

Syllabus

IN THE MATTER OF
BOOK-OF-THE-MONTH CLUB, INC. ET AL.

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

Docket 5572. Complaint, June 30, 1948—Decision, May 8, 1952

In the enactment of Section 5 of the Federal Trade Commission Act, Congress declared "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce to be unlawful, and it has been well settled by the Commission and the courts that included within the statute containing such standards of conduct is the principle that a false statement or representation of a material fact in the sale and distribution of merchandise in interstate commerce, which has the tendency and capacity to deceive and injure competition or customers, is an unlawful method, act or practice calling for corrective action by the Commission in the public interest.

The problem involved in the use of the word "free" or similar words in the sale and distribution of merchandise should be approached by applying to the representation made, the same yard stick that should be applied to all advertising, viz.: "It is true or false?"

A statement in an advertisement which is totally false cannot be qualified or modified, nor may a seller make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end. And the fact that the careful observer would not be misled is not, of course, material, for the statute is intended to protect the unthinking and credulous members of the public as well as the more sophisticated and intelligent.

The word "free" as used in the sale and distribution of books in the instant case has the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition; is unambiguous and without a secondary meaning; and since it makes a single representation and is untrue, cannot be qualified but can only be contradicted.

The astute advertiser well knows that once the average mind has received the impression conveyed by the word "free", it can never be completely eradicated by any other words of explanation or contradiction, and when a prospective customer is offered something "free", it is not unreasonable to assume that the conscious or subconscious appeal involved in the offer will influence his judgment so that the value of the so-called "free" article will divert the customer from the major inquiry into the quality of the article or of competing articles, at the risk of his dissatisfaction, in order to obtain the so-called "free" article.

As respects the drawing power of the word "free" and the drawing power of the lottery or chance, there is not the slightest difference in the psychological appeal of the two methods.

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It is "THE FIRST IMPRESSION" that is of vital concern to the advertiser, and the advertiser who desires to use the word "free" or words of similar import in the sale and distribution of merchandise—even though ready and willing to explain immediately in conjunction therewith, that to obtain the so-called "free" article, some other merchandise must be purchased, action performed, or service rendered—knows the meaning conveyed to the prospective purchaser, knows that if once the impression is made in his mind that such goods are free, repeated subsequent contradiction will not completely eliminate that impression; and is motivated by his desire for the benefit of the tremendous drawing power imparted by such words.

The opportunity to sell is important, and the word "free" in advertisements attracts the eye and the mind and causes the reader to read advertisements which otherwise he would not, so that, even though the true facts are also disclosed, the seller has achieved the opportunity to sell by the use of a false and misleading representation; and such false advertising, which will induce the purchase of goods that otherwise would not be purchased, is unfair to the seller's competitors as well as to customers, and under the statute may constitute an unfair method of competition as well as an unfair and deceptive act and practice in commerce.

The Commission's administrative interpretation in regard to the use of the word "free" to describe merchandise, issued on January 14, 1948, 44 F. T. C. 1427, is not a "rule" within the meaning of the Administrative Procedure Act, was based upon the experience which the Commission had had in dealing with the problem as it affected the public interest, does not have the force of law, and was intended only to serve as a general guide for the business community and to outline the circumstances under which the use of the word "free" and words of similar import are likely to mislead.

The effects of certain trade practices on competition or on the consumer may change with changing conditions, and the concept and application of such a statute as Section 5 of the Federal Trade Commission Act, which, expressed in general terms, provides that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful, should not remain static. An agency charged with the duty of preventing such unfair practices must be alive to the facts of trade, and aware of the unfair effects on competition or on the consumer of unfair competitive practices.

The Commission, in a litigated case, must examine the factual record, and in the light of the whole record, if it is found that there has been a violation of law, prescribe a remedy, which is based on and justified by the record and is sufficient to prohibit the recurrence of the illegal act or practice found to exist.

The Commission, as an administrative agency charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action or lack of action on its part in the past, and principles of equitable estoppel may not be applied to deprive the public of the protection of a statute because of such action or lack of action on the part of public officials.

Where a corporation engaged in the interstate sale and distribution of books; in advertisements in publications of large circulation through the United States and in circulars and other advertising material—

Made such statements as "A FREE Copy . . . To New Members of the Book-of-the-Month Club", followed by the names of a number of current books, and "Please enroll me as a member. I am to receive, free, INSIDE U. S. A. with the purchase of my first book indicated below, . . .";

When in fact, the books thus designated as "free" were not gifts or gratuities or without cost to the recipient, but, on the contrary, the prospective member, before he was entitled to receive such books, was required to join the Book-of-the-Month Club and assume the obligation to purchase at least four books from it over a period of a year, and, in the event of his failure so to purchase, was called upon to make payment for the so-called "free" book:

With tendency and capacity to deceive, and with result of deceiving, members of the purchasing public into the mistaken belief that books offered by it as "free to new members" were in fact given without charge or obligation:

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

Respondent's contention in the instant proceeding that, although the books might not be free, the advertisements concerned contained statements which clearly disclosed what the customer was required to do in order to receive the so-called "free" books, and that such statements neutralized any probability or possibility of deception, was not well taken, since the word "free", as used by respondent, made a single representation which was untrue and could not be qualified, and, in said respect differed from various cases cited in which selection of qualifying words, effective to eliminate deception, was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which were true and some of which were untrue.

Other contentions of respondents, as special defenses, to the effect that the administrative interpretation above referred to was adopted and promulgated without notice to the public, etc., in violation of the Administrative Procedure Act, was invalid in that it was sought to be given retroactive instead of a prospective application, and was arbitrary, capricious and unlawful, were without merit since the complaint was not based upon alleged violations of any rule, but upon violations of the Federal Trade Commission Act, and because the interpretation was not a "rule" within the meaning of said Act, and in no wise violated any of its provisions.

As respects respondent's further special defense, namely, its allegation that the Commission's previous utterances as to the meaning of the word "free", and previous rulings favorable to respondents, constituted grounds for the dismissal of the complaint: while the Commission on a previous occasion considered the question of the adverse effects of the use of the word "free" to describe commodities which were not in fact free, and was then of the opinion that the public interest could be protected by a limited form of relief or remedy, the Commission, with the question again before it in the instant case, and following its examination of the factual record, was of the opinion that respondent had used the word "free" in violation of Section 5, and that the order which had been entered in the matter was appropriate and necessary in the circumstances.

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The prior opinion of the Commission in the matter of *Samuel Stores, Inc.* Docket 3210, 27 F. T. C. 882, is overruled, to the extent that it is in conflict with the views expressed in the Commission's opinion.

As regards the allegation of the complaint that respondent's use of the term "book dividends" was false, misleading and deceptive the Commission was of the opinion, and found, that said charge was not sustained by the evidence.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Wolfson, Caton & Moguel, of New York City, for respondents.

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 Book-of-the-Month Club, Inc., a corporation; Harry Scherman and Meredith Wood, individually and as officers of Book-of-the-Month Club, Inc., a corporation hereinafter referred to as respondents, have violated 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. The respondent, Book-of-the-Month Club, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 385 Madison Avenue, New York.

The respondents, Harry Scherman and Meredith Wood, are individuals and are officers of corporate respondent Book-of-the-Month Club, Inc.

PAR. 2. Respondents are now and for more than two years last past have been engaged in the sale and distribution of books.

In the course and conduct of their business, respondents cause, and have caused their said products when sold, to be transported from their place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein, have maintained a course of trade in their said books in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. Respondents, in the course and conduct of their said business, and for the purpose of inducing the purchase of their products have made representations and statements concerning their products, said statements and representations having been disseminated by respondents between and among the various States of the United

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States and in the District of Columbia among prospective purchasers by use of the United States mails, by advertisements in newspapers, trade journals and by means of advertising folders, pamphlets, circulars and other advertising media all of general circulation. Among and typical of such statements and representations, but not all inclusive, are the following:

**THIS CARD GOOD FOR Free COPIES OF Andersen's & Grimm's Fairy Tales—
IF YOU SUBSCRIBE TO THE CLUB WITHIN THE NEXT 30 DAYS.**

Please enroll me as a member. It is understood that I am to receive free copies of ANDERSEN'S and GRIMM'S FAIRY TALES; that I am also to receive, free, your monthly magazine which reports about current books; and that for every two selections I purchase from the Club, I am to receive free, the current book-dividend then being distributed. I agree to purchase at least four books-of-the-month from the Club each full year I am a member; and I may cancel my subscription any time after purchasing four such books from the Club.

If you do not wish Andersen's and Grimm's Fairy Tales as your free enrollment books write in title below of book-dividend you prefer. (See large circular for list of book-dividends.)

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Mr. _____
Name Mrs. _____
Miss _____

Please Print Plainly

Address _____

Postal District

City _____ No. (if any) _____ State _____

IMPORTANT: Please indicate—by writing the name of the selection below—whether you wish to begin the subscription with any of the books mentioned in the accompanying circular.

Dear Reader:

Time and again we have found that bookish persons who are extremely busy—as you may be—allow their subscriptions to lapse for some special temporary reason; then, later they decide to rejoin the Club, but just never get 'round to doing so. Because we feel this may be so in your case, we have decided to make this offer to you.

If you will rejoin the Club within the next 30 days, we shall give you FREE COPIES of two books that belong in every library—beautifully illustrated with full color—ANDERSEN'S FAIRY TALES and GRIMM'S FAIRY TALES. These two books are handsomely boxed and their retail price is \$5.00.

You will remember that, as a member of the Club, you will receive in addition, a book-dividend of similar beauty and value to those shown in the enclosed circular with every second book-of-the-month you purchase.

FOR YOUR LIBRARY Free copies TO NEW MEMBERS

Andersen's Fairy Tales and Grimm's Fairy Tales

In Two Separate Volumes (Boxed)
with beautiful color illustrations and
numerous pen drawings

Retail Price \$5.00

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Right now you may begin your subscription to the club with any one of these national best sellers

"The Hucksters",
"Animal Farm",
"The Egg and I",
"Peace of Mind",
"Britannia Mews",

and receive free any one of the books offered on page 1 or any one of these other book-dividends and thereafter with every two selections you buy, you will receive another book-dividend free.

Free copy to new members—your choice of any one of these book-dividends

"Alice in Wonderland",
"The Hucksters",
"The Egg and I",
"A Treasury of Grand Opera."

Free copy to new members of the Book-of-the-Month Club John Gunther's absorbing new book about America "Inside U. S. A." Retail Price \$5.00.

This card good for free copy of any one of the books offered in this circular if you subscribe to the club within the next 30 days.

PAR. 4. The use by the respondents of the word "free" and the term "book dividends" is false, misleading and deceptive. In truth and in fact, the books designated as "free" or as "book dividends" are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchaser, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents.

PAR. 5. The aforesaid acts and practices of the respondents as herein alleged are all to the prejudice and injury of the public and constitute 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 June 30, 1948, issued and subsequently served its complaint in this proceeding upon the respondents, Book-of-the-Month Club, Inc., Harry Scherman, and Meredith Wood, charging them with the use of 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 respondents' answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by

it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding came on for final consideration by the Commission upon the complaint, answer thereto, testimony and other evidence, recommended decision of the trial examiner with exceptions thereto, and briefs and oral argument of counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the recommended decision of the trial examiner, 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. The respondent Book-of-the-Month Club, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 385 Madison Avenue, New York, New York.

Respondents Harry Scherman and Meredith Wood are individuals. Respondent Harry Scherman is and has been since 1931 president, and is and has been since 1926 a director, of respondent corporation. Respondent Meredith Wood is, and has been since 1931, executive vice-president, treasurer, and a director of respondent corporation. The participation of said individual respondents in the acts and practices hereinafter found has been only as officers of the corporation. The Commission is of the opinion that such participation in the absence of further showing as to their authority and control over and responsibility for said acts and practices does not constitute sufficient grounds for including them in this proceeding as individual respondents and the complaint as to them should be dismissed. As hereinafter used, the term "respondent" refers only to respondent Book-of-the-Month Club, Inc.

PAR. 2. The respondent Book-of-the-Month Club, Inc., is now, and for more than two years last past has been, engaged in the sale and distribution of books. In the course and conduct of its business respondent causes, and has caused, its books, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and for more than two years has maintained, a course of trade in its said books in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business and for the purpose of inducing the purchase of its books, respondent has made statements

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and representations concerning its books and the terms upon which such books may be obtained, by means of advertisements in publications of large circulation throughout the United States and in the District of Columbia, and by means of circulars and other advertising material disseminated throughout the United States and in the District of Columbia. Typical of such statements and representations are the following:

A FREE Copy . . . To New Members of the Book-of-the-Month Club
John Gunther's
absorbing new book about Americans
INSIDE
U. S. A.
Retail Price \$5.00

Sumner Welles—"The wisest and most penetrating analysis of this country of ours that has ever been written."

Sinclair Lewis—"The richest treasure-house of facts about America that has ever been published, and probably the most spirited and interesting."

F. H. LaGuardia—"The United States as it really is . . . It will be read as long as people read."

Henry Kaiser—"An inspiration and a challenge to every American."

William L. Shirer—"A magnificent book about our wondrous and fantastic land. Nothing like it has ever been published."

Clifton Fadiman—"If any single book can tell what it means to be an American citizen, this is it."

Orville Prescott, N. Y. Times—"A tremendously impressive book . . . No other man alive could have written so comprehensively and yet so spiritedly."

Lewis Gannett, N. Y. Herald Tribune—"Not since Bryce has any writer even attempted so inclusive a survey of the American commonwealth."

Harry Hansen, N. Y. World-Telegram—"The most sparkling, the most entertaining and the most personal letter to the folks back home."

Begin your subscription with *ANY ONE* of these
good books

Gus
The Great
by Thomas W.
Duncan
Price to
Members only
\$3.25

Thomas B.
Costain's
Latest Book
The
Moneyman
a Rich
Historical Romance
\$3.00

Peace
of Mind
by Joshua Loth
Liebman
\$2.50

Back
Home
by Bill
Mauldin
\$3.50

A Study
of History
by Arnold J.
Toynbee
\$5.00

Red
Plush
by Guy
McCrone
Price to
members only
\$3.25

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BOOK-OF-THE-MONTH CLUB, INC.,
385 Madison Avenue, New York 17, N. Y.

Please enroll me as a member. I am to receive, free, INSIDE U. S. A. with the purchase of my first book indicated below, and thereafter for every two books-of-the-month I purchase from the Club, I am to receive, free, the current book-dividend then being distributed. I agree to purchase at least four books-of-the-month—or special members' editions—from the Club each full year I am a member, and I may cancel my subscription any time after purchasing four such books from the Club.

As my first selection please send me.

- | | |
|---|--|
| ☐ Gus the Great
by Thomas W. Duncan (\$3.25) | ☐ Back Home
by Bill Mauldin (\$3.50) |
| ☐ The Moneyman
by Thomas B. Costain (\$3.00) | ☐ A Study of History
by Arnold J. Toynbee (\$5.00) |
| ☐ Peace of Mind
by Joshua L. Liebman (\$2.50) | ☐ Red Plush
by Guy McCrone (\$3.25) |

Name-----

(Please Print Plainly)

Address-----

City----- Postal Zone No. (if any)----- State-----

Book prices are slightly higher in Canada, but the Club ships to Canadian members, without any extra charge for duty, through Book-of-the-Month Club (Canada), Ltd.

You buy many books-of-the-month ANYWAY—why not get those you want from the Club, often PAY LESS, and share in the Club's book-dividends.

You do not pay any fixed yearly sum as a member of the Book-of-the-Month Club. *You simply pay for the particular books you decide to take, and you have a very wide choice among the important books published each year.*

Not only do the Club's five judges, every month, choose an outstanding book (sometimes a double selection) as the book-of-the-month; in addition, the Club makes available "special members' editions" of many widely discussed books—*making a total of fifty to sixty books each year from which you may choose.*

If you buy as few as *four of these books in any twelve-month period, you get the full privileges of Club membership, and since there are sure to be, among so many good books, at least four that you would buy anyway, the saving to you is extraordinary.*

You pay the regular retail price—frequently less—for the book-of-the-month, whenever you decide to take it. (A small charge is added to cover postage and other mailing expenses.) Then, with every two books you buy (from among the books-of-the-month and "special members' editions" made available) you receive—*free*—one of the Club's book-dividends.

These are beautiful library volumes, sometimes highly popular best-sellers. Last year the retail value of the free books Club members received was in excess of \$16,000,000—books given to members, not sold! This year it will be more. Why not share in this distribution, *particularly since you need never take any book you do not want, and actually pay less for many books?*

Also, as a member, you are kept fully informed about all the important new books, and insure yourself against missing the ones you are particularly anxious

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to read. These, briefly, are the sensible reasons why hundreds of thousands of book-reading families now belong to the Book-of-the-Month Club.

PAR. 4. The use of the word "free" to describe the "enrollment" book has tremendous advertising value in inducing people to sign and send in the membership coupon.

PAR. 5. The use by the respondent of the word "free" is false, misleading, and deceptive. In truth and in fact, the books designated as "free" are not gifts or gratuities or without cost to the recipient but, on the contrary, the prospective member, before he is entitled to receive such books, must join the Book-of-the-Month Club and assume the obligation to purchase at least four books from respondent over the period of a year, the fulfillment of which obligation inures directly to the profit of the respondent. Additional evidence of the fact that such books are not free is the fact that if a member does not purchase at least four books from the respondent within a year of his application for membership in the Book-of-the-Month Club, payment for the book theretofore designated as "free" is thereafter demanded by the respondent.

PAR. 6. Respondent's advertisements have the tendency and capacity to deceive, and actually have deceived, members of the purchasing public into the erroneous and mistaken belief that books offered by respondents as "free to new members" are in fact given without charge or obligation to new members of Book-of-the-Month Club.

PAR. 7. The complaint herein also charges that the respondents' use of the term "book-dividends" is false, misleading, and deceptive. The Commission is of the opinion, and so finds, that this charge is not sustained by the evidence.

CONCLUSION

The acts and practices of the respondent Book-of-the-Month Club, Inc., as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Commissioner Mason dissenting.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondents, testimony and other evidence introduced before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner with exceptions thereto, and briefs and oral argument of counsel; and the Commission having made its find-

ings as to the facts and conclusion that the respondent Book-of-the-Month Club, Inc., has violated the provisions of the Federal Trade Commission Act:

It is ordered, That the respondent Book-of-the-Month Club, Inc., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Using the word "free," or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Harry Scherman and Meredith Wood as individuals, but not in their capacity as officers of respondent Book-of-the-Month Club, Inc.

It is further ordered, That respondent Book-of-the-Month Club, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Mason dissenting.

OPINION

Mead, Chairman:

The Commission's complaint in this matter charges that the respondents' use of the word "free" and the term "book-dividends" is false, misleading, and deceptive and constitutes unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. The respondents, in their answer to the complaint, denied that their use of the word "free" and the term "book-dividends" is false, misleading, and deceptive, and in addition alleged a number of special defenses to the complaint. Hearings were held before a trial examiner of the Commission, during which considerable testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced, and the trial examiner made his recommended decision, in which he recommended the issuance of an order to cease and desist against the respondent Book-of-the-Month Club, Inc. The respondents filed numerous exceptions to the trial examiner's recommended decision, and the Commission has had the benefit of briefs and oral argument of counsel with respect to all the issues involved.

The trial examiner's recommended findings as to the facts and order to cease and desist are, in the opinion of the Commission, supported by and in accordance with reliable, probative, and substantial evidence in the record, and the Commission's findings as to the facts and order to cease and desist are substantially the same as those recommended by the trial examiner. The charge in the complaint with respect to respondents' use of the term "book-dividends" is not sustained. Also, it appears that the individual respondents Harry Scherman and Meredith Wood participated in the unlawful acts and practices only in their capacity as officers of the Book-of-the-Month Club, Inc. Such participation, in the absence of further showing as to their authority and control over and responsibility for the unlawful acts and practices, does not warrant the issuance of an order to cease and desist against them as individuals.

Substantially all of the material facts affecting the issues in this proceeding were either stipulated between counsel or proven by uncontroverted evidence. The material facts may be summarized as follows:

The respondent Book-of-the-Month Club, Inc. (hereinafter referred to as the Club) is engaged in the business of selling books by mail order to its subscribers, who are commonly known as members of the Book-of-the-Month Club. It has no salesmen and its business is solicited by circularizing, advertising, and similar promotional material. In soliciting new members the Club in its advertisements and circulars offers to new subscribers a "free" copy of any one of a number of designated books, provided the new subscriber or member agrees to purchase at least four books from the Club each year he is a member, with the right to cancel the subscription after purchasing four books from the Club. In other words, the so-called "free" or enrollment book is delivered to a new subscriber only after the subscriber agrees to purchase at least four of the books within a period of a year. The word "free" is featured in the circularizing, advertising, and similar promotional material used by the Club, as for example:

A FREE Copy . . . To New Members of the
Book-of-the-Month Club
John Gunther's
absorbing new book about Americans
INSIDE
U. S. A.
Retail Price \$5.00

The advertisement in which the above-quoted statement was featured, as well as other advertising and promotional material dis-

seminated by the Club, contains additional information for prospective subscribers, including the fact that in order to get the "free" copy the subscriber must agree to purchase at least four other books from the Club during each year and that the subscriber may resign or cancel his subscription after four such books have been purchased. These facts alone are sufficient to sustain the charge in the complaint that the books represented as being "free" are not in fact gifts or gratuities given to the recipient without cost or other obligation. However, additional evidence that the books represented as being "free" are not in fact free is the fact that if a new subscriber fails to fulfill his obligation to purchase at least four books from the Club within a year, the Club demands payment from the subscriber for the so-called "free" book.

The enrollment books are either free or they are not free. They cannot be both. The advertisements feature a representation that the books are free. Elsewhere in the advertisements is the statement which indicates that such books are not free. At best, these statements are contradictory. One of the statements must therefore be contrary to fact. This is obviously the statement that the books are free.

The word "free" is one of those dynamic terms in our language which alerts us and calls to action certain emotions within us. It has both political and monetary connotations. Cynics may say that all of us should know that we cannot get something for nothing, yet the hope of getting something free has the habit of springing eternal in the human breast. Alas, however, on closer inspection there generally are found a few "provided, however" or other conditional strings to the so-called "free" offer. Such is the case here. The customers who did not buy the other books were obliged to pay for the "free" book.

In the enactment of Section 5 of the Federal Trade Commission Act (52 Stat. 111; 15 U. S. C. Sec. 45), Congress declared "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce to be unlawful. In so doing, Congress purposely failed to define such terms and left it to the Commission, subject to judicial review, to determine by the process of inclusion and exclusion what methods, acts or practices are encompassed therein. Detailing of specific methods, acts and practices was not attempted in an effort to preserve flexibility of the law and to make possible its application to any method, act or practice which might be devised in the future and found to be unfair. It has been well settled by the Commission and the courts that included within the statute containing these standards of conduct is the principle that a false statement or representation of a material fact in the sale and distribution of merchandise in interstate commerce which has the tendency and capacity to deceive and injure

competition or customers is an unlawful method, act or practice calling for corrective action by the Commission in the public interest. The Commission was authorized and directed by Congress to prohibit such methods, acts or practices and the courts have repeatedly sustained the Commission in so doing without the necessity of having to establish either deception or injury.

The problem involved in the use of the word "free" or similar words in the sale and distribution of merchandise should be approached by applying to the representation made the same yardstick that should be applied to all advertising, viz.: "Is it true or false"?

In the present case the word "free" as used by the respondent in the sale and distribution of its books has the definite and absolute meaning of a gift or a gratuity given without charge, cost or condition. So used the word is unambiguous and does not have a secondary meaning. Its meaning cannot be altered or qualified by other words. It can only be contradicted and the total representation made through use of the word "free" is false.

Respondent contends that although the books may not be free the advertisements contain statements clearly disclosing those things which the customer must do in order to receive the so-called "free" books and that these statements neutralize any probability or possibility of deception. We are unable to agree.

The contention might have some merit if the other statements in the advertisements only qualified the word "free." For illustration, in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933), the word "milling" imported the grinding of wheat into flour when in truth the Royal Milling Company only mixed and blended flour purchased from others engaged in grinding. The continued use of the trade name if used together with such qualifying words as "not grinders of wheat" was permitted. In *N. Fluegelman & Co. v. Federal Trade Commission*, 37 F. (2d) 59 (C. A. 2, 1930), the use of the words "Satinmaid" and "Satinized," which signified a fabric with a satin weave and a silk content, whereas the product in question was of a satin weave but of a cotton content, was permitted provided there was also used the phrase "a cotton fabric," "a cotton satin," "not silk," or equivalent modifying terms. In *Federal Trade Commission v. Good-Grape Company*, 45 F. (2d) 70 (C. A. 6, 1930), it was held that the name "Good-Grape" and the slogan "Fruit of the Vine" might be used if qualified by words making it appear that the product was an imitation, artificially colored and flavored. In *Federal Trade Commission v. Cassoff*, 38 F. (2d) 790 (C. A. 2, 1930), the word "shellac" in the trade names "white shellac" and "orange shellac" deceptively imported a product composed solely of genuine shellac gum dissolved

in alcohol. The use of the word "shellac" was permitted if there was also used in connection therewith the phrase "shellac substitute" or "imitation shellac," accompanied by a statement that the product was not 100% shellac.

It will be noted that in these cases the selection of qualifying words, effective to eliminate deception, was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue. Thus, in *Royal Milling Co.* case the representation of the word "milling" as to mixing and blending of the flour was true but the representation as to the origin of the flour, i. e., as to by whom it was ground, was untrue. In the *Fluegelman* case the representation of the words "Satinmaid" and "Satinized" that the fabric had a satin weave was true but the representation that it had a silk content was not. In the *Good-Grape* case the representation of the phrases "Good-Grape" and "Fruit of the Vine" that the product was like grape juice in color and flavor was true, but the representation that it was made of natural grape juice was untrue. In the *Casoff* case the representation of the phrase "white shellac" and "orange shellac" that the product was composed solely of genuine shellac gum dissolved in alcohol was untrue, but the representation that it was like shellac, or that it could be used for the purpose of shellac, was true.

In these cases, for the reasons stated, qualifying words could be chosen which would eliminate the deceptive representation and leave standing the truthful one alone. In the present case, however, the other statements in the advertisements do much more violence to the word "free" than merely qualifying it. The word "free" as used by the respondent makes a single representation and, being untrue, cannot be qualified; it can only be contradicted. A statement in an advertisement which is totally false cannot be qualified or modified. *Federal Trade Commission v. Army & Navy Trading Co.*, 88 F. (2d) 776 (C. A. D. C., 1937); *Heusner & Son v. Federal Trade Commission*, 106 F. (2d) 596 (C. A. 3, 1939); *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. (2d) 103 (C. A. 7, 1946). A seller may not make one representation in one part of his advertisement and withdraw it in another part since there is no obligation on the part of the customer to protect himself against such a practice by pursuing an advertisement to the bitter end. *A. P. W. Paper Company v. Federal Trade Commission*, 149 F. (2d) 424 (C. A. 2, 1945); *General Motors Corporation, et al. v. Federal Trade Commission*, 114 F. (2d) 33 (C. A. 2, 1940); *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*, 143 F. (2d) 676 (C. A. 2, 1944). The

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fact that the careful observer would not be misled is not, of course, material, for the statute is intended to protect the unthinking and credulous members of the public as well as the more sophisticated and intelligent members. *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112 (1937). The law was not "made for the protection of experts but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous." *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. (2d) 73, (C. A. 2); and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced." *Federal Trade Commission v. Standard Education Society*, *supra*.

Involved in this proceeding is the question whether the Commission will insist upon truth in advertising or will approve this type of falsity in advertising. If it is false, it is unfair, and if it is unfair, it violates the Federal Trade Commission Act regardless of whether actual injury or deception may be involved. While all deceptive acts are unfair, not all unfair acts are deceptive. It is possible to commit unfair acts without actually injuring or deceiving anyone, but in its unfairness lies the tendency and capacity to mislead and deceive, and as long as that tendency and capacity exist, such acts are unlawful.

The argument that respondent's advertisements lack both the tendency and capacity to deceive loses sight of or completely ignores the psychological effect created by the false use of the word "free." The word "free" is a lure. It is the bait. It is a powerful magnet that draws the best of us against our will "to get something for nothing." The astute advertiser well knows that once the average mind has received the impression conveyed by the meaning of the word "free" it can never be completely eradicated by any other words of explanation or contradiction. The meaning of the word "free" remains more or less fixed, and that meaning is the actual cause of the purchase. Without such use of the word "free," we are of the opinion that the sales of the books would have been considerably less and that purchasers were induced to buy books who ordinarily would not have purchased any, and in many instances purchased more books than they ordinarily would have purchased.

All advertisements are designed to excite demand for the advertised article and to call attention to the particular product. But when a prospective customer is offered something "free," it is not unreasonable to assume that the conscious or subconscious appeal involved in the offer will influence his judgment; the value of the so-called "free" article will divert the customer from the major inquiry into the quality of the article or of competing articles. The major inquiry is thus

subordinated, and the purchaser runs the risk of dissatisfaction in order to obtain the so-called "free" article.

Where is the distinction between a business conducted upon lottery and chance and a business based upon false representations that the books are free? Is the drawing power of the lottery or chance any greater than the drawing power of the word "free"? One plays the lottery or takes the chance solely in the hope that he will get something free, or something more than that for which he has paid. There is not the slightest difference in the psychological appeal of the two methods. In one you may get nothing, in the other you may get more, or at least think you are getting more, but the hope of getting more is stronger than the knowledge that you may get less or may get nothing, and the sucker plays the lottery or takes the chance while the gullible person purchases merchandise in order to get something "free." As in *Rast v. Van Deman & Lewis*, 240 U. S. 342, 365 (1916) the Supreme Court appropriately stated with respect to certain advertising practices that "they rely on something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called 'gaming'; it may, however, be considered as having the seduction and evil of such * * *."

An appropriate question could be asked: Why does an advertiser desire to use the word "free" or words of similar import in the sale and distribution of merchandise even though immediately in conjunction therewith the advertiser is ready and willing to explain that to obtain the so-called "free" article some other merchandise must be purchased, some action performed, or service rendered? The obvious answer is that the advertiser desires the benefit of the tremendous magnet and drawing power imported by such words. The advertiser knows the meaning conveyed to the prospective purchaser and knows that if once the impression is made in the mind of the purchaser that such goods are free, repeated contradictions thereafter will not completely eliminate that impression. It is **THE FIRST IMPRESSION** that is of vital concern to the advertiser. The opportunity to sell is important. The word "free" in advertisements attracts the eye and the mind and causes the reader to read advertisements which otherwise he would not. And although the true facts are also disclosed in the advertisement, the seller has achieved the opportunity to sell by the use of a false and misleading representation. Such advertisements will induce the purchase of goods that otherwise would not be purchased. We are of the opinion that such false advertising is unfair

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to the seller's competitors as well as to customers and under the statute may constitute an unfair method of competition as well as an unfair and deceptive act and practice in commerce.

In the present case it is clearly established by substantial evidence that the use of the word "free" in respondent's advertisements is a material representation describing the "enrollment" book; that the representation has tremendous advertising value in inducing prospective purchasers to sign and send in the membership coupon; that the representation is false, and not only has the tendency and capacity to mislead and deceive, but actually has deceived prospective purchasers into the erroneous and mistaken belief that the "enrollment" book offered by respondent as "free" would in fact be given without cost or other obligation. We are of the opinion that the acts and practices of the respondent are all to the prejudice and injury of the public, that the public is entitled to be protected against this species of deception, and that its interest in such protection is specific and substantial.

In the matter of *Joseph Rosenblum, et al., trading as Modern Manner Clothes*, D. 5263, the Commission issued its order commanding respondents to cease and desist from

Using the word "free," or any other word or words of similar import or meaning, to designate, describe, or refer to wearing apparel, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the performance of some service inuring directly or indirectly to the benefit of the respondents. (47 F. T. C. Decisions 712, 722)

On petition to review in the United States Court of Appeals for the Second Circuit, the legal validity of the foregoing order was "Affirmed on authority of *Federal Trade Commission v. Standard Education Society*, 302 U. S. 112; *Progress Tailoring Co. v. Federal Trade Commission*, 7th Cir., 153 F. (2d) 103; and *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 2d Cir., 143 F. (2d) 676." *Joseph Rosenblum et al. trading as Modern Manner Clothes v. Federal Trade Commission*, 192 F. (2d) 392 (C. A. 2, 1951). Subsequently, the Supreme Court denied a petition for writ of certiorari on March 24, 1952.

There is nothing in the order in the present case to prevent the respondent Book-of-the-Month Club, Inc. from distributing free books or from truthfully representing the facts. (See the opinion of Commissioner Ayres in the *Matter of Unicorn Press, et al.*, D. 5488, 47 F. T. C. Decisions 273.) The distribution of books which are in fact free may not be a profitable business endeavor. That decision, however, is for the respondent corporation. If the respondent does not

choose to distribute free books, there are sufficient words in the English language available to respondent which will accurately, truthfully and vividly describe the offer of respondent to its prospective purchasers. The respondent corporation is offering for sale many of the great works of literature. Certainly the advertisements for such subject matter can have customer appeal and yet be accurate.

The Commission, on January 14, 1948, issued the following administrative interpretation with respect to the use of the word "free" to describe merchandise:

"The use of the word 'free,' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

As special defenses to this proceeding the respondents contend that the complaint is based upon alleged violations of the above-quoted administrative interpretation, which they choose to call a "rule," and that said "rule" was adopted and promulgated without notice to the public and without furnishing an opportunity to interested parties to be heard, all in violation of the Administrative Procedure Act; that said "rule" is further invalid in that it is sought to be given a retroactive instead of a prospective application; and that said "rule" is arbitrary, capricious, and unlawful. These special defenses are without merit. The complaint in this proceeding is clearly not based upon alleged violations of any rule, but upon alleged violations of the Federal Trade Commission Act. The Commission's administrative interpretation in regard to the use of the word "free" to describe merchandise is not a "rule" within the meaning of the Administrative Procedure Act, and the Commission, in issuing its interpretation, in no wise violated any provision of the Administrative Procedure Act. The Commission's administrative interpretation was based upon the experience which the Commission has had in dealing with the problem as it affects the public interest. The interpretation does not have the force of law and was intended only to serve as a general guide for the business community and to outline the circumstances under which the use of the word "free" and words of similar import are likely to be misleading.

As a further special defense to this proceeding, the respondents allege that the Commission's previous utterances as to the meaning of

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the word "free" and previous rulings favorable to respondents made by the Commission constitute grounds for the dismissal of the complaint.

Section 5 of the Federal Trade Commission Act provides that unfair methods of competition and unfair or deceptive acts or practices in commerce are unlawful. This statute is expressed in general terms. The concept and application of such a statute should not remain static. An agency charged with the duty of preventing unfair practices in commerce must be alive to the facts of trade. It must be aware of the adverse effects on competition or on the consumer of unfair competitive practices. The effects of certain trade practices on competition or on the consumer may change with changing conditions. The Commission on a previous occasion considered the question of the adverse effects of the use of the word "free" to describe commodities which were not in fact free. The Commission at that time was of the opinion that the public interest could be protected by a limited form of relief or remedy. This question again came before the Commission in this case. The Commission in a litigated case must examine the factual record and, in the light of the whole record, find what the facts are. In the light of the facts so found the Commission must prescribe a remedy if it is found that there has been a violation of the law. This remedy must be based on and justified by the record and should be sufficient to prohibit the recurrence of the illegal act or practice found to exist. In the light of the facts in this record the Commission is of the opinion that the order to cease and desist which is being issued in this case is both appropriate and necessary.

The Commission is an administrative agency charged with the protection of the public interest, and is certainly not precluded from taking appropriate action to that end because of mistaken action or lack of action on its part in the past. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134 (1940); *Houghton v. Payne*, 194 U. S. 88 (1904). Nor can the principles of equitable estoppel be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials. *United States v. San Francisco*, 310 U. S. 16 (1940); *Utah Power and Light Co. v. United States*, 243 U. S. 389 (1917); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. (2d) 52 (C. A. 4, 1950).

It is, therefore, the view of the majority of the Commission that the respondent Book-of-the-Month Club, Inc. has used the word "free" in violation of Section 5 of the Federal Trade Commission Act and that the order to cease and desist which has been entered in this matter is appropriate and necessary in the circumstances.

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Dissenting Opinion

To the extent that the opinion of the Commission in the matter of Samuel Stores, Inc., Docket No. 3210, 27 F. T. C. Dec. 882, is in conflict with the views expressed herein, it is hereby overruled.

Commissioners Carson and Spingarn concur in the above opinion.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON

This is a case about a company that gives its customers one book for every two they buy. The plan is simple. It is difficult to use more than three sentences explaining the whole thing.

Here it is:

The company sells books by mail order. You agree to buy four books a year. For every two books you buy, you get one free.

There it is.

A child past the Fourth Reader could understand it. For years, fifty thousand people a day bought the books and never complained they were fooled by a certain word in the ads which I shall not mention at this time. Nor, for that matter, was the Commission fooled on that certain word from 1940 to 1947. During this period, the Commission kept looking at and studying and analyzing the ads of the defendant, and from time to time advised defendants there was nothing objectionable in the way they used the word "free."

That's the word.

The Commission knew when it agreed to buy four books a year, it would get two books free. And if the Commission had done so, it would have gotten a jolly good bargain. The uncontradicted testimony showed the books cost no more and often less than the market price. Besides, the Federal Trade Commission would get a free book on top of all this for every two it purchased.

Things were fine, the consumers were getting good literature cheap, the company was distributing a million books a month, competitors were organizing rival book clubs, and everybody was happy. Even the Federal Trade Commission unbent enough to write the defendant that it saw nothing wrong with the idea of giving one book free for every two purchased.

Then in 1948 something happened. Just what, nobody knows. The urge to "tell someone off" and to issue mandates is a hidden hunger that crops up in unexpected places for unexplainable reasons. At any rate, there were rumblings around the Federal Trade Commission that all was not well with the word "free." Sinister implications and connotations wafted through our corridors. The word "free" was too emotional. It played on the credulities of the gullible American. People bought things to get something else free—a dangerous tendency

liable to stimulate trade, palliate unemployment and eradicate bankruptcy in the book business. Something had to be done to a merchandising plan that was so simple and so plain that it could be explained in 25 words—a plan that was selling millions of books and spreading education, culture and knowledge, along with a not unreasonable amount of tripe to the public.

The answer to all this well-being was, of course, for bureaucracy to promulgate an interpretation. There is nothing like a good promulgation to satisfy the emotional “id” of a Government agency.

So on January 14, 1948, the Federal Trade Commission issued its statement of policy on the word “free.” In accordance with usual agency practice, the Commission took 214 words to explain what one word meant. Before this, the millions of people who dealt with defendant knew what “free” meant, but after the January 14 explanation, more bulletins were issued by Better Business Bureaus and other organizations for the public good, explaining the Commission’s explanation, than ever before in the history of bureaucracy. Now no one has any moral certainty as to how free is “free.”

Albeit the Commission’s definition doesn’t coincide with Mr. Webster, it must be remembered there was no Federal Trade Commission extant in Noah Webster’s life. In those days, a word definition was not the subject of Government fiat. It rested entirely on common usage and custom. In fact, a dictionary maker was a historian, not a law maker. He merely noted accepted word usages in a handy volume. On the word “free” Mr. Webster (unabridged) records 24 separate uses. Some in Government believe this to be unfair. They hold to the “one-word, one-meaning theory”—a rose is a rose. From now on, Webster’s is out and the Federal Trade Commission’s unabridged is in.

Hereafter:

“The use of the word ‘free,’ or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act.”

Commissioners Freer and Mason voted against this definition.

On June 30, 1948, the Commission issued its complaint charging respondents violated Section 5 of the Federal Trade Commission Act in substantially the same language as that of the January 14 definition.

During the trial, the defendant was able to extract an admission from the Commission's attorney that:

"The Club's method of operation is accurately described in the circularizing and advertising material filed as Commission's exhibits, provided that the new subscriber performs his contract with the Club by the purchase of four books within one year.

* * *

"The foregoing circulars, contract and subscription forms and advertisement set forth accurately and fully each and every obligation which a subscriber or new subscriber incurs by becoming a member of Book-of-the-Month Club, Inc. and also set forth accurately and fully the privileges of such members, provided that the new subscriber performs his contract with the Club by the purchase of four books within one year."

These admissions would probably force a less arduous agency to drop the allegation that defendants were deceiving the public. But no such candor kept the Commission staff from maintaining the January 14 Promulgation of Interpretation, etc.

Out of the millions of satisfied customers, there must be some who would testify that the word "free" misled them. A recess was taken by the prosecution for four months. During this breathing spell the Government got hold of all the deadbeats who owed the Book Club money—that choice $98\frac{1}{100}$ of one percent of defendants' customers who would be the last called if the Government ever wanted to make a dispassionate and just analysis of its own operation. Out of this cull the Government was able to distill thirteen defaulters whose virtuous regard for truth and veracity was undoubtedly only exceeded by their financial integrity. Without reading their testimony, you can assume they agreed with the Commission's definition of the word "free" 110 percent, whether they understood it or not.

Must we reject facts and clasp to our hearts the opinions of the unhappy thirteen?

I cannot say so.

As points have been raised involving questions of procedure which do not directly bear on the ultimate judgment, I wish to add these technical observations in this dissent.

Respondents show that twice (in 1940 and 1947) the Commission by written memoranda said it had no intention of challenging the respondents' use of the word "free."

Then in 1948, the Commission changed its mind. Respondents apparently feel the Commission had no right to do this, at least in the manner it did.

I cannot subscribe to respondents' argument of estoppel.

Though I disagree with the altered position of the Commission, there is no doubt but that it has the power to change its mind as many times as it believes inconsistency is in the public interest. Nor do I quarrel with the very salutary effort to keep business men advised by issuing explanatory statements on Commission policy from time to time. The fault lies not in their being—but too often in their paucity and obscurity. In the instant matter, the fault, as I see it, lies in its lack of jurisdiction to define such words and our inability to sue for violations of those definitions.

If this order stands on appeal, perhaps the following week we shall define "good," "true" and "beautiful."

To sum up the area of agreement between the majority views and mine, one can say the administrative procedures leading to the cease and desist orders are in accord with sound judicial practice. There is also substantial agreement on the facts.

In fine, the issues in the instant case are, to my mind, clear-cut but invalid.

Just as clear-cut and invalid as if we were trying respondents for selling books on Saturday.

Saturday selling would be a clear-cut issue, and one which more than thirteen people in the United States would be willing to condemn. Suppose the Commission on January 14, 1948, had adopted a statement of policy with reference to Saturday selling, the same to be immediately effective, as follows:

"The practice of Saturday selling of merchandise sold or distributed in interstate commerce is considered by the Commission to be in violation of the Federal Trade Commission Act.

"Because certain business men have been selling books on Saturday and the Commission has heretofore not issued complaints against them for so doing, the Commission has reconsidered this matter and directs that an opportunity be extended to all those who have sold books on Saturday to execute a stipulation to cease and desist from so doing, with the further direction that if a satisfactory stipulation not be tendered, formal complaint issue in conformity with the statement of policy as above set out."

If respondents admitted the charges, we would certainly find them guilty on the clear-cut issue of Saturday selling. But would it be valid? Do we have the right to enter an order against doing business on Saturday?

A rule limiting what may be done on Saturday is no more valid than a rule limiting what may be done with the word "free" unless there is

factual support in a record before the Commission to give us jurisdiction over the days of the week or over the definitions of such qualitative words as in the instant case.

Our function under the statute is to prevent deception and other unfair acts in commerce. All that the Commission can do is to find as a body of experts, that certain advertisements are false and misleading and, therefore, must be inhibited.

In the instant case the Government admits the price of the gratuity was not added to the price of the purchased goods. If it had been secretly added, we could have very well entered a cease and desist order against such trickery. But realities have a way of killing off theories, and the harsh fact here is that the gratuity's cost was borne by defendants and not by the customer, and, therefore, it was in fact free.

The January 14 statement was not a rule properly promulgated according to the Administrative Procedure Act. Therefore, its violation could not be used as the basis for suit.

After taking testimony, the trial examiner (with an innate sense of propriety) having held that the January 14 statement was not a firm rule of law, recommended an order in language different from the rule,¹ thus demonstrating in this respect that he was trying the case on the facts, and not on a preconceived rule of the Federal Trade Commission.

Under his order, it was apparent the trial examiner rejected as not being sustained by the facts, the provisos composed by the Commission in its January 14, 1948, definition of "free."

But the Commission, not content with his delicacy, rejected his proposed order and inserted language identical to its January 14 statement.²

This, of course, does not of itself invalidate the order, but it does indicate what I believe to be the rationale behind the Commission's insistence on prohibitions in excess of our authority. It appears to me a simple order based on deception will not stand upon appeal. For there is the admission on the record, agreed to by Commission's attorney, that defendants' ads were accurate in their entirety. This being so, the order had to be directed against something more than

¹ " * * do forthwith cease and desist from using the word 'free,' or any other word or words of similar import or meaning, to describe any book which is not in truth and in fact a gift or a gratuity furnished without cost or obligation to the recipient thereof."

² " * * do forthwith cease and desist from using the word 'free,' or any other word or words of similar import or meaning, in advertising to designate or describe any book, or other merchandise, which is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the benefit of the respondent."

deception or tendency to deceive, if the Commission was to maintain its suit.

The prohibition had to specifically follow the Commission's banning of "free" to include those new elements added in its January 14 statement.

Faced with the impossibility of finding deception in view of the prior admission on the record that defendants' ads were accurate, it will not, in my opinion, avail the Commission to extend the meaning of the word "free" past what the millions who got the books understood it to mean.

By this order the Commission sets itself up as a lexicographer with power to punish those who ignore our definitions.

By this order the Commission has fallen into the one-word, one-meaning fallacy which all semanticists regard as futile. Serious students of the problem hold that words shift and change in meaning, and that only by their context may they be known.

Even if we could limit by official definition the use of the word "free," a qualitative word like "good," "special" or "substantial," I believe the logistics of our agency condemn the expenditure of funds on such "Canuteisms."

But, in my opinion, it is not the function of the Commission to define and limit the use of subjective words, which are always conditioned by the personal characteristics as well as the transitory state of mind of the individual at the time he contemplates the word.

I believe that this order reverses the whole historic concept of word authority by common usage. We supplant accepted usage with bureaucratic fiat.

And that I am against.

Complaint

IN THE MATTER OF

PHILIP KREMER AND HARRY MONOKER TRADING AS
THE MURD COMPANY

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

Docket 5968. Complaint, Mar. 17, 1952—Decision, May 8, 1952

Where two individuals engaged in the manufacture and interstate sale and distribution of a rodenticide preparation designed by them as "Zurd"; in statements in advertisements concerning their product, directly and by implication—

- (1) Represented falsely that said rodenticide preparation was 100% efficient in that it would kill all rats and mice on the premises; would achieve complete control of any rat or mouse problem and would prevent reinfestation by such rodents;
- (2) Represented falsely that according to Department of Interior reports the ingredient Warfarin has been proven to eliminate all rats and mice on the premises; and
- (3) Represented that Zurd was safe and would not be harmful to humans, pets or domestic animals; when in fact it contained a poison and, if ingested, might cause illness and even the death of any warm blooded animal;

With tendency and capacity to mislead a substantial portion of the purchasing public into the mistaken belief that such representations were true and to induce it, because of such erroneous belief, to purchase said preparation; whereby substantial trade was unfairly diverted to them from their competitors, and substantial injury was done to competition in commerce:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. Edward F. Downs for the Commission.

Einhorn & Schachtel, of Philadelphia, Pa., for respondents.

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 Philip Kremer and Harry Monoker, individuals and co-partners, trading as The Murd Company, hereinafter referred to as respondents, have violated the provisions of the 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: