

the Department with significant information.

INTRODUCTION

EMI expressly adopts and incorporates herein the Memorandum in Opposition to the Petition submitted by Respondents Time Warner, Inc., Sony Corporation of America and Bertelsmann, Inc. and the Memorandum in Opposition to the Petition submitted by Polygram Holding, Inc. While EMI joins in the arguments made by the other Respondents, it submits this memorandum to address the jurisdictional issue as it affects EMI and its affiliates as well as the burdensome nature of the CID as it now applies to EMI.

FACTS

In July 1994, the Department issued the CID pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314, as part of its investigation of activities by the Respondents to determine whether or not such activities restrain or monopolize "domestic and international markets for cable, wire, and satellite delivered music programming through price-fixing cartels and overbroad joint ventures," in violation of the Sherman Act, 15 U.S.C. §§ 1-2. See Civil Investigative Demand No. 11115, dated July 7, 1994.

After the issuance of the CID, representatives of EMI and its parent THORN EMI plc ("THORN")¹ met with the Department's staff in an effort to understand the purpose and focus of the

¹THORN, an English corporation headquartered in London, received a request by the Department to respond voluntarily to specifications for information and documents.

investigation. At those meetings, EMI and THORN asserted their position that the Department has no jurisdiction to investigate their foreign activities, and voiced concern over the burdensome worldwide scope of the CID. Nevertheless, they expressed their intention to cooperate with the Department's inquiry where appropriate. In order to provide the Department with a fuller understanding of the subject foreign business activities, EMI and THORN voluntarily agreed to provide significant information and documents concerning those activities. EMI and THORN did not abandon their objections to the CID. Rather, it was their expectation that the documents provided would reveal that the Department's concerns are unfounded.

On October 24, 1994, EMI responded fully with respect to domestic ventures and objected to the inquiry into foreign activities on the ground that the investigation exceeded the Department's extraterritorial jurisdiction. EMI also raised a number of other significant objections to the onerous CID. Without abandoning its objections, however, EMI voluntarily answered voluminous interrogatories, and produced many thousands of pages of documents, related to purely foreign business activities.

In all, EMI produced almost 27,000 pages of documents to the Department. Included in this production were documents relating to the two foreign ventures and the two domestic ventures of concern to the Department. Thus, as of the date of the production, EMI provided documents relating to VIVA, a German language music video television channel in Germany, Austria and

parts of Switzerland, and produced thousands of documents concerning the ongoing negotiations for a Mandarin language music video channel which has been proposed for Asia. EMI also produced all of its documents concerning the Music Video Channel, a music television venture among some of the Respondents' subsidiaries planned for the United States, and Digital Cable Radio Associates, a domestic venture among a number of companies, including subsidiaries of three of the Respondents, for the cable transmission of sound recordings.

In addition, THORN voluntarily produced almost three thousand pages of documents related to foreign matters even though it was under no obligation to do so. In particular, the documents provided to the Department by THORN included (1) pleadings and related documents from the United Kingdom litigation brought by MTVE against Video Performance Limited ("VPL"), The International Federation of the Phonographic Industry ("IFPI") and the major record companies, MTV Europe v. BMG Records Ltd., 1993 M No. 5078 (High Court of Justice, Chancery Division); (2) various papers from the proceedings before the European Commission relating to VPL and IFPI, and VIVA, including correspondence and related documents, MTV/VPL-IFPI, No. IV/33.366 (Commission of European Communities) and MTVE/VIVA, No. IV/34-920 (Commission of the European Communities); (3) Memorandum and Articles of Association for VPL; (4) Memorandum and Articles of Association for Phonographic Performance Limited ("PPL"); (5) the assignment of music video rights to VPL by Picture Music International (a division of EMI

Records Ltd.); (6) basic agreements, membership and structural information for IFPI; and (7) basic agreements for VIVA.

The significant voluntary production made by EMI and THORN as well as the information that the Department presumably has received from third parties should have led the Department to conclude that its investigation is unwarranted. At the very least, the Department was given sufficient information to state the factual basis for its jurisdiction to investigate and to focus its inquiry. Yet the Department has not provided even a de minimis showing with regard to those matters. Instead, the Department's petition does nothing more than make unsubstantiated accusations against the Respondents. The petition in this case leads to no other conclusion but that the Department wants carte blanche to conduct an unlimited investigation of foreign matters without concern for the limitation of its power imposed by Congress through the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a.

ARGUMENT

THE DEPARTMENT LACKS JURISDICTION TO INVESTIGATE THE FOREIGN ACTIVITIES OF EMI AND ITS AFFILIATES

As set forth in detail in the Memoranda submitted by the other Respondents, to which the Court respectfully is referred, no logically consistent set of facts can validate the Department's investigation of the foreign activities described in the petition. Under the United States antitrust laws, the Department lacks jurisdiction to investigate such activities as a matter of law.

In order to investigate EMI's foreign business activities, the Department must show a reasonable basis for the Court to find that under the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311 and 1312, the Department has reason to believe the requested information is relevant to an investigation of a possible antitrust violation. In order to meet this burden, the Department must demonstrate that under the FTAIA, 15 U.S.C. § 6a, the Respondents' foreign activities have a "direct, substantial and reasonably foreseeable effect" on United States domestic or export commerce. Absent such a showing by the Department, the Court cannot enforce the Department's demand for information concerning EMI's foreign activities. Federal Trade Comm'n v. Miller, 549 F. 2d 452, 460 (7th Cir. 1977) (court will not automatically defer to agency's interpretation of its jurisdiction).