

The contract provision here cited (Paragraph 4, which was waived by the parties in February 1960) is one which is not found in any other outside label contract. It obviously originated in the circumstances peculiar to the Verve contract. It was feared that Verve might be compelled to dump its repertoire in such a manner as to depreciate the value of the Verve name (CX 82). In effect it provided that if Verve were to convert itself into a budget line label, thus depreciating the value of the Verve name, Columbia could offer the records on the Columbia label. The paragraph was carefully limited in its application to records from 12 specific Verve masters originally listed on Schedules A and B of the 1959 contract (CXs 23g-h, 24, 25). It merely reflected the concern of Club officials in 1958 about Verve's financial condition.

Verve was absolved from "responsibility" for pricing at the retail or dealer level (CX 23c), and thus the contract did not, in terms, prohibit dealers from selling Verve records at, below, or above the Club's retail price. However, if Verve chose to sell the records at "distress prices," or if the Verve label had depreciated at retail to the status of a "low price label," such as the Columbia "Harmony" and the RCA "Camden" budget lines, Columbia, under Paragraph 5 (CX 23i), could elect to release phonograph records manufactured from the Verve masters on the "Columbia" label after giving Verve "written notice." (Camden, for example, then had suggested list prices of \$1.98 and \$2.98 (CX 316, p. 256).)

The contract makes clear that the purpose of this clause was not to prevent competitive retail price reductions by Verve. Thus, sales which were "casual" or "inadvertent" were not to be considered "distress" sales (CX 23h-i). Nor were sales by Verve during sales programs, in accordance with practices "customary" in the record industry, to be deemed "distress" sales. Finally, Verve's limited agreement was with respect only to its prices to its distributors, and not with respect to retail selling prices (CX 23c).

The limited intent of the parties was further made clear in a contract clause which specified that the "distress selling" provision was not to be used to "frustrate the basic intent of the parties hereunder to utilize the 'Verve' label" (CX 23i-j). It was to be invoked only if the Verve name had become "depreciated" (CX 82b).

Despite its limited effect with respect to a handful of records, Paragraph 4 of the Verve contract was waived by a contract amendment dated February 17, 1960 (CX 32).

There is no evidence in the record as to what price those records were in fact sold by Verve to its distributors.

But Columbia failed to waive either Paragraph 1(f), defining

"distress price," or Paragraph 5, which was designed to discourage not only "distress selling" by Verve, but also

the consistent offering of records on the "Verve" label at retail prices comparable to the prices at which the present Columbia "Harmony" and RCA "Camden" records are being sold.

If Columbia determined that as a result, the Verve label had depreciated to the status of a low price label, Columbia could "release phonograph records manufactured from the Licensed Masters under the 'Columbia' label" after giving Verve written notice (CX 23i).

Respondents take the position that Paragraph 5 of the Verve contract was described by Paragraph 4 as being the "sole remedy" available to Columbia in case Verve breached the "distress price" provisions of Paragraph 4.

"Obviously," say respondents, "when Paragraph Four dealing with 'distress prices' was waived by the parties in February 1960, it was not also necessary to waive the 'definition' of 'distress prices' which is contained earlier in the contract (CX 23b-c), or the 'sole remedy' for the breach of waived Paragraph Four which appears in Paragraph Five."

The trouble with respondents' argument is that Paragraph 5 not only was the sole remedy for breach of Paragraph 4; it also stood on its own feet in providing a remedy for selling at budget line prices, as well as at distress prices.

Despite all the explanations and qualifications, the contract obviously had the capacity and tendency to influence and control Verve's prices.

The contract provision was in effect for eleven months. The record does not disclose Verve's actual selling prices to distributors before the February 1960 waiver.

It does not appear that any other contract had comparable provisions.

In CPF 120, Government counsel refer to an "extension" of the Verve agreement on March 14, 1962. Because the extension retained the terms and conditions of the 1959 agreement "except as herein expressly modified" (CX 287), Government counsel think it strange that Paragraph 5 was not rescinded at that time. Respondents' answer is that Paragraph 5 already was ineffective because of the 1960 waiver.

Regarding the extension, respondents explain that the Verve contract was about to expire in March 1962 unless Columbia exercised its option. But the parties had agreed in February 1962 that the contract was to be terminated (Maxim 1729), and re-

spondents say that some provision had to be made to permit a carrying on of operations pending agreement on the details of termination. The contract was in fact terminated as of June 1962 (CX 288).

The investigation in this matter commenced in 1960, and changes in the Caedmon contract were adopted after that time. A letter dated December 7, 1960, from counsel for respondents indicates on its face that the investigation had been in progress for a considerable period of time (CX 1a).

On April 15, 1961, the Caedmon contract of 1958 was rescinded and the explicit agreement about price (CPF 111) was removed. The new contract included a provision tying the royalty payment to "*** our [Columbia's] retail selling price ***" (CXs 22a, 22e). This was similar to the provision in the 1959 Verve contract (CX 236).

As indicated previously, an attempt had been made to replace the Caedmon contract considerably before the investigation began in this matter. (See p. 89, *supra*.) For reasons similar to those stated concerning the Verve agreement, Club officials, on advise of counsel, decided in 1960 to enter into an entirely new contract with Caedmon. It does not appear to be disputed that this was before the Commission's investigation started.

The new agreement was prepared, but was not immediately executed because of a pending lawsuit. A new contract was entered into (CX 22) by Columbia with Caedmon as of April 1961. (Keating 5172-84; RPF 192 (footnote).)

The new Caedmon contract eliminated the principal contractual provisions challenged by the complaint.

Government counsel have not disputed respondents' claim that the facts surrounding the revision of the Caedmon and Verve contracts were fully disclosed during the precomplaint investigation.

Respondents complain that "The early abandoned contracts are used here as a tactic to invalidate the later contracts although no connection was ever shown between them. * * * The fact that complaint counsel rely so heavily on the two obsolete contracts merely highlights the sophistry and weaknesses of the attack on the later agreements" (Exceptions, page 15).

Of course, respondents claim too much when they deny any "connection" between the contracts. But there is enough truth in respondents' contention to provide a troublesome problem for the examiner. It is certainly true that the terms of the new Caedmon contract were substantially different from the terms of the

old contract, and that despite the efforts of Government counsel to view the Caedmon and Verve contracts as "precedents," the later contracts do not contain the challenged provisions.

Under the new Caedmon contract, as well as under the Verve, Mercury, Kapp and Warner Bros. contracts, royalties were to be paid by Columbia by applying the royalty formula in the contract to a base price—which was the Club's selling price. Except as the Government undertakes to color that arrangement by reference to the abandoned price-fixing provisions, the use of Columbia's selling price as the measure of royalty payments is legally unobjectionable.

Columbia sold Caedmon records through the Club at a price of \$4.98, and Caedmon maintained a suggested list price of \$5.95. In 1961, the Club offered many Caedmon records and consistently made the following representation:

. . . \$4.98 (regular list price \$5.95) (CX 564, pp. 4-7, 10-13; see also RX 134f, RX 135a-i).

As recently as Christmas of 1962, Columbia was representing that the Caedmon regular list price was \$5.95 and the Columbia price through the Club was \$4.98 (CX 593, pp. 16 and 17). The *Schwann* LP catalog for December 1962 shows that Caedmon has maintained its \$5.95 suggested list price (CX 319, page 282).

The "Royalty Price" Provisions

In CPF 124, Government counsel get carried away by their theory that "royalty price" is the key to a price-fixing agreement between Columbia and each of its licensors. Government counsel state:

Following the precedent of the Verve-CBS Agreement, CBS and Mercury agreed that payments to the Licensor shall be made on the basis of a "Royalty Price." This "Royalty Price" was defined by and related to the Club selling price and the Licensor's suggested list price.

Actually, the Mercury contract of 1960 did not follow any Verve precedent, and it is misleading to state that the royalty price was "defined by and related to the Club selling price and the Licensor's suggested list price."

Paragraph 1(d) does define royalty price as Columbia's "retail selling price" less certain deductions. Those deductions are described as follows:

- (1) Any excise or other similar tax.
- (2) The charge made by Columbia for any record container.
- (3) The charge made by Columbia for any "extraordinary librettos or program notes included with such records."

(4) The additional charge made by Columbia to the retail purchaser for postage and handling, provided any such additional charge is deemed to be included in the retail selling price.

The contract further provides that the charges for items (1) through (4) "shall be no greater than the same amount as we [Columbia] deduct in determining artist royalties for the leading Columbia recording artist whose records are sold by the Columbia Record Club."

The definition of royalty price concludes:

For purposes of calculating the royalties payable to you [Mercury] during the term of this agreement under the formula set forth in paragraph 11 hereof it is agreed that the royalty price on records with a suggested retail price in the United States of \$3.98, \$4.98 and \$5.98 shall be \$3.46, \$4.42, and \$5.26 respectively. The royalty price on records with a different suggested list price shall be determined by the general criteria outlined above (CX 34b).

In the Verve agreement, the royalty was to be paid on the base of the defined "royalty price" (CX 23L). In the Mercury agreement, however, the actual royalty payment provision (Paragraph 11 (a), CX 34d) contains no reference at all to the term "royalty price." Subject to specified qualifications, a base royalty of 5% is payable on 95% of Columbia's "net sales" of phonograph recordings manufactured from Mercury's master recordings. Net sales are defined as gross shipment less returns.

Paragraph 11 (b) contains the usual provision specifying that no royalty shall be payable with respect to "free" or "bonus" records.

The only references to "royalty price" in the Mercury contract appear in connection with paragraph 11 (c), which involves a complicated procedure in case the amount of free and bonus records exceeded certain amounts, and in connection with paragraph 11 (d), which provides for certain adjustments if records on which royalties were paid totaled less than one million (CX 34d-e).

The new language was apparently inserted in this contract for use in calculating the payments to be made under those provisions.

The contract language quoted in CPF 124 becomes the focal point of many of the Government's subsequent proposed findings. Government counsel argue that the "royalty price" means the licensor's suggested list price. Respondents deny this and say that the record shows that it refers to the Club's selling price.

Although the dispute involves a crucial legal issue, the difference is essentially one of semantics rather than actualities. This is be-

cause, as respondents themselves concede (Exceptions, page 91), the Club's selling price "is normally suggested list price."

But whether it refers to Club selling price or licensor's suggested list price, the question is whether the royalty clause amounts to an agreement between the parties as to the prices which the Club will charge.

Analysis of the contracts and the testimony shows that the "royalty price" is not necessarily related to the suggested list prices of the outside labels. There was no testimony to support such a construction of the contracts, and Government counsel cite none.

In their brief (page 343), Government counsel themselves seem dubious:

"It is the position of complaint counsel," they say, "that the Licensing Agreements have a specific formula requiring list price selling. But irrespective of the actual words used, the understandings of the parties and their actions show an unlawful combination. * * *"

One gets the impression that their "position" is a shaky one and that they virtually concede that "the actual words used" are at least ambiguous. If so, the burden was on them to clarify them or otherwise prove the intent and meaning they have ascribed to them.

As a matter of fact, the contract clause emphasized in CPF 124 follows immediately after the generalized definition of "royalty price," and the reference is obviously to the Club's selling price less specified deductions. Again we note that the Club's selling price is normally suggested list price.

In the Liberty contract, then, the formula is applied in the contract itself, so that giving effect to the specified deductions, the royalty price is \$3.46 for a \$3.98 record, \$4.42 for a \$4.98 record and \$5.26 for a \$5.98 record.

Just how this contractual arrangement amounts to a price-fixing device is not made clear by the Government.

We are inclined to agree with the respondents that the diversity of the contractual provisions suggests that undisclosed business considerations, rather than any uniform pricing policy, are apparently involved. Thus, the Kapp contract, which was executed subsequent to the Mercury contract, does not contain the new clause quoted in CPF 124. Neither does it appear in the subsequent Caedmon, United Artists or Cameo contracts (CXs 22, 44 and 453), or in the first Warner Bros. contract (CX 39).

There is additional internal evidence from the contracts themselves that the language relied on by Government counsel was not

