

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.

MOTION TO SET A HEARING DATE

The United States respectfully submits motion to set a hearing date in the above-captioned matter. In support of this motion, the petitioner states as follows:

1. The United States filed its petition on November 3, 1994.

2. The factual and legal issues have been extensively briefed.

3. As set forth in the accompanying memorandum, the United States has continued its investigation to the extent permitted by the present discovery impasse, but access to the withheld documents and information is essential to a final resolution of this investigation.

4. Alternatively, should the Court determine that it can rule on the Petition on the basis of the briefs that have been filed to date, the United States respectfully requests that the Court, at its earliest convenience, enter the proposed Order submitted with the Petition.

5. Pursuant to Local Rule 108(m), undersigned counsel has discussed this motion by telephone with counsel for each of the respondents. Respondent EMI Music Inc. does not oppose the motion. Respondents Time Warner, Inc., Sony Corporation of America, Bertelsmann Inc. and PolyGram Holding Inc. have not made a final determination as to whether or not to oppose this motion.

WHEREFORE, the United States respectfully requests that the Court set the earliest possible hearing date.

Respectfully submitted,



Robert P. Faulkner (430163)

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UNITED STATES OF AMERICA,

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**MEMORANDUM IN SUPPORT OF
MOTION TO SET A HEARING DATE**

The United States respectfully submits this memorandum in support of its motion to set a hearing date in the above-captioned proceeding. This Memorandum also serves as a status report to bring the Court up to date on developments in the underlying investigation that are relevant to the pending matter.

I.

The United States filed this action on November 3, 1994, requesting that the Court order prompt compliance with civil investigative demands (CIDs) that had been issued to the respondents. The issues were extensively briefed in numerous memoranda filed by the parties.

Since the last substantive filing in February 1995, the United States has, to the extent possible given the respondents' refusal to cooperate fully with the investigation, continued to develop evidence relating to the various potential Sherman Act violations described in its papers, and to monitor developments in the industry. Some of this newly developed information is

described in Part II of this Memorandum.

In addition to gathering evidence from third parties, the United States on June 2, 1995 issued additional Civil Investigative Demands (CIDs) to the respondents in this action.¹ These supplemental CIDs called for the respondents to update the information called for in the CIDs that are the subject of this proceeding. The United States made compliance with these new CIDs regarding foreign conduct contingent upon this Court's decision in this matter:

The obligation to respond to interrogatories or document requests relating to conduct which you have claimed does not fall within the jurisdiction of the Department of Justice to investigate and which is the subject of United States v. Time Warner, No. Misc. 94-338 HHG (filed Nov. 3, 1994) (the "Time Warner proceeding") is contingent upon, and the manner and timing of production will conform to, any order rendered by the district court in that proceeding.

Pursuant to these supplemental CIDs, each of the respondents has now provided documents and information related to its domestic activities but has withheld U.S.-located documents related to its foreign conduct.

In the Summer of 1995, the United States noticed depositions for officers of some of the respondents, and one such deposition actually took place. However, attorneys for each of

¹ One of these CIDs is attached hereto as Exhibit 1. The others are substantively identical to Exhibit 1.

the respondents have informed the United States that their officers will not be permitted to answer questions relating to the respondents' foreign activities while the instant matter is pending. Accordingly, the United States suspended the taking of any depositions from the respondents' officers until a complete examination could be conducted.

As the Court is aware, Directorate General IV (DG-IV) of the European Commission is also investigating some of the activities that form the basis of the instant investigation. Counsel for some of the respondents have confirmed that DG-IV recently issued new requests for information relating to the possibility of collusion in the licensing of music videos to programmers in Europe. Where the law so permits, the United States continues to coordinate its investigation with DG-IV.

The United States has, for all practical purposes, exhausted all reasonably available avenues of investigation that do not involve compliance with the CIDs in question. Accordingly, the United States respectfully requests that this Court set a date for hearing so that the Antitrust Division can determine whether to bring an antitrust case or to terminate this investigation.

II.

During the past year, there have been several factual and evidentiary developments which, though not essential to the

determination of the core legal issue,² should be brought to the attention of the Court. These developments further underscore the possibility of improper concerted conduct of the respondents around the world that restrain the domestic and export commerce of the United States.

MuchMusic USA. The United States has learned that some of the respondents may have fixed prices and/or shared material information in relation to the licensing of music videos to MuchMusic USA. MuchMusic USA is a 50-50 partnership between Rainbow Holdings, Inc., a subsidiary of Comcast Corporation, and Chum, Ltd., a Canadian company that operates a music video programming service in Canada. When MuchMusic USA launched its U.S. music video service in August of 1994, some of the respondents made identical demands for payment even though the typical price in the U.S. market is zero. These respondents may have boycotted the launch of MuchMusic USA and coordinated their demands throughout the negotiations with that firm.

Changes in Investigated Ventures. As the Court is aware, one of the respondents terminated the "VIVA US"

² That issue, as noted in previously filed briefs, is whether the respondents can show conclusively that, as a matter of settled law and undisputed fact, the United States had no jurisdictional basis for its investigation. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-18 (1946); FTC v. Ernstthal, 607 F.2d 488, 490 (D.C. Cir. 1979); Australia/Eastern U.S.A. Shipping Conference v. United States, 1982-1 Tr. Cas. (CCH) ¶64,721 (D.D.C. 1981).

partnership, which had been formed to produce a U.S. music video channel and which the United States alleged may have been a vehicle for price fixing. The United States is attempting to determine whether, as reported in some press accounts, a similar joint venture or other industry-wide price-fixing mechanism is likely to be re-formed in the United States. See, e.g., Brett Atwood, Majors Eye New Options for Vid Channel, Billboard, July 22, 1995 (attached hereto as Exhibit 2).

In addition, the respondents claim to have restructured five national performance right societies in Europe so that the societies will no longer hold exclusive rights to their members' works. The United States has been unable to determine the exact nature of the restructurings owing to the respondents' continued refusal to produce documents related to their foreign activities. The United States has obtained some documents relating to the restructuring of Video Performance, Ltd. (VPL), the British performance right society, which raise concerns as to whether the societies' role as the exclusive source of licenses has in fact ended. The withheld documents will aid the United States in investigating the existence, scope and likely permanence of such restructurings, the existence or likelihood of *de facto* exclusivity, and the possibility of continued collusion through participation in such societies.

Worldwide License Agreements. In its opening brief,

the United States referred to the possibility that collusive activity in foreign countries could "coerce U.S. programmers into paying higher-than-competitive fees for . . . worldwide licenses, which by definition encompass programmers' foreign and domestic programming inputs."³ The Court has before it a copy of one such worldwide license agreement between respondent Sony Music Entertainment, Inc. and MTV Networks, Inc.,⁴ and it now appears that two more such agreements have been executed. Without going into the details of these competitively sensitive agreements, the license fees and the negotiating positions of the respondents leading to these agreements are consistent with the theory set forth above. The United States believes that various programmers and some of the respondents may have engaged in further negotiations for worldwide licenses. The United States continues to investigate the relationship between these agreements affecting the U.S. market and the respondents' collective arrangements around the world.

Information Sharing. The United States has developed evidence that the respondents may have engaged in substantial sharing of information about their licensing of music videos to

³ See Memorandum of Points and Authorities in Support of Petition to Enforce Civil Investigative Demands, filed Nov. 3, 1994, at 33 (emphasis in original).

⁴ See Exhibit 1B to the United States' Reply in Support of Petition to Enforce CIDs, filed December 22, 1994.

U.S. programmers. These activities may include (1) the exchange of information relating to U.S. license negotiations through contacts with representatives of foreign performance rights organizations; (2) direct high-level information exchanges among the respondents relating to negotiations for the worldwide license agreements discussed above; (3) other exchanges of information concerning the price and material terms of U.S. license agreements; and (4) agreements among certain respondents to utilize most favored nations clauses to ensure price uniformity. The United States continues to investigate these issues.

CONCLUSION

Several factors suggest the need for a prompt decision in this proceeding. First and foremost, if the defendants are engaged in illegal activities, U.S. consumers and companies are being adversely affected. Various existing license agreements are expiring, and new worldwide license agreements are being negotiated. Reforming a tainted market structure, if this were to prove appropriate, would be far more difficult than ensuring in advance that the market evolves free of improper restraints on competition.

Second, the United States has now exhausted other available avenues of information and requires the withheld information to complete its investigation. Further passage of

time raises the possibility that the trail will grow cold, *i.e.*, that anticompetitive conduct will be masked or tailored to appear benign, that key witnesses will be dispersed or forget events, or that relevant documents could be lost. Third, the Division's ability to coordinate its investigation (or relief) with DG-IV is hampered by its ignorance of the full scope of the respondents' conduct and the exact nature of their various ventures. Finally, the Division's ability to take further action regarding the respondents' conduct (to bring suit or close its investigation, for example) is constrained by the large gaps of information created by the current discovery dispute.

WHEREFORE, the United States respectfully requests that the Court set the earliest possible hearing date. Alternatively, should the Court determine that it can rule based on the briefs that have been filed to date, the United States respectfully requests that the Court, at its earliest convenience, enter the proposed order submitted with the Petition.

Respectfully submitted,



Robert P. Faulkner (430163)

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Misc. No. 94-338 HHG: Exhibit No. 1

United States Department of Justice

ANTITRUST DIVISION WASHINGTON, D.C. 20530

TO Time Warner Inc.
75 Rockefeller Plaza
New York, NY 10019

Civil Investigative
Demand No.

12985

This civil investigative demand is issued pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§1311-1314, in the course of an antitrust investigation to determine whether there is, has been, or may be a violation of Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1-2

by conduct, activities or proposed action of the following nature: Restraint or monopolization of domestic and international markets for cable, wire and satellite-delivered music programming through price-fixing cartels and overbroad joint ventures.

You are required by this demand to produce all documentary material described in the attached schedule that is in your possession, custody or control, and to make it available at your address indicated above for inspection and copying or reproduction by a custodian named below. You are also required to answer the interrogatories on the attached schedule. Each interrogatory must be answered separately and fully in writing, unless it is objected to, in which event the reasons for the objection must be stated in lieu of an answer. Such production of documents and answers to interrogatories shall occur on the 21st day of June, 19 95 at 10:00 a.m. ~~p.m.~~

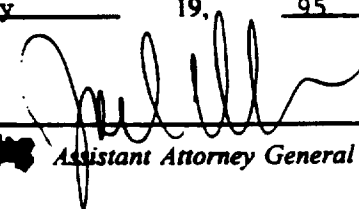
The production of documentary material and the interrogatory answers in response to this demand must be made under a sworn certificate, in the form printed on the reverse side of this demand, by the person to whom this demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production and/or responsible for answering each interrogatory.

For the purposes of this investigation, the following are designated as the custodian and deputy custodian(s) to whom the documentary material shall be made available and the interrogatory answers shall be submitted: Chris Kelly (Custodian), Robert P. Faulkner (Deputy Custodian) and Stacy S. Nelson (Deputy Custodian), Civil Task Force I, City Center Bldg., 1401 H Street, N.W., Suite 3700, Washington, D.C., 20530

Inquiries concerning compliance should be directed to Robert Faulkner 202/514-0259 or Stacy S. Nelson 202/514-8380

Your attention is directed to 18 U.S.C. §1505, printed in full on the reverse side of this demand, which makes obstruction of this investigation a criminal offense.

Issued at Washington, D.C., this 31st day of May, 19, 95


Assistant Attorney General

SCHEDULE

I. DEFINITIONS

1. The definitions set forth in the Schedule accompanying Civil Investigative Demand Number 11113 are incorporated herein.

II. INSTRUCTIONS

1. The instructions set forth in the Schedule accompanying Civil Investigative Demand Number 11113 are incorporated herein, excepting Instruction 1 as it relates to production and search cut-off dates. Unless otherwise specified, the information and documents requested by this schedule are information and documents, not already provided, in the possession, control or custody of your company that were applicable, effective, prepared, written, sent, dated or received at any time between July 7, 1994 and the date of your company's compliance with this request.

2. All written modifications to Civil Investigative Demand Number 11113, excepting modifications relating to cut-off dates for searches or production, are incorporated herein.

3. The obligation to respond to interrogatories or document requests relating to conduct which you have claimed does not fall within the jurisdiction of the Department of Justice to investigate and which is the subject of United States v. Time Warner, No. Misc. 94-338 HHG (filed Nov. 3, 1994) (the "Time Warner proceeding"), is contingent upon, and the manner and timing of production will conform to, any order rendered by the district court in that proceeding.

4. This Schedule is supplemental to, and does not in any manner replace, Civil Investigative Demand Number 11113. The United States and your company retain all rights and remain under all obligations arising out of Civil Investigative Demand Number 11113.

III. INTERROGATORIES

1. To the extent not already provided, or to the extent that your company is not already obligated to respond pursuant to Civil Investigative Demand Number 11113, provide a response, for the period specified in Instruction Number 1, to the following interrogatories:

- a. All interrogatories (or subparagraphs thereof) set forth in Civil Investigative Demand Number 11113 that are the subject of the Time Warner proceeding;
- b. Interrogatory Numbers 1, 3, 15, 28-37, 54, 55 and 57 to the extent they seek information that is not the subject of the Time Warner proceeding.

IV. DOCUMENT REQUESTS

1. To the extent not already produced, or to the extent that your company is not already obligated to produce pursuant to Civil Investigative Demand Number 11113, produce all documents, for the period specified in Instruction Number 1, that otherwise respond to each document request set forth in Civil Investigative Demand Number 11113.

Misc. No. 94-338 HHG: Exhibit No. 2

Majors Eye New Options For Vid Channel *Joint Venture Called Off; U.S. Continues Probe*

■ BY BRETT ATWOOD

LOS ANGELES—Most of the major-label participants in an abandoned U.S. music video venture may be laying the groundwork for another new U.S. music video channel to launch in 1996, sources say.

A much-discussed venture between Warner Music Group, EMI Music, PolyGram, Sony Corp., BMG, and Ticketmaster has reportedly been called off, although the U.S. Justice Department antitrust inquiry into the proposed major-label-backed channel continues.

Meanwhile, some industry sources suggest that another U.S. music video channel, backed by many of the same corporations, may be on the horizon.

"It's just too big an opportunity for the major labels to overlook," says one source at Warner Music Group.

Two separate sources indicate that the new U.S. channel is likely to be some sort of collaborative effort by Germany's Viva! music network and Hong Kong-based Channel V, which is the music video service of News Corp.'s STAR TV.

A spokesman for STAR TV did not deny the possibility that a U.S. music video channel is in the works but offered no further information.

Ironically, most of the major music corporations affiliated with STAR TV and Viva! are the same as those that were partners in the ill-fated U.S. music video venture. Sony Pictures Entertainment, Warner Music Group, BMG, and EMI Music Group own 50% of STAR TV, while PolyGram, Sony, EMI, and Time Warner are the majority owners of Viva! At press time, it was unclear whether or not Ticketmaster would be a partner in any new channel proposal.

Ticketmaster is already positioning itself as a player in music video programming. Earlier this month, a wholly owned subsidiary of Ticketmaster finalized its acquisition of a 50% stake in the Box UK (see story, page 59).

Sources say the fate of the original label-backed music video channel was sealed with the firing of former Warner Music Group chairman Robert Morgado (Billboard, May 13).

"That [music video channel] was mostly Morgado's thing," says one industry source. "When he went, it went, too."

However, a source at BMG adds that the venture was on shaky ground even before the departure of Morgado.

"Not one bit of work has been done to move this project forward for over a year," says the

Conference, Morgado cited limited cable channel capacity and government reregulation of cable as reasons for the slow development of the channel (Billboard, Nov. 12, 1994).

A spokeswoman for MTV had no comment on the decline of its potential major-label-backed competitor.

Since 1994, the Justice Department has been investigating antitrust implications in the possibility of five of the six major record labels owning a competitor to MTV.

A spokeswoman for the Justice Department says that the investigation is ongoing, despite the apparent demise of the competitive music video network.

A major obstacle for any new venture remains the ability to enter the competitive cable market, which is already faced with an abundance of new services and a limited channel capacity.

One of the reasons the major labels may be anxious to establish a solid music video channel presence on the U.S. cable systems is frustration with MTV's programming. The network has beefed up its specialty programming over the past few years and significantly lessened

its music video content, they say.

MTV also has a reputation as a tough negotiator when it comes to securing the licensing rights to the music videos that it plays.

MTV recently entered into global music video licensing and compilation disc agreements with EMI and Sony. The music video channel is reportedly negotiating similar agreements with Warner, BMG, and PolyGram.

However, none of these licensing agreements are exclusive, and they do not prevent the music labels from offering their clips to competing services.

The same five record companies had been named in two parallel cases being considered by the European Commission—the administrative arm of the European Union—and the U.K. courts. In the cases, filed in 1993, MTV is challenging the majors' right to license videos collectively through the U.K.'s Video Performance Ltd.

Following MTV's individual licensing deals with Sony and EMI, both labels were removed from the U.K. lawsuit (Billboard, July 15).

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ORDER

Upon the United States' motion to set a hearing date in the above-caption matter, the respondents not opposing said motion, and being fully advised in the premises, it is hereby

ORDERED: That the Court will hear arguments on the United States' petition to enforce civil investigative demands on the _____ day of _____, 1996, at 10:00am.

Senior District Judge

Dated: _____, 1996

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NOTICE OF CHANGE OF ADDRESS

Please take notice that, effective immediately, all notices or correspondence related to this matter should be addressed as follows:

U.S. Department of Justice
Antitrust Division
Civil Task Force
325 Seventh Street, N.W.
Suite 300
Washington, D.C. 20530

Undersigned counsel can be reached by telephone at 202/514-0259, or by facsimile transmission at 202/307-9952.

Respectfully submitted,



Robert P. Faulkner (430163)

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Antitrust Division
Civil Task Force
325 Seventh Street, N.W.
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Telephone: (202) 514-0259

CERTIFICATE OF SERVICE

I certify that, on this 5th day of February, 1996, I have caused to be served, by overnight delivery service, a copy of the foregoing Motion to Set a Hearing Date, Memorandum in Support of Motion to Set a Hearing Date, a proposed order, and a Notice of Change of Address on counsel of record for the respondents at the addresses below:

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Robert P. Faulkner