IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Petitioner*, v. TIME WARNER, INC., et al., *Respondents*.	Civil Action No._____

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
TO ENFORCE CIVIL INVESTIGATIVE DEMANDS

INTRODUCTION

The United States has filed a petition to enforce Civil Investigative Demands (CIDs) issued by the Antitrust Division of the United States Department of Justice to Time Warner, Inc. (Warner); Sony Corporation of America (Sony); PolyGram Holding, Inc. (PolyGram); EMI Music (EMI); Bertelsmann, Inc. (BMG); and MCA, Inc. (MCA), commonly referred to in the music industry as the "majors." The CIDs seek information related to an antitrust investigation of the majors' collective and potentially anticompetitive conduct in the United States and abroad. The CID document requests now at issue seek only documents located in the United States. Although the majors have produced some documents in response to the CIDs, they claim that the United States lacks jurisdiction to investigate any activities that occurred abroad; with minor exceptions, they have refused to produce *any* information and documents that *in their opinion* relate only to foreign activities.

The majors claim that under no set of circumstances could Sherman Act jurisdiction apply to their foreign conduct. However, the United States has reason to believe that, acting through various "copyright societies" and joint ventures--including music video and "digital radio" ventures formed to conduct business in the United States--the majors may have entered into a worldwide series of related agreements designed to dominate, discipline, eliminate or extract monopoly prices from companies providing high-technology audio and music video programming services via cable, satellite and wire transmission (hereinafter "music programming") in all major geographic markets. In addition to the domestic effects arising from the operation of the American components of the alliance, it is likely that foreign components substantially affect the domestic and export commerce of American music programming companies.

The Court should grant the petition and order the majors promptly to produce the documents and information sought by the CIDs for the following reasons. *First*, absent arbitrary government action or a clear absence of jurisdiction based on settled law and undisputed facts, the United States has the authority to investigate all factual issues related to possible violations of the antitrust laws, including issues relating to jurisdiction. The majors cannot contend the investigation is arbitrary, nor can they reasonably claim that the undisputed facts, as a matter of law, foreclose the exercise of U.S. antitrust jurisdiction over their activities. Accordingly, the

Court need not address the factual questions relating to ultimate jurisdiction but may rule, simply, that the United States is entitled to U.S.-located information and documents relevant to conduct that may be covered and prohibited by the Sherman Act.

Second, should the Court address the issue, it appears that United States courts will have antitrust jurisdiction over much of the majors' foreign activity. In this regard, the foreign conduct may form part of a global conspiracy having U.S. members, components and effects. Moreover, the foreign conduct by itself may have a "direct, substantial and reasonably foreseeable effect" on domestic and export commerce. 15 U.S.C. §6a.

Third, evidence of the majors' foreign activity is also relevant, discoverable and ultimately admissible to show the purpose and character of the joint ventures formed in the United States. Thus, even were United States courts to lack antitrust jurisdiction over the majors' foreign conduct, the Department would nevertheless be entitled to obtain U.S.-located information and documents regarding such activity in order to evaluate the nature and intent of domestic transactions that the majors concede to be encompassed by the Sherman Act.

STATEMENT OF FACTS

This investigation has barely proceeded beyond the preliminary stages. The following is a brief summary of the preliminary evidence that has led to, and is being developed in, the ongoing investigation.

I. Background.

The majors and their affiliates collectively account for approximately eighty to eighty-five percent of the U.S. and world-wide markets for pre-recorded records, tapes and compact discs (the "record market"). Although individual market shares fluctuate from country to country, it is believed that the eighty percent figure remains relatively constant throughout the world. Warner, possessing the largest U.S. market share, is an American company.[1/] The other CID recipients are large domestic subsidiaries of foreign parents.[2/]

Beginning in the late 1970s and early 1980s, music companies began to produce short movies, known as "music videos," designed to promote record sales by providing a visual experience to accompany the music recorded by artists. Although music videos can be sold directly to consumers or licensed to bars and nightclubs, by far the most important outlets are music video programmers who disseminate the videos broadly over networks carried on cable and satellite television systems. The majors

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[1] Warner accounts for 21.6 percent of the U.S. record market.

[2] Sony, a U.S. subsidiary of Sony Corporation of Japan, controls 16.1 percent of the U.S. record market. PolyGram Holding, Inc., a U.S. subsidiary of PolyGram N.V. of The Netherlands, controls 11.3 percent of the U.S. music market. EMI Music, a U.S. subsidiary of Thorn EMI Plc. of the United Kingdom, controls 12 percent of the U.S. music market. BMG, a U.S. subsidiary of Bertelsmann AG of Germany, controls 13.9 percent of the U.S. record market. MCA, Inc., a U.S. subsidiary of Matsushita Electric Industrial Company, Ltd. of Japan, accounts for 11.4 percent of the U.S. record market.

account for at least ninety percent of the music videos aired by music video programmers.

In the 1990s, several innovative companies began providing "digital radio" services through which multiple channels of CD-quality audio programming is delivered via cable or satellite to consumers in their homes. Subscribers pay a monthly fee for this service over and above the charge for "basic" cable or satellite service. The vast majority of music played on digital radio networks originates with the majors.

A. Programmers.

It is believed that the United States leads the world in the domestic broadcast and export of music programming services. Thus far, the United States has identified six U.S. music video and digital radio programmers that may be affected by the majors' foreign and domestic conduct.

1. Gaylord Entertainment Company, Inc.

Gaylord Entertainment Company, Inc. (Gaylord) is the parent company of The Nashville Network (TNN), Country Music Television (CMT) and Z Music Television (Z). Both TNN and CMT air country music programming. TNN delivers country life-style programming consisting of country music videos and original programming such as outdoor programs and car racing. CMT is devoted entirely to music video programming. Z broadcasts contemporary Christian music videos mixed with original programming consisting of interviews, news, information and specials. All three networks originate from Nashville, Tennessee, and are broadcast via

satellite and cable television in the United States, Canada and Mexico.

In 1992, Gaylord launched CMT Europe, a music video programming service currently reaching approximately eight million homes in Europe. The music videos and interstitial material[3/] shown on CMT Europe's network are assembled into a unified block of programming in Nashville, Tennessee, and transmitted via satellite "uplinks" to cable systems and satellite dishes throughout Europe. From the point of assembly in Nashville to the point of delivery to the consumer in Europe, the content of the signal remains the same.

In October 1994, Gaylord launched its CMT Pacific service, which broadcasts to Asia and the Pacific Rim, including Australia and New Zealand. CMT Pacific's programming is identical to that of CMT in the U.S., except that U.S. commercials are removed and new custom material is inserted at a facility in California, from which the signal is beamed to a satellite for distribution in Asia and the Pacific Rim. Gaylord has announced plans to create a service in 1995 for Central and Latin America.

2. Viacom International, Inc.

Viacom International Inc. (Viacom), a subsidiary of Viacom, Inc., is headquartered in New York City. MTV Networks, a division of Viacom, operates the MTV and VH-1 music video

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[3] In the industry, "interstitial material" refers to short segments of original programming such as short promotional ads, lead-ins, public service announcements, and computer-generated information identifying a music video for the viewer.

programming services. MTV's programming consists of music videos in a rock/pop/urban format, interstitial material and long-form original programming. Between thirty and forty percent of MTV's domestic programming consists of original programming developed and produced in the United States, and much of that programming is exported to Viacom's foreign subsidiaries. Similarly, VH-1's programming contains a mix of music video and original programming.

Viacom's music services reach over 250 million homes throughout the world. In addition to MTV, Viacom currently has four international MTV affiliates: MTV Europe, MTV Japan, MTV Latino, and MTV Brasil. A fifth international MTV affiliate, MTV Asia, was on the air from September 1991 to May 1994. Viacom plans to re-launch MTV Asia in English and Mandarin later this year and has additional plans for individual countries in Asia. Recently, Viacom launched its VH-1 service in the United Kingdom. All of Viacom's foreign programming incorporates MTV's or VH-1's logo, formats, original programming and interstitial material as well as a substantial number of U.S.-made music videos.

In Europe, Japan, Brasil and Asia, Viacom provides or will provide its service through subsidiaries formed in the region where the service is provided, with the subsidiary incorporating some foreign videos and making other programming adjustments required to tailor the service to the local culture. MTV-Latino, however, is assembled in the United States and beamed unchanged from an uplink facility in Florida to a satellite, from which it

is distributed to parts of the United States and most of Central and South America.

3. Black Entertainment Holdings, Inc.

Washington, D.C.-based Black Entertainment Holdings, Inc. owns the BET Cable Network ("BET"). BET is the first and only basic cable network that specifically targets the viewing interests of African Americans. The "footprint" of satellites carrying BET encompasses Canada and the Caribbean countries. BET distributes its U.S. music video programming to Identity Television Limited (Identity), a London-based cable service, targeting viewers in the United Kingdom. BET loaned start-up capital to Identity and holds an option to purchase an equity interest in the venture. BET sends tapes of original programming that incorporates music video programming, such as "Caribbean Rhythm" and "Rap City," to the United Kingdom via courier. Similarly, BET delivers original programming, some of which incorporates music videos, to South Africa, Zimbabwe, Kenya, Tanzania and Uganda. In 1995, BET plans to launch a jazz music video channel, first in the U.S., Canada and the Caribbean, and then expanding to Europe and other regions.

4. MOR Music TV

New entrant MOR Music TV of St. Petersburg, Florida, uses music video programming as a vehicle for direct over-the-phone selling of compact discs and cassettes. The operating premise is this: while a music video is being played, a computer-generated L-shaped menu appears on the viewer's screen providing a

telephone number to call and describing the artist, song, album and price of a CD. Operated as a video "record club," MOR Music TV also sells music-oriented material such as promotional T-shirts. The company plans to expand its music video home-shopping service into Europe in 1995. All programming decisions will be made in the United States, and the plan is to beam the channel from the United States via satellite to the United Kingdom, where it will be delivered unchanged to consumers. A joint venture partner will help distribute merchandise overseas.

5. Video Jukebox Network, Inc.

"The Box" is a service of Video Jukebox Network, Inc. (VJN), headquartered in Miami, Florida. The Box is a viewer-interactive music video television service that operates 24 hours per day. Through a combination of technologies, viewers may select music videos by choosing them from a menu appearing on their television screens. The order is placed by making a "900" number telephone call. A "box" consisting of a computer, video cassette recorders, and a laser disc player is located in the viewer's local cable company office or broadcast station. When a telephone order is received, the "box" programs the order and cues the videotape or laser disc, which then transmits the music video to everyone receiving the signal. Typically, a selected video appears on the viewer's screen within twenty minutes. Similar to an ordinary juke box, no music videos are played if no one makes a call. Currently, VJN offers its music video programming service in the United Kingdom and plans to extend its

service throughout Europe and to other regions. A London-based affiliate has discretion over programming. However, the laser disc containing a "menu" of music videos is produced in the United States and then sent by VJN to the United Kingdom. VJN also sends the "boxes" to the United Kingdom. Maintenance and repair of the boxes is performed in the United States.

6. International Cablecasting Technologies, Inc.

International Cablecasting Technologies, Inc. ("ICT") d\b\a Digital Music Express ("DMX"), operates a twenty-four hour subscription digital radio service. DMX offers thirty channels of CD-quality audio programming with no commercial or dee-jay interruption. DMX uses remote control devices that serve the twin functions of permitting the subscriber to change channels and of displaying information (*e.g.*, the artist and song title) on a screen incorporated into the device.

ICT launched its DMX service in Europe in 1993. As with CMT, MOR Music TV and MTV-Latino, the DMX service is "packaged" in the United States and beamed, through several wire and satellite connections, to European subscribers without any change in programming content. In 1995, ICT intends to launch a direct-to-home satellite service that will dramatically increase its exposure. ICT projects over two million European subscribers by the year 2000.

B. The Supply of Music Videos in the U.S.

The principal focus of the investigation is on access to music programming inputs. The majors control access to records

and music videos that they produce or contract with others to produce. A collective refusal to physically deliver music videos to programmers, or a collective decision to charge a high price before making such a delivery, might adversely affect programmers' ability to compete. More importantly, the majors also control the various intellectual property rights that attach to their records and music videos. The nature of these intellectual property rights, and the majors' use of them, require some elaboration.

Depending on international treaties and the laws of various countries, a music video may contain several major copyright and other intellectual property rights that must be licensed before a programmer is free to air the video. For present purposes, the most important of these is the "public performance right" in the sound recording of the musical composition and the video. This right does not exist under the laws of the United States but is often protected in other nations. A programmer operating in England, for example, cannot broadcast a music video without first obtaining a license for the right to "perform" the video. Typically, the music company holds of this right.

Similarly, many countries have created a performance right in music companies for pre-recorded music such as records, CDs and tapes. Again, that right does not exist in the United States, although the music industry has sought legislation to create such a right applicable to digital (as opposed to broadcast) radio transmissions. For the moment, at least, a

digital radio programmer operating in the United States can buy a CD from a retailer and broadcast the music over its system without a license from the music company. In Europe, on the other hand, the programmer would violate the music company's performance right if it did not first obtain a license.

In the United States, music video programmers typically pay nothing for the music videos they broadcast on their networks. This has less to do with the absence of a performance right than with the dynamics of the market. Music videos, although products in themselves and essential elements of a music video programmer's service, are used by the majors principally as a promotional tool for records. It is considered essential for a music company's music videos to appear as often as possible on programmers' networks. Although the music companies would prefer to receive compensation for music videos, individually they lack the economic power to force programmers to pay. As with other forms of advertising, the benefits accruing to record sales outweigh the costs of production.

C. Collective Licensing.

Outside the United States, the majors have refused to license the rights to their music and music videos except through associations called "copyright societies".

The International Federation of the Phonographic Industry ("IFPI") is an international copyright society which, among other things, guards against copyright piracy and advances the music companies' legislative agenda throughout the world. Beneath the

IFPI umbrella, the majors have formed national copyright societies in many countries. In the United Kingdom, the music video copyright society is Video Performance, Limited ("VPL"), and the copyright society having jurisdiction over digital radio is Phonographic Performance, Limited ("PPL"). Although these copyright societies have numerous member music companies, they are controlled by the majors.

In addition to their other functions, the copyright societies act as collective licensing bodies for performance rights. As a condition of membership in VPL, for example, a music company assigns or exclusively licenses the rights to its music videos to VPL.[4/] In order to play the same videos on their

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[4] At least in the case of Europe, the copyright societies appear specifically designed to avoid the "American" model of music video licensing and to target American programming services that attempt to follow that model. For example, according to its Consultant Director, VPL was formed in 1984 for the following purpose:

> Europe's record companies feared that MTV type operations were being planned for Europe and that the UK record industry would allow these operations to get access to the videos of certain American-based companies on a free-of-charge basis and then, for promotional purposes, the rest of the industry would be bound also to license their videos to these operations on a free-of-charge basis. This was the experience in the early days of MTV.
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> To prevent this happening, the UK industry formed VPL . . . to negotiate a blanket license . . . .

Roger Drage, Opinion: Business Growth v Rights, International Media Law 50 (1985). In 1986, when MTV entered the European market, it attempted to negotiate individual licenses, but these attempts were rebuffed. Eventually it signed a blanket license

European networks as they do on their channels in the United States, The Box, Viacom, CMT, BET and MOR Music TV must pay a blanket licensing fee to VPL for the rights to all U.S.- and foreign-produced music videos. In the case of digital radio programmers, the fee would be paid to PPL. The fee demanded is typically 20 percent of all revenues, though in the case of The Box the initial demand was a staggering 50 percent of revenue. Pursuant to various agreements and formulas, VPL or PPL then distributes the fees to the other affected copyright societies and to the majors.

It appears that copyright societies similar to VPL exist in almost every European country, Canada, Israel, Australia and New Zealand. They may exist in other countries. In Asia, IFPI appears to act as the collective licensing authority. At least in Sweden, Asia and Australia, programmers appear to be subject to a 20-percent demand. In Latin America, although no copyright societies are yet in place, the majors may nevertheless be collaborating on license fees charged to MTV-Latino, each demanding similar fees derived from the 20 percent benchmark set by copyright societies in other regions.

On June 10, 1992, MTV filed a complaint with the Commission of the European Communities (EC) alleging that the majors,

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agreement of the type described in the text. In April 1991, after Viacom had begun more vigorous attempts to negotiate individual licenses with the majors, the majors-dominated VPL Board adopted and enforced a resolution requiring member companies to assign all "performing" and "dubbing rights" rights to VPL.

through VPL and IFPI's collective licensing practices, had created a price-fixing cartel. In a Statement of Objections issued March 10, 1994, the Commission preliminarily concluded that the collective licensing provisions violated Articles 85 and 86 of the Treaty of Rome, which govern competition policy in the European Union.

After the filing of the European complaint, the EC brokered an interim licensing agreement between Viacom and VPL/IFPI. With some modifications, it extended an earlier licensing agreement that capped payments at 15 percent of revenue. When Viacom recently attempted to expand its service into Spain and Czechoslovakia, regions not covered by the EC-brokered agreement, IFPI wrote to Viacom's customer broadcast stations saying that Viacom did not have the right to perform its videos in those countries. Viacom is facing a current demand of 20 percent of revenues in order to expand its operations into these and other regions.

D. Joint Ventures.

Beginning in 1992, the majors began forming or joining music programming joint ventures that compete directly with existing programmers.

DCR is a U.S. joint venture among three of the majors (Sony, Warner, and EMI), a cable equipment manufacturer, and six cable television multiple system operators (MSOs). The three DCR music company partners account for 50 percent of the U.S. record market, and each holds an 11.6% interest in the DCR joint

venture. At least two of the remaining majors, BMG and PolyGram, may have been invited to join the DCR joint venture. When Warner and Sony joined the venture in 1992, DCR agreed to pay each music company 2% of revenue, and later agreed to pay the same amount to EMI when that company joined.[5/] A European version of the DCR joint venture has been formed in Europe, with Warner owning a controlling interest. Details of that transaction are unclear.

The majors (four of the six) have created one music video programming joint venture in Germany and are in the process of creating a similar joint venture in the United States (five of the six) and Asia (four of the six). As reported in the trade press, each of these ventures will be targeted at MTV's audience, though the ventures appear to have the capacity to compete against programmers operating in other niches of the music programming market. Again, it is believed that other majors have been invited to join, or have expressed interest in joining, these ventures. It is believed that further joint ventures are being planned.

II. Procedural History

The Department of Justice is currently conducting an investigation into possible violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, in connection with the restraint or

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[5] Each of the license agreements between DCR and the majors contains a most-favored-nation clause which, in operation, guarantees that the license fees will remain uniform for each major. In light of the absence of a performance right in the United States, it is unclear what rights are "licensed" under these agreements.

monopolization of domestic and international markets for cable, wire, and satellite-delivered music programming.

On July 7, 1994, CIDs were issued to Warner, Sony, EMI, BMG and PolyGram by the Department directing the companies to produce documentary material and to answer interrogatories described in the attached schedule by August 15, 1994. A CID and schedule were issued to MCA on July 18, 1994 directing that company to respond by August 22, 1994. With the exception of the CID addressed to Warner, the CID document requests were limited in the first instance to documents located in the United States.[6/] In the case of Warner, the initial search for documents has been limited by agreement to U.S. entities represented to be principally involved in the U.S. joint ventures.

The United States has granted substantial extensions of time in which to respond to the CIDs and has reached agreement with the parties clarifying or reducing the burden of various interrogatories and document requests.[7/] Each of the majors has produced some information and documents related to the domestic joint ventures described above. With respect to foreign activities, however, the majors have uniformly objected to producing information or documents related to foreign activities.

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[6] Letters requesting voluntary production of information and documents were sent to foreign parents.

[7] The majors have also raised a number of "boilerplate" objections, including claims of burdensomeness and ambiguity. The United States anticipates that such objections can be resolved through negotiation.

With minor exceptions, no documents relating to foreign activities have been produced.[8/]

The petition to enforce is brought pursuant to Section 104(a) of the Antitrust Civil Process Act, 15 U.S.C. § 1314(a), which provides for such an action.

ARGUMENT

I. Unless Jurisdiction is Plainly Lacking Based on Clear Authority and Undisputed Facts, the Government Has the Right to Investigate All Factual Issues Relating to a Potential Antitrust Violation, Including Issues Relevant to Jurisdiction.

In ruling on the instant petition, the Court need not address the complex legal and factual issues relating to its ultimate subject-matter jurisdiction over the majors' foreign activity. The threshold and dispositive issue is whether the Government is entitled to investigate the factual basis for an antitrust claim, including evidence regarding jurisdictional questions, through a CID. Clearly, it is.

Section 102 of the Antitrust Civil Process Act (ACPA) provides that a CID may issue

> [w]henever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information, relevant to a civil antitrust investigation . . . .

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[8] Some documents relating to Latin American activities have been produced, apparently in recognition that the MTV-Latino signal encompasses some parts of the United States. EMI, while maintaining its jurisdictional objection, has produced some information and documents relating to foreign joint ventures.

15 U.S.C. § 1312(a). The term "antitrust investigation," in turn, means "any inquiry conducted . . . for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation . . . ." 15 U.S.C. § 1311(c).

Whenever an antitrust investigation encompasses some overseas conduct, "ascertaining" the existence of an "antitrust violation" necessarily entails an inquiry into the nature of that conduct and whether the activity triggers U.S. jurisdiction under the antitrust laws, *i.e.*, whether there is "conduct" involving "commerce with foreign nations" that has the requisite impact on domestic, import or export commerce. See 15 U.S.C. §§ 1-2, 6a; Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891 (1993). Logically, therefore, CID responses that shed light on the existence, nature or intent of the foreign conduct and its effects constitute "information" and "documentary materials" that are "relevant to a civil antitrust investigation." 15 U.S.C. § 1312(a).

The case law fully supports this conclusion. Thus, the Supreme Court has held that a regulatory subpoena *duces tecum*, provided for by statute, may be used to investigate whether the statute "covers" the recipient of the subpoena at all. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-18 (1946).[9/]

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[9] Similarly, it has long been recognized that "the grand jury ha[s] authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within [its] jurisdiction." Blair v. United States, 250 U.S. 273, 282-83 (1919); accord United States v. Partin, 552 F.2d 621, 630 (5th Cir. 1977). The simple yet compelling rationale for this holding is that "the identity of the offender, and the

In Oklahoma Press, the Court held that statutory language similar to that contained in the ACPA, and lacking any "express condition requiring showing of coverage,"[10/] clearly authorized the administrative agency to issue subpoenas seeking "the production of specified records to determine whether [the recipients] were violating the Fair Labor Standards Act, including records relating to coverage." Id. at 189, 200. Courts in this Circuit have applied the Oklahoma Press doctrine to regulatory subpoenas, FTC v. Ernstthal, 607 F.2d 488, 490 (D.C. Cir. 1979) (ordinarily, a party may not challenge an agency's jurisdiction in subpoena enforcement proceeding), and, most importantly, to Civil Investigative Demands. Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Tr. Cas. (CCH) ¶64,721 (D.D.C. 1981) (rejecting challenge to CID requests alleged to relate to activities outside the Antitrust Division's jurisdiction).[11/]

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precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." Blair, 250 U.S. at 282.

[10] Section 11(a) of the Fair Labor Standards Act provided at that time for the Administrator of the Wage and Hour Division of the U.S. Department of Labor to inspect places and documents "`and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act*.'" Oklahoma Press, 327 U.S. at 199 (emphasis added) (quoting 29 U.S.C. § 211(a)).

[11] See also Associated Container Transp. (Australia), Ltd. v. United States, 705 F.2d 53, 60 (2d Cir. 1983) (Antitrust Division CID similar to agency subpoena: "[o]nly when permitted to utilize its investigating authority will the Division be able to exercise its expertise to determine . . . whether the Noerr-

Under these precedents, a party may not raise a jurisdictional challenge to a regulatory subpoena except in extraordinary circumstances, and any party attempting to make such a challenge bears an extremely heavy burden. In Oklahoma Press, the Court rejected the proposition that the agency must show "probable cause, that is, probability in fact, of coverage" before it could be entitled to the records sought, concluding that the agency's

> investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing . . . orders for discovery of evidence, and is governed by the same limitations. These are that [it] shall not act arbitrarily or in excess of [its] statutory authority, but this does not mean that [its] inquiry must be "limited . . . by forecasts of the probable result of the investigation . . ."

Id. at 216 (quoting Blair, 250 U.S. at 282) (footnote omitted). Thus, the strong presumption of authority to investigate can be overcome only where the investigation is arbitrary, cf. Chattanooga Pharm. Ass'n v. United States Dep't of Justice, 358 F.2d 864, 865 (6th Cir. 1966) (setting CID aside based on uncontradicted allegations that CID was issued to harass and intimidate the recipient), or where settled law and uncontroverted facts show that the agency or department clearly lacks jurisdiction. Ernstthal, 607 F.2d at 490 (where the agency

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Pennington doctrine immunizes appellees' conduct"); Amateur Softball Ass'n of America v. United States, 467 F.2d 312 (10th Cir. 1972)(permitting Antitrust Division to use CID to fully investigate facts of conduct alleged by recipients to fall outside the Division's subject-matter jurisdiction).

"does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding . . ."); Australia/Eastern, 1982-1 Tr. Cas. (CCH) ¶64,721, p.74,062 ("where the question is not absolutely determined by authority, and facts surrounding the question of the coverage of the antitrust laws are unresolved, the Antitrust Division is authorized by the ACPA to fully investigate those facts") (citing Amateur Softball, 467 F.2d 312, 316 (10th Cir. 1972)). As Judge Greene concluded in Australia/Eastern:

> To summarize the status of jurisdictional challenges to CIDs under the ACPA, there is no statutory language directly stating that such challenges are appropriate, or should be treated differently from similar challenges to the subpoenas of other agencies. The House Report does reflect that the limitation by definition of the ACPA to antitrust violations permits challenges based upon *clear exemptions* from the antitrust laws. The case law on the matter is scant, but appears to allow such challenges *only when no factual development is required to determine the issue*. In conclusion, there appears to be little, if any, difference between the standards that have traditionally been applied in subpoena enforcement cases . . . and those that should be applied to CIDs under the ACPA.

Id. at 74,062-63 (emphasis added).

The Antitrust Division's investigation cannot be regarded as arbitrary. The formation and operation of license fee collecting societies raise substantial antitrust issues, see Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979),[12/] as does the formation of a programming joint venture in

[12] Although the investigation is not complete, the "copyright societies" at issue here appear to bear little

which the major suppliers of programming participate. See United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412, 429-30 (S.D.N.Y. 1980) (programming joint venture including major movie studios condemned as per se illegal), aff'd mem., 659 F.2d 1963 (2d Cir. 1981). The European Commission has issued a Statement of Objections suggesting that some of the majors' foreign activity is anticompetitive. Under these circumstances, it is hardly surprising or unreasonable for the United States to undertake its own investigation of these potential antitrust violations and their effects on U.S. domestic and export commerce.

Nor can the majors reasonably claim that the law or the facts compel a finding that the United States clearly lacks jurisdiction. Foreign activities may be subject to U.S. antitrust laws in a variety of circumstances, see 15 U.S.C. §6a (conduct having a direct, substantial and reasonably foreseeable effect on U.S. domestic or export commerce supports Sherman Act jurisdiction), and any determination of what constitutes an

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relationship to the types of collective licensing organizations judged under the antitrust "rule of reason" in Broadcast Music. The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), are organizations representing tens of thousands of individual composers and other holders of copyrights in musical compositions. Copyright owners grant ASCAP and BMI the non-exclusive right to license their musical compositions.

In contrast, the copyright societies under consideration have fewer members, are controlled by a handful of music companies and require, as a condition of membership, that members assign or exclusively license all performance and dubbing rights to the organization, thus preventing programmers from negotiating directly with a music company.

appropriate jurisdiction-triggering "effect" on export or domestic commerce is inherently fact-specific. Cf. Ernstthal, 607 F.2d at 491 (where jurisdiction rested on factual issue of classification, regulatory subpoena would be enforced). Accordingly, and given that the majors have entered into a series of collaborative arrangements in the United States and abroad, any further inquiry into ultimate jurisdiction is unnecessary at this stage, and the Court should grant the petition without hesitation.

II. Available Information Suggests Several Grounds on Which the Majors' Conduct May Be Subject to the Sherman Act.

We do not believe that it is necessary for the court to consider the issue of subject-matter jurisdiction over various violations that may be uncovered in this investigation in order to grant the instant petition. Nor do we believe that it is necessary or appropriate at this stage of the investigation to discuss in detail all possible theories related to jurisdiction. The majors, however, have asserted that no reasonable basis exists for the exercise of jurisdiction in this case. In fact, there is such a basis.

The CIDs in question were issued to investigate possible violations of Sections 1 and 2 of the Sherman Act, both of which apply to "commerce among the several states, or with foreign nations." 15 U.S.C. §§1,2. It has long been clear that anticompetitive behavior is not immune from U.S. antitrust scrutiny simply because it occurs overseas, so long as it has

substantial effects on American commerce. Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2909 (1993); United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).[13/]

The Foreign Trade Antitrust Improvements Act of 1982 clarified the case law relating to "foreign commerce" jurisdiction under the Sherman Act and provides in pertinent part:

> Sections 1 through 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless
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>
> (1) such conduct has a direct, substantial and reasonably foreseeable effect--
>
> (A) on trade or commerce which is not trade or commerce with foreign nations . . .; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States
> . . . .

15 U.S.C. § 6a.

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[13] "Foreign commerce" jurisdiction has often been directed at the collusive anticompetitive behavior of international cartels, see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114-15 (1969); Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 916-17 (D.C. Cir. 1984); Daishowa, Int'l v. North Coast Export Co., 1982-2 Tr. Cas. (CCH) ¶ 64,774, p. 71,786 (N.D. Cal. 1982), including their control over intellectual property rights. Zenith, 395 U.S. at 114-15; United States v. Westinghouse Elec. Corp., 471 F. Supp. 532, 538 (N.D. Cal. 1978), aff'd in part, rev'd in part, 648 F.2d 642 (9th Cir. 1981), see also United States v. Imperial Chem. Indus., Ltd., 100 F. Supp. 504, 517 (S.D.N.Y. 1951); United States v. General Elec. Co., 82 F. Supp. 753, 798 (D.N.J. 1949); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 290 (N.D. Ohio 1949); United States v. General Elec. Co., 80 F. Supp. 989, 1004 (S.D.N.Y. 1948).

Here, there is reason to believe that the major American and foreign music companies, through various associations, ventures and agreements, may have formed an international conspiracy designed to dominate, discipline, eliminate or extract monopoly prices from music programmers. As set forth above, the majors have (1) created a web of "copyright societies" that collectively negotiate licensing fees and thus may have fixed the price of the intellectual property rights to pre-recorded music and music videos; (2) formed an international network of digital radio and music video programming joint ventures which may operate to raise the price of music videos supplied to all programmers or tend to eliminate competition in the music programming market; and (3) entered into collateral agreements supportive of an international price-fixing scheme. Depending on the exact nature and characteristics of these arrangements, these collaborative endeavors may support jurisdiction in any of several ways.[14/]

A. The United States has Jurisdiction Over an International Conspiracy Having Domestic Members, Components and Effects.

Where an antitrust conspiracy affecting American commerce is composed of domestic and foreign components, Sherman Act

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[14] Considerations of comity may also bear on the Department of Justice's decision regarding the nature and extent of any action it might bring at the conclusion of its investigation. See Antitrust Enforcement Guidelines for International Operations 1994, Draft for Public Comment, 59 Fed. Reg. 52,810, 52,818-19 (October 13, 1994). The evidence that bears on the jurisdictional and substantive antitrust issues in the investigation will also be relevant to the Department's consideration of comity factors.

jurisdiction applies to the entire conspiracy so long as the domestic effects are direct, substantial and reasonably foreseeable. 15 U.S.C. §6a; Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In Continental Ore, cited with approval in the FTAIA's legislative history, the Supreme Court held that the trial court erred in excluding evidence relating to the Canadian components of a conspiracy having U.S. members, components and effects. Id. at 702-07.[15/] Just as important to *this* investigation--which includes various transactions that may be part of a single unlawful scheme--the unanimous opinion in Continental Ore held that courts should not "tightly compartmentaliz[e]" the various factual components of an alleged antitrust conspiracy but should give plaintiffs "the full benefit of their proof" and judge the character and effect of the conspiracy "by looking at it as a whole." Id. at 699.[16/] Concluding that the appellate court erred in examining the individual parts of the defendants' conduct *seriatim*, id. at 698-99, the Court remanded for "a new trial of the entire case in view of the close interconnection between the Canadian and domestic issues . . . ." Id. at 708.

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[15] In so holding, the Court rejected arguments that the defendants' foreign conduct was immune because it occurred outside the United States, because there was some foreign government involvement, and because the conduct was legal under foreign law. Id. at 704-07.

[16] Accord Avis Rent-A-Car System v. Hertz Corp., 782 F.2d 381, 385 (2d Cir. 1986) (court must look at "entire mosaic"); Regency Oldsmobile, Inc. v. General Motors Corp., 723 F. Supp. 250, 258 (D.N.J. 1989) ("the Court must strive to see the constellation from the stars").

Here, the available information, viewed as a whole and in light of the fact that the investigation is at an early stage, suggests that the majors have entered into a conspiracy that includes U.S. members, components and effects. With respect to participation, Time Warner is an American company and, in addition, appears to be the driving force behind many of the collaborative associations and agreements under consideration. Other CID recipients, though subsidiaries of foreign parents, are well-known and substantial American companies. It is believed that, by themselves, the American CID recipients and their subsidiaries are collectively responsible for the majority of records and music videos heard and seen throughout the world. Many of the agreements and decisions relating to foreign activities were likely negotiated and made in the United States, though this cannot be confirmed without access to all of the relevant documents.

More importantly, the majors entered into two American music programming joint ventures. While their stated purpose is to provide audio and video music programming to United States audiences, they appear to be "closely interconnected" with the majors' foreign collaborative activities. See Continental Ore, 370 U.S. at 708. As with the copyright societies, for example, one underlying intent and effect of the U.S. joint ventures appears to be to raise the price of music and music videos

provided to all U.S. programmers.[17/] Moreover, to the extent that the conspiracy is intended to dominate high-technology distribution systems, and eventually retail distribution of tapes and CDs through home-shopping services provided through the same systems, the domestic joint ventures may share that purpose and effect with the foreign joint ventures. Both U.S. joint ventures, moreover, share common ownership, timing of creation and subject-matter with their foreign counterpart ventures. See Adam Sandler, They Want Their MTV, Daily Variety, Jan. 21, 1994, at 7 ("[t]he first phase of the launch of the new channel, according to sources, would be the creation of several foreign music channels . . ."). [18/] If an unlawful conspiracy exists, therefore, purely American activities form a significant and inseparable segment of the scheme. An investigation directed at

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[17] The licensing agreements between DCR and, respectively, Warner, Sony and EMI contain identical language calling for a uniform license fee (2 percent of revenue) supported by most favored nations clauses. An original draft of the U.S. music video joint venture partnership agreement provided for the payment of licensing fees identical to the 20 percent figure routinely demanded by the majors-dominated copyright societies abroad. Even now, the U.S. music video joint venture channel is seen as a price-setting "example" to other programmers. See Martin Peers, Bertelsmann Joins Rival MTV Channel, New York Post, June 29, 1994, at 24 (BMG executive "admitted that Bertelsmann wanted music video channels to pay for the use of videos. `We think one way to influence that would be to be involved in at least one channel that might set an example to the others', he added").

[18] Many documents already produced by the majors as relevant to these joint ventures contained references to foreign activities but have been redacted to exclude such references; this further supports the conclusion that the domestic and foreign conduct is intertwined.

establishing any such connection is clearly consistent with the jurisdictional approach of Continental Ore.

B. The United States has Jurisdiction Over Foreign Conduct Having Direct, Substantial and Foreseeable Effects on U.S. Domestic and Export Commerce.

1. Domestic Effects.

The activities of the foreign "copyright societies", in the context of this industry, may have direct, substantial and reasonably foreseeable effects on domestic commerce under the FTAIA. For example, a horizontal price fix of music video rights licensed to MTV-Latino would affect domestic commerce, since MTV-Latino's signal encompasses part of the United States. Moreover, the collective licensing scheme in foreign countries may constitute a horizontal agreement among competitors not to provide world-wide licenses to U.S. programmers.[19/] The effect of such a collective refusal to deal may be (1) to support an agreement among the majors not to pay for airplay on programmers' networks *in the United States* or (2) to eventually coerce U.S. programmers into paying higher-than-competitive fees for any such world-wide licenses, which by definition encompass programmers' foreign *and* U.S. programming inputs.

Further, the collective licensing arrangement by VPL and other copyright societies requires programmers to pay a percentage of their *total* revenue, regardless of the percentage

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[19] The exclusive licenses to VPL effectively prevent any music company from entering into a world-wide license without receiving permission or withdrawing from the society.

of programming actually devoted to the licensed music videos. This licensing scheme may have the effect of decreasing programmers' revenues for original programming as well as video programming. Moreover, in light of the majors' antipathy to such original programming, it is possible that this was not only an effect, but a principal intent underlying the total-revenue structure of the collective licensing scheme.

Accordingly, the United States is seeking to determine the extent to which these arrangements directly affect commerce in the United States.

2. The Majors' Foreign Activity Has Direct, Substantial and Reasonably Foreseeable Effects on U.S. Export Commerce.

In addition to the numerous domestic effects set forth above, the majors' foreign conduct directly, substantially and foreseeably affects the export trade of American music programmers.

a. The Relevant Exports.

Although exports and imports of services are less tangible than commodities hauled to a loading dock, they are entitled to the same treatment for jurisdictional purposes. See, e.g., Laker Airways, 731 F.2d 909 (D.C. Cir. 1984); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). Each of the U.S. programming exporters has developed a complex, unique, consistent and recognizable type of service in the United States, which the

company then brings to market in foreign countries. The total service package generally includes substantial numbers of U.S.-produced music videos, trade and service marks, other intellectual property rights and know-how, original programming, interstitial material, art and formats--all developed in the United States. Foreign consumers, businesses and governments typically identify these services as American in origin. Indeed, several of the music programmers package each day's programming *in the United States*, from which it is beamed *unchanged* via satellite uplinks to foreign consumers. In other cases, the American company exports its service through a foreign subsidiary that tailors the service to the local culture. In addition, programmers like Viacom exports *to* that subsidiary a substantial quantity of U.S.-produced original programming.[20/] These transfers, whether effectuated by electromagnetic wave transmission, a foreign branch or subsidiary, or physical delivery clearly constitute export commerce under the FTAIA.[21/]

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[20] Similarly, BET exports six-hours per day of original programming to its joint venture affiliate in London. In the case of MOR Music TV, merchandise sold on its proposed overseas channel may also be exported to its overseas joint venture.

[21] The use by a programmer such as Viacom of a wholly-owned foreign subsidiary or branch, even one that has discretion over programming, does not alter the "export" character of the unique package of services being delivered to foreign consumers. Rather, a court must look to the degree of American involvement and content in the export. Thus, although the fact that a foreign service provider is American-owned is clearly not sufficient to justify treating the service as a U.S. export, see Power East Ltd. v. Transamerica Delaval, Inc., 558 F. Supp. 47, 48-49 (S.D.N.Y.), aff'd, 742 F.2d. 1439 (2d Cir. 1983), it is also clear that an American service provider's use of a subsidiary, branch, joint venture or other entity in the foreign

b. Effects on Export Commerce.

Effects on these U.S. exports may well prove to be direct, substantial and reasonably foreseeable. First, the investigation may show that the collective licensing scheme raises costs to the point where some programmers will find it unprofitable to export their programming at all. Whether they exit, choose not to enter, or choose not to expand to the next country, region or cable system, the foreclosure effect on exports is substantial. Second, for programmers like Viacom, the price fix may have the possibly intended effect of eliminating or reducing original programming exported from the United States so that airplay of the majors' music videos is increased. Third, the potential effects of the various overseas joint ventures on exports by U.S. programmers are severe. To the extent that the majors restrict programmer access to the rights to music and music videos played on the channel, the ability to export music programming necessarily is impeded. Likewise, to the extent that such ventures are formed as a means of coercing other programmers into acquiescing to the price fixed by the copyright societies, they contribute to the adverse effects described above.

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country to tailor the service to the local culture does not disqualify the service as an export or the American company as an exporter. Cf. United States V. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 952-63 (D. Mass. 1950)(export company's use of wholly owned subsidiary to modify and sell exported product treated as "export trade" under Webb-Pomerene exception to Sherman Act). Here, all of Viacom's overseas operations are properly regarded as exports.

In short, the available facts indicate numerous ways in which U.S. jurisdiction based on anticompetitive harm to domestic and export commerce may result from the majors' collaborative efforts overseas.

III. The United States is Entitled to the Information and Materials Requested in the CID Because Evidence of the Majors' Activity Overseas is Relevant to Show the Character and Purpose of the Majors' Domestic Conduct.

Even if the potential impact of the majors' foreign activities on domestic and export commerce would not, *under any theory or any set of circumstances*, be direct and substantial enough to confer jurisdiction, the United States is entitled to discover U.S.-located information and materials relating to the foreign copyright societies and joint ventures because such evidence is highly relevant to the intent, nature and effects of the two domestic joint ventures.

If this matter proceeds to trial, such evidence will be admissible pursuant to Rule 404(b) of the Federal Rules of Evidence (evidence of other crimes, wrongs or acts admissible to prove, *inter alia*, motive, intent, plan and knowledge). Clearly, evidence related to the foreign copyright societies and joint ventures is relevant to the issues of intent, motive and knowledge with respect to the majors' contemporaneous domestic joint ventures. See Rothberg v. Rosenbloom, 771 F.2d 818, 823 (3d Cir. 1985) (trial court properly admitted evidence of four joint ventures not at issue in the case to show the "nature and

purposes" of two other joint ventures alleged to have violated federal securities laws).[22/]

Rule 404(b) codified, *inter alia*, "the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670-71 n.3 (1965) (internal quotations, citations omitted); Local Lodge No. 1424, Int'l Ass'n of Machinists, AFL-CIO v. NLRB, 264 F.2d 575, 580 (D.C. Cir. 1959)(evidence of acts outside the period received to "illuminate and explain events within the period"), rev'd on other grounds, 362 U.S. 411 (1960). This rule applies whether or not the conduct in question was legal, Pennington, 381 U.S. at 670-71

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[22] Accord United States v. Southwest Bus Sales, Inc., 20 F.3d 1449, 1456 (8th Cir. 1994)(evidence of a Minnesota conspiracy was of the exact nature of the charged South Dakota conspiracy and was admissible and relevant to the issues of intent to conspire, motive, and lack of mistake); United States v. Misle Bus & Equipment Co., 967 F.2d 1227, 1234 (8th Cir. 1992)(evidence of a conspiracy separate from the charged conspiracy was admissible on the ground that it was relevant to and probative of defendants' knowledge and general intent); Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245, 1250 (9th Cir. 1990) (testimony regarding previous agreements was admissible to demonstrate other anti-competitive conduct by defendant), cert. denied, 501 U.S. 1230 (1991); United States v. Suntar Roofing, Inc., 897 F.2d 469, 479 (10th Cir. 1990)(evidence concerning similar agreements entered into by defendants charged with conspiracy in violation of the Sherman Act before and during the time period charged is admissible as being relevant to the issue of intent); United States v. Haldeman, 559 F.2d 31, 88-89 (D.C. Cir. 1976)(evidence of a break-in of the offices of a psychiatrist was relevant to show a central motive for the Watergate conspiracy), cert. denied, 431 U.S. 933 (1977).

n.3, or outside the subject-matter jurisdiction of the court. See, e.g., Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 46-47 (1911) (activity prior to passage of the Sherman Act admitted to show nature of subsequent conduct); Whittaker Corp. v. Execuair Corp., 736 F.2d 1341, 1347 (9th Cir. 1984) ("Evidence of events or transactions which cannot be the subject of a suit by virtue of a statute of limitations bar may be introduced to show the nature and character of transactions under scrutiny or to establish a course of conduct").

CONCLUSION

The United States is entitled to the documents and interrogatory answers sought by its CIDs because it is authorized to investigate the factual basis for a potential antitrust claim, because U.S. courts probably have jurisdiction to hear such a claim, and because the information is otherwise relevant to understanding, and admissible to establish, the full nature and intent of the majors' domestic activities over which U.S. jurisdiction is undisputed.

WHEREFORE, the United States requests that the instant petition be granted.

Respectfully submitted,

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