

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

MODIFIED ORDER, OPINION, AND DISSENT IN REGARD TO THE ALLEGED
VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5572. Order and opinion, Mar. 9, 1954

Order modifying the Commission's prior order, dated May 8, 1952, 48 F. T. C. 1297, with respect to the use of the term "Free", in the light of the Commission's present policy as announced in its opinion in the matter of *Walter J. Black, Inc., etc.*, Docket 5571, Sept. 11, 1953, *infra*, page 225, and following the remand of the proceeding to the Commission by the Court of Appeals for the Second Circuit for its consideration in the aforesaid connection, and the respondents' motion to vacate or modify said order and to dismiss the complaint (granted in part and denied in part)—

So as to require respondent corporation, its officers, etc., in connection with the offer for sale, sale, and distribution of books in commerce, to cease and desist from "using the word 'Free' or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any book or other article of merchandise" when all the conditions, etc., pertaining to the matter are not clearly and conspicuously explained at the outset, etc., or when the offerer increases the ordinary price or reduces the quality, quantity, or size of the article, as in said order below in detail set out; and

Dismissing the complaint as to respondent individuals as such, but not as officers of respondent corporation.

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

Mr. Jesse D. Kash for the Commission.

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

MODIFIED 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 hearing examiner of the Commission theretofore duly designated by it, recommended decision of the hearing examiner and exceptions thereto, and briefs and oral argument of counsel, and the Commission, having made its findings as to the facts and its conclusion that the respondent Book-of-the-Month Club, Inc., had violated the provisions of the Federal Trade Commission Act, on May 8, 1952, issued its order to cease and desist, which order was subsequently affirmed by the United States Court of Appeals for the Second Circuit; and

Said Court of Appeals, acting on a petition filed by the respondents, having remanded this proceeding to the Commission for the purpose

of considering appropriate action in connection with the order to cease and desist in the light of the present policy of the Commission regarding the use of the word "free," in advertising, as announced in the Commission's opinion in the proceeding entitled "In the Matter of Walter J. Black, Inc., a corporation, trading as The Classics Club and Detective Book Club"; and

The respondents having thereafter filed with the Commission a motion to vacate or modify said order to cease and desist and to dismiss the complaint, and the Commission having entered its order granting said motion in part and denying it in part and being of the opinion that its order to cease and desist issued on May 8, 1952, should be modified in certain respects:

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, 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 or in other offers to the public, to designate or describe any book, or other article of merchandise:

(1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) when, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

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 the 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 Mead dissenting.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon a motion, filed by the respondents, for reconsideration of the order to cease and desist

entered herein on May 8, 1952, and in which they request that said order to cease and desist be vacated and set aside and the complaint dismissed, or, in the alternative, that the order to cease and desist be modified. Counsel in support of the complaint filed an answer in which he objects to so much of the motion as requests that the order be vacated and the complaint dismissed, but in which he joins with the respondents in so much of the motion as requests the order's modification. The Commission's jurisdiction to entertain the motion is clear, the entire proceeding having been remanded to the Commission on December 11, 1953, by the United States Court of Appeals for the Second Circuit, for the purpose of considering and taking appropriate action on just such a motion.

The respondents do not in the present stage of the proceeding contend that the order to cease and desist issued by the Commission on May 8, 1952, was then improvident. They do contend, however, (1) that after the date of issuance of said order to cease and desist, the Commission's position on the use in advertising of the word "free" was changed, as announced in the Commission's opinion in the proceeding entitled "In the Matter of Walter J. Black, Inc., a corporation, trading as The Classics Club and Detective Book Club," Docket No. 5571, with the result that the outstanding order against these respondents prohibits practices which would not now be regarded as unfair or deceptive, and (2) that unless the order is vacated or, at least, modified the respondents will be placed at an unfair competitive disadvantage with their competitors upon whom such an order would not now be imposed.

The Commission does not disagree with either of these contentions. The outstanding order to cease and desist broadly prohibits the respondents from using the word "free," or any other word of similar meaning, in advertising, to designate or describe any book, or other merchandise, which is not in fact a gift or gratuity or is not given to the recipient without requiring the purchase of other merchandise or requiring the performance of some service inuring, directly or indirectly, to the respondents' benefit. In so doing, the order was in strict conformity with the Commission's policy in effect at the time the order was issued and was identical in all respects with orders which had theretofore been issued against many other advertisers concerning the use of the word "free." That it was proper in all respects is clearly shown by the opinion of the Court of Appeals for the Second Circuit, dated February 10, 1953, in that court's decision of the case arising out of the respondents' petition for review of the order (202 F. 2d 486). As pointed out by the respondents, however, the Commission's position on this subject has now been changed. Henceforth, the use of the

word "free," or other words of similar import or meaning, in advertising or in other offers to the public, to designate or describe an article of merchandise, will be considered to be unfair and deceptive only (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or (2) when, with respect to an article of merchandise required to be purchased in order to obtain the "free" article, the offerer either increases the ordinary and usual price, reduces the quality, or reduces the quantity or size of such article of merchandise. (In the Matter of Walter J. Black, Inc., etc., Docket No. 5571—September 11, 1953). It is thus clear that the order against the respondents, consistent in all respects with the Commission's previous policy, does prohibit the use, in advertising, of the word "free," and other words of similar meaning, under circumstances which would not now be considered unfair or deceptive. To the extent that it does so, it obviously imposes upon the respondents requirements which would not be imposed upon their competitors.

This, however, does not mean that the order should be vacated and set aside and the complaint dismissed, for, as the original findings as to the facts in this proceeding show, the respondents have used the word "free" in their advertising in a manner which would be considered unfair and deceptive even under the new policy, in that they did not clearly and conspicuously disclose in said advertising all of the conditions, obligations, or other prerequisites to the receipt and retention of the book referred to therein as "free." Specifically, the respondents did not disclose the fact, and that it was a fact is undisputed by the respondents, that if a member of the Book-of-the-Month Club failed or refused to purchase at least four books within a year after joining the club, payment for or the return of the book theretofore designated as "free" would be required. Whether or not all of the other conditions, obligations, or prerequisites to the receipt and retention of the book described as "free" were clearly and adequately disclosed need not now be decided.

In view of the foregoing, it would not be in the public interest for this proceeding to be disposed of by dismissal of the complaint. On the other hand, the Commission has no desire to impose upon the respondents a restriction which is unnecessarily harsh or which places them at an unfair competitive disadvantage in the sale of their books. In the exercise of its administrative discretion, therefore, and in an effort to leave the respondents in the same competitive position as others who may wish to use the word "free" in advertising their prod-

Opinion

50 F. T. C.

ucts, the Commission has determined that the order to cease and desist in this case should be modified by so qualifying it that the prohibition against the respondents will be, in effect, the same as would be the prohibition against their competitors under similar circumstances. Applying the familiar principle that the Commission's orders should proscribe the entire illegal practice as well as the specific acts by which such illegal practice has been manifested (*Hershey Chocolate Corporation v. Federal Trade Commission*, June 30, 1941, 121 F. 2d 968 (971-972) and similar cases), such a prohibition would cover the use of the word "free" (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood, or (2) when, with respect to an article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (a) increases the ordinary and usual price; or (b) reduces the quality; or (c) reduces the quantity or size of such article of merchandise.

Commissioner Mead would deny respondents' motion to vacate or modify the order to cease and desist entered herein on May 8, 1952, for the reasons stated in Commissioner Mead's dissenting opinion in the matter of Walter J. Black, Inc., et al., Docket No. 5571.

Decision

IN THE MATTER OF
PICKOW DISTRIBUTING CORPORATION ET AL.DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 5890. Complaint, June 27, 1951—Decision, Mar. 10, 1954

Where a corporation and its three officers engaged in the sale of sewing machine heads imported from Japan—upon which there appeared, on the back of the vertical arm, the words “Made in Occupied Japan” or “Japan”, or upon the front, the word “Japan”—and of completed sewing machines of which said heads were a part, to independent dealers and retailers and, as thus engaged, in attaching to the back of said heads, at the only place provided therefor, motors marked as “Universal Motor” and “Made in U. S. A.”—name of the well-known domestic product—and thus effectively concealing such markings—

- (a) Offered and sold the aforesaid imported sewing machines, upon some of which the word “Japan”, as included with others on the front of the vertical arm, was distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow and with no adequate marking to show their place of manufacture or foreign origin;
 - (b) Falsely represented that their said machines were manufactured by or connected in some way with well-known firms through displaying in many instances on the horizontal arms of said machines the trade names “Hoover” or “Eureka”, and through the use of said names in literature distributed by them with the machines they sold, as well as in price lists and similar material distributed by them; and thereby also enhanced the erroneous belief on the part of the purchasing public that said machines were of domestic origin;
- With result of providing dealers with the means for misleading the purchasing public as to the place of origin and manufacture of said machines:

Held, That such acts and practices constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart for the Commission.

Mr. N. Randall Bassett, of New Haven, Conn., for respondents.

Mr. E. K. Gubin, of Washington, D. C., for Hoover Co., intervenor.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 27, 1951, issued and subsequently served its complaint in this proceeding upon the respondents, Pickow Distributing Corporation, a corporation, and Louis Pickow, Harold Gessner, and Abraham Lippman, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce