It strains credulity that RCA records sold in the *Life* package, RCA records sold in the *Reader's Digest* package, RCA records sold by the RCA Record Club and RCA records sold by dealers, department stores and racks, are all in different markets.

Another mail-order seller of some stature is Book-of-the-Month Club, which offered a package of folk records produced by Vanguard (RX 499); Pickwick (RX 538); and Concert Hall Society (RX 541).

In a footnote to CPF 425, the Government states that RX 345 shows that in 1962 the Columbia Club had 44% of all sales by direct mail. Later in the footnote, that sweeping statement is qualified by the statement that

> RX 345 tends to be ambiguous on its face. The designation "Columbia Club" was intended to include some indeterminate non-Club mail order sales of Columbia and Epic records (Wright 8039).

Actually, that figure includes:

(1) Sales of Columbia, its subsidiary labels and of outside labels through the Columbia Record Club.

(2) Non-Club mail-order sales of Columbia and its own subsidiary labels by record dealers, mail-order specialty houses, etc.

(3) Packages sold by Columbia on a test basis.

(4) Packages pressed by Columbia for, and sold by, third parties.

The 44% figure represented sales for the first three quarters of 1962 and not the entire year, as indicated in the Government's proposed finding. Moreover, the figure represented a decline from the third and fourth quarters of 1961 (RX 450).

Otherwise, the record indicates that Columbia's share of all mail-order sales continued to slide during the rest of 1962. *Life*, for example, achieved its major sales volume on record packages at the end of 1962 (see RPF 273); BOMC increased its mail-order activity in and toward the end of 1962 (see RPF 274; RX 496, RX 502 *in camera*); and the RCA Clubs grew rapidly during the entire year (see RPF 437).

The Government notes "a high degree of concentration in direct mail sales" on the basis of RXs 345 and 450:

	Percent
Columbia	44
RCA Victor	20.8
Reader's Digest	18.2
Capitol	8.1
Total	91.1
All others	8.9

According to respondents, this conclusion of concentration is contrary to the facts. It refers to RX 451, which purports to show a decline in Columbia's share of the so-called club market. RX 451 shows Columbia's percentage share of total record club dollar purchases as declining from 66% in 1957 to 41.5% in 1961 (or possibly 50.5% as of May 1961).

Respondents also complain that the Government ignores the trend toward a dispersion of sales with the entry of new firms into this new field of mail order (see RPFs 273–78, 436–40).

Respondents also challenge the Government's statement that "there is no question that the Reader's Digest is the largest direct mail seller by far, apart from the record clubs" (citing Adler 4915).

Adler did testify that Reader's Digest was the largest direct-mail seller (Tr. 4915)—a fact acknowledged by Hitesman (Tr. 10143–45)—but without comparing its sales to those of record clubs.

In camera evidence shows that Reader's Digest sales are substantially higher than those of the Capitol Record Club (compare RX 700 *in camera* and CX 465 *in camera*; see also RPF 299).

The demonstrated fact that records sold by the Reader's Digest and the RCA Record Club sound similar is dismissed by Government counsel as "nothing more than a revelation that some classical and popular music is recorded from a standard written score. * * * " It is difficult to reconcile this argument with the Government's repeated insistence that performances by individual artists are "unique." The fact of the matter is that records may be artistically distinctive and yet compete with each other in the market place. "A man by the name of Rene Leibowitz" will hardly be credited with contributing to the Government's effort to draw a hard-and-fast line between club records and package records (compare CPF 443 with Exceptions, pages 388–89).

The opinion testimony of Marek and RCA as to claimed differences between record club members and buyers of record packages is contradicted by the business operations of his own organization (see respondents' Exceptions to CPFs 425 and 439).

The price structure used in the mail-order sale of packages is not "entirely different" from club prices. The per unit price, or the total dollar commitment, is similar.

The best selling Reader's Digest packages (in mono) have prices ranging from $12.98 to $22.89 (RXs 386c, 703a,b). New mono members of the RCA Record Club have obligated themselves to spend from $16 to $22 during the first year of membership

for enrollment and commitment records. (Both the Reader's Digest packages and the RCA Club payments are exclusive of mailing and handling charges, the amounts of which are not shown in this record.)

On a per-LP basis, prices of the Reader's Digest packages and the RCA Record Club are also similar. The average prices per LP for the Reader's Digest packages (mono) range from $1.33 to $2.33.

Prices charged by the RCA Record Club during the first year of membership have averaged from $1.77 to $2.18 per record.

Interestingly enough, the *Reader's Digest* offers a preferential price to members of the *"Reader's Digest Family."* The Government, in a footnote, identifies the Family as comprising *Reader's Digest* subscribers. Actually, the Family includes also active and cancelled members of the RCA Record Club (RX 386; Hitesman 10079; Adler 5008). This broadening of the Family to embrace both package buyers and club members ill comports with the Government's theory of separate markets.

OPINION OF THE COMMISSION

JULY 25, 1967

BY DIXON, *Commissioner*:

The complaint in this case, issued on June 25, 1962, charged that the Columbia Broadcasting System, Inc., and its wholly owned subsidiary, Columbia Record Club, Inc., had engaged in certain unfair business practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45,[1] including attempted monopolization, the "squeezing" of retail dealers with whom it competes, and the making of agreements with competing record manufacturers to fix noncompetitive record prices, fix and depress the prices paid to artists for their recording services (royalties), and cut off the supply of certain records to actual and potential competitors in the "club" sector of the phonograph record industry.[2] Hearings were held before a hearing examiner of the Commission, and approximately 11,000 pages of testimony and 1,400 exhibits in support of and in opposition to the allegations

[1] That section provides in part: "Unfair methods of competition in [interstate] commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

[2] The complaint also charged (Count II) that respondents had unfairly misrepresented, in certain of their advertising, the "savings" to be realized by the consumer in purchasing records from the Club. That charge was subsequently abandoned by counsel supporting the complaint.

of the complaint were received into the record. In an initial decision of 304 pages filed September 30, 1964, the examiner found that the allegations of the complaint had not been sustained by the evidence and ordered the dismissal of the proceeding.

We believe that decision was erroneous and hence must be reversed and set aside.

The charges in the complaint center around Columbia's formation and operation of its Columbia Record Club, an organization that distributes phonograph records direct to the consuming public through what is called the "club" or "subscription" form of mail order selling.[3]

Columbia entered the club market in August of 1955. One of its purposes in so doing was to prevent the entry of certain non-record firms, particularly the entry of mail order book-distributing organizations.[4]

Commencing in May 1958, Columbia decided that the Club could be more profitably operated if it sold not just its own (Columbia) records, but those of some of its competitors as well. However, instead of going to those manufacturers' wholesale distributors (the "open market") and buying the records at the same price paid by other record retailers (the Columbia Record Club is admittedly a "retailer," in that it sells directly to the ultimate consumer), the Club entered into a series of "licensing" agreements with nine (9) of its medium-sized and smaller competitors under which it gets their records for a total of some 87.5¢, versus a price of $1.60 or more all competing retailers are required to pay for those same records. It also included in those "licensing" agreements provisions (a) fixing (depressing) the price (royalty) to be paid by those manufacturers to their artists on records sold through the Columbia Record Club,[5] and (b) giving the Columbia Record Club the sole and "exclusive" right or "license" to make records from those nine competitors' "master"[6] recordings (for a "royalty" of some 17.8¢ per record made from them), those competitors expressly promising not to engage in a club operation themselves, not to sell directly to anyone else who operates a club,

[3] Finding 3.

[4] Finding 5.

[5] Two of the earlier contracts also contained provisions fixing the price at which the Columbia Record Club was to sell the competitors' records through the Club and fixing the price at which the competitors themselves were to sell the same records to their own distributors (nonclub channel). There is insufficient evidence to establish that those agreements are currently in effect, however, or that similar agreements were ever entered into with the other seven licensor-competitors. The evidence on the fixing of artists' royalties, on the other hand, is clearly set out in several of the contracts, including the later ones. Findings 10 and 11.

[6] A master is an original recording or duplicate thereof, from which other phonograph records can be manufactured.

and not to allow anyone else to use their "masters" for the purpose of producing records to be sold through a club. In short, Columbia sought to assure itself that no one else would be able to sell the records of those nine producers through the mail in competition with the Columbia Record Club.

I

The Columbia Broadcasting System, Inc. (hereinafter CBS or Columbia) is a New York corporation with seven (7) operating divisions, one of which is Columbia Records,[7] a manufacturer and seller of phonograph records. In 1961, CBS as a whole had sales of $473.8 million and net assets of $142.4 million. In 1961 and 1962, the Columbia Record Club had phonograph record sales of $41.5 million and $53 million, respectively; the company's nonclub sales of records (to wholesalers and retailers) was roughly the same in volume, making phonograph records somewhat less than 20% of CBS' total sales.

Columbia is the leading producer and seller of phonograph records in the United States. In 1960, total consumer expenditures for all kinds of records (including "LP's" and "singles" [8]), through all channels of distribution (including clubs, racks,[9] juke boxes, and dealer stores), was an estimated $521 million.

One of the principal issues to be determined in this proceeding is the "relevant market" in which the competitive effects of these challenged agreements with Columbia's nine competitors are to be evaluated. Respondent argues in favor of a broad "all-record" market. Counsel supporting the complaint, on the other hand, argues that the appropriate "relevant market" involved here is not the sale of all records through all channels of distribution but the sale of "LP" records only, through only one of the mail order channels, a method of selling by mail called the subscription of "club" technique.

The outer boundary of the relevant market is the broad, all-record market. This market, however, consists of four channels by which records are distributed to consumers: retail stores, racks,

[7] The other six are: (1) CBS Television Network, (2) CBS Television Stations, (3) CBS Radio, (4) CBS Laboratories, (5) CBS International, and (6) CBS News.

[8] "LP's" are the "long-playing," larger discs that have six performances on each side and retail for $2 and up; "singles" are the smaller discs with one performance on each side, retailing for less than $1. The LP's account for about 75% of all record sales, "singles" for the remaining 25%.

[9] "Racks" are the familiar structures displaying the 50 or so current "hits" in supermarkets, drug stores, and other high traffic areas.

nonclub mail, and club mail.[10] We find the club market to be a relevant submarket.

The very fact of these agreements excluding competitors from an equal opportunity to sell these records "through any mail order record club" [11] evidences Columbia's *own* conviction that the clubs are a sufficiently distinct market to make this restrictive arrangement economically worthwhile. As one text writer has put it, "the courts will take as the market, for the purposes of deciding cases, just that market which the concern itself takes for its field of activity; if a firm shows an intent to exclude competition from that field, it will be assumed that the field sufficiently describes a market, for otherwise what would be the point of the effort to exclude?" [12]

Furthermore, as discussed in some detail in the accompanying Findings As To The Facts, a number of economic factors operate to produce entirely different conditions of supply and demand in the sale of phonograph records through the various submarkets. Each of the relevant submarkets possesses different cost components and structures.[13] On the demand side they offer consumers different sets of advantages and disadvantages. The clubs especially appeal to a group of customers that have certain distinctive characteristics.[14] These supply and demand conditions are sufficiently different between the retail and club markets, for example, that each is capable of generating particular competitive forces which, in turn, can discipline one another.

The present arrangement is found to be a restriction upon competition in the club market as a relevant submarket. In addition, this practice lessens the competitive contribution of the club submarket to the broader, all-record market. In certain structural situations a given practice which occurs and is measured in a relevant submarket can have an adverse effect not only in that submarket but also upon the broader market itself. This is especially true—as in the instant case—where the submarket under question enjoys a cost advantage.[15] The capacity of the other channels of distribution to discipline the club sector is limited by their cost disadvantages. In such an instance it is especially

[10] Finding 13.

[11] CX 20.

[12] Neale, *The Antitrust Laws of the USA*, p. 125 (1960).

[13] Finding 22.

[14] Findings 19 and 20.

[15] Findings 22 through 24. For a brief discussion of the significance of different cost structures upon competition among relevant submarkets (or "interindustry competition") see: (1) Kaysen and Turner, *Antitrust Policy*, p. 102, fn. 2 (1959) and (2) *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 975–977 (S.D.N.Y. 1916).

important to maintain the level of competition in the advantaged outlet.

II

Columbia maintains that the "licensing" agreements challenged in this proceeding were entered into with its nine competitors for the purpose of meeting the demands of its Club members for a greater "variety" of records to choose from. The evidence is very clear, however, that the relatively small number of records offered by the Columbia Record Club is not a matter of record shortage but a deliberate policy on the part of the Club's officials, in accordance with what they conceive to be the particular tastes of their Club members. The Columbia Record Club could offer an unlimited variety of phonograph records to its members if it thought such a policy would be more profitable than the narrower selection it now offers.[16]

III

The purposes and the effects of the "licensing" agreements at issue here are twofold, namely, (a) to give the Columbia Record Club a discriminatorily low price on the "hit" records of those nine competitors, and (b) to bar the entry of competing clubs into the market by denying them access to suitable records ("hits") on equally favorable terms, *i.e.*, at costs that would permit them to profitably compete with the Columbia Record Club.

It should be emphasized that, while these agreements are couched in terms of "exclusive" contracts, their immediate effect is not to deny other club operators access to those records altogether, but simply to make the newcomer pay a higher price for them. Thus, it was agreed between Mercury Records, one of the nine "licensors," and the Columbia Record Club, that "during the term of this agreement you [Mercury Records] will not, in the territory of the United States and Canada, (1) sell by direct mail, (2) offer for sale by direct mail, or (3) authorize or consent to the sale or offering for sale by direct mail by any third party of phonograph records manufactured from master recordings which you now own or control or which you may hereafter own or control."[17] The effect of this provision is not, however, to physically prevent other clubs from acquiring these records at all; rather, since anyone can buy any manufacturer's records on an "open market" at a going market price from the country's

[16] See Findings 21, 25 and 28.
[17] CX 34, p. 3, par. 7.

hundreds of independent wholesalers,[18] the effect is simply to force any other club desiring to sell those records to go to the wholesalers and pay that "open market" (distributor-to-dealer) price of $1.60 to $2.47.[19] Under these licensing agreements, however, the Columbia Record Club's total costs of acquiring a finished Mercury, Kapp, or other licensor record, ready for sale through the club, is 87.5¢.[20] This gives it, then, a cost advantage on these records of from 72.5¢ to $1.59½, depending on whether the new club operator is able to acquire those same records from the wholesalers at the "best" price ($1.60) or the "list" price ($2.47). The magnitude of this barrier [21] thus thrown up in the path of potential club operators is suggested by the fact that the Columbia Record Club's own profit, according to its own figures, was no more than 24¢ per record on sales to first-year members and 75¢ per record on sales to second-year members.[22]

This cost "handicap" imposed on potential club entrants by these licensing agreements has obviously affected the structure of the club market and seriously lessened the vigor of competition in it. There can be little question but that entry into that market would be substantially more attractive if the potential entrant could secure the records of these nine manufacturers for the 87.5¢ paid by the Columbia Record Club, rather than for the $1.60 to $2.47 charged by the wholesalers. The records of these nine firms constitute a quite substantial share of the total supply of records available to club operators on at least potentially realistic terms. As discussed in the accompanying Findings, the "big three"—Columbia, RCA, and Capitol—can foreclose from potential entrants into the club field some 48% of all records simply by unilaterally refusing to sell their own respective labels (Columbia, RCA, and Capitol) directly to such potential entrants

[18] These nine competitors of Columbia promised only that *they* would not sell to any other club operator and wouldn't "authorize or consent" to the sale of their records through a club by any third party. There is of course no authority under the law for these manufacturers to control the further disposition of their records, once those records have been sold to their wholesalers, *i.e.*, the producers cannot lawfully prevent their wholesalers from reselling the records to other clubs, regardless of what the "exclusive" contracts with Columbia might say about it.

[19] Finding 23.

[20] Finding 22.

[21] Barriers to entry are "evaluated roughly *by the advantages of established sellers in an industry over potential entrant sellers. . . .*" Bain, *Barriers to New Competition* 3 (1956) (emphasis in original). One such barrier is the ability of established firms to secure needed input factors, *e.g.*, phonograph records for resale, "at lower prices than potential entrants can. . . ." *Id.*, at 14.

[22] The Columbia Record Club reported total costs of not less than $2.13 per record. Subtracting this from its first- and second-year prices of $2.37 and $2.88 gives a profit of 24¢ and 75¢, respectively.

(or by refusing to sell to him except on prohibitive terms [23]). For all practical purposes, then, the new club that expects to seriously compete with the clubs of the "big three" would be limited to the records of the nonbig three manufacturers, those represented by the remaining 52%.

Since RCA and Capitol both testified in this proceeding that their clubs had been profitably operated with the use of only their own records—*i.e.*, RCA has operated a successful club using only RCA records (16% of all records sold in the country in 1960), and Capitol has operated a successful club offering only Capitol records (11.1% of all records)—this remaining 52% would undoubtedly be sufficient to permit the profitable operation of a number of additional record clubs besides those of the "big three." The "licensing" contracts involved here, however, not only expressly bar these nine most likely entrants from starting their own clubs,[24] but dries up their share of that remaining 52% of the total supply of records to all other potential entrants. They sold, in the 12 months prior to the signing of their respective licensing contracts with Columbia, an aggregate of some 11.2% of the LP's [25] sold through retail dealer stores.[26] This transfer of another 11.2 percentage points out of the nonintegrated sector and over to one of the "big three" integrated firms further reduces by that amount the supply of records available to potential new club operators on economical terms.

The foreclosure involved here, however, is considerably greater than that indicated by any of these figures. As noted above, not all of the approximately 25,000 separate records offered for sale by the country's approximately 50 record manufacturers are equally attractive to the particular segment of the record-buying public that joins clubs. Their preferences run primarily to the most popular of the "hit" records, particularly to the 150 or so records that are, at any given moment, on the popularity "charts" published by the trade magazines (*Billboard*, etc.). It is from these much smaller groups of records that the bulk of the records *suitable for club use* are apparently drawn in actual practice.

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[23] Columbia did in fact refuse to sell to one ultimately unsuccessful club except at the full wholesaler-to-dealer "list" price of $2.47, less periodic discounts, or at an average price of $2.12. Tr. 9014–9015; finding 27. A club paying that price for its records, and incurring the same additional costs that the Columbia Record Club incurs, would have total costs of $3.37½, and hence would lose just over $1 on each record sold in competition with the Columbia Record Club at the latter's price of $2.37.

[24] Findings 6–9.

[25] "Singles" cannot be sold economically through clubs.

[26] This is presumably a fair approximation also of their share of all LP sales through all nonclub channels of distribution, *i.e.*, racks and juke boxes as well as dealer stores.

And of course it was precisely on the basis of their actual or potential capacity for producing "hits" that the nine "licensors" were selected by Columbia in the first place.[27]

These licensing contracts foreclosed to potential club entrants (except on disadvantageous terms) some 41.2% of what would otherwise have been an "open" market in "hit" records suitable for club use.[28]

But even if the effects of these contracts are evaluated not in terms of the share of club-type records actually tied up by the Columbia Record Club and hence actually foreclosed to potential club operators, but simply in terms of the smaller dollar share represented by the Columbia Record Club's *sales* of those particular records it ultimately elected to use itself (approximately 30% of the records it tied up), the principal conclusion would still be the same.

The Club's 1961 sales of $41.5 million were an estimated 53% of all "club" sales in that year, with approximately 36.7 percentage points representing its sale of its own (Columbia) records ($28.7 million), and the other 16.3 percentage points ($12.8 million) representing its sale of the nine competitors' records. In these circumstances we think the most clearly appropriate legal standards by which to judge the legality of the conduct involved are those expressed in the Supreme Court's recent merger[29] decisions, particularly those involving the so-called "horizontal" combinations.[30] The factual situation before us—one

[27] Finding 25.

[28] *Ibid.*

[29] While combinations effected by contract are admittedly less "permanent" than mergers of stock and all physical assets, we do not understand the law to be that competition may be lessened and monopoly created merely because it is scheduled to end at some specified future date; if there is injury to competition, there is injury to the public and should be ended without delay. Here, moreover, the time limit itself is more apparent than real: the contracts run for a stated period of years (*e.g.*, three years), but they are frequently renewed for additional periods of similar length.

It might be suggested that, since the actual effect of these agreements is not to "exclude" competitors from access to the records of these nine licensors in the physical sense of that term but only to make them pay a higher price than the Columbia Record Club pays, the applicable legal standard should be that expressed in the price discrimination law. Since the price differential (87.5¢ vs. $1.60) has allowed into the club market no significant competitors other than the integrated "big three" and has thus given the Columbia Record Club a virtual monopoly on the sale of the records of these nine firms through clubs, we think the situation should be evaluated primarily in terms of merger standards. However, considering the magnitude of the discriminatory price involved (a discrimination of some 54.7% in the Columbia Record Club's favor) and of the market share it has been able to get and hold as a result of it (53% in 1962), the conclusion would doubtless be the same under the price discrimination law. *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (April 24, 1967).

[30] *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964); *United States* v. *Aluminum Co. of America (Alcoa-Rome)*, 377

in which a firm with some 36.7% of the relevant market already, has acquired by contract with nine of its competitors another 16.3%, and in which it then shares over 90% of that market with only two other firms [31]—falls squarely within the rule of *Philadelphia Nat'l Bank* against a consolidation that "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market. * * * " [32] That merger, had it been allowed, would have produced a firm with 36% of the relevant market, substantially less than the 53% held here by the Columbia Record Club.

IV

Columbia offers several "business justifications" as to why it should be allowed to retain its "exclusive" hold on the sale of the records of these nine competitors in the club market. One of them—the argument that the Columbia Record Club is a less efficient retailer of records than the country's approximately 5,000 record dealers and thus should be allowed to buy at a lower price in order to offset the latter's alleged cost advantages—would be relevant only if the question was solely one of discrimination against, and competitive injury to, the dealers. Here, however, the competitive injury we find has occurred in the club rather than the nonclub market. A club's "justification" for inducing a discriminatory price not accorded to the operators of dealer stores obviously is no "justification" for contract provisions imposing a higher price *on clubs*.

Respondent argues further, however, that the Columbia Record Club is entitled to keep its "exclusive" hold on the Club sale of these records, and hence its advantage over other clubs, because of certain "guarantees" it gave the nine competitors in question. In negotiating these contracts, Columbia expanded its obligation beyond the unit "royalty" payment of so much for each licensor record sold (an average of 17.8¢ per record) by adding a promise on its part to pay the licensor-competitors a *minimum* total dollar figure, regardless of how few licensor records the Club might in fact sell. For example, in its contract with Kapp, respondent agreed to pay Kapp royalties on *at least* 150,000 records per year, for four years.[33] From this point, respondent reasons as follows:

U.S. 271 (1964); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

[31] See generally *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); Brodley, "Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy," 19 *Stanford L. Rev.* 285, 299 (January 1967).

[32] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

[33] See CX 41, 44, 45, 81, 180, 184, 191, 265, 512.

"[T]hese [licensor] companies almost universally demanded guarantees and we felt that we could meet the guarantees more successfully if we had exclusivity on the artists and the product [records] produced by these companies." [34]

There would seem to be no question but that the Columbia Record Club could, in fact, "meet the guarantees *more successfully* if we had exclusivity" on those records, *i.e.*, that it could take in more revenue if it had a monopoly on the mail order distribution of those records than if it had to compete with others selling those same records through the mail. This follows from the elementary economic principle that the sale of any product is more profitable, *i.e.*, that more money can be gotten for it, if it is sold in a monopolized rather than a competitive market. It does not follow, however, that one can first agree to pay a high price for something, a price that reflects the expectation of being able to resell it in a market free of competition, and then use the high price originally paid for it as "justification" for keeping the monopoly. This is a circular or "boot-strap" argument, to say the least. Assuming that Columbia has in fact "guaranteed" to pay Kapp and the others more than the club can earn from the sale of their records in a genuinely competitive market,[35] this establishes only that the parties knowingly bargained for the purchase and sale of a monopoly, not that the monopoly itself should be sustained. We know of no principle of law under which a private interest in realizing the fruits of a purchased monopoly must be given precedence over the public interest in preventing such monopolies.

Respondent's "advertising" argument is somewhat similar to those already discussed. A Club official explained it to the hearing examiner this way: "The basic reason [for demanding "exclusive" rights to sell these records through the mail] was that we would be advertising the artists and the labels extensively, spending millions of dollars in advertising for new members and in promoting these artists and their records and the labels in our club magazines, and we felt that during the period of the contract our

[34] Tr. 5240.

[35] There is little evidence that the "guarantees" given are actually all that "high." Thanks to the "negative option" system employed by the Club, approximately 35% of the Club's total membership (some 2 million) can be expected to accept the record "selected" for them (the "regular selection") each month (Finding 3). Thus, in 1962, no "regular selection" in the Club's "popular division" (40% of the total membership) sold less than 95,000 records. In effect, this means that the Columbia Record Club can generally meet a 100,000–150,000 "guarantee" by simply picking *one* of the licensor's records for the coveted role of "regular selection" of the month. In fact, there is reason to believe this is the real significance of the guarantee provisions in the contracts—they assure the licensor he'll get at least one of his records featured as a "regular selection" and hence in the hands of 100,000 "automatic" buyers.

[advertising] investment justified this exclusivity."[36] As we understand it, respondent's basic argument here is that its advertisements, some of which carry the names of these nine licensor-competitors' labels, and the names and pictures of some of their more popular artists, have created some sort of residual or continuing "demand" for the records of those manufacturers and their artists and that this continuing "demand" is something respondent alone, as its creator, should be allowed to exploit. To allow a newcomer to sell Mercury, Liberty, Verve, Caedmon, Kapp, Warner Bros., United Artists, Vanguard, and Cameo-Parkway records through the mail would thus permit such a newcomer to take a part of what respondent's advertising had created—in short, it would, as we understand the reasoning, permit him to reap where he had never sowed. Or, stated another way, respondent is apparently arguing for the establishment of a principle of law that the *first* seller to *advertise* a given product must thenceforth be allowed to enjoy a monopoly on the sale of that product in the area covered by his advertisement, lest some residual "demand" created but not harvested by that first advertiser be garnered by later entrants into that market. We are at a loss to understand how, under such a rule as this, competition could ever arise at all.

There is nothing in respondent's advertisements to support such a conclusion.[37]

The purpose of these advertisements is as straightforward as their appeal to the customer's "bargain" instinct:

Q. Mr. Rabar, what is the basic purpose of Columbia Record Club national advertising?

A. There is only one purpose; to get members.[38]

The sole criteria applied in determining whether a club advertisement will be placed in a particular periodical is whether it produces

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[36] Tr. 5239 (emphasis added). Although Columbia's licensing contracts give it an "exclusive" on *all* of the records in each licensor's catalog (including new ones as they're released), it doesn't actually use all of them. Thus, of the 2,509 records offered for sale by these nine producers, the Columbia Record Club has elected to use or offer to Club members only 736 (29.3%) of them. Its "exclusive" contracts, however, barred all other clubs from using not only these 736 records but the other 1,773 records (70.7%) as well, records that it had no desire to use itself but didn't want anyone else to use, either. The President of RCA testified that, in his view, this was one of the "deleterious" effects of exclusive licensing: "[N]o record club can use up all of the repertoire of a Verve, a United Artists, other labels, and that it may well be, if you have an exclusive contract with another label, that part of the repertoire remains unused; it lies fallow; it stays on the shelf. And if that is true, then the cultural effect, as you call it, would be deleterious." Tr. 1871. He also thought it had bad "commercial" effect: "I think exclusive [licensing] contracts, in that sense, such as the one that Columbia has had with [these licensor] labels, [is] likely to have certain bad effects. These bad effects * * * always do come about when one agency in distribution or in entertainment, become so all-powerful [a] smaller manufacturer listens all too carefully to what this agency dictates or tells [it]." Tr. 1871.

[37] See, *e.g.*, Finding 3, n. 4.

[38] Tr. 6779.