

Complaint

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IN THE MATTER OF
CLAYTON F. SUMMY COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED
VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER
26, 1914

Docket 1174—December 7, 1925

SYLLABUS.

Where a corporation engaged in the publication of sheet music and music books of an educational character and in the sale of a large proportion of said publication to music teachers and of the balance to retailers and schools; in disregard of the collective action of members of the industry, acquiesced in by it, denouncing and discontinuing such practice, and seeking to profit by such action; marked its said publications with a price one-third higher than that at which they were expected to be and usually were resold by retailers, and so listed the same in its catalogues, together with advertisements that teachers purchasing from it directly received a discount of one-third off from list price; with the result that ultimate consumers were misled and deceived as to the usual selling prices of such publications, music teachers and other purchasers were misled into believing that they were obtaining such publications at a discount and were enabled, more particularly in suburban and rural districts, to exact the full marked up price from pupils and customers, to whom they sold its publications in such districts, dealers, schools and teachers were enabled to defraud ultimate purchasers of such publications, and a preference was created for the same over those of competitors, who did not use such a price marking system and were put in the position of being forced to adopt a similar practice or compete at an unfair disadvantage:

Held, That such practice, under the circumstances set forth, constituted an unfair method of competition.

Mr. E. J. Hornibrook for the Commission.

Burry, Johnstone & Peters of Chicago, Ill., for respondent.

SYNOPSIS OF COMPLAINT ¹

Reciting its action in the public interest pursuant to the provisions of the Federal Trade Commission Act, the Commission charged respondent, an Illinois corporation, engaged in the printing, publishing or sale of sheet music and musical scores and compositions of various kinds to wholesalers, retailers, schools, music teachers and users thereof at points in the various states, and with principal office and usual place of business in Chicago, with misrepresenting prices in violation of the provisions of section 5 of such act, prohibiting the use of unfair methods of competition in interstate commerce, in that it sells its aforesaid musical publications with purported retail

¹ As amended.

prices conspicuously printed or marked on the front page thereof, which are exaggerated and considerably in excess of the prices at which such publications are usually sold at retail to the purchasing public, by a large proportion of the dealers selling the same; the practice being one not followed by numerous competitors, constituting collectively the preponderant part of the musical publication industry, who either do not mark their publication with any price, or print thereon prices which are actually or substantially those at which their respective publications are sold at retail to the purchasing consuming public.

The practice, as alleged by the complaint, has the following results:

(a) Enables a substantial number of dealers to sell such publications to uninformed purchaser consumers at the aforesaid exaggerated prices and to obtain prices substantially in excess of those at which the publications are available to informed purchaser consumers, thereby causing such dealers to purchase the publications in question in preference to publications of competitors who do not follow such a practice;

(b) Enables a substantial number of music teachers and schools to retail the publications in question to their pupils and students at the exaggerated prices, thereby obtaining prices considerably in excess of those at which such publications are usually sold at retail to informed purchasers, and causing such teachers and schools to prefer the publications in question to those of competitors who do not follow such a practice;

(c) Has a tendency and capacity to mislead and deceive the purchasing consuming public into buying the publications in question from dealers, music teachers, and other marketers in the belief that the prices marked thereon are the real and usual selling prices of the publications, and misleads and deceives a large proportion of the purchasing consuming public into such belief; and

(d) Works confusion among its wholesale, retail, music teacher, and school customers, who are confused and uncertain as to what is a proper or fair selling price for the publications in question, and misleads the purchasing consuming public or a substantial portion thereof into believing that they are obtaining the publications in question at bargain or unusually low prices.

According to the complaint the practice at all times "has been an instrumentality for the exacting of an inequitable price," and "has and now does defraud the purchasing public, and has and now does unfairly divert trade in musical publications to respondent, and has and now does constitute a means and instrumentality for the decep-

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tion of the musical publication purchasing public at the hands of those who avail themselves of the misrepresentation provided by the respondent, and will compel competitors of respondent who are truthfully marking their respective musical publications to continue suffering a diversion of trade or adopt a like practice," and respondent's acts and practices "are all to the prejudice of the public and respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of section 5."

Upon the foregoing complaint, the Commission made the following

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission issued and served an amended complaint upon the respondent Clayton F. Summy Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act.

Respondent having entered its appearance and filed its answer to the amended complaint herein, hearings were had and evidence was introduced upon behalf of the Commission and respondent, before W. W. Sheppard, an examiner of the Federal Trade Commission, duly appointed, and the said examiner having filed his findings of fact herein and the respondent having filed its exceptions thereto.

Thereupon this proceeding came on for final decision on the record herein. And the briefs and oral arguments having been filed and made and the Commission being fully advised in the premises makes this its findings as to the facts and its conclusions drawn therefrom.

FINDINGS AS TO FACTS

PARAGRAPH 1. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Illinois. It was incorporated in the year 1895. Its principal place of business is the city of Chicago in said State. It has a capital stock of \$60,000; the majority is owned by Clayton F. Summy, who is the manager and president. It does an annual business of more than \$100,000. It publishes at its said principal place of business, sheet music and musical books, of an educational character, and sells and ships the same to retail music dealers, music teachers, and schools located in every State of the United States. It reaches its retail customers through salesmen, and its teacher and other customers by general advertising, and circulars and catalogues sent through the United

States mails. It also operates a retail music store in said city of Chicago. It publishes and sells approximately 10 per cent of the educational music published and sold in the United States. In the publication and sale of music as aforesaid it is in competition with White-Smith Publishing Co., Boston, Mass.; Gamble-Hinge Music Co., Chicago, Ill.; C. C. Church & Co., Hartford, Conn.; G. Schirmer, Inc., New York City, N. Y.; Oliver Ditson & Co., Boston, Mass.; Theodore Presser & Co., Philadelphia, Pa., and many others, all of whom publish and sell in interstate commerce to teachers, retailers of music, and schools, music of the kind above described and which can be and is used for the same purposes as the said music of respondent. Seventy-five per cent of respondent's customers, dealt with in interstate commerce, as aforesaid, are music teachers; the remaining 25 per cent are retailers and schools.

PAR. 2. The music, published and sold by respondent as aforesaid, has a price marked upon the outside cover thereof. This price, so marked is $33\frac{1}{3}$ per cent higher than such music is expected and intended by respondent to be sold for at retail and at which said music is commonly and usually sold by retail dealers thereof. A typical example of the music sold by respondent, so marked and priced, is a piece of sheet music called "Iris." This piece of music, while price marked by respondent at 60 cents, is sold by it to teachers at 40 cents, and is commonly sold by music retailers to teachers and to other customers at 40 cents. It is sold by respondent to retailers at a discount of from 50 per cent and 10 per cent to 50 per cent and 25 per cent, or from 27 cents to 22 cents. Schools and colleges can and do purchase this piece of music and similar pieces of respondent's music from the respondent at $33\frac{1}{3}$ per cent and 10 per cent less than the marked price thereof.

PAR. 3. Respondent's method of marking musical publications as described above has generally become known in the music publishing industry as "fictitious price marking."

PAR. 4. Respondent's musical publications are all marked with a fictitious price mark, as above described, and are kept in stock and are for sale in practically every retail music store in the United States; and they are commonly and usually sold by such retail stores to teachers and all other customers at a price of $33\frac{1}{3}$ per cent below the price marked upon the same by the respondent.

PAR. 5. The respondent issues a catalogue which it circulates among its said customers, wherein its publications are listed at prices corresponding to the prices printed on the music as described in paragraph 2 hereof. In some of its advertising matter used in interstate

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commerce respondent represents that teachers who purchase music from it direct receive a discount of $33\frac{1}{3}$ per cent. The teacher purchasing from respondent receives no discount, but pays the same price that she or anyone would usually and commonly be required to pay had they purchased from a retail dealer of music. The so-called discount, referred to in respondent's advertising matter as aforesaid, is paid by the pupil, or its parent or guardian. The average student of music consumes \$10 worth of educational music per annum; this is figuring the cost of such music at the retail price thereof. Music teachers and schools utilizing the said fictitious price marked on respondent's music can and they do, on account of said fictitious price marking, often annually charge each of their students \$3.30 more for their music than the same could be purchased for at retail, and in a large majority of such cases the making of such overcharge is unknown to the pupil, its parent or guardian.

PAR. 6. For fifty years prior to June, 1924, it had been the custom among publishers of educational music in the United States to print upon their products fictitious prices, varying from 50 per cent to $33\frac{1}{3}$ per cent more than it was expected or intended that the music would sell for at retail. This was a business custom which had grown up with the industry and was inherited from Germany. In the course of time it came to the knowledge of these publishers that some retailers and many teachers were taking advantage of this fictitious price marking and collecting from their customers and students the full amount of the price marked on such music. There was much agitation among such music publishers for the marking of music at a net price, that is to say, the actual retail price. The old system was not regarded as strictly honorable or strictly businesslike by many of the publishers of such music. There were a few publishers of educational music who never had adopted the system of fictitious price making. In 1918, G. Schirmer, Inc., of Boston, tried the experiment of price-marking music at its actual retail price. Very few publishers followed the example of this company, and it was forced to return to the old system of marking its music at the said fictitious prices, because at that time there was a demand for overpriced music among teachers, retailers and schools and this company found itself injured by this new departure for the reason that many teachers and some retailers would not purchase its music unless it had the said fictitious price printed thereon.

PAR. 7. The question of abandoning the use of said fictitious price continued to be agitated by said music publishers, and on August 4, 1923, the Music Publishers' Association of the United States, a voluntary association composed of all or nearly all of the reputable

publishers of educational music in the United States who distribute such music on a national scale and who publish and distribute between 80 and 90 per cent of the educational music published in the United States, adopted a resolution requesting the Federal Trade Commission to hold a trade practice conference on this question. This request was granted by the Federal Trade Commission and on October 2, 1923, such trade practice conference was held in New York City. A member of the Commission presided at such conference and it was attended by members of said association representing between 80 and 90 per cent of the total output of educational music published in the United States. The respondent was represented at such conference by Clayton F. Summy, its president, who voted for the first two resolutions hereinafter set forth and which resolutions were unanimously adopted by the members of said association so represented. At this meeting fictitious price marking was condemned. The following resolutions, among others, were adopted:

First. We believe the proper method of marking the price of music is to have the price printed which is substantially that which the publisher believes the music will bring under normal conditions of competition.

Second. If after deliberating on the minutes of the conference and after going over such information as you may have in your files, the Commission believes that a change should be made in the trade customs in the matter of marking prices, that our members will heartily agree with you and support you and do everything possible to put the change into effect in a practical way.

The Commission, on January 23, 1924, after deliberating upon the report of this conference, authorized and issued its official expression in a resolution, as follows:

We believe the proper way of marking the price of music is to use the price at which it is expected the music will sell for at retail under conditions of normal competition.

On February 14, 1924, the said association, at a meeting of its directors, voted to put this resolution into effect, and by June, 1924, practically all of said publishers had marked the music published by them with the actual retail price and retail stores generally had restamped such music at the actual retail price thereof.

PAR. 8. The respondent company made no change in its price marking method and still continues to print, publish and sell its music marked with the said fictitious price printed thereon as aforesaid. Since June, 1924, the respondent company had undertaken to take advantage of the situation brought about by the said trade practice conference by issuing circulars to its customers upon which are printed statements that it continued to be a "friend of the music teacher" and that "it would not abandon the music teacher, and that

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it would still continue to allow a discount to music teachers" and such statements have also been printed on its musical publications since June, 1924.

PAR. 9. Music teachers in cities of 200,000 or more generally have their pupils purchase their music at retail music stores. Music teachers throughout the different States of the United States, who are customers of the respondent and who reside in rural districts or cities and towns of less than 200,000 inhabitants, generally sell respondent's music at a price above the price at which the same can be obtained at any retail music store in the United States, and many of such music teachers obtain the full marked up price therefor, and they are enabled to dispose of such music at such prices by the printing of the said marked up price on the same.

PAR. 10. Many schools, which are customers of the respondent, sell respondent's music in the different States of the United States at the full marked up price thereof, and they are enabled to and do collect such full price because of the price marking by respondent of its music as aforesaid.

PAR. 11. Music teachers have purchased and do purchase the publications of the respondent in preference to those of its competitors, which latter is now marked with the real and usual retail price as aforesaid, in the mistaken belief that they are receiving a discount.

PAR. 12. In some instances retailers in the different States of the United States are enabled to and do charge and collect the full marked up price for respondent's music and therefore prefer to sell respondent's music rather than that of its competitors.

PAR. 13. Retailers often receive remittances, through the mails, for the full marked up price of respondent's music and some retailers keep the full remittance.

PAR. 14. Ultimate purchasers of respondent's music in the different States of the United States are often deceived into the belief that the marked up price on respondent's music is the actual retail selling price thereof and are thereby caused, in ordering respondent's music, to remit the full marked up price thereof.

PAR. 15. Respondent daily receives remittances of the full marked up price for its sheet music and in such instances returns 20 per cent of the amount of the marked up price, and in the instance of what the respondent calls "Reading Music" with marked up prices, as aforesaid, the full marked price is often remitted and in such instances respondent retains the full amount of the remittance. They, the remitters, send the full amount in the belief that the marked up price is the actual retail selling price. The respondent regularly sells this identical marked up music over the counter of its retail

store at a price $33\frac{1}{3}$ per cent less than the said marked price and other retail music stores throughout the United States generally sell the same at $33\frac{1}{3}$ per cent less than said marked price.

PAR. 16. There is a preference for music marked with a price higher than it is expected to be sold at retail on the part of suburban and rural music teachers and on the part of some retailers and schools because such marking enables them to sell such music at more than the retail price of the same. There is also such preference on the part of the uninformed purchasers, that is to say, if there are two pieces of music, one marked 40 cents and one marked 60 cents, both of which serve the same purpose and both of which are actually for sale at 40 cents, the uninformed will take the piece marked 60 cents in the belief that he is getting a bargain.

PAR. 17. Music marked with the said fictitious price diverts trade from those competitors who are truthfully price marking their music and will compel them to adopt a similar practice or compete at a disadvantage.

Also the acts and things done by the respondent, as above described, have and do:

(a) Mislead and deceive the ultimate consumer of respondent's music into the belief that the prices marked upon the same are the real and usual selling prices.

(b) Mislead music teachers and other purchasers into the belief that they are obtaining a discount of $33\frac{1}{3}$ per cent when purchasing music from respondent.

(c) Enables music teachers and dealers in suburban and rural districts particularly and schools handling respondent's music to exact the full marked up price from their customers.

(d) Create a preference for the respondent's music over music of competitors who do not use a similar price marking system and afford respondent an unfair advantage in business over such competitors.

(e) Defeat the purpose of the trade practice conference of October, 1923, and will compel all competitors of respondent to adopt a system of price marking similar to that of respondent or continue to compete with respondent at a disadvantage.

(f) Place in the hands of dealers, schools and teachers the means of defrauding the ultimate purchasers of respondent's music.

PAR. 18. Said practice of respondent is injurious to the music purchasing public and against public interest.

CONCLUSION

The acts and things done by respondent under the conditions and circumstances described in the foregoing are unfair methods of com-

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petition in commerce and constitute a violation of the act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers, and duties and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent and the testimony and evidence submitted, the trial examiner's report upon the facts, and exceptions thereto, and the briefs and oral argument, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of an act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers, and duties and for other purposes,"

Now, therefore, it is ordered, That the respondent, Clayton F. Summy Co., its officers, directors, agents, servants, employees, and successors do cease and desist from:

(1) Printing, stamping or marking on its musical publications sold in commerce a price mark which is $33\frac{1}{3}$ per cent higher than the price at which it intends that its musical publications shall be sold, and at which said publications are in fact commonly and actually sold at retail;

(2) Printing, stamping or marking on said musical publications any fictitious price mark in excess of the price at which it intends that its musical publications shall be, and at which said publications are in fact usually and commonly sold at retail;

(3) Selling or offering for sale in commerce any of its musical publications which are stamped, printed or marked with a price mark which is $33\frac{1}{3}$ per cent higher than the price at which it intends that its musical publications shall be, and at which said publications are in fact commonly and usually sold at retail;

(4) Selling or offering for sale in commerce any of its musical publications upon which is printed, stamped or marked any fictitious price mark in excess of the price at which it intends that its musical publications shall be and at which said publications are in fact usually and commonly sold at retail.

It is ordered that, The respondent, within sixty days after the service upon it of a copy of this order shall file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinbefore set out.

Syllabus

IN THE MATTER OF
P. H. HANES KNITTING COMPANY

COMPLAINT (SYNOPSIS), FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SECTION 5 OF AN ACT OF CONGRESS APPROVED SEPTEMBER 26, 1914

Docket 1134—December 21, 1925

SYLLABUS.

Where a corporation engaged in the manufacture of men's and boys' underwear, and in the sale thereof to jobbers, department stores and others throughout the United States; in pursuance of a merchandising policy, which had for its purpose the increasing of the profits of itself and its dealer customers and included the observance by such customers of the retail prices named by it, made known to customers and the trade through catalogues and price lists, and through cards to be used by customers' salesmen in quoting prices to retail merchants;

- (a) Considered in the selection of customers their willingness and express or implied agreements to maintain its prices, urged customers to do so, and notified them that it would not sell to dealers who did not do so;
- (b) Requested the cooperation of customers in maintaining prices through adhering thereto themselves, and through assisting in ascertaining, and reporting, names of price cutting dealers, in order that it might thereby eliminate such price cutting either by refusing to make further sales to the price cutters or by securing their assurances that they would thereafter observe specified prices;
- (c) Investigated reports of price cutting thus secured or received and refused further sales to the price cutters or secured from them assurances of observance of prices thereafter, and advised informing dealers of the results of its investigations;
- (d) Cooperated with customers in cutting off supplies of price cutters, who did not secure their supplies from it directly;
- (e) Refused to sell to persistent price cutters; and
- (f) Endeavored by letters and agents to induce price cutting customers to promise to observe its prices thereafter as a condition of reinstatement, and reinstated price cutting customers who so promised;

With the result that it secured the cooperation of customer dealers in its price maintenance policy, established prices prevailed, dealers engaged in the distribution and sale of its products were prevented from selling the same at such lower prices as might be deemed by them to be warranted by their respective selling costs, and competition in respect of its products was suppressed and hindered:

Held, That such a plan of resale price maintenance, under the circumstances set forth, constituted an unfair method of competition.