

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

POLYGRAM HOLDING, INC.,
a corporation,

DECCA MUSIC GROUP LIMITED,
a corporation,

UMG RECORDINGS, INC.,
a corporation,

and

UNIVERSAL MUSIC & VIDEO
DISTRIBUTION CORP.,
a corporation.

Docket No. 9298

**INITIAL DECISION
[Public Record Version]**

By: James P. Timony, Administrative Law Judge

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Melissa Westman-Cherry, Esq.
Federal Trade Commission, Washington, D.C.
Counsel Supporting the Complaint.

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Counsel Supporting Respondent.

FINDINGS OF FACT

I. BACKGROUND

A. History

1. The Federal Trade Commission (“FTC”) issued a complaint on July 31, 2001, alleging that Respondents PolyGram Holding, Inc. (“PolyGram Holding”), Decca Music Group Limited (“Decca MGL”), UMG Recordings, Inc. (“UMG”), and Universal Music & Video Distribution Corp. (“UMVD”) agreed with competitor Warner Communications Inc. (“Warner Communications”): (a) to restrict price competition, and (b) to forgo advertising, violating Section 5 of the Federal Trade Commission Act.

2. On September 17, 2001, the Commission accepted a consent agreement with Warner Communications enjoining agreements with a competitor to fix prices or limit truthful, non-deceptive advertising or promotion. (*Warner Communications Inc.*, C-4025 (Sept. 17, 2001)).

3. A trial of this matter commenced on March 5, 2002. Complaint Counsel called four witnesses. Anthony O’Brien, from Atlantic Recording Corp. (an affiliate of Warner Communications); Rand Hoffman, from PolyGram Holding; Professor Catherine Moore, the director of the Music Business Program at New York University; and Dr. Stephen Stockum, an economist. Respondents rested without calling any witnesses. Both sides introduced numerous documents and deposition testimony of 20 witnesses.

B. Three Tenors

4. The Three Tenors are opera singers Jose Carreras, Placido Domingo, and Luciano Pavarotti. Stip. ¶ 2. Since 1990, they sang every four years at the site of the World Cup soccer finals¹ for a live concert and recording session. Stip. ¶ 84.

5. The Three Tenors recorded three albums of arias and songs. The first album, *The Three Tenors* (“3T1”), was released in 1990 by PolyGram. The second album, *Three Tenors in Concert 1994* (“3T2”), was released in 1994 by Warner. The third album, *The Three Tenors – Paris 1998* (“3T3”), was released in 1998 by PolyGram and Warner. Stip. ¶ 85.

C. Respondents

¹ The World Cup is an international soccer tournament. The World Cup final match was located in Rome in 1990, in Los Angeles in 1994, and in Paris in 1998. Stip. ¶ 83.

57. Warner calculated that, on the conservative assumption that the third Three Tenors album sold only 60 percent as well as 3T2, then Warner and PolyGram would each make over \$5.5 million. CX 366 at 3TEN00007334. If the profits had been projected to be only \$3 million, Warner still would have gone ahead with the deal. O'Brien, Tr. 412.

B. PolyGram and Warner Negotiate

58. By a series of contracts dated October 14, 1997, in return for an \$18 million advance and other consideration, Rudas licensed to Warner the worldwide audio, video, and home television rights to the 1998 Three Tenors concert and a box set and greatest hit albums from 3T1, 3T2 and 3T3 (the "3T3 Rights"). Stip. ¶ 126; JX 11 (*in camera*); CX 205 (*in camera*); CX 206 (*in camera*).

1. Specific terms of the collaboration

59. Pursuant to the Concert/License Agreement dated December 19, 1997, Warner and PolyGram agreed to collaborate on the distribution of products derived from the 1998 Three Tenors World Cup concert. The contract is formally between Warner Benelux B.V. and PolyGram S.A. Stip. ¶ 127; JX 10.

60. The contract between PolyGram and Warner provides that:

- a. Atlantic, a Warner affiliate, is responsible for exploiting the 3T3 Rights within the United States. JX 10-N.²
- b. Warner licenses to PolyGram the right to exploit the 3T3 Rights outside of the United States. JX 10-N-O.
- c. Warner and PolyGram are separately responsible for developing and implementing marketing plans for their respective territories. Neither party has the right to approve or disapprove the other's marketing plans. JX 10-P, T. However, Warner and PolyGram agree to "consult and coordinate" with respect to marketing and promotion activities in connection with the exploitation of the 3T3 Rights. JX 10-P.
- d. Warner and PolyGram are each entitled to 50 percent of the net profits and net losses derived from the worldwide exploitation of the 3T3 Rights (as well as from the production of a Greatest Hits album and/or a Box Set incorporating the 1990, 1994, and 1998 Three Tenors albums). JX 10-Q.

² To "exploit" a recording is a music industry term that encompasses selling, advertising, marketing, and promoting the album. O'Brien 422:6-11.

