

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

POLYGRAM HOLDING, Inc.
a corporation,

DECCA MUSIC GROUP LIMITED,
a corporation,

UMG RECORDINGS, INC.,
a corporation,

and

UNIVERSAL MUSIC & VIDEO
DISTRIBUTION CORP.,
a corporation

Docket No. 9298

**COMPLAINT COUNSEL'S MEMORANDUM IN RESPONSE TO WARNER
COMMUNICATIONS INC.'S MOTION TO MODIFY THE PROTECTIVE ORDER**

Pursuant to the the Federal Trade Commission's ("FTC") Rules of Practice and this Court's Order, dated October 22, 2001, Complaint Counsel herein responds to non-party Warner Communications Inc.'s ("Warner") Motion to Modify the Protective Order Governing Discovery Material ("Warner Motion"). With the caveats outlined below, complaint counsel does not object to Warner's motion, and submits this memorandum in order to set forth its position on the modifications sought by Warner.

1. **Definition of "Protected Discovery Material"**

Warner proposes to modify the definition of "Protected Discovery Material" such that employees of Respondents would generally be denied access to documents where such disclosure

would be personally embarrassing to Warner. This would be in addition to the protection already provided to documents where disclosure would cause substantial commercial harm. See Warner Motion pp. 3-5. Complaint counsel is skeptical that there are any or many documents in Warner's submission that would be "personally embarrassing" to Warner without causing it "substantial commercial harm." At the same time, complaint counsel also recognizes the Court's responsibility to ensure that discovery is conducted in a manner that will protect non-parties and parties alike from "annoyance, embarrassment, oppression or undue burden." 16 C.F.R. § 3.31(d) (2001). Accordingly, complaint counsel does not object to this component of Warner's motion.

2. Use of Warner Material in Other Proceedings

Warner objects to the provision of paragraph 1 of the Protective Order because it fears that this paragraph would permit Respondents to use Discovery Material in other proceedings without Warner's consent. Warner Motion pp. 5-6. We agree that this would be an improper use of documents submitted by Warner to the Commission in the context of a law enforcement investigation. On the other hand, complaint counsel believes that information gathered in one investigation or litigation may properly be used by the Commission in other contexts to further the Commission's law enforcement mission. To that end, complaint counsel seeks to clarify the revisions suggested by Warner by adding the text underlined below:

Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other

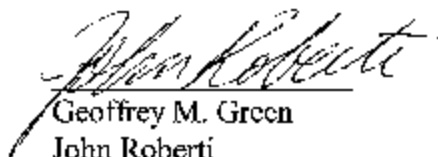
legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

Warner has no objection to the insertion of this language. Roberti Declaration ¶¶ 3-5.

3. **Notice of Intent to Disclose to Experts**

Warner requests that the Protective Order be modified to provide that Warner will receive advance notice if a party intends to provide Confidential Discovery Material to any expert, regardless of that expert's affiliation. Warner Motion pp. 6-8. Complaint counsel supports a strong presumption in favor of allowing experts to have access to information relevant to the litigation. However, there is nothing unreasonable about providing Warner with notice and an opportunity to object to disclosure of its Confidential information to a particular expert. Consequently, complaint counsel does not object to Warner's proposed modification.

Respectfully submitted,


Geoffrey M. Green
John Roberti
Complaint Counsel

Of counsel: Melissa Westman (bar admission pending)

Dated: November 1, 2001

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DECLARATION OF JOHN ROBERTI

1. I am an attorney employed by the Federal Trade Commission, and complaint counsel in the above-captioned matter.

2. I submit this declaration to bring before this Court facts pertinent to Complaint Counsel's Memorandum in Response to Warner Communications Inc.'s Motion to Modify the Protective Order.

3. On October 22, 2001, I contacted Tanya Dunne, Esq., attorney for Warner Communications, Inc. I asked her if her client had any objection to inserting the following language to paragraph 1 of the Protective Order for purposes of clarification:

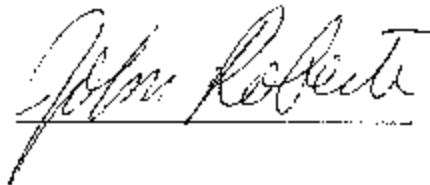
Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission.

4. At Ms. Dunne's request, I emailed this language to her.

5. Later on the morning of October 22, 2001, Ms. Dunne contacted me by email and confirmed that her client had no objection to inserting the quoted language.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 29, 2001

A handwritten signature in cursive script, reading "John Roberti", written over a horizontal line.

John Roberti

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DISTRIBUTION CORP.,)	
a corporation.)	
_____)	

ORDER

Upon the motion of Warner Communications Inc. and complaint counsel, and for good cause shown, **IT IS HEREBY ORDERED** that the Protective Order entered in this matter on October 16, 2001 is modified as follows:

1. paragraph 16 of the Definitions shall be modified to add the phrase "or personal embarrassment" after the phrase "would not cause substantial commercial harm";
2. paragraph 5(b) of the Protective Order shall be modified to add the following three sentences:

“Disclosure of Protected Discovery Material made under subparagraph 5(b) above shall only be made to persons on a demonstrated need to know basis and shall be used by such persons only for the purpose of this proceeding and not for any business, competitive or other purpose whatsoever; in addition, the Parties shall follow the procedure set forth in paragraph 8(b) & (d) below for Disclosure to New Persons except notice by disclosing Party to Producing Party need only consist of the name and title/position of the person at Universal to whom such material is to be disclosed and a brief statement of the reasons why this person has a need to know Protected Discovery Material.”;

3. paragraph 8(b) shall be modified to replace “5” with “5(a)” in the first sentence;
4. the following words shall be deleted from paragraph 1 of the Protective Order:

“Notwithstanding the foregoing, with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided, however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event”;

5. the following words shall be added to paragraph 1 of the Protective Order after the first

sentence:

“Notwithstanding the foregoing, nothing contained in this Protective Order shall prevent the Commission from using any material produced as part of the investigation in this matter, including any Discovery Material, for any authorized law enforcement purpose, provided that the Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission.”

6. the following words shall be deleted from paragraph 8(a) of the Protective Order:

“and who is employed in, regularly consults to, or may otherwise have a financial or pecuniary interest in the music or home video industry beyond his employment as an expert in this Matter”.

ORDERED:

James P. Timony
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I, Melissa Westman, hereby certify that on November 1, 2001, I caused a copy of the following documents to be served upon the persons listed below by facsimile and by U. S. Mail or Hand-Carried:

- (1) Complaint Counsel's Motion for Extension to File Expert Report;
- (2) Proposed Order; and
- (3) Declaration of John Roberti.

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Melissa Westman