertions that are wrong and potentially misleading.

First, mixing memory with desire, the majors assert that the impetus for the CIDs was their formation of a joint venture to establish a U.S. music video channel and that the termination of that joint venture is an "additional reason[] to deny enforcement" of the outstanding CID requests. Joint Memorandum, at 2-3. In fact, however, the Antitrust Division's investigation of the potentially anticompetitive conduct by the

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[1] See Respondents' Joint Memorandum in Response to Petitioner's Motion to Set a Hearing Date ("Joint Memorandum"), filed February 16, 1996.

majors began almost three months before the formation of the U.S. joint venture was announced and focused on international activity affecting U.S. export commerce. Termination of the joint venture does not resolve all of the concerns of the Department of Justice and is not a reason to deny enforcement of the CIDs.

Second, while withholding information necessary to evaluate their commonly controlled foreign performance rights societies, the majors claim that changes made to one such society--specifically, the withdrawal of their grant of exclusive rights to VPL--are sufficient to resolve all competitive concerns. Id. at 3. However, even if this investigation were limited to VPL, the removal of *formal* exclusivity would not necessarily alleviate all competitive problems raised by a performance rights organization. See generally BMI v. CBS, Inc., 441 U.S. 1 (1979) (non-exclusive pooling and blanket licensing of performance rights subject to rule of reason). Obviously, moreover, the permanence of any such changes is the subject of legitimate inquiry. In any event, this investigation encompasses far more than just one performance rights society. Accordingly, changes made to VPL would not provide a basis to deny enforcement of the CIDs.

Third, the majors assert that the Justice Department's cooperation arrangements with the European Communities (EC) obviate the need for the material sought by the CIDs. This

contention is preposterous. The Department's petition to enforce the CIDs deals only with materials located in the United States. We do not seek to compel the production of material located in Europe, whether in the possession of the EC antitrust authorities or otherwise; nor do we know, or do the respondents reveal, the extent to which the information we seek is in the possession of EC authorities. If the EC authorities do not have the documents we seek, the majors' suggestion that we ask the EC for them is empty. To the extent the EC authorities do have these documents, it is nonetheless absurd to suggest that the Department must seek assistance from a foreign antitrust authority to secure foreign-located information before using its own statutory powers to obtain the same information from domestic sources.

In any event, respondents completely misapprehend the nature of the U.S.-EC antitrust cooperation agreement. The agreement, which was entered into in 1991 (not, as the respondents indicate, in 1995), does not override provisions in the laws of either party that prohibit the disclosure of information that is subject to domestic confidentiality laws. The United States could not, for example, disclose to the EC information obtained pursuant to a Civil Investigative Demand, and the EC could not disclose to the Department information it had obtained under its comparable powers. Although the International Antitrust Enforcement Assistance Act of 1994, 15

U.S.C. § 6201, authorizes the Department (and the Federal Trade Commission) to enter into antitrust agreements with foreign counterparts that would permit the exchange of otherwise confidential investigative information, the U.S.-EC agreement is not an agreement of that nature.

Finally, and consistently with their desire geographically to compartmentalize any investigation of their worldwide activities, the majors state that the United States is free to conduct discovery related to their "U.S. practices or negotiations." Joint Memorandum at 2, 4. This assertion ignores that the majors' foreign and domestic activities are clearly related, that documents covering both U.S. and foreign activities have been redacted to exclude the foreign-related matter, and that the majors have refused to allow deposition testimony relating to foreign activities believed by the United States to have a significant bearing on United States commerce.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 26th day of February, 1996, I have caused to be served, by overnight delivery service, a copy of the foregoing Reply Memorandum in Support of Motion to Set a Hearing Date on counsel of record for the respondents at the addresses below:

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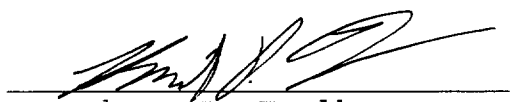

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