# Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary - Concerning the Market for Prerecorded Music in the United States

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**BY:** Robert Pitofsky, Former Chairman; Sheila F. Anthony, Former Commissioner; Mozelle W. Thompson, Former Commissioner; Orson Swindle, Former Commissioner; Thomas B. Leary, Former Commissioner

**Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony, Mozelle W. Thompson, Orson Swindle, and Thomas B. Leary**

***In the Matter of* Time Warner Inc.;**
***In the Matter of* Sony Music Entertainment Inc.;**
***In the Matter of* Capitol Records, Inc., d.b.a. "EMI Music Distribution";**
***In the Matter of* Universal Music & Video Distribution Corp. and UMG Recordings, Inc.; and**
***In the Matter of* BMG Music, d.b.a. "BMG Entertainment"**

**FTC File No. 971-0070**

The Commission has unanimously found reason to believe that the arrangements entered into by the five largest distributors of prerecorded music violate the antitrust laws in two respects. First, when considered together, the arrangements constitute practices that facilitate horizontal collusion among the distributors, in violation of Section 5 of the Federal Trade Commission Act. Second, when viewed individually, each distributor's arrangement constitutes an unreasonable vertical restraint of trade under the rule of reason. A discussion of these violations is spelled out in our Analysis to Aid Public Comment.

The Commission considered carefully whether the anticompetitive vertical restraints should be evaluated under a *per se* rule or a rule of reason. In the past, the Commission has employed the rule of reason to examine cooperative advertising programs that restrict reimbursement for the advertising of discounts, because such programs may be procompetitive or competitively neutral. *Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs - Rescission*, 6 Trade Reg. Rep. (CCH) ¶ 39,057. The cooperative advertising programs that were the subject of previous Commission actions involved only advertising paid for in whole or in part by the manufacturer, but did not restrain the dealer from selling at a discount or from advertising discounts when the dealer itself paid for the advertisement. *See, e.g., The Advertising Checking Bureau, Inc.,* 109 F.T.C. 146, 147 (1987) ("the restraints . . . do not prohibit retailers from selling at discount prices or advertising discounts or sale prices with their own funds").

The Minimum Advertised Pricing ("MAP") policies of the five distributors in this matter go well beyond the cooperative advertising programs with which the Commission has previously dealt: the distributors' MAP policies prohibited retailers from advertising discounts in all advertising, including advertising paid for entirely by the retailer; the MAP policies applied to in-store advertising, excepting only the smallest price labels affixed to the product; and a single violation of a distributor's MAP policy carried severe financial penalties, resulting in the loss of all MAP funds for all of the retailer's stores for 60 to 90 days (*see* Paragraph 7 of each Complaint).

Retailers were free to sell at any price, so long as they did not advertise a discounted price. In fact, there was evidence that some retailers on rare occasions did sell product at a discount without advertising the discounted price, instead advertising simply that the product was available at a "guaranteed low price." We are therefore reluctant to declare that compliance with the MAP policies by retailers constituted *per se* unlawful minimum resale price maintenance, because we cannot say that there is sufficient evidence of an agreement by retailers to charge a minimum price. As stated by a majority in *In the Matter of American Cyanamid Co.*, "both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement." 123 F.T.C. 1257, 1265 (1997) (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney).[(1)]

In *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 735-36 (1988), the Supreme Court held that "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." In our view, *Sharp* requires something more than a showing that an agreement has some influence on price. Restrictions on advertisements that include discounted prices in advertisements funded in whole or in part by the manufacturer are not *per se* illegal, notwithstanding the fact that they are likely to have an influence on resale prices. Indeed, the pervasive practice of publishing suggested retail prices is also likely to have some influence on actual prices, but it is well established that this practice is not *per se* illegal. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

Nonetheless, we conclude that the distributors' MAP policies are unlawful under a rule of reason analysis. The five distributors together account for over 85 percent of the market (*see* Paragraph 2 of each Complaint), and each has market power in that no music retailer can realistically choose not to carry the music of any of the five major distributors. The MAP policies were adopted by each of the distributors for the purpose of stabilizing retail prices (*see* Paragraph 10 of each Complaint). The MAP policies achieved their purpose and effectively stabilized retail prices with consequential effects on

wholesale prices, ending the price competition that previously existed in the retail marketplace and the resulting pressure on the distributors' margins (i*d.*). Compliance with the MAP policies - which was secured through significant financial incentives - effectively eliminated the retailers' ability to communicate discounts to consumers (*see* Paragraph 8 of each Complaint). Even absent an actual agreement to refrain from discounting, this inability to effectively communicate discounts to consumers meant that retailers had little incentive to actually sell product at a discount.

In the future, the Commission will view with great skepticism cooperative advertising programs that effectively eliminate the ability of dealers to sell product at a discount. The Commission will, of course, consider *per se* unlawful[(2)] any arrangement between a manufacturer and its dealers that includes an explicit or implied agreement on minimum price or price levels,[(3)] and it will henceforth consider unlawful arrangements that have the same practical effect of such an agreement without a detailed market analysis, even if adopted by a manufacturer that lacks substantial market power.

**Endnotes:**

1. In *American Cyanamid*, the manufacturer conditioned financial payments on its dealers' charging a specified minimum price, which the Commission found to be *per se* unlawful minimum resale price maintenance. By contrast, financial payments under the distributors' MAP policies here were conditioned on the price advertised, not on the price charged.

2. Commissioners Swindle and Leary have previously stated that the Supreme Court should reassess the applicability of the *per se* rule to the practice when the appropriate case arises. *Nine West Group Inc.*, Dkt. No. C-3937 (Statement of Commissioners Orson Swindle and Thomas B. Leary). However, they agree that, so long as this *per se* rule is the law, summary treatment is appropriate for resale price agreements and other agreements with the same practical effect.

3. In addition, the Commission will continue to consider *per se* unlawful any cooperative advertising program that is part of a resale price maintenance scheme. *Cf. The Magnavox Co.,* 113 F.T.C. 255, 262 (1990) ("Of course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful . . . .").

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