IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Petitioner*, v. **TIME WARNER, INC., et al.**, *Respondents*.	[dated: December 22, 1994 Misc. Action No. 94-338 HHG

REPLY IN SUPPORT OF
PETITION TO ENFORCE CIDS

The United States submits this reply to the opposition briefs filed by Time Warner, Inc. (Warner), Sony Corporation of America (Sony), Bertelsmann, Inc. (BMG), EMI MUSIC INC. (EMI), and PolyGram Holding, Inc. (PolyGram) (collectively the "majors").[1/] Despite an absence of applicable case law supporting their position and despite unresolved factual issues, the majors invite the Court to rule, as a matter of law, that the instant investigation of the foreign components of the majors' conduct is utterly without merit. In the process, they (1) rewrite the *Oklahoma Press* doctrine; (2) pretend that their domestic joint ventures are wholly unrelated in purpose and

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[1] See Memorandum in Opposition to Petition to Enforce Civil Investigative Demands, filed December 7, 1994 by Warner, Sony and BMG (hereinafter "W-S-B Brief"); Memorandum of Points and Authorities of PolyGram Holding, Inc. in Opposition to Petition to Enforce Civil Investigative Demand No. 11114, filed December 7, 1994 by PolyGram (hereinafter "PolyGram Brief"); Respondent EMI Music Inc.'s Memorandum in Opposition to Petition to Enforce Civil Investigative Demands, filed December 7, 1994 by EMI (hereinafter "EMI Brief"). Each of the respondents has joined in the arguments of the others. MCA, Inc. has been dismissed from this proceeding. See Notice of Dismissal, filed December 5, 1994.

effect to their foreign activities; (3) ignore facts set forth in the United States' opening brief; and (4) impart to the 97th Congress an intent to exclude foreign price fixing from the reach of U.S. antitrust laws even if such conduct is intended to, and does, directly restrain U.S. domestic and export commerce.

The United States respectfully requests that the Court restate in the strongest possible terms that, in accordance with *Oklahoma Press* and its progeny, a CID recipient seeking to avoid compliance carries the burden of establishing, based on clear authority and undisputed facts, that jurisdiction is necessarily absent. However, the United States will respond to some of the majors' factual contentions and provide supporting documentation. In particular, the United States has filed under seal as Exhibit 1A a document that should put to rest any argument that the domestic components of the majors' global strategy *must* be viewed as procompetitive and separate from the majors' foreign conduct.[2/] For the reasons set forth herein, the United States requests an order directing the majors promptly to produce the *U.S.-located* documents and information called for in the CIDs.[3/]

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[2] See Agreement, Stipulation and Protective Order filed December 22, 1994.

[3] Contrary to the majors' assertion, W-S-B Brief at 11 n.13, limitation of the United States request to U.S.-located documents only is not new. With respect to Sony, Bertelsmann, EMI and PolyGram, the CIDs never extended to foreign-located documents. See Petition, Exhibit 1. In the case of Warner, the CIDs were limited to the offices of particular U.S. companies by letter dated October 21, 1994, attached hereto as Exhibit 2.

FACTUAL CLARIFICATIONS

The majors assert that various disputed facts are "undisputed." W-S-B Brief at 3. In this reply, the United States points out, and provides limited documentation concerning, the most serious factual disputes between the parties.

The majors claim that the United States' argument that a collective refusal to grant world-wide licenses could force programmers to pay higher prices for such licenses is "factually flawed" because "Sony recently entered into a worldwide music video license with MTV Networks." W-S-B Brief at 23 n.24. They also claim that "programmers are *not* prevented from negotiating directly with Respondents for foreign licenses." W-S-B Brief at 31 (emphasis in original). A copy of the world-wide license agreement has been filed under seal as Exhibit 1B. In addition, the United States has filed under seal as Exhibit 1C a document indicating that a member of VPL may not negotiate independently with programmers unless it withdraws from the organization. Although the investigation continues, the United States believes that these documents support its contention relating to world-wide licenses.[4/]

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[4] The majors also claim that the notion of paying for airtime on programmers' channels "makes no sense" and "might itself be illegal." W-S-B Brief at 23. To the contrary, market dynamics could easily lead to payments for airtime. The same music video which the majors characterize as "art" can also be characterized as an "advertisement" for records (indeed the majors elsewhere describe them as "promotional", W-S-B Brief at 3). See also Richard Katz, TCI-BMG Breakdown May Foster Viacom Talk, 15 Multichannel News 16 (June 13, 1994) ("[T]he domestic promotion departments at the labels are firmly against charging (continued...)

The majors also assert that their domestic music video joint venture is "procompetitive," W-S-B Brief at 7, suggest that its sole purpose is to "introduce competition," id., ignore their other venture's digital radio service, and generally maintain that their domestic activities should be viewed as wholly divorced from their foreign activities. These contentions are important; it is only through them that the majors can make even the most tenuous argument that their foreign activity has no anticompetitive domestic effects.

Whatever the outcome of the Department's analysis of the majors' domestic ventures, it is already clear that their purposes and effects raise substantial antitrust concerns similar to those raised by the foreign activities also under investigation. Indeed, in its opening brief, the United States expressly referred to (1) license agreements between some of the majors and DCR that appear to fix license fees and (2) a draft partnership agreement for the domestic video channel that fixes the price of music video licenses at twenty percent of revenue (identical to the price often demanded of U.S. programmers by VPL).[5/] These documents have been filed under seal as Exhibits

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TV outlets for their videos. Les Garland, executive vice president of The Box points out that labels have paid $650,000 this year for The Box to play their videos in its 'Playola' segments"). Paying for airtime is illegal only in narrow circumstances. See 47 U.S.C. § 508.

[5] In the most recent version of the formal partnership agreement, this provision does not appear. The United States is investigating whether the parties' current agreements and
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1D and 1E, respectively. As noted, we have also filed under seal as Exhibit 1A a document that is relevant to this issue. The United States invites the Court to review the exhibits as it considers whether the domestic ventures' purposes and effects must be viewed as predominantly procompetitive and wholly unrelated to the majors' foreign activity.

In its opening brief, the United States contended that the foreign joint ventures could harm U.S. exports if the majors "restrict programmer access to the rights to music and music videos . . . ." Opening Brief at 36. In partial response, the majors simply state that their German channel, VIVA, has been cleared by German competition authorities and that "some" of the majors are "considering possible joint ventures in Asia and other foreign areas . . . ." W-S-B Brief at 8. They suggest the sole intent is to "create a competitive outlet," id. at 9, and do not address the concern that U.S. programmers may be denied access to videos. The United States has filed under seal as Exhibit 1F a document relating to the proposed Asian venture. Pages 1 through 6 and page 9 of that document support the United States' position.

The majors contend that only foreign buyers and producers are affected by the foreign price fix. W-S-B Brief at 27; PolyGram Brief at 8 n.10. This ignores the U.S. programmers,

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actions, formal and informal, are intended to achieve similar price-enhancing effects through other means. It is of course unlikely that any intent to fix prices disappeared simply because alert counsel deleted the clause from the formal contract.

such as CMT and DMX, that provide their services by beaming their signal unchanged from the United States to foreign countries. In addition, MTV Europe, the programmer most specifically targeted by the majors, is an American partnership formed under the laws of Delaware by American subsidiaries of Viacom.[6/] It is therefore more properly regarded as an American exporter of services.

The United States also disputes, *inter alia*, the assertions or suggestions that Viacom is the only significant outlet for music videos of "mass appeal" or that there are only a "handful" of other programmers,[7/] that the VPL license fee is insignificant,[8/] that the instant CIDs are part of any "plan to expand [the Department's] foreign jurisdiction and 'internationaliz[e] antitrust enforcement,'"[9/] and that the

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[6] In its opening brief, the United States incorrectly identified MTV Europe as a foreign subsidiary of Viacom.

[7] W-S-B Brief at 4 n.4. The 1993 Music Video Association Directory indicates that there are 20 national and 138 regional music video outlets.

[8] Id. at 28-29. A 20%-of-revenue fee is clearly substantial.

[9] W-S-B Brief at 10 n.12 (quoting Address of Anne K. Bingaman, "International Antitrust: A Report From the Department of Justice", Fordham Corporate Law Institute, Oct. 27, 1994, at 2). The *full* quote from the Assistant Attorney General's speech is as follows: "After giving you a brief overview of our draft Guidelines, I will then turn to several examples of mutual assistance and enforcement cooperation that have occurred this year, and finally to our exciting and successful effort in Congress to pass legislation that will facilitate future efforts in our continuing goal of 'internationalizing' antitrust enforcement by combining the energies, efforts and abilities of diverse enforcement entities throughout the world in cooperative

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United States "has been unwilling to negotiate any significant modification to the CIDs."[10/]

ARGUMENT

I. Respondents' Attempt to Place the Burden on the United States Should Be Rejected.

The United States has never said "that its investigatory powers are unlimited," that it may investigate "even where it plainly lacks jurisdiction," that this "Court has no power" to determine compliance with the CID statute, or that the Department of Justice "may automatically and unreviewably enforce a CID." W-S-B Brief at 12. Our position is that (1) the United States is not required to establish its ultimate subject matter jurisdiction at the beginning of its investigation and (2) that compliance with the CID is required unless the *recipients* can establish a manifest lack of jurisdiction based on undisputed facts and settled law. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214-18 (1946); FTC v. Ernstthal, 607 F.2d 488, 490 (D.C. Cir. 1979); Australia/Eastern U.S.A. Shipping

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efforts aimed at addressing anticompetitive conduct in an increasingly global economy." Fordham Address, supra, at 2.

[10] W-S-B Brief at 11 n.12. In fact, the CIDs themselves invite the respondents to suggest modifications, see, e.g., Petition, Exhibit 1. The United States has granted, when requested, many substantial modifications relating to the majors' domestic joint ventures, as well as numerous extensions of production deadlines. More than a month prior to filing the petition, the United States expressly invited counsel for the majors to propose modifications to the CIDs as they relate to international activities. See Exhibit 3 (letter to counsel for the majors).

Conference v. United States, 1982-1 Tr. Cas. (CCH) ¶64,721 (D.D.C. 1981).

The majors claim that the United States must affirmatively establish the basis for its subject matter jurisdiction[11/] and that the Court must apply strict scrutiny to the facts and theories offered by the Government.[12/] To see the fallacy of such a position, one need look no further than *Oklahoma Press*. There, the Supreme Court rejected the idea that the Government must show "'probable cause', that is, probability in fact, of coverage." 327 U.S. at 214. In fact, the Court upheld a regulatory subpoena based solely on a "showing" of statutory coverage consisting of "allegations" to the effect that "the company was a newspaper publisher, that the Administrator had reason to believe it was violating the Act, and that it was 'engaged in commerce and in the production of goods for commerce.'" Id. at 215 n.53. In keeping with its broader

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[11] "To establish jurisdiction to *investigate*, the *Department must demonstrate* . . . that . . . Respondents' activities have a 'direct, substantial and reasonably foreseeable effect" on U.S. commerce or exports *arising from a violation of the Sherman Act*." W-S-B Brief at 12 (emphasis added).

[12] See W-S-B Brief at 14 ("it is a court's duty to scrutinize carefully . . ."); id. ("painstaking inquiry"); id. ("closely scrutinize[]"). The majors attempt to stretch certain passages in the legislative history into a congressional intent to hobble the Antitrust Division's investigatory power, and they cite *Australia/Eastern* as if that case supports their argument. W-S-B Brief at 13. In fact, Judge Green extensively reviewed the legislative history upon which the majors now rely before concluding that "there appears to be little, if any, difference between the standards that have been traditionally applied in subpoena enforcement cases such as *Oklahoma Press* . . . , and those that should be applied to CIDs under the ACPA." 1982-1 Tr. Cas (CCH) ¶64,721, at 74,063.

holding, the Court's inquiry into the jurisdictional question was far from "painstaking."[13/]

Because they rest their argument on the wrong standard, the majors fail to make the required showing that the jurisdictional question requires "no factual development" and is "absolutely determined by authority." Australia/Eastern, 1982 Tr. Cas. (CCH) ¶64,721, at 74,062-63. Numerous unresolved factual issues have been set forth in the factual statements of the parties. As for clear authority, the majors ask the Court to rule that, notwithstanding the express wording of the FTAIA, effects that are otherwise direct, substantial and reasonably foreseeable should not trigger U.S. antitrust jurisdiction if they stem from foreign price fixing, even if the collusive behavior has been targeted specifically at a particular U.S. exporter and the "American" model of music video licensing. Opening Brief at 14 n.4. No cases support this broad

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[13] As a corollary to their argument that jurisdiction must be established before the investigation may proceed, the majors assert that the United States may not investigate the factual basis for its potential jurisdiction through the instant CIDs. W-S-B Brief at 12. However, both *Oklahoma Press* and the legislative history of the ACPA indicate that the standards applicable to grand jury investigations should apply to regulatory subpoenas generally, and to the scope of CIDs in particular. Id. at 216 (citing Blair v. United States, 250 U.S. 273, 282 (1919)); Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 58 (2d Cir. 1983) ("the House report accompanying the 1976 amendments to the ACPA reveals a preference for the less stringent grand jury subpoena standard, 'tailored as it is to reflect the broader scope and less precise nature of investigations'") (citation omitted). The grand jury has long had the "authority and jurisdiction to investigate the facts in *order to determine the question whether the facts show a case within [its] jurisdiction*." Blair, 250 U.S. at 282-83 (emphasis added).

proposition, and the entire argument rests on a partially quoted passage from the legislative history. See infra. Other arguments proceed without benefit of case citation, and still others make strained analogies to remote authority. The conclusion is inescapable that the majors' legal arguments are not supported by the settled authority required at the CID enforcement stage under the *Oklahoma Press* doctrine. See Australia/Eastern, 1982-1 Tr. Cas. (CCH) at 74,062.

II. The Majors' Substantive Jurisdictional Arguments Are Without Merit.

The majors' arguments relating to ultimate subject matter jurisdiction require little discussion. All of them rest on flawed premises based on "facts" that are disputed.[14/] Accordingly, only three of the majors' substantive contentions will be discussed here. The remainder are either controverted by the United States' factual allegations or adequately addressed in the opening brief.[15/]

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[14] For example, the majors assert that no larger conspiracy involving substantial domestic components exists; that the domestic components are procompetitive in purpose and effect; that the investigation of foreign activity is exclusively concerned with price fixing; that the majors' foreign activity presents no entry barriers or exit pressure on U.S. exporters of music programming services; that the majors' foreign licensing scheme constitutes "standard" price fixing; and that the majors' activity is not targeted at American exporters. But as discussed here and in the opening brief, there is reason to believe that each of these assertions is false.

[15] The claim has been made (by EMI generally and by BMG with respect to documents concerning MTV-Latino) that further production should be excused because some documents and information has already been provided. This amounts to a claim that one may selectively comply with a regulatory subpoena. No (continued...)

A. *Continental Ore* Applies to This Case.

The majors claim that Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) "pertains to the admissibility of evidence, *not extraterritorial jurisdiction*." W-S-B Brief at 18 (emphasis added). In fact, *Continental Ore* stands for the proposition that, where a conspiracy having domestic components and domestic effects is alleged, the Court has jurisdiction over the entire conspiracy, whether or not some of the activity occurred overseas, *and* that the plaintiff is entitled to introduce evidence of the foreign conduct. Id.[16/] As the majors note, *Continental Ore* involved the cartelization of a U.S. market. W-S-B Brief at 18. So does this case. *Continental*

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authority supports this novel approach.

Referring to MTV-Latino specifically, EMI, Warner, Sony and PolyGram state that they "have already produced information responsive to the CID requests concerning MTV-Latino." W-S-B Brief at 21. Noticeably absent from this statement is the phrase "*all* information" or the broader term "Latin America." The Department has reviewed the majors' CID responses regarding Latin America. This review confirmed that the respondents produced relatively few documents related to Latin America and that PolyGram, at least, redacted some documents. In light of this review and the ambiguous phrasing used in the majors' opposition papers, the United States disputes that "discovery concerning MTV-Latino is not at issue." W-S-B Brief at 21.

[16] The majors also state that the national identity of the co-conspirators and the location of the collaborative activity are irrelevant considerations under the FTAIA. W-S-B Brief at 18. In the context of the majors' comity arguments, however, these factors are directly relevant to the connection between the United States and the alleged conduct. See Antitrust Enforcement Guidelines for International Operations 1994, Draft for Public Comment, 59 Fed. Reg. 52,810, 52,818 (October 19, 1994) (hereinafter "Guidelines").

Ore also involved the plaintiff's "alleged elimination from" a foreign market. 370 U.S. at 702. So does this case.

The majors generally disparage the allegation of a world-wide conspiracy having domestic effects, apparently relying on their conclusory assertions that their domestic joint ventures are both "procompetitive" and unrelated to their foreign conduct. The United States should be allowed to test these assertions under the *Oklahoma Press* cases cited above, *Continental Ore's* stricture against "tightly compartmentalizing" an alleged conspiracy, 370 U.S. at 699, and the appropriate test for discovery in antitrust conspiracy cases:

> Because conspiracies, for instance, are usually concealed, conjecture may be inescapable until after the discovery process. The same may be true for the motive or merit that substantive rules sometimes make relevant. As one court put it, for example,
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> > Experience has shown that where a conspiracy is suspected, the proof of it most frequently emerges from discovery . . . . To require that each private plaintiff have personal knowledge of the legal and factual intricacies of an alleged national conspiracy would impair at least to some degree the ability of private citizens to augment by private actions governmental enforcement of Congress's will.
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> And the same might be said of a government complaint, for that matter.

2 Phillip Areeda & Donald Turner, Antitrust Law ¶317b, at 74 (1978) (footnote omitted, quoting Bogosian v. Gulf Oil Corp., 337 F. Supp. 1234, 1235-36 (E.D. Pa. 1972)).

B. The FTAIA Does Not Exempt Foreign Price Fixing.

The FTAIA did not "contract the reach of U.S. antitrust law," PolyGram Brief at 6,[17] nor did it broadly exempt all price-fixing schemes having a foreign component. PolyGram Brief at 1-14; W-S-B Brief at 17. This proposition, which is the majors' only argument purporting to be solely "legal" in nature, is based principally on an out-of-context quote from the FTAIA's legislative history. The relevant passage, quoted more fully here, occurs in a discussion of a foreign purchaser's standing to bring a private action:

> Thus, a price-fixing conspiracy *directed solely* to exported products or services, *absent a spillover effect* on the domestic marketplace . . . would *normally* not have the requisite effects on domestic or import commerce. *Foreign buyers* injured by such export conduct would have to seek recourse in their home courts.
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> *If such solely export-oriented conduct affects export commerce of another person doing business in the United States,*[18] *both*

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[17] Rather, the Act was intended to "clarify" the existing standard by codifying the Department of Justice's interpretation in its then-existing Guidelines. H.R. Rep. No. 97-686, 97th Cong., 2d Sess., at 1-8. Congress noted that various formulations of the effects test had been articulated but did not reject the *result* of any decision reached under the *Alcoa* standard. Id. at 5-6. In fact, the only substantive adjustment to the law was to change "intended effects" to "foreseeable effects." This change clearly does not "contract" the reach of U.S. antitrust jurisdiction.

[18] "[P]erson doing business in the United States" is a somewhat loose reference to Subsection (1)(B) of the FTAIA, which permits jurisdiction for effects on "export trade or export commerce with foreign nations, *of a person engaged in such trade or commerce in the United States*." 15 U.S.C. §6a(1)(B) (emphasis (continued...)

> *the Sherman and FTC Act amendments preserve jurisdiction insofar as there is injury to that person.*

H.R. Rep. 97-686, 97th Cong., 2d Sess., at 10 (emphasis added). The most that this passage can mean is that the FTAIA bars U.S. courts from hearing allegations of price fixing "directed solely" at pure exports bought by foreign consumers, who would be limited to the laws of the country to which the goods are exported. In that narrow circumstance, there is no jurisdiction because there is no injury to U.S. domestic or export commerce. Here, what is alleged is a price fix affecting an input *into* a U.S. service that will be exported, and injury to all U.S. producers of these services would be the direct result.

There are numerous other considerations that distinguish this case from the scenario mentioned in the legislative history. First, the alleged conspiracy does not simply involve price fixing. Second, there are domestic effects, such as the effects of the domestic joint ventures and the higher prices that programmers must pay for world-wide licenses. Third, and most importantly, the alleged victims of the price fix are not foreign consumers but U.S. exporters. To the extent the passage is applicable at all, therefore, it supports the instant investigation.[19/]

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added). There is no requirement in the FTAIA that an exporter must be selling its products or service to U.S. consumers to have standing.

[19] The majors have found one case that dismissed a (continued...)

Focusing solely on price fixing, the majors readily concede that "the FTAIA is concerned with such conduct as boycotts and other exclusions that directly suppress what the legislative history refers to as 'export opportunities' of domestic firms." PolyGram Brief at 10. However, the allegations made here include numerous references to boycott activity, such as a collective refusal to deal except through a common agent, a collective refusal to grant world-wide licenses, efforts by the common agent to prevent recalcitrant programmers from entering into new territories, and providing music videos exclusively to joint venture channels. These activities, intertwined with the majors' price-setting behavior, take this investigation out of the realm of a "standard price fix." PolyGram Brief at 11.

The numerous citations to antitrust standing cases to support the majors' price-fixing argument is perplexing. The claim is that "producers of an input or complement to a price-fixed product cannot sue the price fixers." PolyGram Brief at 11. That statement is both unremarkable and irrelevant. A *buyer* of a price-fixed product unquestionably has standing to sue,

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complaint alleging a world-wide price-fixing conspiracy. Eurim-Pharm GmbH v. Pfizer Inc., 593 F. Supp. 1102 (S.D.N.Y. 1984); but see Daishowa Int' v. North Coast Export Co., 1982-2 Tr. Cas. (CCH) ¶64,774 (N.D. Cal. 1982) (price-fixing activities of foreign buyers' cartel supported exercise of pre-FTAIA antitrust jurisdiction). In *Pfizer*, the plaintiff's complaint failed to allege any effect on U.S. trade or commerce, id. at 1106, and the plaintiff's opposition to the motion to dismiss conceded the absence of effects on import and export commerce. Although the plaintiff raised the notion of "spillover effects," it could only allege a price increase in the U.S. without connecting the increase to any activity of the defendant. Id. at 1106-07.

whether or not the buyer uses the product to produce a complement. Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (standing of broadcaster to sue rights association alleged to fix prices of music licenses assumed). If, as the majors claim, the appropriate test for "directness" under the FTAIA is similar to antitrust injury and standing analysis, PolyGram Brief at 11-12; W-S-B Brief at 26-28, then the effects alleged here are clearly "direct" since they would confer antitrust standing if the conduct occurred solely in the United States.

C. The Majors' Comity Arguments Are Without Merit.

The majors claim that principles of comity foreclose the exercise of jurisdiction. This contention is inappropriate, premature, and wrong.

Where the United States is the complaining party, the decision to seek judicial relief "represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns." See Guidelines, 59 Fed. Reg. at 52,818. Accordingly, comity is not a relevant consideration except to the extent that, as noted in the opening brief, the Department will consider comity in determining whether to initiate a lawsuit. See United States v. Baker Hughes, Inc., 731 F. Supp. 3, 6 n.5 (D.D.C.) ("whatever the relevance of comity concerns in antitrust disputes between private parties . . ., they are not a factor here. . . . It is not the Court's role to second-guess the executive branch's judgment as to the proper

role of comity concerns under these circumstances"), aff'd, 900 F.2d 981 (D.C. Cir. 1990).[20/] The United States continues to communicate with foreign governments regarding this investigation.

Even if comity should be considered in an eventual suit by the United States, it is premature to raise the issue here. Associate Container (Australia) Ltd v. United States, 705 F.2d 53, 60 (2d Cir. 1983). In *Associated Container*, CID recipients attempted to set aside CID requests on the basis of the state action doctrine, which is "rooted in considerations of international comity." Id. Rejecting the argument, the Second Circuit held:

> appellees invite us to halt an on-going investigation being conducted by the Justice Department, a division of the executive branch whose independence the act of state doctrine primarily protects. We decline to do so.

Id. at 61. By raising comity concerns at this stage, the majors are in effect requesting the Court to "first-guess" the executive branch, which is properly charged with addressing the concerns of foreign governments and making the initial foreign policy determination. As in *Associated Container*, we ask the Court to reject this request. See id.

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[20] Cf. Timberlane Lumber Co. v. Bank of America, N.T., 549 F.2d 597, 613 (9th Cir. 1976) ("in private suits. . . there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that consideration has been outweighed").

In any event, the majors have not established that comity would preclude a lawsuit by the United States if the factual assertions alleged in the opening brief can be established. See generally Guidelines, 59 Fed. Reg. at 52,818 (listing factors). As the Supreme Court recently made clear, the "conflict with foreign law" factor, stressed heavily by the majors, looks for a "true conflict" in the sense that foreign law *requires* conduct that would otherwise violate the Sherman Act. Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2910 (1993). No such requirement exists here.[21/] In general center-of-gravity terms, moreover, it is clear that an international conspiracy such as the one described in the opening brief--that is, spanning the entire world but involving U.S. members, components, products, services, victims and effects--satisfies any objections that might be raised by foreign governments.

For each of these reasons, the majors' comity arguments lack merit and should be rejected.

III. Miscellaneous Matters.

In addition to subject matter jurisdiction and comity issues, individual defendants, with the exception of Warner, have raised various affirmative defenses in their answers to the petition. With the possible exception of burdensomeness, *none* of

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[21] Indeed, one foreign tribunal--the European Commission--has preliminarily concluded in its Statement of Objections that certain practices of the majors may violate European competition law.

the respondents has addressed these issues in the opposition papers. Accordingly, they receive brief treatment here.

Sony, EMI, BMG and PolyGram have raised as affirmative defenses the allegation that this Court lacks personal jurisdiction and that venue is inappropriate under Section 104 of the ACPA, 15 U.S.C. § 1314(a), claiming they do not "transact business" in the District of Columbia. By asking the Court to address the merits without pressing these defenses, they waive their forum objections.[22/] In any event, each of these large, fully integrated companies transacts substantial business in the District, both directly and through subsidiaries under their direct ownership and control. In addition to the records and other products and services[23/] these respondents provide in the District, they all transact business regularly with D.C.-based

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[22] See Spann v. Colonial Village, Inc., 899 F.2d 24, 32 (D.C. Cir.) ("forum objections, *i.e.*, personal jurisdiction and venue, can be waived at any stage of the proceeding . . ."), cert. denied, 498 U.S. 980 (1990); Oetiken v. Jurid Werke, G.m.b.H., 556 F.2d 1, 4 (D.C. Cir. 1977) (although personal jurisdiction objection raised in motion to dismiss, defense waived when not "pressed before the district court"). In an expedited proceeding, where a final decision on the merits follows closely on the heels of the initial pleadings, raising the defense in the answer is not enough. The respondents should not be allowed to brief the dispositive question, ask the Court to deny the Petition on the merits, and remain silent on these threshold issues. Clearly, the Respondents may not wait for the oral hearing (which the Court may or may not grant) or a final decision on the merits and only then resurrect venue and personal jurisdiction. Yet that is the necessary implication of their silence.

[23] Sony Corporation of America, for example, has entered into several contracts with the General Services Administration, located in the District of Columbia, for contracts to supply government agencies. See Ustad Affidavit, attached hereto as Exhibit 4.

Black Entertainment Television, Inc. See Boelter Affidavit, attached hereto as Exhibit 5. It is highly likely, moreover, that these respondents have substantial business relationships with D.C.-based radio stations, retailers and independent record companies.[24/] Given these indices of a substantial business connection to the District of Columbia, and given that the harm alleged in the petition occurred in the District, this forum is clearly appropriate under the applicable statutory and constitutional standards.

In this instance, the respondents may not base their defense on the parent-subsidiary relationship, *i.e.*, claim that the actions of subsidiaries and labels doing business in the District are not attributable to the CID recipients, because the degree of decisionmaking control the parent firms exercise over their subsidiaries and labels is substantial. See, e.g., Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182, 1202 (D.D.C. 1984) (finding personal jurisdiction and venue under analogous "transacting business" standard of Section 12 of the Clayton Act, 15 U.S.C. § 22, upon finding, *inter alia*, of a "unified hierarchy of Toyota corporations that transact business in the District of Columbia"); Ramamurti v. Rolls-Royce Ltd, 454 F. Supp. 407, 409 (D.D.C. 1978) (where subsidiary used as agent for the transaction of business, personal jurisdiction proper

[24] Upon information and belief, these companies also purchase various services in the District on a continuing basis, including legal services from some of the law firms involved in this case, and have substantial business contacts with the D.C.-based Recording Industry Association of America.

under D.C. Code § 13-344), aff'd, 612 F.2d 587 (D.C. Cir. 1980). The respondents exercise substantial control over the record and music video operations of their labels. In many cases, the corporate heads of the CID recipients are CEOs of record subsidiaries as well.[25/] Moreover, the business plans produced for Sony Music Entertainment, Bertelsmann, Inc. and EMI Music Inc.[26/] all show substantial direction and control by the parent firms over their labels and other subsidiaries.[27/] Most conclusively, the numerous license agreements involving the respondents[28/] illustrate the unity of purpose and direction

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[25] For example, Michael Dornmann is the chief executive officer of Bertelsmann, Inc. (the CID recipient) *and* of Bertelsmann Music Group, Inc., *and* of Arista Records, Inc. Likewise, Alain Levy is the head of both PolyGram Holding, Inc. (the CID recipient) and PolyGram Records, Inc. Michael Schulhof is CEO of Sony Corporation of America (the CID recipient), Sony Software Corporation (SSC) and Sony Music Entertainment (SME).

[26] See Bates Nos. Sony 28350-413; B002697-908, B002340-369, B001979-2102; EMI 25470-6903.

[27] PolyGram has refused to produce any business plans called for in Document Request Number 32. For confidentiality reasons, and because the Department is necessarily guessing at the respondents' arguments, the business plans for SME, EMI and Bertelsmann have not been filed at this time. To the extent the majors are in fact basing their argument on the parent-subsidiary relationship, these documents can be filed at a later date.

[28] In the music programming operations that form the subject matter of this dispute, the majors clearly exercise direction and control over their affiliates' licensing practices. For example, the United States has filed under seal as Exhibit 1G a "Parent Agreement" among EMI, PolyGram, Sony Software Corporation, Ticketmaster Corporation and Warner Music Group Inc. Page 3 of the agreement, as well as the signature pages, support this conclusion, as does Exhibit 1D (pages 1-8) and the entirety of Exhibit 1B.

necessary to overcome corporate formalities for jurisdiction and venue purposes.[29/]

Respondent PolyGram has raised claims of burdensomeness in its answer,[30/] and the majors in general intermingle such claims with their jurisdictional arguments.[31/] A court may deny enforcement of a subpoena if it is established that compliance would impose an unreasonable burden. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). The burden of showing that the government's request is unreasonable is on the subpoenaed party. United States v. Powell, 379 U.S. 48, 58 (1964). Furthermore, the subpoenaed party may not merely utter the claim of

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[29] To the extent the respondents are permitted and wish to litigate these issues, the United States requests discovery and, in the Court's discretion, an evidentiary hearing. See Chrysler, 589 F. Supp. at 1194-1206. In particular, depositions of the corporate officers of the respondents and their labels may dispose of some issues fairly quickly. Of course, to avoid extensive litigation over collateral issues, the United States will stipulate that the effect of any consent to personal jurisdiction and venue will be limited to this CID enforcement matter.

[30] PolyGram has also raised affirmative defenses based on the ground of privilege and on the ground of lack of custody, possession or control over the requested documents and information. The United States, of course, is not seeking documents or information properly regarded as privileged under the law. CID Instruction Numbers 5, 7 and 8 recognize that privileged material may be withheld. Furthermore, by letter dated August 8, 1994, attached hereto as Exhibit 6, the entities to be searched under the CID were limited to PolyGram Holding, Inc. and its subsidiaries PolyGram Records, Inc., Island Entertainment Group, Inc., Island Records, Inc., A & M Records, Inc., PolyGram Group Distribution, PolyGram Sound, Inc., and London Records J/V.

[31] As stated in the opening brief, the United States anticipates that objections as to burdensomeness and ambiguity can be resolved through negotiation. If the majors are indeed pressing the burdensomeness argument, it should be rejected.

burdensomeness or set forth a minimal showing. Id. "[T]he question is whether the demand is *unduly* burdensome or *unreasonably* broad." F.T.C. v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir.), cert. denied, 431 U.S. 974 (1977)(emphasis by the court). Modification of an investigative subpoena should be denied unless "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." Id.

Beyond the conclusory assertion in the PolyGram answer and various oblique references in the briefs, the majors have not even attempted to meet the standard for establishing *undue* burden or *unreasonable* breadth. To the contrary, the United States has been extremely receptive to requests to modify and limit the scope of the CIDs. With respect to relevance, the Government set forth in its opening brief the relevance of the CID documents and information to the investigation. None of the Respondents has articulated how enforcement of the CIDs will disrupt or hinder the operations of its businesses.

CONCLUSION

The majors have said that this case raises "an important question . . . ." PolyGram Brief at 1. We agree. But the truly important question before the Court is not whether the FTAIA reaches certain types of foreign conduct, but whether *Oklahoma Press* remains the law of the land. If it does, then the substantive jurisdictional issues, however important or interesting they may be, must be put aside for another day when the facts and issues will have taken more definite shape.

WHEREFORE, the United States respectfully requests that its petition be granted in full.

Respectfully submitted,

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