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DISCORDANT NOTES: A REPLY TO PROFESSOR WRIGHT

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DISCUSSION

Discordant Notes: A Reply to Professor Wright

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In a concurrently published comment in this journal, Professor Wright mischaracterizes both the legal basis and the factual context of the FTC's Three Tenors opinion, recently affirmed by Judge Ginsburg's opinion for a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit. Neither opinion relies on the timing of the moratorium agreement. Under either opinion, the agreement to eliminate advertising and price competition would have been proscribed even had it occurred at the formation of the joint venture. Moreover, the factual underpinnings of the case differ from Professor Wright's assertions. In particular, the facts demonstrate that the joint venture did not attempt to promote the combination of various Three Tenors (3T) products. The only coordination with the first two albums was a restriction on their discounting and advertising. In fact, there was none of the usual production, distribution, and promotion among these three albums that is normally associated with an integrated effort.

In his comments on the FTC's Three Tenors opinion published in this same issue (Wright, 2005), it appears that Professor Wright read a different opinion than the one I authored for a unanimous Federal Trade Commission (FTC, 2003), recently affirmed by a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit.[1] He mischaracterizes both the opinion's legal analysis and the facts as the Commission found them. I discuss each problem in turn.

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* Foundation Professor, George Mason University of Law. I thank Tom Krattenmaker for his useful suggestions.

[1] *Polygram Holding, Inc. v. F.T.C.*, No.03-1293 (D.C. Cir. July 22, 2005), available at 2005 WL 1704732.

1. THE COMMISSION'S LEGAL ANALYSIS DOES NOT RELY ON THE TIMING OF THE MORATORIUM AGREEMENT

Professor Wright states "[t]he Commission argues that the timing of the moratorium agreement is an important, though not dispositive, factor in determining ancillarity." The Commission had explicitly stated that timing was "not dispositive" (FTC, 2003:55), yet Wright apparently divines that timing was the true basis of the Commission's argument. It is difficult to prove that the opinion did not say something without repeating its entire 61 pages. Nevertheless, as the opinion's author, let me reassure Professor Wright that the Commission would have condemned the moratorium regardless of its timing. My response to Professor Goldberg (Muris, 2005) restated the facts of the Three Tenors (3T) case to make the timing of the challenged agreement simultaneous with the formation of the joint venture. I did so because the Commission's opinion did not rest on the timing of the restraint and to respond to an anonymous referee who claimed that the Commission had relied on the moratorium's timing. I later learned that the referee was Professor Wright.

Judge Ginsburg's opinion for the D.C. Circuit in *Polygram Holding* provides additional evidence that the timing of the moratorium was not "important," "dispositive," or even relevant. As Professor Wright admits, the Ginsburg opinion fails to even mention timing. Had timing been as crucial to the Commission as Professor Wright asserts, one would have thought that Judge Ginsburg would have at least noted this fact, if not expressed his apparent disagreement.

Of course, the opinion does recognize the difference in timing--it was, after all, a fact--and at one point discusses the relevance of the timing, but for a different purpose than Professor Wright asserts. Perhaps the context of that discussion explains both Professor Wright's confusion and why Judge Ginsburg made nothing of the Commission's discussion of the timing issue.

The FTC's opinion was based on alternative grounds. The first of them, the one that Professor Wright condemns, and the one upon which Judge Ginsburg affirmed, was that the free rider justification was not legally cognizable in this setting. The other ground, the one that Judge Ginsburg explicitly stated he did not reach and the one containing the analysis of timing, was that even if the justification was cognizable, the facts did not support the argument.[2] This part of the opinion covered about 9 pages, and relied on a variety of facts for its conclusion, including testimony that the parties would have distributed the album in question without the moratorium, proof that the joint venture explicitly contemplated the practices that the moratorium later prevented, strong evidence that the practices the moratorium prevented were common in the music industry, and the fact that the moratorium was formed after the joint venture.

2. PROFESSOR WRIGHT MISCHARACTERIZES THE FACTS

Again, it seems Professor Wright read a different opinion than the one published. Thus he finds that the joint venture was formed in February 1998; the Commission's opinion stated that the venture was formed the previous December (FTC, 2003:8). He finds that the competition between the two earlier 3T albums was limited to the albums' release; the Commission's opinion states, in four separate places, that the parties promoted their albums on other occasions when the Three Tenors themselves were being promoted (FTC, 2003:6, 51, 53, and 58).

Crucially, Wright asserts that the joint venture involved promoting the combination of Three Tenors products. Had it done so, the case would have presented different facts, requiring a different legal standard, although perhaps not a different result.[3] In fact, the only coordination with the first two albums was the restriction on their discounting and advertising. There was none of the usual production, distribution, and promotion among the three albums that we would normally associate with an integrated effort. Indeed, the contract forming the joint venture explicitly provided to the contrary.

[2] Wright completely misses the point that this is an alternative argument. He even faults the Commission for not trying to make the kind of factual argument that this alternative holding made (Wright, 2005:405).

[3] As Professor McChesney (2004) argues, the Commission could have used the evidence available upon the release of the second 3T album in 1994 to frame its opinion. That album met vigorous competition from the first album, resulting in large sales of both albums and significant

Judge Ginsburg succinctly summarizes the facts and the appropriate legal disposition:

> The "free-riding" to be eliminated by the moratorium agreement, however, was nothing more than the competition of products that were not part of the joint undertaking. Why not an agreement by which PolyGram and Warner would eliminate advertising and price competition on all their records for a time while they focused exclusively upon promotion of the new Three Tenors album? The "pro-competitive" justification PolyGram offers is "nothing less than a frontal assault on the basic policy of the Sherman Act." (*Polygram*, at 15).

Judge Ginsburg continues with this hypothetical from the FTC's opinion:

> if General Motors were vigorously to advertise the release of a new model SUV, other SUV manufacturers would no doubt reap some of the benefit of GM's efforts. [citation omitted] But that would not mean General Motors and its competitors could lawfully agree to restrict prices and advertising on existing SUV models in return for General Motors giving its rivals a share of its profit on the new model (*Polygram*, at 15).

Although Professor Wright acknowledges that restraints among competitors are different than the restraints a manufacturer imposes on its distribution chain (and that I made this point in my response to Goldberg), he nevertheless critiques the GM hypothetical by reference to a proposed GM/dealer agreement not involving coordination between GM and its manufacturing competitors. Again, this is not the opinion the Commission wrote, which had nothing to do with the vertical distribution arrangements upon which both Professor Wright and I presumably agree.[4]

Finally, Professor Wright ignores the apparent motive for the moratorium agreement. I agree that it was not to increase the profitability of the first two albums by fixing a supracompetitive price. Instead, the parties sought to avoid the competition that had occurred between the first two albums on release of the second, apparently because the repertoire of the third album was not significantly different from that of the first two. The point of the moratorium

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benefits to consumers. The absence of a moratorium did not prevent the second album from becoming highly successful.

[4] *Polk Brothers, Inc. v. Forest City Enters., Inc.* (776 F.2d 185, 188-89 (7th Cir. 1985)), upon which both Wright and the parties rely, is easily distinguished. Like *Polygram*, the parties formed a joint venture, in this case opening a new store at a new location. Unlike *Polygram*, the parties allowed their other stores to compete with the new store.

was to prevent competition that would have driven the parties to discount and advertise upon the third album's release. The moratorium presumably increased the parties' anticipated joint profits above their level in an environment in which competition was unconstrained. As Judge Ginsburg notes, however, such profitability is not a cognizable justification under the antitrust laws, especially when it comes at the expense of consumer welfare, as the tremendous benefits to consumers of the 1994 competition between the first two albums revealed.

3. CONCLUSION

In the end, the FTC opinion stands for the proposition that restraints on price and advertising cannot be justified by claims regarding products not part of the venture. Because he mischaracterizes both the opinion's legal analysis and the facts that it found, Professor Wright's critique has little force.

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