

While Solomon could not recall refusing to distribute Caedmon records (Tr. 3869), Marianne Mantell, president of that company, could (Tr. 6911).

Solomon had a master licensing agreement with Vanguard, but never pressed any records under it (Solomon 3867).

He did not claim at the trial that he wanted or was unable to obtain records of Cameo-Parkway.

He did not claim at the trial that he sought to deal with Verve before, during or after the cancellation of its agreement with Columbia.

Kapp had refused to deal with Solomon early in 1959 (Solomon 3845-47; Kapp 5774-75)—more than a year-and-a-half before its contract with Columbia.

Warner Bros. refused to enter into any agreement with Solomon early in 1959 (Solomon 3855), long before its first contract with Columbia, but was willing to sell records to his club on an individual basis (Friedman 6107; Conkling 6199; Solomon 3792). But, over the next few years, he ordered only a few records, some of which he improperly returned, and became a credit problem (Friedman 6107-08; Solomon 3945-47).

Solomon's hearsay testimony (Tr. 3796) that Warner Bros. stopped selling to him early in 1961 because of "an exclusive arrangement" with Columbia was flatly denied by Joel Friedman, merchandising director of that company, and James Conkling, former president of Warners Records and now head of the Mormon Church's short-wave radio network (Friedman 6107-08; Conkling 6199-200). Solomon's claim, moreover, is dubious on its face since, at the date of the alleged cutoff, Warner had granted Columbia rights with respect to only three records.

While Solomon claimed that he did not even bother to offer UA a contract in 1959 because they "weren't a factor in the record business at that time" (Tr. 3848), Mael of UA recalled that a contract had been offered, and rejected (Tr. 7458-59). In any event, UA was willing to sell individual records to Solomon. But, over the next two years, he ordered small quantities of only two records (Mael 7459-60; Solomon 3848). And UA finally had to sue the Diners' Record Club in order to collect its bill (Mael 7460)—a lawsuit Solomon had difficulty recalling on cross-examination (Tr. 3850-51).

Although Government counsel did not question Solomon on direct examination about his ability to obtain Mercury and Liberty merchandise, it was shown on cross-examination that, after Liberty's contract with Columbia, the Diners' Record Club had in

fact offered more Liberty merchandise than ever before (RX 48; Solomon 3829-33).

When confronted with that fact, Solomon explained that some Liberty records "might have filtered" into his record club because he obtained a supply of such records in his role as a fulfillment agent for "various" Liberty mail-order and premium programs (Solomon 3829-33). But the fact, later developed through Bohanan of Liberty, was that Solomon had acted as a fulfillment agent for only one Liberty program involving a single Liberty LP (Bohanan 6385)—an LP not used in the Diners' Record Club (RX 48). It finally was disclosed that Solomon had an interest in a distributorship that purchased records from Liberty (Solomon 3841-42); that the entire Liberty catalog was available to that distributorship (Bohanan 6383; also see Bennett 6529); and that the distributorship did not pay higher prices as Solomon belatedly claimed (Bohanan 6383-84).

Cross-examination also disclosed that, after Mercury's agreement with Columbia, Solomon offered more Mercury records than ever before (RX 47; Solomon 3819). Solomon reluctantly conceded that in November 1961—about 1½ years after Mercury's licensing arrangement with Columbia—he purchased at one clip more than 100,000 Mercury LPs covering 27 different titles at approximately 50¢ per record—a rather "favorable" price and quite a "substantial" quantity for a club with only about 10,000 members (Solomon 3816-19, 3942-43).

Solomon then "explained" that only 4 of the 27 titles were current (including Mercury's "1812 Overture" and records by Brook Benton, the Piatters and the late Dinah Washington) and that the other 23 were cutouts (Solomon 3816-27, 3952). But he did not advertise the 23 records as cutouts.

Following Solomon's testimony, a Mercury employee checked the company's inventory control cards as to when records were cutout. Based on her testimony, the fact is that 23 of the records were current and only 4 were cutouts at the date of Solomon's purchase (Broun 10,491-93; RX 47). Solomon (a CPA) thus had simply reversed the numbers (Solomon 3871). Indeed, the Mercury order form in use almost a year later still listed 20 of those 27 records as current (CX 398; also see Broun 10,498). It is difficult to believe Solomon bought 100,000 LPs without knowing what he was buying. (See RPF 387 and footnotes.)

(For more detail concerning the Diners' Record Club, compare CPFs 63-64, RPFs 367-87; respondents Exceptions, pages 41-49; Government counsel's Reply, pages 71-77.)

In a field where there are many clubs and other direct mail-order sellers of phonograph records, the fact that the Government must rely solely on the Diners' Record Club as illustrative of a club that allegedly suffered competitive injury underlines the weakness of its proof in that regard.

*Comparison of Introductory Offers*—Any study of the state of competition among record clubs must take pricing into account. Here the position of the Government shows some ambivalence.

Contrary to the position they take elsewhere in their proposed findings (CPF 413), Government counsel, in their zeal to prove a separate club market, assert (CPF 440) that Columbia "responds in pricing and in other ways to other record clubs—which are the *Club's major competitors*," and that in their advertisements, respondents "compare *their* offers to offers of *other* clubs." That proposed finding, taken together with the evidence, is hardly consistent with the Government's contention of an oligopolistic, non-competitive industry.

A comparison of the various club offers is illuminating.

The Government's proposed finding (CPF 440) that the RCA Victor Record Club "sells its records on the basis of 5 for \$1.87 with the commitment to purchase an additional 5 at \$3.98 and \$4.98" is an oversimplification that does violence to the record. That particular offer (RX 154) was in effect during part of 1961 and the first few months of 1962. It resulted in a total price of \$21.77 for 10 \$3.98 LPs over the first year—or an average price of about \$2.18 per LP (exclusive of mailing and handling charges, the amount of which is not reflected in the record).

The record indicates that throughout most of 1962, the RCA Record Club used a variety of different offers, generally resulting in lower average prices. It appears that the most common offer was one record for 10¢ to keep, plus four records on a trial basis that could be purchased for \$1 upon a commitment to buy five additional records at list (RXs 15, 157, 162, 176, 178, 592). That offer resulted in a total price of \$21 for 10 \$3.98 LPs over the first year of membership—or an average price of \$2.10 per LP, exclusive of mailing and handling charges. (See also RXs 613 and 631 for closely similar variations; *cf.* RX 630.)

Under another 1962 offer, the RCA Club advertised one record free with no obligation to purchase any additional records at all, and an additional four free records if the consumer accepted a trial membership and purchased four additional records (RXs 606, 612). If the full offer were accepted, the result was a total purchase

price of \$15.92 for nine LPs over the first year, or an average price of \$1.77, again excluding mailing and handling charges.

Special offers extended by the RCA Club in 1962 to members of the Reader's Digest Family (RXs 189, 632) resulted in average prices of \$2 and \$1.78, respectively, for \$3.98 list LPs.

Thus, the RCA Club had prices lower than indicated by CPF 440—and lower than average prices of the Columbia Club.

CPF 440 takes a curious twist in its proposed finding that Capitol Record Club prices are "identical" with those of the RCA Club "except for the introductory offer."

It is the introductory offer that establishes the average price per record for the first year of membership. And the Government has stressed the importance of the introductory offer as a competitive weapon (CPFs 325-27). Thus, Government counsel include the introductory offer in their computation of the average prices of the Columbia Record Club, and no reason appears for ignoring the same factor in referring to the prices of the Capitol Record Club.

In considering the competitive picture, and also in connection with allegations made elsewhere by the Government, it is worth noting that the Capitol Record Club advertisement (RX 179) cited in CPF 440 contains an introductory offer markedly different from that of either the RCA or the Columbia Club.

The Capitol ad offers up to seven records for 97¢, with a commitment to purchase five additional records. This results in a total purchase price of \$20.87 for 12 records over the first year, or an average price of \$1.74 per record, exclusive of mailing and handling charges. This is lower than Columbia's average price.

*Other Mail-Order Sellers*—The discussion of club competition would be incomplete without some reference to the growth of numerous other companies selling a great variety of recorded material through the mails on a nonclub basis, including various outside labels and outside artists. The evidence indicates the great success enjoyed by many new entrants into that type of merchandising.

Records are sold to consumers through the mail, not only by record clubs, but by a whole host of record dealers, department stores, mail-order houses, book clubs, magazines, record companies and others. As shown in detail by respondents (RPFs 246-79), all those mail-order sellers compete with record clubs and other channels of distribution.

Like clubs, they generally stress the convenience of armchair buying, assistance in record collecting and convenient credit installment arrangements. Like Clubs, they seek to cater to a broad

consuming public by media advertising and direct-mail solicitation. They offer consumers the same records that are available over-the-counter and through clubs or, sometimes, specially prepared records similar to those distributed at retail and by clubs. Those mail-order vendors sometimes offer consumers individual records. In other cases they offer "packages" containing a collection of records programmed with a repertoire in a particular musical category.

The evidence establishes that many record dealers, department stores and other retail outlets sell records both over-the-counter and through the mail (*e.g.*, Adler 4919; Stolon 1260; Maggid 859-60; Leonard 5960-61; Prince 5502-07; Brigati 890-92; Bialek 1377; Collins 3003-04; RXs 6, 9-14, 144, 264, 268, 285, 287, 546).

Government witness Sam Goody initiated large-scale mail-order selling of records at discount prices in about 1950. He was soon joined by certain other retailers, including The Record Hunter, which, along with Goody, was circulating low-price ads in Chicago as early as 1953 (Gallagher 8856; Stolon 1290-91; Inden 5544; also see Ackerman 4222, 4240). In August 1955, before the Columbia Record Club began operations, *Billboard* noted "the competition of large mail-order discount houses at local levels thruout the country" (RX 113a).

Goody, with mail-order operations all over the world, runs daily and weekly advertisements soliciting mail-order sales of individual records and packages. Goody derives between \$500,000 and \$750,000, or 10% to 15% of his sales, from mail-order sales (Stolon 1255-61; RXs 6, 9-14, 144, 264, 285, 287, 546). Others with fairly substantial mail-order business include The Record Hunter (Maggid 859-60; also see RX 268); the Harvard Co-op, which circularizes as many as 150,000 alumni located all over the nation (Leonard 5960-61, 5974-75); the Yale Co-op, distributing holiday catalogs containing as many as 200 selections at \$1.98 per LP (RX 266); and Doubleday, selling at list price and featuring mail-order record buying in 25,000 monthly mailings and 100,000 special mailings (Prince 5502-07).

Unlike record clubs, dealers generally do not obligate their mail-order customers to buy a definite quantity of records (*e.g.*, Brigati 892). But, like clubs, they rely heavily on media advertising and direct-mail solicitations; they use this method of promotion to create consumer interest in records (Leonard 5973-74) and to satisfy the preferences of some consumers for the convenience of mail-order buying (Collins 3004; Bialek 1377; Brigati 890); they generally charge for mailing and handling (*e.g.*, RXs 266-67, 264, 285; Brigati 891); often sell on credit (*e.g.*, RXs 266-67); and

sometimes even have organized fulfillment operations (Stolon 1260-61).

In addition, mail-order sales of records are made by large general catalog companies like Montgomery Ward, Spiegel, Aldens and Sears, Roebuck (Adler 4919; Hitesman 10157; Pierce 5747-49; RX 54c). Specialty mail-order houses, such as Spencer Gifts (with a mailing list of over 1,500,000), and others also sell through the mails the same records that are available at retail and through record clubs (*e.g.*, RXs 54b,c, 66, 67; Solomon 3830, 3902, 3915-16).

*Hi Fi*, a magazine in which the Columbia and RCA record clubs advertise (CX 47a; RX 386b), reviews new record releases and selects top records of the month, which it then sells at list price to readers "who have told us of difficulties experienced in securing new releases" (RX 693, pages 55-98).

Other companies advertise mail-order sales of individual records, either at list price or discount, sometimes with bonus records for every two or three records purchased (*e.g.*, RXs 256-57).

Records are also sold through the mail as premiums in conjunction with the sales of other consumer goods (*e.g.*, RXs 259-61).

Some record manufacturers sell by direct mail. Witness Pierce of Starday, for example, has been successful in selling both 45 r.p.m. and 33 $\frac{1}{3}$  r.p.m. records, individually and in packages, by radio mail-order since 1950 (Pierce 5747-50).

The catalogs of record companies generally contain, in addition to individual records, "packages" containing a collection of anywhere from two to a half-dozen or more records featuring repertoire in a particular musical category (Kavan 10,623-28; *e.g.*, CX 307a, pages 48-49, 53, supplement page 8; CX 247, pages 9, 12, 13, 30, 34-36, 43; RX 297, pages 47, 49, 140, 142-43). Such packages are available at retail and often through record clubs (Kavan 10, 623-28; *e.g.*, RXs 121d, 150, 151; CXs 97, 99, 106, 115). Similar—and, in some cases, identical—packages are offered by direct-mail sellers on a non-club basis. RCA and Reader's Digest constitute the largest factor in that type of mail-order selling.

RCA presses packages of records for Reader's Digest and engages in joint marketing of those packages through the mail. Although Reader's Digest-RCA began selling such packages less than four years ago (Hitesman 10,111), they have achieved a substantial sales volume (RX 700 *in camera*) and are now the largest direct package mail-order sellers of records in the industry (Hitesman 10,145; also see RX 450). By 1962, the Reader's Digest-RCA non-club mail-order package sales accounted for almost 20%

