

Syllabus

IN THE MATTER OF

ROY FELLOM, DOING BUSINESS UNDER THE NAME AND
STYLE OF FELLOM PUBLISHING COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3960. Complaint, Dec. 1, 1939—Decision, June 29, 1940*

Where an individual engaged under trade name in publication of his Pacific Road Builder and Engineering Review periodical, and in sale and distribution thereof to purchasers in various other States, and in deriving main source of income from conduct of his said business of publication and sale of such magazine, devoted to subject matters of interest to contractors, road builders, engineers, and buyers of construction equipment, from sale of advertising space to manufacturers and others having for sale equipment, materials, and commodities which might be of interest to subscribers and recipients of magazine involved, and in competition with others engaged in sale and distribution in commerce in the various States and the District of Columbia of periodicals devoted to the same general subject matter, and of interest to the same general class of readers, and circulated in the same general territory, and who also similarly derived main source of income from their respective businesses—

- (a) Represented in advertising matter distributed by mails or otherwise to advertisers and prospective advertisers in said magazine, located in various States, that it was circulated only to equipment buyers and had no circulation to nonbuyers, and that survey had been made of such equipment buyers in 11 States in which said magazine was principally circulated, and that in said States it was circulated to 93 percent of such buyers, and that it circulated also to 93 percent of heavy construction equipment buyers based on number thereof, and to 98 percent thereof based on volume of purchases in said 11 States;

Facts being, circulation of said periodical was not restricted exclusively to buyers of equipment, but portion of subscribers and other recipients consisted of those who were not such buyers and no accurate and dependable survey had been made by or for him as basis for figures given by him regarding its coverage of equipment buyers, and his magazine was not circulated to 93 percent of such buyers in said 11 states in which principally circulated, or to 93 percent of heavy construction buyers based on number thereof, nor to 98 percent thereof based on volume of purchases aforesaid; and

- (b) Furnished figures and material in regard to volume of circulation of his said magazine for publication and distribution to prospective advertisers, and authorized publication and distribution thereof for information of such advertisers and to induce them to place advertisements in his said magazine, and among such representations set forth that such magazine had a total average monthly net paid circulation of 5,129 and a total average monthly distribution of 6,289 for the last 6 months of 1937, and a total average monthly net paid circulation of 4,583 and a total average monthly distribution of 5,625 for the first 6 months of 1938;

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Facts being, figures furnished and authorized as aforesaid were misleading in that they overstated volume of circulation of periodical in question and gave an erroneous idea of value thereof as an advertising medium based on possible results, and also correctness of prices charged for advertising space therein based on extent of such circulation, and average monthly paid circulation and average monthly distribution of his magazine during last 6 months of 1937 and first 6 months of 1938 were much less than given in his said authorized statements, which were inaccurate and greatly exaggerated;

With tendency and capacity, through such acts and practices used by said individual in connection with offer and sale of advertising space in his said magazine, to mislead purchasers and prospective purchasers into erroneous and mistaken belief that such representations as above set forth were true, and to induce them to purchase, by reason thereof, advertising space in his said publication, with result that trade was thereby diverted unfairly to him from competitors engaged in sale in commerce of advertising space in magazines and other publications circulated in commerce, and including among competitors those who, in sale of advertising space in magazines and other publications, do not similarly or in any manner misrepresent the volume or character of their circulation or matters pertaining thereto:

Held, That such acts and practices set forth were all to the prejudice and injury of the public and competitors, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Mr. B. G. Wilson for the Commission.

Inforth, Cannon & Miller, of San Francisco, Calif., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that Roy Fellom, an individual, doing business under the name and style of Fellom Publishing Co., hereinafter referred to as respondent, has violated the provisions of said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Roy Fellom, is an individual doing business under the name and style of Fellom Publishing Co. with his office and principal place of business at 637 New Call Building in the city of San Francisco, State of California. Respondent is now, and has been for more than 4 years last past, engaged, under said name and style of Fellom Publishing Co., in the publication of a magazine, designated as Pacific Road Builder and Engineering Review, and in the sale and distribution of the same in commerce between and among

the various States of the United States. Respondent, in the course and conduct of said business during the time aforesaid, caused and does now cause its said magazine to be transported from his said place of business in California to, into, and through States of the United States other than California to the purchasers thereof in such other States. Said magazine is devoted to subject matters of interest to contractors, road builders, engineers, and buyers of construction equipment.

PAR. 2. During the time above mentioned, other individuals, firms, and corporations in various States of the United States have been and are engaged in the sale and distribution in commerce between and among the various States of the United States and in the District of Columbia of magazines devoted to the same general subject matter as that of respondent and of interest to the same general class of readers and circulated in the same general territory as that covered by the circulation of respondent's said magazine.

PAR. 3. The main source of income of respondent in the conduct of said business as well as that of his said competitors is derived from the sale of advertising space to manufacturers and others having for sale equipment, materials and commodities which are or may be of interest to the subscribers and recipients of the magazine involved. In connection with the insertion of the advertisements heretofore referred to in respondent's said magazine as well as in those of respondent's competitors, the advertisers contracting for space for the same transport in commerce from their respective States of location to respondent and its competitors located in other States of the United States, cuts, electrotypes, stereotypes, mats, and textual copy for use in making up and publishing such advertisements. Such movement of commerce is materially affected by the methods, acts, and practices of respondent as hereinafter set out.

PAR. 4. In the course and conduct of his business as aforesaid, the respondent has made various misleading representations in advertising matter distributed by mail or otherwise to advertisers and prospective advertisers in said magazine located in various States of the United States in which it is represented that respondent's said magazine is circulated only to equipment buyers and has no circulation to nonbuyers; that a survey had been made of the equipment buyers in the eleven States in which said magazine is principally circulated; that said magazine is circulated to 93 percent of equipment buyers in said eleven States; and that said magazine circulated to 93 percent of heavy construction equipment buyers based on the number of such buyers and to 98 percent thereof based on volume of purchases in

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said eleven States. Among such representations so made are the following:

A circulation coverage limited to equipment buyers—a circulation with no waste to nonbuyers. This is exactly what you need for **BEST ADVERTISING RESULTS!**

A SURVEY SHOWS—

Coverage of equipment buyers in the Eleven Western States comprising contractors (road and public works), State, Federal and county road officials, rock, gravel and cement plants:

By Pacific Road Builder & Engineering Review—93% * * *

* * * You reach in Pacific Road Builder & Engineering Review practically all the equipment buyers in the Eleven Western States.

Breakdown by Purchasing Power in Heavy Construction Pacific Road Builder & Engineering Review Reaches:

By Quantity—93% of Equipment Buyers.

By Volume—98% of Equipment Buying.

PAR. 5. In the course and conduct of his business as aforesaid, respondent has furnished the material and figures in regard to the volume of circulation of his said magazine for publication and distribution to prospective advertisers and authorized the publication and distribution thereof for the information of such prospective advertisers and for the purpose of inducing them to place advertisements in his said magazine. The figures so furnished and authorized to be published as aforesaid have been and are misleading in that they overstate the volume of circulation of said magazine and give an erroneous idea of the value of the same as an advertising medium based on possible results and also of the correctness of the prices charged for advertising space therein based on the extent of such circulation. Among such representations so made by respondent are statements that said magazine had a total average monthly net paid circulation of 5,129 and a total average monthly distribution of 6,289 for the last 6 months of 1937, and a total average monthly net paid circulation of 4,583 and a total average monthly distribution of 5,625 for the first 6 months of 1938.

PAR. 6. In truth and in fact, the circulation of respondent's said magazine is not restricted exclusively to buyers of equipment; a portion of the subscribers and other recipients of respondent's said magazine consists of those who are not buyers of equipment; no accurate and dependable survey had been made by or for respondent as the basis for the figures given in regard to coverage of equipment buyers as quoted in paragraph 4 herein; respondent's magazine is not circulated to 93 percent of the equipment buyers in the 11 States in which it is principally circulated; said magazine is not circulated to 93 percent of heavy construction buyers based on the number of such buyers or to 98 percent thereof based on volume of purchases in said 11 States; and the average monthly paid circulation and average

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monthly distribution of respondent's magazine during the last 6 months of 1937 and the first 6 months of 1938 was much less than given in respondent's authorized statements as set forth in paragraph 5 hereof. All of the statements and representations made by respondent as hereinabove alleged are in fact inaccurate and greatly exaggerated.

PAR. 7. The aforesaid acts and practices used by respondent in connection with the offering for sale and sale of advertising space in his said magazine have had, and now have, the tendency and capacity to mislead purchasers and prospective purchasers thereof into the erroneous and mistaken belief that such representations, as herein alleged, are true, and to induce them to purchase the advertising space in respondent's said publication on account thereof. Thereby trade is unfairly diverted to respondent from competitors engaged in the sale in commerce between and among the various States of the United States and in the District of Columbia of advertising space in magazines and other publications circulated in commerce among and between the various States of the United States and in the District of Columbia. There are among the competitors of respondents those who in the sale of advertising space in magazines and other publications do not similarly or in any manner misrepresent the volume or character of their circulation or matter pertaining thereto. As a result of respondent's said practices, as herein set forth, substantial injury has been and is now being done by respondent to competition in commerce between and among the various States of the United States.

PAR. 8. The aforesaid acts and practices of the respondent as herein alleged are all to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 1st day of December 1939, issued and on the 5th day of December 1939, served its complaint in this proceeding upon respondent Roy Fellom, doing business under the name and style of Fellom Publishing Co., charging him with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer, the Commission, by order entered herein, granted respondent's motion for permission to withdraw said answer and to substitute therefor an answer admitting all the material allegations

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of fact set forth in said complaint and waiving all intervening procedure and further hearing as to said facts, which substitute answer was duly filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the said complaint and substitute answer, and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Roy Fellom, is an individual doing business under the name and style of Fellom Publishing Co. with his office and principal place of business at 637 New Call Building, in the city of San Francisco, State of California. Respondent is now, and has been for more than 4 years last past, engaged, under said name and style of Fellom Publishing Co., in the publication of a magazine, designated as Pacific Road Builder and Engineering Review, and in the sale and distribution of the same in commerce between and among the various States of the United States. Respondent, in the course and conduct of said business during the time aforesaid, caused, and does now cause, his said magazine to be transported from his said place of business in California to, into and through States of the United States other than California to the purchasers thereof in such other States. Said magazine is devoted to subject matters of interest to contractors, road builders, engineers, and buyers of construction equipment.

PAR. 2. During the time above mentioned, other individuals, firms and corporations in various States of the United States have been, and are now, engaged in the sale and distribution in commerce between and among the various States of the United States and in the District of Columbia of magazines devoted to the same general subject matter as that of respondent and of interest to the same general class of readers and circulated in the same general territory as that covered by the circulation of respondent's said magazine.

PAR. 3. The main source of income of respondent in the conduct of said business, as well as that of his said competitors, is derived from the sale of advertising space to manufacturers and others having for sale equipment, materials, and commodities which are or may be of interest to the subscribers and recipients of the magazine involved. In connection with the insertion of the advertisements heretofore referred to in respondent's said magazine, as well as in those of respondent's competitors, the advertisers contracting for space for the same transport in commerce from their respective States of loca-

tion to respondent and its competitors located in other States of the United States, cuts, electrotypes, stereotypes, mats, and textual copy for use in making up and publishing such advertisements. Such movement of commerce is materially affected by the methods, acts, and practices of respondent as hereinafter set out.

PAR. 4. In the course and conduct of his business as aforesaid, the respondent has made various misleading representations in advertising matter distributed by mail or otherwise to advertisers and prospective advertisers in said magazine located in various States of the United States in which said magazine is circulated only to equipment buyers and has no circulation to nonbuyers; that a survey had been made of the equipment buyers in the 11 States in which said magazine is principally circulated; that said magazine is circulated to 93 percent of equipment buyers in said 11 States; and that said magazine circulated to 93 percent of heavy construction equipment buyers based on the number of such buyers and to 98 percent thereof based on volume of purchases in said 11 States. Among such representations so made are the following:

A circulation coverage limited to equipment buyers—a circulation with no waste to non-buyers. This is exactly what you need for BEST ADVERTISING RESULTS!

A SURVEY SHOWS—

Coverage of equipment buyers in the Eleven Western States comprising contractors (road and public works), State, Federal and county road officials, rock, gravel and cement plants:

By Pacific Road Builder & Engineering Review—93% * * *

* * * You reach in Pacific Road Builder & Engineering Review practically all the equipment buyers in the Eleven Western States.

Breakdown by Purchasing Power in Heavy Construction Pacific Road Builder & Engineering Review Reaches:

By Quantity—93% of Equipment Buyers.

By Volume—98% of Equipment Buying.

PAR. 5. In the course and conduct of his business as aforesaid, respondent has furnished the material and figures in regard to the volume of circulation of his said magazine for publication and distribution to prospective advertisers and authorized the publication and distribution thereof for the information of such prospective advertisers and for the purpose of inducing them to place advertisements in his said magazine. The figures so furnished and authorized to be published as aforesaid have been and are misleading in that they overstate the volume of circulation of said magazine and give an erroneous idea of the value of the same as an advertising medium based on possible results and also of the correctness of the prices charged for advertising space therein based on the extent of such circulation. Among such representations so made by respondent are statements that said magazine had a total average monthly net paid circulation of 5,129 and a total average

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monthly distribution of 6,289 for the last 6 months of 1937, and a total average monthly net paid circulation of 4,583 and a total average monthly distribution of 5,625 for the first 6 months of 1938.

PAR. 6. In truth and in fact, the circulation of respondent's said magazine is not restricted exclusively to buyers of equipment; a portion of the subscribers and other recipients of respondent's said magazine consists of those who are not buyers of equipment; no accurate and dependable survey had been made by or for respondent as the basis for the figures given in regard to coverage of equipment buyers as quoted in paragraph 4 herein; respondent's magazine is not circulated to 93 percent of the equipment buyers in the 11 States in which it is principally circulated; said magazine is not circulated to 93 percent of heavy construction buyers based on the number of such buyers or to 98 percent thereof based on volume of purchases in said 11 States; and the average monthly paid circulation and average monthly distribution of respondent's magazine during the last 6 months of 1937 and the first 6 months of 1938 were much less than given in respondent's authorized statements as set forth in paragraph 5 hereof. All of the statements and representations made by respondent as hereinabove alleged are in fact inaccurate and greatly exaggerated.

PAR. 7. The aforesaid acts and practices used by respondent in connection with the offering for sale and sale of advertising space in his said magazine have had, and now have, the tendency and capacity to mislead purchasers and prospective purchasers thereof into the erroneous and mistaken belief that such representations, as herein found, are true, and to induce them to purchase the advertising space in respondent's said publication on account thereof. Thereby trade is unfairly diverted to respondent from competitors engaged in the sale in commerce between and among the various States of the United States and in the District of Columbia of advertising space in magazines and other publications circulated in commerce among and between the various States of the United States and in the District of Columbia. There are among the competitors of respondent those who in the sale of advertising space in magazines and other publications do not similarly or in any manner misrepresent the volume or character of their circulation or matters pertaining thereto. As a result of respondent's said practices, as herein set forth, substantial injury has been and is now being done by respondent to competition in commerce between and among the various States of the United States.

CONCLUSION

The aforesaid acts and practices of respondent as herein found are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and

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unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission and the answer of respondent, in which answer respondent admits all of the material allegations of fact set forth in said complaint, and states that he waives all intervening procedure and further hearing as to said facts, and the Commission having made its findings as to the said facts and conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent Roy Fellom, individually or doing business under the name and style of the Fellow Publishing Co., or any other name, his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale and sale of advertising space in the magazine now designated "Pacific Road Builder and Engineering Review," whether published under that name, or any other name, and in connection with the offering for sale, sale and distribution of said magazine in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That said magazine is circulated only among equipment buyers and has no substantial circulation among nonbuyers of equipment.

2. That a survey has been made of the equipment buyers in the area in which said magazine is principally circulated unless an accurate and dependable survey of such buyers has in fact been made by some qualified agency.

3. That advertisers in said magazine reach, through the medium of said magazine, substantially all of the road building and other heavy equipment buyers located in the area in which the magazine is principally circulated.

4. That said magazine is circulated among 93 percent of the equipment buyers located in the area in which it is principally circulated or among 98 percent of such buyers based on volume purchases or among any percentage or number of such buyers greater than the percentage or number among which it is actually circulated.

5. That the average monthly net paid circulation or average monthly distribution of said magazine is greater in number than the actual net paid circulation or the average monthly distribution.

It is further ordered, That the respondent shall, within 60 days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF
GEORGE W. HAYTINGS, TRADING AS NATIONAL FOLIO
SERVICE

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 4008. Complaint, Feb. 1, 1940—Decision, June 29, 1940

Where an individual engaged in sale and distribution of books and pamphlets, containing so-called treatises purporting to disclose and portray unusual business opportunities, to purchasers in various other States and in the District of Columbia; in advertising his said treatises through advertisements disseminated through newspapers and other periodicals, and through letters and circulars sent through the mails to prospective purchasers—

- (a) Represented directly and by inference that his so-called treatises presented business opportunities which possessed exceptional merit and offered prospects of high earnings and profits with expenditure of little or no effort, and that operation of businesses concerned involved no peddling or canvassing, and that the plans were original and new and in many cases included valuable formulas which had been acquired by him at great expenses and which he owned exclusively;

Facts being many plans set forth were without any substantial merit, and earnings and profits which he represented as obtainable from operation of businesses concerned were far in excess of any amounts which had been or might be earned therefrom, and many of his said plans did require peddling and house to house canvassing, and plans referred to by him were in many cases neither original nor new and did not include formulas which had any substantial value or which were owned exclusively by him; and

- (b) Represented that he was able to grant purchasers of such treatises exclusive rights to operate businesses concerned within certain territories, and that such treatises were offered for sale for a limited time only, and that he issued at regular intervals supplements thereto;

Facts being he was unable to grant purchasers any rights with respect to operation of such businesses in any specific territories, the time within which such plans might be obtained from him were not limited, but they were subject to purchase at any time, and he did not issue any supplements as set forth above;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such false statements and representations were true, and of inducing substantial portion of such public, because of such belief, to purchase a substantial number of such books and pamphlets:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. Lynn C. Paulson for the Commission.