



**Federal Trade  
Commission**  
Protecting America's

Consumers 28, 2003

## FTC Finds Vivendi Subsidiaries Violated Antitrust Laws In Distribution of Three Tenors CDs

### ***Agreement Between Vivendi Subsidiaries and Warner to Prohibit Discounting and Advertising of 3 Tenors CDs Unreasonably Restrained Trade and Constitutes Unfair Method of Competition***

The Federal Trade Commission today upheld charges that several subsidiaries of Vivendi Universal, S.A. illegally agreed with Warner Communications Inc. to restrict competition for audio and video products featuring "The Three Tenors" – Jose Carreras, Placido Domingo, and Luciano Pavarotti. In its opinion, authored by Chairman Timothy J. Muris, the Commission ruled that PolyGram Holding, Inc. (a predecessor to Vivendi) improperly agreed with Warner to curb discounting and advertising to boost sales of recordings that the two companies jointly had distributed based on the tenors' concert in Paris during the 1998 soccer World Cup. The Commission's order bars PolyGram from agreeing with competitors to fix the prices or restrict the advertising of products they have produced independently.

The Commission vote to issue the opinion and accompanying order was 5-0.

Chairman Muris emphasized that "[n]o analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." The PolyGram case provided the Commission with its first opportunity in antitrust litigation to address the issue of competitor collaboration since the Supreme Court's decision in California Dental Ass'n v. Federal Trade Commission, 526 U.S. 756 (1999), and the issuance of the Department of Justice and FTC Antitrust Guidelines for Collaborations Among Competitors in 2000.

In 1997, PolyGram and Warner, two of the world's largest music companies, formed a joint venture to distribute recordings of the 1998 World Cup concert. PolyGram independently had distributed recordings of the Three Tenors concert at the 1990 World Cup (3T1), and Warner alone had distributed recordings of the Three Tenors concert at the 1994 World Cup (3T2). The Commission found that PolyGram and Warner, concerned that the recording of the 1998 concert (3T3) would be less original and commercially appealing than the 1990 and 1994 concerts, agreed to a "moratorium" to restrict price discounting and advertising for 3T1 and 3T2 before and after the public release of 3T3.

The Commission explained that the Respondents' "restraints on price discounting and advertising are inherently suspect." Writing for the Commission, Chairman Muris said the moratorium agreement reflected the view that "consumers should be deprived of the vigorous competitive offering of certain products to induce them to choose others." He added that "[c]ompeting businesses contemplating such strategies should be aware that they are antithetical to the fundamental policies of our antitrust laws and will not be countenanced."

The Commission issued its complaint against PolyGram on July 30, 2001. Following an administrative trial, Administrative Law Judge James P. Timony issued an initial decision and a proposed order on June 20, 2002. He ruled that the moratorium agreement between PolyGram and Warner constituted an unfair method of competition in violation of Section 5 of the FTC Act. The case was argued before the Commission on November 4, 2002.

When the Commission announced its complaint against PolyGram on July 31, 2001, it also announced that it had accepted for public comment a consent order with Warner, settling similar allegations. On September 17, 2001, the Commission issued the final consent order against Warner, enjoining agreements with competitors to fix prices or limit truthful, non-deceptive advertising or promotion for any audio or video product (Warner Communications Inc., Dkt. No. C-4025 (Sept. 17, 2001)).

The Commission opinion traced the development of antitrust doctrine governing "horizontal restraints" – agreements between competitors. From this review, Chairman Muris formulated a synthesis of how the Commission will analyze horizontal restraints that are "inherently suspect" because they "generally pose significant competitive hazards." The synthesis seeks "to specify more fully the analytical principles that we perceive to be embedded in the case law and our own guidelines and to refine the methodology for applying those principles in practice." As such, the synthesis "responds to the need in modern competition policy to devise analytical tests that are sound in substance, transparent in revealing their analytical criteria, and administrable in the routine analysis of antitrust disputes."

In applying the synthesis to the moratorium agreement between PolyGram and Warner, the Commission "found ample basis for concluding" that "the agreement not to discount and the agreement not to advertise are inherently suspect." Chairman Muris explained that the Respondents' "agreement not to discount is ... simply a form of price fixing" and "[t]he agreement not to advertise their earlier Three Tenors products is presumptively anticompetitive."

Concluding that the moratorium restrictions were inherently suspect, the Commission then examined PolyGram's proffered justification – that the moratorium ostensibly served the plausible procompetitive purpose of preventing PolyGram and Warner from free-riding on the release of 3T3 by diverting sales to 3T1 or 3T2, which PolyGram and Warner, respectively, owned outside the joint venture. The Commission wrote: "We reject these arguments as a matter of law, because they go far beyond the range of justifications that are cognizable under the antitrust laws." While observing that "preventing free-riding can be a legitimate efficiency," the Commission concluded that PolyGram, by "arguing that competitors may agree to restrict competition by products wholly outside a joint venture, to increase profits for the products of the joint venture," is engaged in "a frontal assault on the basic policy" of the antitrust laws. Chairman Muris noted that the Respondents' "free-riding argument is simply an attempt to shield themselves from legitimate interbrand competition" and, "as such . . . is not cognizable under antitrust law." Chairman Muris stated:

"Arguably, this conclusion could be characterized as a finding of 'per se illegality' in that we conclude that the restraints at issue are 'naked' restraints on competition because they lack a cognizable justification. . . . In the end, the label matters less than the substance of the analysis, the purpose of which remains 'to form a judgment about the competitive significance of the restraint.' Here, we have no doubt that the restraints before us harm competition and must be condemned."

The Commission went on to conduct a more detailed factual analysis of the restraints and PolyGram's justifications, finding that "the extensive factual record regarding practices in the recording industry and Respondents' own prior course of conduct establishes that the harm to competition not only is inferable from the nature of the conduct but is established as a matter of fact." Chairman Muris explained that, "prior to the moratorium, Respondents discounted prices as part of the marketing strategy for their respective Three Tenors products." Thus, the Commission found "the agreement . . . not to discount . . . is not only presumptively anticompetitive, but also eliminated actual price discounting that had occurred previously . . ."

Similarly, the Commission found that advertising was an important part of competition before the moratorium. In 1994, when Warner released 3T2, PolyGram advertised to inform consumers that 3T1 was the "original" Three Tenors recording, was still widely available, and was often available at a discounted price. The Commission said the evidence also showed that "Warner used advertising to create a distinct identity for 3T2, suggesting to consumers that the newer release was the superior product." The Commission found as well that even if PolyGram "could properly defend on the basis that restricting the marketing of 3T1 and 3T2 was reasonably necessary to ensure the vigorous marketing of 3T3, the record simply does not support that argument as a factual matter."

The Commission's order requires PolyGram to cease and desist from agreeing with competitors to fix prices of, or restrict truthful or "nondeceptive" advertising for, any audio or video product in the United States. The order does not prohibit the Respondents from entering into a written agreement to set prices of or restrict the advertising for any audio or video product if the agreement is reasonably related to a lawful joint venture and reasonably necessary to achieve its procompetitive benefits. The order will be effective upon the 60th day after it is served on the Respondents. Under the Commission's rules, ex parte communications regarding this matter are barred until the

Commission has disposed of any petition for reconsideration, or until the time for filing such petitions (14 days after completion of service) has elapsed. In addition, ex parte communications concerning an application for a stay of all or part of the Commission order are barred from the time that the application is filed until its disposition.

**Copies** of the Commission's opinion and order are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC's Bureau of Competition seeks to prevent business practices that restrain competition. The Bureau carries out its mission by investigating alleged law violations and, when appropriate, recommending that the Commission take formal enforcement action. To notify the Bureau concerning particular business practices, call or write the Office of Policy and Evaluation, Room 394, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, Electronic Mail: [antitrust@ftc.gov](mailto:antitrust@ftc.gov); Telephone (202) 326-3300. For more information on the laws that the Bureau enforces, the Commission has published Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws, which can be accessed at <http://www.ftc.gov/bc/compguide/index.htm>.

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(Docket No. 9298)

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**Related Documents:**

**Docket No. 9298**

***In the Matter of Polygram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc., and Universal Music & Video Distribution Corp.:***  
**Issuance of Opinion of the Commission and Final Order**

- [Opinion](#) of the Commission, by Chairman Timothy J. Muris [PDF 254KB]
- [Final Order](#) [PDF 52KB]

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