

Interlocutory Order

IN THE MATTER OF
DOUBLEDAY AND COMPANY, INC.*Docket 5897. Order and opinions, Sept. 18, 1953*

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.
Satterlee, Warfield & Stephens, of New York City, for respondent.

ORDER AFFIRMING IN PART AND SETTING ASIDE IN PART THE HEARING
EXAMINER'S RULINGS ON RESPONDENT'S MOTIONS TO DISMISS, AND
REMANDING PROCEEDING TO HEARING EXAMINER

This matter having come on to be heard by the Federal Trade Commission upon the appeal of counsel supporting the complaint from the hearing examiner's ruling on respondent's motion to dismiss Count I of the complaint herein to the extent that it grants said motion and from his initial decision dismissing Count III, and upon briefs in support of and in opposition to this appeal and oral argument of counsel; and

The Commission, upon consideration of the entire record herein, having decided, for the reasons stated in the written opinion of Chairman Howrey which is being issued simultaneously herewith, that the hearing examiner correctly ruled that respondent's practice of granting exclusive book club publishing rights is not in violation of the Federal Trade Commission Act, but erroneously ruled that its practice with reference to the fixing of publication dates comes within the protection of the Copyright Act; and

The Commission being of the opinion that the hearing examiner's initial decision dismissing Count III of the complaint should be set aside (Commissioners Spingarn and Carretta each having set out in a separate opinion their reasons for this action, which reasons differ from those stated in the opinion of Chairman Howrey and concurred in by Commissioner Mead); and

The Commission being of the further opinion that this proceeding should be remanded to the hearing examiner for completion of the taking of evidence and for such other action as may be necessary to finally dispose of the case, with leave to respondent, however, to renew its motion for dismissal of Count III at the close of the taking of evidence;

It is ordered, That the hearing examiner's ruling as to Count I of the complaint herein be, and it hereby is, affirmed insofar as it holds that respondent's practice of granting exclusive book club publishing

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rights is not in violation of the Federal Trade Commission Act, and that said ruling be, and it hereby is, set aside insofar as it relates to respondent's practice of fixing publication dates.

It is further ordered. That the initial decision of the hearing examiner dismissing Count III of the complaint be, and it hereby is, set aside.

It is further ordered. That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course, with leave granted to respondent to renew its motion to dismiss Count III at the close of the taking of evidence.

Commissioner Mason not participating.

Chairman HOWREY delivered the opinion of the Commission with reference to Count I.

This is an interlocutory appeal by counsel supporting the complaint from the Hearing Examiner's decision granting respondent's motion to dismiss Count III and from his rulings granting in part respondent's motion to dismiss Count I.

Respondent is one of the major publishers of trade books¹ in the country. In number of titles published it ranked second among American publishers in 1952. In the course of its business it enters into agreements with authors of books under which the respondent becomes the licensee or assignee of the copyrights covering such books. These agreements provide that respondent is to receive the exclusive rights to make, publish and sell the books of the copyright holder. In addition, respondent receives rights to exploit the copyrighted material in arrangements with newspapers, magazines, motion picture producers, radio and television broadcasters, and others.

Respondent sells books published by it to independent retail book stores throughout the country. It also furnishes books to twenty-five wholly-owned retail book shops located in various states.

With respect to the literary works covered by its agreements with authors, respondent enters into further agreements with so-called book clubs.² Under these agreements, or sub-licenses, the book clubs obtain exclusive rights to publish and sell "book club editions." In addition to these intangible rights, respondent undertakes to furnish printing plates for the work. No resale price requirements are imposed upon the book clubs and it is agreed that they shall be expressly excluded from the operation of any fair trade agreement entered into with others.

¹ Popular fiction and non-fiction books are known as trade books.

² See Commission Exhibits 8 (a) to (d).

Respondent is also engaged in the business of publishing and distributing the same books as "publisher's editions." These editions are sold by respondent to independent retail book sellers for the purpose of resale, oftentimes under fair trade agreements fixing minimum resale prices under applicable State laws. Respondent also furnishes the same publisher's editions to its own retail book shops.

As a part of a typical agreement or sublicense with respect to a book club edition, the book club and respondent agree that the publication date of the publisher's edition will not precede that of the book club.

The case as to Count I depends upon the contention that the following operative facts establish violations by respondent of Section 5 of the Federal Trade Commission Act:

(a) Its failure to extend the same publication rights to retail book stores as granted to book clubs;

(b) Its agreement with book clubs that it will not print, publish, or release to retail book sellers copyrighted publisher's editions prior to the date by which the book clubs are able to print, publish, or distribute book club editions; and

(c) Its fixing of resale prices under the fair trade laws as to publisher's editions sold to independent retail stores while leaving the book clubs free from any resale price requirements.

The Hearing Examiner held that (a) and (b) above did not violate Section 5 of the Act for the reason that such practices did not extend or increase the legal copyright monopoly; that "a copyrightee or his licensee may legally agree or do anything which accomplishes no more than to preserve or exploit the monopoly given him, but that he may not by restrictions or restraints add to that monopoly, extend it or increase its effective orbit of operation. *Mercoird Corporation v. Mid Continent Co.*, 320 U. S. 661." (Rulings, p. 2.)

As to (c) above, the Hearing Examiner held that this practice was illegal in that "such an undertaking does not merely preserve intact to the respondent its copyright, that is, its exclusive right to print and publish free from duplication, but instead restricts price-wise one avenue of distribution thereby holding a price umbrella over another and competitive avenue, and extends restraint of competition below and beyond the orbit of the licensee's own field" (Rulings, p. 2). Since there was no interlocutory appeal from the ruling described in (c) above, this practice is not now before the Commission for decision.

The facts in the partial record now before us seem to present a case of competitive disadvantage to retail book sellers. The Hearing Examiner thought it obvious "that a retail bookseller, paying respondent \$2.10 for a book he must resell at \$3.50" might have diffi-

culty in selling "to potential purchasers who may obtain the same book for anywhere from nothing, in case it is a premium or gift or bonus, up to \$2.00 or so, merely by subscribing to a book club * * *." ³

The question for decision is whether this competitive situation results from practices which are violative of law. Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to a book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent. "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair." *Federal Trade Commission v. Paramount Famous-Laskey Corp.*, (C. A. 2, 1932) 57 F. 2d 152, 157. "Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face." *Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 582.

Counsel supporting the complaint attempt to equate respondent's licensing practices with discriminatory pricing practices under the Robinson-Patman Act. They say:

"When it [respondent] does lease the plates to the book clubs [⁴], with the knowledge and intention that the book clubs utilize the plates to print book club editions to be sold in competition with the publisher's editions of the same title, and with both editions being of the same grade and quality, then in so leasing at such figures as make it impossible for the retail book sellers to compete with the book clubs, the respondent certainly is discriminating against its retail bookseller customers." (brief, p. 14)

This, they admit, is not a violation of the Robinson-Patman Act in that the granting of book club rights and the leasing of plates constitute a license to manufacture and sell, not a sale of commodities. They contend, however, that it is a form of discrimination which can be corrected under Section 5 of the Federal Trade Commission Act.

This argument conveniently ignores the very question the Commission is called upon to decide, namely, whether the factors contributing to the alleged discrimination are themselves illegal acts.

Thus, we come back to the question decided by the Hearing Examiner: Is the granting of an exclusive license of publication rights in copyrighted property a violation of law? We think not. We agree

³ Rulings, p. 1.

⁴ The heart of the matter is not the leasing of plates but rather the licensing of publication rights.

with the Hearing Examiner that exclusivity is the essence of a copyright (35 Stat. 1075, 17 U. S. C. sec. 1), and that a licensee (such as respondent) has the right arbitrarily to sublicense one and refuse to sublicense another. A holder of a patent or copyright may clearly license one party to the exclusion of other parties. *Extractal Process, Ltd. v. Hiram Walker & Sons, Ltd.*, (C. A. 7, 1946) 153 F. 2d 264, 268.

Economic effect in such a situation is immaterial. As the Hearing Examiner said, "Copyrights and patents, being monopolies, of necessity produce economic disadvantage to non-sharers. The very nature of the grant prevents competition and restrains commerce and the exclusive enjoyment thereof is an inherent and fundamental part of the grant itself." (Rulings, p. 2)

The book club, instead of using independent distributors or retail book stores, sells its books primarily by mail direct to readers. The presence of two publishers in the field, each using different distributional methods, results in a duality in consumer price. While the impact of this dual price is felt by the retail bookseller, its mere existence is not violative of law.

While the foregoing disposes of the first issue raised under Count I, we are not unmindful of the issue of public interest. Disadvantage to retail booksellers may be perpetuated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs, and a large section of the reading public. On balance, the overriding public interest (as well as the law) seems to lie with the views held by the Hearing Examiner.

The second issue under Count I concerns respondent's agreement with book clubs with reference to publication dates. The Hearing Examiner found that respondent "contracts that it will not print, publish or release to its distributive outlets, the copyrighted trade edition, prior to the date which the book club can print, publish or distribute to its members" (Rulings, p. 1). He held, however, that this was a valid use by respondent of its copyright monopoly; that the postponement of distribution of the copyrighted book to its own customers was "no imposition on the activities of another but is solely a voluntary restriction upon itself" (Rulings, p. 2). This conclusion, we think, is unrealistic; it disregards the purpose and effect of the agreement.

Obviously the prohibition against prior publication and sale is for the benefit of the book club. It "effectively insulates" the latter from prepublication competition. It prevents competitors, including retail booksellers, from offering their higher priced edition to the public prior to the date when the lower priced book club edition hits the

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market. The retail booksellers are thus deprived, by agreement between respondent and the book club, of any opportunity of reaching the market first. The prohibition has the purpose and effect of restraining not only the respondent but also third parties (respondent's customers) who are competitors of the book club.

Without deciding whether or not this violates the Federal Trade Commission Act, it seems to fall within the class of contractual provisions not protected by the Copyright Act (35 Stat. 1075, 17 U. S. C. 1).⁵ The distribution of books in the open market is restrained in order to protect the book club from advance competition, or, to put it another way, from a competitive advantage the retail booksellers might otherwise enjoy.

We want to make it clear that the facts in the instant case are in no wise analogized to those in the *Interstate Circuit* case. We rely on that case merely to indicate the type of agreement which we think is beyond the protection of the Copyright Act. We expressly reserve judgement on the question as to whether or not the agreement involved here constitutes an unreasonable restraint of trade or an unfair method of competition.

Clearly the prior publication prohibition is not illegal *per se*. Cf. *U. S. v. Paramount Pictures*, 334 U. S. 131, 145, affirming 66 F. Supp. 323, 341. In determining whether the prohibition is unreasonable, the following factors (among others) are relevant:

- (1) The simultaneous publication by trade publishers and licensed book club;
- (2) The character and location of book club readers as compared with those who buy from retail book stores;
- (3) The character of the competition involved—potential versus actual competition;
- (4) The fact that the largest sale of a popular book takes place shortly after its publication and gradually dwindles thereafter;
- (5) The policy of operation of book clubs, such as the purchase of books by subscribers which they might not voluntarily purchase at a retail book store, etc.

The evidence should be reviewed by the Hearing Examiner in the light of these and other appropriate standards in order to determine whether the simultaneous publication clause is reasonable or unreasonable.

⁵ See *Interstate Circuit v. United States*, 306 U. S. 208, 227. We think the Hearing Examiner misread portions of the *Interstate Circuit* opinion. He said it was not in point because "There the contract involved the use of uncopyrighted films and there was an agreement among all distributors that each severally would enter into the same individual restrictive contract with its exhibitors." The part of the opinion on which we rely (306 U. S.), beginning at page 227, deals specifically with the protection afforded by the Copyright Act to the separate agreements between the distributor and the exhibitor.

With respect to Count I, we affirm the ruling of the Hearing Examiner to the effect that the grants to book clubs of exclusive book club publication rights are not in restraint of trade and do not constitute unfair methods of competition or unfair acts or practices within the meaning of Section 5 of the Federal Trade Commission Act. The remaining issue under Count I is remanded to the Hearing Examiner for further consideration in conformity with this opinion.

Commissioner MASON took no part in the consideration or decision of this Count.

Separate opinion of Chairman HOWREY, with whom Commissioner MEAD concurs, with reference to Count III.

At issue under Count III is the relationship of the McGuire Act (66 Stat. 631, 15 U. S. C. 45) to respondent's activity of selling publisher's editions direct to the public, through its wholly-owned or controlled retail book shops, while selling the same editions to independent retail book stores under fair trade contracts. It is not disputed that respondent owns or controls some 25 retail shops located in various parts of the country.

The principal purpose of the McGuire Act is to exempt vertical resale price maintenance contracts from the operation of federal anti-trust statutes—as did its predecessor the Miller-Tydings Amendment—where such contracts are lawful under State laws in their application to intrastate transactions (House Report No. 1437, 82nd Cong., 2nd Session). It was the purpose of both Acts to withhold from horizontal arrangements any immunizing effect.⁶

The McGuire Act, which is the same as the Miller-Tydings Amendment in many respects, went beyond the statutory provisions of the latter to the extent felt necessary by the Congress to remove any doubt as to the binding effect of fair trade contracts upon nonsigners who “willfully and knowingly” advertise, offer for sale, or sell the commodity at a lower price (see Section 3 of the McGuire Act). The Supreme Court had held in the *Schwegmann* case (341 U. S. 384) that the Miller-Tydings Amendment did not authorize the enforcement of resale price contracts against dealers who were not signatories to such contracts, where the commerce involved was interstate. Thus, for purposes of the present case, there are no significant differences in the application of the two statutes.

The question raised by this count is whether respondent, being partially engaged in the business of selling books at retail, is author-

⁶ Senate Report No. 879, 75th Cong., 1st Sess., as to the Miller-Tydings Amendment, and House Report 1437, 82nd Cong., 2nd Sess., on the McGuire Act. Also see *General Electric v. Klein On Square, Inc.*, 1953 CCH Trade Cases, para. 67,443 (N. Y. Sup. Ct. 1953) decided February 20, 1953; *Sunbeam v. Payless Drug Stores*, 1953 CCH Trade cases, para. 67,492.

ized by the McGuire Act to specify minimum resale prices in fair trade contracts entered into with independent retailers.

In view of the fact that respondent sells books through the 25 stores which it owns or controls, it is contended that its resale price maintenance contracts with independent retail stores are "between retailers," and therefore respondent's contracts are beyond the protective limits of the McGuire Act.⁷

Section 5 (a) (5) of the Act reads as follows:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to * * * between manufacturers or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The Hearing Examiner held that Section 5 (a) (5) does not apply to contracts between retailers who are not shown to be in competition with each other or where the retailing operation is incidental to a different major endeavor.

While these two factors are pertinent to the issue under consideration, the ultimate question for decision was not reached by the Hearing Examiner.

The purpose of the McGuire Act, as we have said, was to exempt from the operation of the Federal Trade Commission Act and the antitrust acts vertical agreements prescribing minimum or stipulated resale prices. Horizontal agreements of the same type were expressly *not* exempted. The ultimate question for consideration, therefore, is whether the agreements under scrutiny are "vertical" or "horizontal." When negotiating the fair trade agreements with retailers was respondent acting in its capacity as a manufacturer-publisher or in its capacity as a retailer? ⁸

⁷ Respondent also owns, through a subsidiary corporation, one of the largest book clubs, the Literary Guild, which in 1947 had about 900,000 members. However, neither brief nor argument raised the question as to whether the Literary Guild was a retailing operation within the meaning of the McGuire Act.

⁸ Senator Humphrey, the leading proponent for the enactment of the McGuire Act in the Senate, explained that the test of:

"whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.

"It is important to keep this distinction in mind, because many producers of trademarked items sell them to consumers, retailers, and wholesalers alike.

"Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make

In other words, it is necessary to study the particular agreement, examine its form, economic purpose, intent and effect and then decide whether it is a vertical or horizontal resale price-maintenance agreement. Form alone, of course, is not conclusive—the vertical form must not be used as a subterfuge or as a cloak to cover an arrangement having all the effects of a horizontal agreement in restraint of trade.

The fact that respondent functions in a dual capacity—as a publisher and as a retailer—is not determinative of the issue.⁹ The practice of manufacturers of selling their products direct to consumers through their own outlets, while at the same time selling to independent wholesalers and retailers is a widespread marketing practice.¹⁰

Neither the Miller-Tydings amendment nor the McGuire Act, nor their legislative histories, show that Congress intended to discriminate between integrated and nonintegrated manufacturing enterprises in securing the benefits of resale price maintenance for themselves or their customers. In fact, some of the testimony at the Hearings on the McGuire Bill indicates that one of the purposes of

contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trademarked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.”

While floor remarks of the proponent need not necessarily be considered presuasive of legislative intention, the foregoing statement is of interest in view of the fact that Committee reports are silent on the point.

⁹This basic question, while undecided directly by any court, has been anticipated in legal periodicals. One writer has said: “It would seem consistent with the spirit of the legislation that its benefits should be denied only where there is a substantial degree of horizontality between the contracting parties.” 32 Harv. L. Rev. 287.

It has also been stated: “All of the legislation is expressly made inapplicable to horizontal price-fixing contracts, but this provision has not been deemed to prohibit contracts between a retailer and a manufacturer with a retail outlet, or between a manufacturer and a manufacturing retailer.” Williams, *Resale Price Maintenance and Minimum Price Legislation* (1950 Institute on Antitrust Laws and Price Regulations, page 141). See also Callman, *Unfair Competition and Trade Marks*, Vol. 1, page 377. Cf. Statement of Thurmond Arnold appearing in *Final Report and Recommendations of the TNEC* (1941), page 238.

¹⁰For a discussion of the economic purposes that are frequently served by such methods, see Phillips, *Marketing by Manufacturers* (1946), Chicago, Illinois, particularly page 144, where it is explained:

“The third type of selling directly to consumers is that in which the manufacturer owns and operates retail stores. Such retail stores may be operated in limited number, as, for example, those owned by the Dennison Manufacturing Company; in larger number but limited to the larger cities, as by the Eastman Kodak Company; or as large chains extending over a broad area, as exemplified by such organizations as the Melville Shoe Corporation, Thom McAn stores) and the United-Rexall Drug Company (Liggett, Owl, and Sontag stores). Retail stores have been opened by manufacturers for a variety of reasons, including, among others, the following: (1) to secure distribution for the manufacturers' product under conditions that the manufacturer desires, as, for example, the control of prices; (2) to enable the manufacturer to ‘keep his fingers’ on the pulse of the market, so to speak; (3) to act as laboratories in which to test market reactions to certain products, policies, procedures, and so on; and (4) to act as ‘service stations’ for the manufacturers' products.”

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the proponents of the Act was to place nonintegrated businesses on the same footing as integrated enterprises. This is shown by the colloquy between Congressmen Patman and Hale—Mr. Patman on the stand:

“Mr. Hale. Mr. Patman, I infer from what you have said that you thought the vertical pricing was all right and horizontal price fixing objectionable. Will you explain the philosophical difference between the two?

Mr. Patman. Well I am talking about this particular case only. * * * But in this particular case, vertical price fixing is all right and is all this bill permits. In other words, the national chains now engage in vertical price fixing and they are engaging in it. No one objects to it. It is perfectly legal under our existing laws because they own the manufacturing plant and they own the wholesale houses, the retail outlets, and fix the prices from the manufacturer of the product, or the producer, right on down to where it is sold over the counter.

The theory behind this bill is to give the small independent merchant the same privilege and opportunity as the big man, from the manufacturer to the middleman, and right on down to the retail outlet . . .” (Hearings, p. 13).

There have been several occasions on which the courts have passed upon resale price maintenance contracts between integrated concerns and retailers. In none that we have seen has it been held that a manufacturer or producer having retail functions has gone beyond the protective limits of either the Miller-Tydings Amendment or the McGuire Act merely by concluding resale price contracts with independent retailers. See, for example, *General Electric Co. v. R. H. Macy & Co.*, 103 N. Y. S. (2d) 440 (1951); *General Electric Co. v. S. Klein On Square, Inc.*, 1953 CCH Trade Cases, para. 67,443 (N. Y. Sup. Ct. 1953) decided February 20, 1953.

The theory of counsel supporting the complaint involves, it seems to us, a direct administrative nullification of Congressional intent. Under their interpretation any retail selling—regardless of degree, i. e., the volume of retail sales as compared with non-retail activities—would disqualify a manufacturer and his customers from the benefits of fair trade protection. Presumably the same theory would apply to manufacturers selling at wholesale.

It is common knowledge that many manufacturers engage to a lesser or greater degree in some wholesaling or retailing activity.¹¹ Con-

¹¹ In 1939, according to the Census of Business, manufacturers made 2.8 percent of their sales through their own retail stores, 1.8 percent of their sales direct to consumers, and 43.7 percent of their sales direct to retailers or through their own wholesale branches.

sequently the effect would be to nullify the newly passed McGuire Act insofar as large segments of our economy are concerned. Such a disregard of Congressional intent is neither logical nor necessary. It does violence to the fundamental principle that legislation should be construed in the light of its basic purpose.

In this connection we cannot close our eyes to the long and controversial history, both legislative and litigious, of resale price maintenance. Certainly Congress, in enacting the McGuire Bill by an overwhelming vote, left us in no doubt concerning the basic purpose and intent of the legislation. It approved resale price maintenance and it is not the Commission's business to nullify that approval.¹²

One further contention of counsel supporting the complaint requires brief comment. They urge that a horizontal agreement between retailers to fix resale prices comes under Section 5 (a) (5) of the Act "irrespective of whether or not said retailers are in competition with each other" (brief, p. 16). This may be true—although we do not now decide the question—but it does not necessarily follow that such an agreement constitutes a *per se* violation of Section 5 of the Federal Trade Commission Act.

Section 5 (a) (5) does not contain any affirmative prohibition or create any new categories of illegality. Horizontal price fixing agreements are merely left to be tested under the general principles of anti-trust law. Ordinarily such agreements are between (or relate to) competitors and for that reason the courts have in some cases considered them illegal *per se*. We seriously doubt, however, that the *per se* doctrine can be stretched to cover a situation where the parties affected by the agreement are not in competition with each other. How can injury to competition be presumed where no competition exists?

Commissioner Mead and I believe that the issues raised by this appeal under Count III should be remanded to the Hearing Examiner

Except in the case of sales direct to consumers, these percentages had increased since 1929. Subsequent information is available only for wholesale levels, but it indicates that direct wholesaling by manufacturers has increased further since 1939.

Wholesale and retail distribution by manufacturers varies widely in importance from industry to industry. In many industries there appears to be a considerable amount of direct distribution alongside sales to independent wholesalers and retailers. In 1939, wholesale branches owned and operated by manufacturers of distilled liquors made 13.1 percent of the sales of such manufacturers. In the same year, such wholesale branches made 43 percent of the sales of rectified or blended liquors, and, in addition, direct sale by manufacturers to retailers amounted to 12½ percent of manufacturers' sales. In the case of perfumes and cosmetics, manufacturers made 32.4 percent of their sales directly to independent retailers and an additional 15.7 percent through manufacturer-owned wholesale outlets. Moreover, manufacturers made 7.2 percent of their sales to consumers at retail. In the case of drugs and medicines, manufacturers made 29.4 percent of their sales through their own wholesale branches and an additional 16.4 percent direct to retailers.

¹² The Congress also reiterated the policy of preventing illegal horizontal agreements, and we should be equally careful to observe this part of the Congressional intent.

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for further consideration and action in conformity with this opinion. Commissioners Spingarn and Carretta agree that Count III should be remanded but for different and separate reasons. Because of this conflict of opinion, Count III has been remanded to the Hearing Examiner with instructions to proceed in the regular course, with leave to respondent to renew its motion to dismiss at the close of the evidence.

Commissioner MASON took no part in the consideration or decision of this count.

SEPARATE OPINION OF COMMISSIONER SPINGARN

I concur with the action of the Commission as to the appeal from the hearing examiner's ruling relating to Count I of the complaint.

I also concur with its action reversing the hearing examiner's ruling dismissing Count III of the complaint—the count involving the construction of the new resale price maintenance law—and remanding the case to the hearing examiner for further consideration. However, with respect to Count III, I arrive at this result by a course of reasoning substantially different than that of two of my colleagues who share the same views (which are incorporated in the separate opinion of Commissioner Howrey). I believe that the adoption of their views would direct the hearing examiner down the wrong road; one which will inevitably result in his returning to the Commission with another ruling again dismissing Count III of the complaint.

I believe that my two colleagues erroneously make the form of the agreements and the economic purpose and intent of the respondent determinative factors to be considered by the hearing examiner in deciding whether the agreements between retail book stores and a publisher who operates book stores are legal resale price fixing agreements or whether they are illegal price fixing agreements between retailers. In my opinion, proper decision of this case requires a determination as to whether the effect of these agreements has been to restrict price competition between respondent's book stores and their competitors in the retail market. To the extent that these agreements have such a restrictive effect on competition, they are illegal and should be prohibited regardless of their form and regardless of the economic purpose or intent of the parties to the agreements.

The record shows that among the retail stores owned and operated by respondents, 16 are located in States in which respondent has entered into resale price maintenance agreements and in which all retailers are bound by such agreements whether they have signed an agreement or not. Respondent admits that wherever its fair trade

contracts were executed, nonsigners were duly notified as required by State law, resulting in valid and binding fair trade protection on a substantial number of its book titles. Respondent admits that it sells to other retail stores in each of the cities in which its above-referred to retail outlets are located. Testimony as to three of these retail outlets located in New York City, Philadelphia, and Boston, respectively, shows they are in close competition with retail stores buying from respondent. All of the book stores in New York, Pennsylvania, and Massachusetts are bound by respondent's fair trade contracts. Thus, the record clearly shows that respondent's fair trade contracts have fixed prices of competitors of its retail outlets.

It is settled law that any agreement fixing prices between competitors is an unreasonable restraint on trade. (*United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927), *Ethyl Gasoline Corporation, et al. v. United States*, 309 U. S. 436 (1940), *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944), *United States v. Frankfort Distilleries*, 324 U. S. 293 (1945).)

It is well established that agreements in unreasonable restraint of trade are unfair methods of competition within the meaning of that term as used in Section 5 of the Federal Trade Commission Act. (*Federal Trade Commission v. Cement Institute, et al.*, 333 U. S. 683 (1948).)

Therefore, to the extent that respondent's agreements fix prices between its retail outlets and competing retailers, they are in violation of Section 5 of the Federal Trade Commission Act unless they fall within the exemption provided by the McGuire Act. This act, which legalizes certain resale price maintenance agreements, specifically states that it does not legalize agreements between retailers establishing their resale prices. I agree with my two colleagues that it would void the obvious desire of Congress in passing this act to interpret it as not legalizing any resale price fixing agreement if the producer of the goods also sold at wholesale or retail even through one outlet. However, I feel that it would likewise be contrary to the clear meaning of the exemption to the McGuire Act to interpret it as legalizing agreements which fix prices between respondent's retail outlets and competing retailers. Also I believe it is immaterial whether the agreement is signed both by respondent and the competing retailer (as respondent admits in its answer is the fact in certain cases) or if the competing retailer is bound to observe the fixed prices as a non-signer by respondent's agreement with a different retailer within the same State.

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Companies engaged in the dual functions of producing and selling at retail who wish to avail themselves of the protection of the McGuire Act must avoid agreements which bind their retail competitors from engaging in price competition with them. Respondent in this matter has entered into agreements fixing the prices at which its retail competitors can sell certain books in competition with its retail stores. In my opinion, such agreements are outside the exemptions of the McGuire Act and are in violation of Section 5 of the Federal Trade Commission Act.

Therefore, I believe that the present record contains a prima facie case upon which, if no further evidence were presented, the Commission could issue an order prohibiting respondent from entering into agreements with retailers of books which agreements would fix the resale prices of books sold by retail stores in competition with respondent's retail stores. In my opinion, the hearing examiner should be so instructed and the case returned to him for appropriate action in accordance with these instructions.

SEPARATE OPINION OF COMMISSIONER ALBERT A. CARRETTA

This matter is before the Commission upon an interlocutory appeal by counsel supporting the complaint from the Hearing Examiner's ruling granting in part respondent's motion to dismiss Count I and from his Initial Decision granting respondent's motion to dismiss Count III of the complaint herein.

As to the Hearing Examiner's ruling relative to respondent's motion to dismiss Count I of the complaint, I am in agreement with the reasoning and with the conclusion expressed in the opinion of the Commission as prepared by Chairman Howrey.

As to the Hearing Examiner's Initial Decision granting respondent's motion to dismiss Count III of the complaint herein, I agree with the other Commissioners that the Hearing Examiner should be reversed and that the case should be remanded to said Hearing Examiner with instructions to proceed in the usual course, reserving to the respondent the privilege of renewing its motion to dismiss after the introduction of evidence by all parties to this proceeding. However, my reasons for arriving at this conclusion are not exactly the same as those set forth by Chairman Howrey in his Separate Opinion and by Commissioner Spingarn in his Separate Opinion.

Because of the importance of this case, in addition to reading all of the pleadings in this proceeding as well as the excellent briefs filed by all counsel in this case, I have seen fit to review the legislative history of both the Miller-Tydings Act and of the McGuire Act.

Section 5 (b) of the Federal Trade Commission Act provides, among other things, that "Whenever the Commission *shall have reason to believe* that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, * * * it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect * * *". When the Commissioners of the Federal Trade Commission on June 29, 1951, decided to issue the complaint herein (which complaint contained four separate and distinct counts), they undoubtedly, in their individual minds, "*had reason to believe*" that the respondent herein had been using unfair methods of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act. [By the passage of the McGuire Act amendment to the Federal Trade Commission Act on July 14, 1952, Section 5 (a) was redesignated as Section 5 (a) (1).]

The record indicates that counsel in support of the complaint has submitted his evidence in support of the allegations contained in the complaint. Counsel for respondent, under date of December 1, 1952, filed a motion with the Commission requesting that each of the four counts contained in the complaint herein be dismissed upon the ground that the Commission had failed to establish a "prima facie" case of violation. The Hearing Examiner, among other things, saw fit to grant respondent's motion with respect to Count III of the complaint, and counsel in support of the complaint then appealed said decision to the full Commission.

I am of the opinion that the Hearing Examiner was in error in granting respondent's motion to dismiss Count III of the complaint and in finding that there was no showing of competition between respondent's retail stores and customers of the respondent. While I do not now pass upon the merits of this case, I am of the opinion that counsel in support of the complaint has established a prima facie case in violation of Section 5 (a) (1) of the Federal Trade Commission Act. In other words, based upon the present record before the Commission, *I have reason to believe* that respondent's practices, insofar as Count III of the complaint is concerned, are in violation of Section 5 (a) (1) of the Federal Trade Commission Act. It is now up to the respondent to introduce evidence to rebut this prima facie case.

This case, for the first time, makes it necessary for the Commission to interpret the words of Section 5 (a) (2) and of Section 5 (a) (5) of the Federal Trade Commission Act, which sections were added to said Act by the passage of the McGuire Act. There is no doubt in my mind that by the enactment of the McGuire Act amendment to the Federal Trade Commission Act, the Congress of the United States

did not label as illegal any method of competition, or any act or practice, which had not theretofore been labeled as illegal under either the Federal Trade Commission Act or any of the antitrust acts.

What Section 5 (a) (2) of the McGuire Act amendment to the Federal Trade Commission Act did was to provide that whenever certain pricing agreements defined therein were lawful under a State statute in its application to intrastate commerce, those specified pricing agreements were not to be deemed illegal in violation of either the Federal Trade Commission Act or any of the antitrust acts. In effect, this section of the McGuire Act amendment to the Federal Trade Commission Act provides an exemption of certain pricing agreements from the operation of the Federal Trade Commission Act and from other Federal antitrust acts.

After providing this exemption, the Congress of the United States further included in Section 5 (a) (5) of the McGuire Act amendment of the Federal Trade Commission Act a provision which, in effect, is an exception to the exemption provided in Section 5 (a) (2) of the same amendment. Paragraph 5 (a) (5) reads, specifically, as follows:

"Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other."

The foregoing quoted subsection of the McGuire Act amendment is the one which has caused most concern to the Commission and which must be carefully analyzed in conjunction with the legislative history affecting this subsection. In my opinion, in order to better understand the intent of Congress in enacting this particular subsection, we should divide it into two parts. The first part would read as follows:

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers. (The last phrase of Section 5 (a) (5) has been omitted.)

The second part would read as follows:

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commod-

ity referred to in paragraph (2) of this subsection, * * * between persons, firms, or corporations in competition with each other. (There has been omitted herefrom that section of 5 (a) (5) which refers to the various classifications of businessmen.)

What Section 5 (a) (5) does is to state that insofar as the pricing agreements referred to therein are concerned, no one can point to Section 5 (a) (2) of the McGuire Act amendment and say that by reason of its enactment, the pricing agreements set forth in Section 5 (a) (5) are legal. Section 5 (a) (5) in and of itself does not specifically say that the pricing agreements specified therein are "illegal." In my opinion, all that it says is that insofar as the pricing agreements enumerated in Section 5 (a) (5) are concerned, this Commission must continue to look to the provisions of Section 5 (a) (1) of the Federal Trade Commission Act to determine whether such enumerated practices are illegal. *As to these particular enumerated pricing agreements, it is just as though the McGuire Act amendment was never enacted.*

In view of the foregoing, if any minimum resale price fixing agreement is entered into between one manufacturer and another manufacturer, or between one retailer and another retailer, in connection with a trade marked product, such an agreement does not come within the exemption provided in Section 5 (a) (2) of the McGuire Act amendment. However, this failure to come within such exemption does not, in and of itself, cause such an agreement to be an illegal agreement. We must then look to the provisions of Section 5 (a) (1) of the Federal Trade Commission Act to determine whether the contracting parties are in competition with each other. If they are, the Commission may find such an agreement to be in violation of the Federal Trade Commission Act. If they are not in competition, as, for example, when one retailer doing interstate business is located in San Francisco and another retailer doing interstate business is located in New York City, then the pricing agreement very probably would not be held to be in violation of Section 5 (a) (1) of the Federal Trade Commission Act.

In support of this opinion, I rely somewhat upon the definition of Senator Humphrey, wherein he stated that "the test of whether a resale price maintenance contract is horizontal is if it is between *competing* sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved." (Italics added.)

Now, with regard to a minimum resale price-fixing agreement affecting a trade marked commodity which is entered into between "persons, firms, or corporations in competition with each other," the test appears to be that there must be competition between the con-

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tracting parties. It appears to be of no importance whether the contracting parties are both of the same class or of different classes. For example, if a manufacturer enters into a minimum resale price-fixing agreement with a retailer, and that manufacturer is also in competition with that retailer, such agreement is not made lawful by anything contained in Section 5 (a) (2) of the McGuire Act amendment. Here, then, we must look to Section 5 (a) (1) of the Federal Trade Commission Act to determine whether such an agreement is illegal. There is nothing in the McGuire Act amendment which makes it either legal or illegal.

We next come to the situation in which one of the contracting parties operates in a dual capacity, that is, either as a manufacturer-wholesaler, or as a manufacturer-retailer, or as a wholesaler-retailer. Regardless of whether such contracting party is more of a manufacturer than he is a wholesaler, or whether he is more of a manufacturer than a retailer, if that manufacturer-wholesaler or manufacturer-retailer is *actually* in competition with the other contracting party, then such manufacturer-wholesaler or manufacturer-retailer cannot claim the exemption provided in Section 5 (a) (2) of the McGuire Act amendment. This is due to the language of Section 5 (a) (5) of the McGuire Act amendment. This position I hold whether the manufacturer conducts his wholesaling activities or his retailing activities as an incidental adjunct of his manufacturing enterprise or whether such manufacturer conducts his wholesaling operations or his retailing operations through the medium of wholly owned subsidiary corporations or where the record is clear that even if such manufacturer does not wholly own the subsidiary corporation, such manufacturer dominates the control and operation of such subsidiary.

Of course the competition envisaged by Congress, in my opinion, cannot be merely *de minimis*. It will suffice if the competition offered by one contracting party to the other is something more than casual or incidental competition.

Syllabus

IN THE MATTER OF
DICTOGRAPH PRODUCTS, INC.

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3
OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 5655. Complaint, May 2, 1949—Decision, Sept. 24, 1953

Where one of the largest corporate manufacturers of hearing aids, engaged in the manufacture and competitive interstate sale and distribution of its "Acousticon" instruments and parts and accessories therefor; in selling its said products to about 220 independently owned and operated distributors located throughout the United States, who were part of a group of about 1,000 devoted solely to the sale of hearing aids and related products, and as such offered the best market therefor, and one which was used generally by manufacturers of such products as distributive mediums—

- (a) Consistently followed, since 1937, a policy of making sales and contracts for sales of its products on the condition, agreement, and understanding that the purchasers thereof should not use or deal in hearing aid instruments or parts or accessories therefor sold and distributed by competitors;
- (b) Required also that all its distributors refrain from selling any used hearing aids or any which had been traded in as part payment for a new hearing aid;
- (c) Provided in its said contracts for the appointment of sub-distributors by its distributors in the territory allotted to them, on contract forms supplied by it and subject to the same restrictive exclusive-dealing provisions contained in the contract between it and the distributors;
- (d) Provided in its said contracts that they might be cancelled at any time, with or without cause, and that in said event the distributor would cancel the franchises of all its dealers and would not for a year engage in any hearing aid business in the territory concerned;
- (e) Required its distributors to sign supplements to such agreements by which they agreed that, upon termination of the contracts, they would surrender their telephone directory listing and authorize that any mail upon which appeared the name "Acousticon" or any variation of the word "Acoustic," be forwarded to its home office, said latter agreement being in such form as to constitute a directive to the Postal Department to forward all mail so addressed direct to it;
- (f) Brought to the attention of each distributor at the time of the execution of the written contract that such distributor must handle only its products; and through its exclusive-dealing clause in conjunction with the right of cancellation and the prohibitions against continuing in business for a year after cancellation, intimidated and coerced distributors and compelled them to purchase products concerned solely from it; and
- (g) Instructed its field representatives to check the stock of products carried by its dealers and distributors to determine whether any competitive products were being carried, and threatened those whom it discovered to be carrying such products with immediate discontinuance of the distributor's franchise pursuant to the cancellation provisions contained therein, and in the event of any such distributor's persistence in carrying such products, immediately discontinued him;