

IN THE MATTER OF
STANDARD SEWING EQUIPMENT CORPORATION AND
WILLIAM J. HACKETT AND HARRY KRON

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT

Docket 5888. Complaint, July 13, 1953¹—Decision, May 2, 1955

Order requiring an importer in New York City of sewing machine heads on which appeared the words "Made in Occupied Japan" or "Japan," and of completed sewing machines in the assembling of which those words on the heads were concealed by attachment of the motor, to cease offering their products for sale without clear and conspicuous disclosure of the country of origin of the heads, and to cease using the brand or trade name "Universal" without using in connection therewith in legible and clearly visible marking their corporate name.

Before *Mr. Frank Hier*, hearing examiner.

Mr. William L. Taggart and *Mr. Ames W. Williams* for the Commission.

Schnader, Harrison, Segal & Lewis, of Philadelphia, Pa., and *Holtz & Rose*, of Boston, Mass., for respondents.

Carretta & Counihan, of Washington, D. C., also represented Standard Sewing Equipment Corp. and William J. Hackett.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

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 respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, 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 in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner, theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by said hear-

¹ As amended.

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ing examiner on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel; and said hearing examiner having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Standard Sewing Equipment Corporation 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 114 W. 27th Street, New York, New York. Respondents William J. Hackett and Harry Kron, are President and Secretary-Treasurer, respectively, of corporate respondent and acting as such officers formulate, direct and control the policies, acts and practices of said corporation, their addresses being the same as that of the corporate respondent. There is no other officer, employer, agent or representative of corporate respondent, who has any control, authority or responsibilities over its acts and practices.

PAR. 2. Respondents are now and have been for several years last past, engaged in the sale of sewing machine heads imported from Japan by them, and of completed sewing machines of which such heads are a part, to retailers who, in turn, resell to the purchasing public. In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in the various other States, and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Respondents first began the importation of these sewing machine heads manufactured in Japan in the early months of 1949. Such machines had a gold decalcomania embossed or imprinted on the black enamel of the sewing machine head, reading "Japan" or "Made in Occupied Japan" just above the bed plate of the head on the rear of the vertical arm. These sewing machine heads are designed for electrical operation and when a motor is attached thereto at the only place provided for it, on the rear of the vertical arm, the aforesaid decalcomania marking, showing the origin of the machine head, is effectively concealed from even careful inspection, short of removing the motor, or of turning the machine into an awkward and unusual position, from the ordinary user's standpoint, which action would

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eventuate only from a desire to see that particular spot but entirely unlikely to ensue from ordinary or normal use of the machine. There is substantial evidence in the record, that purchaser-users never saw this concealed marking, or suspected the foreign origin of their purchases, at least until it was called to their attention by someone familiar with these machines and the marking. The finding is that such marking is for practical purposes, and to the ordinary user or purchaser, completely and effectively concealed.

PAR. 4. Sometime prior to June 1, 1949, the Bureau of Customs of the U. S. Treasury wrote corporate respondent that it was necessary in order for these above-described machine heads to pass through customs legally, that it require that the marking indicating the country of origin, appear on the face of the machine in a place where it was not likely to be defaced, covered, or obscured by combination with any other article, that the method of marking should be legible, indelible and permanent, and the approved forms of marking included die stamping, the use of a metal plate bearing the name of the country of origin, and stamping, or the use of the type of decalcomania which is not readily removed by ordinary washing with normal solvents. Thereafter respondents adopted, with the approval of the Customs authorities, a metal medallion, hexagonal or oval in shape about $1\frac{1}{2}$ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend "De Luxe" in raised quarter inch letters, and below that "De Luxe Family Sewing Machine Quality" in raised letters approximately $\frac{1}{8}$ " in length, and below that the word "Japan" in raised letters of approximately $\frac{1}{16}$ " in length, and ordered their Japanese suppliers to attach them to all machines by rivets in the front of the vertical arm. Since the middle part of 1949 all sewing machine heads imported by respondents have been so marked.

PAR. 5. These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word "Japan" is indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. There is also sufficient evidence in the record that users and purchasers did not see, or seeing, did not comprehend such marking.

PAR. 6. When this marking is taken with the additional facts that the motor attached by respondents to these machines bear metal labels reading "Universal—Made in U. S. A.," "Delco—Made in Rochester, N. Y.," "Simplex—Made in U. S. A." or "Universal sewing machine motor—made in U. S. A.," which labels are plainly legible and conspicuous when the machine head is viewed from above; that the book

of instructions given when the machine is sold to consumers, nowhere mentions the place of manufacture of the machine, that the two examples of periodical advertising by the respondent themselves in the record, and that five of the seven examples of dealer advertising, in some instances partially subsidized by respondents nowhere mention importation or the origin of the machine and that the brand name "Universal" appearing on the front and across the top of the horizontal arm, conspicuous and legible at many feet distance, is part of the corporate name, or is the brand name of a number of American concerns, manufacturing and selling in the United States, some of them nationally known, it is plain that many consumer-purchasers would be, and are deceived into the belief, as the record shows, that respondents' Universal sewing machines are made in the United States. The finding accordingly, is that respondents' imported sewing machines and sewing machine heads, are not adequately marked to show their place of manufacture or origin.

PAR. 7. The facts that respondents at no time directly represented their imported sewing machines as being made in the United States, or would refuse to sell any dealer who did so, or that respondents' dealers are under no misapprehension as to the place of manufacture or origination or that respondents have never received any complaint as to customer confusion as to place of origin are immaterial. Respondents by placing in the hands of these dealers, their sewing machines as hereinabove described have provided those dealers with the means and instrumentality whereby the purchasing public may be, and is, misled and deceived as to the place of origin of said machines. This is emphasized by the substantial evidence in the record that these riveted medallions or plaques can be removed with comparative ease, without the marks of removal being discernible except upon the closest inspection. Even the rivet holes can be filled in with a black filler. There is also substantial evidence in the record that even when such holes are left gaping, that users took such holes to be for oiling the machine rather than to indicate the removal of something originally a part of the machine.

PAR. 8. Not all, but a substantial portion of the purchasing public has a decided preference for products of domestic manufacture over those of foreign make, particularly machinery of any kind, and when sewing machines are exhibited and offered for sale to the purchasing public and such articles are not marked at all, or are inadequately marked to show their foreign origin, or if marked and the markings are concealed, removed, or obliterated, such purchasing public understands and believes such articles to be wholly of domestic origin.

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PAR. 9. The complaint alleges and the evidence shows that respondents' invoices and form letters which go to respondents' dealers (respondents do not deal with the consuming public) bear the legend "Manufacturers and wholesale distributors sewing machines and supplies" immediately beneath corporate respondents' name and that respondents do no manufacturing and neither own nor control any factory. The complaint further alleges that substantial numbers of retailers prefer to buy products from concerns who manufacture the products sold by them. Of this there is no substantial evidence in the record. Although two of respondents' dealers were witnesses in this proceeding, nothing on this point was asked them. These dealers know that respondents' sewing machines were made in Japan and for aught that appears may have likewise been aware that respondents bought them rather than manufactured them, or may have been wholly indifferent.

PAR. 10. Corporate respondent was organized in 1946, for the purpose of selling in the United States imported sewing machines, it being the first importer to do so, and for approximately two years it imported and sold in the United States the English made "Jones" under that name. Being unable to secure sufficient of these machines, corporate respondent turned to an Italian factory from which it imported sewing machines for a short time in 1948. These machines had a foreign brand name, which respondents decided would hamper rather than aid domestic merchandising and considered the adoption and use first of the name "Standard," but learned upon attempting to register it as a trade-mark "that there were some complications" and thereupon decided on "Universal" as a trade name. The latter name, however, had been registered as a trade-mark by the White Sewing Machine Company of Cleveland, Ohio, for use on sewing machines, but apparently it had not been so used for a number of years. Respondents' attorneys succeeded in having the registration cancelled for non-user by the U. S. Patent Office and on April 4, 1950, the latter issued a trade-mark registration to respondents for the name Universal to be used on sewing machines and it was thereafter put on a majority of the sewing machine heads which respondents imported from Japan by respondents' vendors in Japan, by gold decalcomania across the front, and sometimes also on the top of the horizontal arm. Respondents since that time have prevented by some 25 legal actions the use of this brand name "Universal" on sewing machines marketed by others, and have undertaken to have their dealers listed in the classified section of telephone directories all listed under the brand name of Universal sewing machines, as well as regis-

tering each brand name in foreign countries where respondents have dealers.

PAR. 11. The brand name "Universal" appearing frequently but not always surrounded by a line tracing suggestive of a dog bone in shape, has also been registered by the U. S. Patent Office in favor of Landers, Frary & Clark of New Britain, Connecticut, for use on a wide variety of kitchen and household appliances, the original registrations dating back as far as 1906, 1914 and 1916 and the more recent registrations applicable to electrical household appliance being dated in 1933 and since. This firm advertises and sells nationally and extensively through dealers; electric toasters, coffee pots, food mixers, blenders, irons, grills, waffle irons, heating pads, small stoves, blankets, vacuum sweepers, floor polishers, and other household gadgets collectively known as light traffic appliances. These products are extensively advertised, widely sold through thousands of retail distributors and are well and favorably known to a very substantial portion of the purchasing public, particularly the feminine part thereof. The name "Universal" is stamped on many of these products unsurrounded by any dog-bone etching. Neither at the time of respondents' second registration as a trade-mark of the name "Universal" for use on their sewing machines, nor since, did Landers, Frary & Clark file or make any protest. Respondent Hackett testified that he had had some negotiations with the Universal Major Electrical Appliance Company of Lima, Ohio, manufacturers and distributors of the heavier household electrical appliances such as washers, dryers, water heaters, stoves, under the brand name of "Universal" by agreement with Landers, Frary & Clark, as to the former acting as distributor for respondents' Universal sewing machines. Neither it nor Landers, Frary & Clark have ever manufactured or sold sewing machines nor do they have their brand name registered for use on sewing machines. Landers, Frary & Clark also distributes vacuum bottles, food choppers, vacuum cleaners, food freezers and coffee makers under other brand names than "Universal."

PAR. 12. In addition to this, respondents have shown there are some 356 listings in the Manhattan telephone directory of corporations or organizations part of whose business name is the word "Universal" and some 85 similar listings in the Philadelphia telephone directory; that the U. S. Patent Office has issued trade-mark registrations to 64 business concerns throughout the country for the brand name "Universal" of which five are to Landers, Frary & Clark and of which three, other than respondents, are to concerns using such trade names on sewing machines and that there are eighteen state registrations of this trade name in twelve states, although none on sewing machines.

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Respondents and their dealers have also advertised "Universal" sewing machines locally to a considerable extent and such machines are listed in the catalogs of mail order houses and sold in department stores. Such advertising always bears corporate respondents' name or that of the dealer.

PAR. 13. The evidence as to consumer confusion over the name "Universal" is in some conflict. It was stipulated that respondents could produce approximately ten purchasers of respondents' machines who would, if called, testify that the name "Universal" thereon did not indicate to them any connection with Landers, Frary & Clark. On the other hand, more than twenty witnesses in two different locations, most of them housewives, testified in considerable detail that they were and had been for some time familiar with the Universal household electrical appliances sold by Landers, Frary & Clark and with the brand name "Universal" identified therewith, either from seeing advertisements thereof, from ownership, either by gift or purchase, or from seeing or using such appliances in the homes of relatives or friends, that they had a high regard for the utility and durability of such appliances, that when they were shown respondents' Universal sewing machines they received the impression that the latter were made by the same company—Landers, Frary & Clark, which made the "Universal" appliances, that some of them were not told differently by the sales person and in several instances, had that impression given them or strengthened by the salesman's conversation, that they bought respondents' sewing machines under that impression and for that reason. These witnesses were all cross-examined at length and the detail of their testimony as well as their number makes the evidence substantially preponderant that the brand name identity does confuse consumer-purchasers and does deceive them into buying respondents' sewing machines, believing them to be made by and sponsored by Landers, Frary & Clark. In addition thereto is the testimony of the Assistant District Attorney at Fort Worth, Texas, of the results of his investigation, pursuant to many complaints from purchasers, into the distribution in that area through one of respondents' dealers, of respondents' sewing machines, that many purchasers had bought them in the belief that they were made in the United States by Landers, Frary & Clark. On the record in this proceeding, it is immaterial that occasionally the word "Universal" on the products of Landers, Frary & Clark appears within a dog-bone frame on some of their advertising whereas respondents' "Universal" does not, or that respondents occasionally emboss theirs on a globe whereas Landers, Frary & Clark do not.

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PAR. 14. The record shows at least one dealer displaying and selling to the consumer public in the same store respondents' Universal sewing machines and Landers, Frary & Clark's Universal vacuum cleaners. It also shows that respondents' Universal sewing machines are offered for sale by a number of department stores.

PAR. 15. Respondents by placing in the hands of dealers, their sewing-machine heads and completed sewing machines of which the heads are a part, as described above, provide said dealers with a means and instrumentality whereby they may and do mislead and deceive the purchasing public as to the origin, manufacture and sponsorship of said machines.

PAR. 16. Respondents in the course and conduct of their business are in substantial competition in commerce with the makers and sellers of non-imported machines and also with sellers of imported machines.

PAR. 17. The failure of respondents adequately to disclose on their sewing-machine heads that they are manufactured in Japan, and the use by respondents of the brand or trade name "Universal" thereon, has the tendency and capacity to lead substantial numbers of the purchasing public into the erroneous and mistaken belief that respondents' machines are of domestic origin and are manufactured in the United States by the makers or distributors of Universal electrical household appliances, Landers, Frary & Clark, and to induce the purchase of substantial numbers of said sewing machines because of such erroneous and mistaken belief. As a result thereof, trade in commerce has been and may be unfairly diverted to respondents from their competitors and substantial injury has been and is being done to competition in commerce.

PAR. 18. The aforesaid acts and practices of respondent as hereinabove found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

CONCLUSIONS

1. The foregoing findings of fact are not based in anywise on the testimony appearing in the record at pages 151-200; 227-339; 399-436; which testimony has been ignored and is rejected for lack of credibility and weight because the witness' demeanor under examination and because the testimony elicited under cross-examination of the witness clearly demonstrated to the Hearing Examiner that such testimony was not objective, but on the contrary was biased. The printed ex-

hibits introduced through this witness have, however, been given full weight and credit.

2. The fact that respondents' imported sewing machines are inspected and passed by United States Customs officials at the port of entry as being properly and adequately marked so far as Customs laws are concerned and that respondent has marked its products in accordance with Customs demands is immaterial and no defense to this proceeding (*L. H. & Son, Inc. v. F. T. C.*, 191 F. 2d 954).

3. The Commission has the authority to forbid sale without affirmative and clear disclosure on imported products of the country of origin. *L. Heller & Son, Inc. v. F. T. C.*, 191 F. 2d 954.

4. Whether or not the Singer Sewing Machine Company or any other concern or individual imports into this country articles of foreign manufacture which are not marked, or are inadequately marked as to place of origin is immaterial and no defense to this proceeding. Similar illegality by others is no defense to anyone. *Independent Directory Corporation v. F. T. C.*, 188 F. 2d 468; *Ford Motor Company v. F. T. C.*, 120 F. 2d 175.

5. The fact that Landers, Frary & Clark do not manufacture all of the products distributed by them in commerce under the brand name "Universal" or that they manufacture or sell other very similar products, marked and marketed under different brand names does not dilute or militate against the confusion and deception hereinabove found to exist with reference to the products advertised and branded "Universal" and respondents' sewing machines similarly branded.

6. The fact that respondents sell only to dealers, many or all of whom are aware of the origin of respondents' sewing-machine heads or sewing machines of which said heads are a part, so sold, or are informed thereof by respondents, is no defense to the charge of inadequate or concealed markings, since such machines are obviously intended for ultimate consumer purchase, and respondents, as the importers and distributors, have placed in the hands of others through sale, the means whereby the ultimate purchaser may be and is misled and deceived. *Chas. A. Brewers & Sons v. F. T. C.*, 158 F. 2d 74.

7. Registration of a brand or trade name or mark with the U. S. Patent Office for use on a class of products does not confer on the registrant the unqualified right to use such name where to do so is to confuse such products with products of even an entirely different class in the mind of the consumer because of the identity of the brand, the widespread currency and favorable acceptance of the latter products and their closeness in function and usage to the class of products for which such registration has been issued. Registration

of a trade-mark is not controlling in a suit for unfair competition arising out of its use, *E. F. Prichard Co. v. Consumers Brewing Co.*, 136 Fed. 512, and the practice or rulings of the Patent Office cannot create a conclusive vested right in the registrant. *White House Milk Products Co. v. Dwinell-Wright Co.*, 111 Fed. 490, 493.

8. The use of a brand or trade name, on the acceptance and identification of which, much effort and money has been expended should not be taken away from the user unless the public interest clearly so requires. There is in this record, however, too much substantial evidence that the purchasers of sewing machines, or at least those who usually instigate their purchase—women—associate the name “Universal” with the products of another company, to doubt that public confusion exists and tends and will tend to induce purchases which otherwise would not be made. It matters not whether Landers, Frary & Clark are indifferent to such usage or confusion. Nor is the good faith of respondents in selecting its brand name, or its lack of intention to trade on the brand name of another, material. It is not private interest or motive which must be served, but solely that of the public.

9. Considerable thought and speculation in observance of the legal principle that a person will not be required to discontinue the use of a name where some remedy “short of excision” will give adequate protection (*Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212; *Jacob Siegel Company v. Federal Trade Commission*, 327 U. S. 608) has been given to requiring the addition of a legend under the word “Universal” on the horizontal arm in letters sufficiently large to be as easily read as the word “Universal” such as “Not connected with Landers, Frary & Clark” or “Unrelated to any other electrical or household appliance” or “Importers and distributors of sewing machines only” or something else which would immediately dispel from the viewer’s mind the impression many of them get from the name “Universal.” However, the evidence is clear that any such decalcomania marking can easily, quickly and effectively be obliterated by the superimposition thereon of a different decalcomania undetectable by anyone other than an expert. The record shows the same with metal plaques, which can be removed in a matter of minutes, without trace, to the ordinary purchaser of the removal. From the demonstration of this in the hearing room, it would appear also that another and different plaque could be attached with rivets in the same holes without easily discernible marks of substitution. The record is barren of any suggestion by experienced persons as to how adequate protection against the confusion which the evidence dem-

onstrates, can be achieved short of complete excision of the name "Universal."

10. It is not necessary to show that public witnesses saw respondents' machines in the dealers' stores, or bought respondents' machines there or at all. It is sufficient, on the point of brand name confusion, if respondents' sewing machines are exhibited to the witness while testifying, or even if they merely testify to their confusion, or association of the brand name with the products of another seller without ever seeing respondents' product. Actual deception need not be shown and the law under which these proceedings have been brought seeks not only to protect the intelligent, the expert, the dealer, or the careful, but the ignorant, the credulous, the unthinking, the careless, the inattentive, in sum the ordinary, unsuspicious purchaser.

11. The record herein presents a far different picture than that of previous cases heard by this Hearing Examiner where brand names such as Mercury, Hudson or Hoover were alleged to deceive the purchaser into believing the sewing machine was made by the Ford Motor Car Company, the Hudson Motor Company or the Hoover Company. In the first place there is a wide disparity in use, function, price, and size between sewing machines and automobiles. Secondly, a large number of housewives, familiar with the Universal line of household electrical appliances, testified in great detail as to their reactions and impressions, detail which was missing in other records. Thirdly, this record reveals for the first time that a decalcomania can be so effectively, cheaply and quickly covered by another and different decalcomania that detection of the superimposition is impossible and further, that metal plaques or medallions riveted to the sewing machine head can be easily removed without visible marring of the enameled finish and the rivet holes filled so that only an expert can discern the alteration. It would seem that an adequate and effective marking would be to have the words "Made in Japan" cut into the top side of the bed of the machine head in letters of such size and depth that an enameling or covering with lacquer would not obliterate it and the user could not escape seeing and comprehending such marking. Whether this can be done, or if done, whether it too, can be concealed easily, the record does not reveal.

12. Since it is clear from the record that the individual respondents are the only officers, agents, representatives or employees of corporate respondent who have had or now have any authority or control over the acts and practices involved in this proceeding, the words "and its officers" following the words "a corporation" and the words "and said respondents' representatives, agents and employees" following the

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words "as officers of said corporation" in the order requested in the "Notice" appended to the complaint come within the prohibitions of *R. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535, 540-4 and are accordingly omitted from the following Order.

ORDER

It is ordered, That the respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated.

2. Using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent "Standard Sewing Equipment Corporation."

It is further ordered, That with respect to any issue raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By SECREST, Commissioner:

This is an appeal by respondents from an initial decision in which the hearing examiner found that respondents had violated the Federal Trade Commission Act in selling to dealers, who in turn sell to the consuming public, sewing machine heads and sewing machines (1) not adequately marked as to the country of origin (Japan), and (2) deceptively marked with the word "Universal."

In 1949, respondents began the importation from Japan of sewing machine heads, which are manufactured there under respondent's supervision. The head consists of a horizontal and vertical arm with sewing machinery, all attached to a base plate. After importation, the head is placed in a carrying case or cabinet, and usually a motor, foot pedal and light are attached. Such machines are then distributed

under the name Universal which word is attached in Japan by a decalcomania on the horizontal arm. In some cases, heads are imported without the name "Universal," for sale to manufacturers who distribute them under their own trade names. The number of heads imported with the word "Universal" has varied from 25% in 1949 to 60% in 1950 and 1951, and to 95% at the time of the hearing.

As a prerequisite to the requirement that a sewing machine or machine head manufactured in a foreign country must be marked to disclose the foreign origin of the article we must find, as the Commission long has, that a substantial number of the purchasing public has a general preference for sewing machines produced in the United States.

The reasons for such a preference may vary and to explore them all might well be the source material for a lengthy book. National pride or a sense of loyalty to things American are, no doubt, great factors. Veterans who spent years fighting a foreign nation might well prefer American made goods over those of the nations against whom we were at war. Relatives, or even friends, of those imprisoned or killed, might well have the same preference. Many American workers, and even whole communities in which they work, have a preference based largely on the fact that certain imported goods have replaced in the American Market products they themselves would like to produce. Typical of such workers, to name only a few, are those in the glass, pottery, watch and fishery industries. There are many who feel that, in general, the quality of American made goods is superior. Further, a vast majority of people in the United States have a general preference for products made in the United States over those made in the many nations behind the iron curtain.

The Commission has decided many cases involving the marking of foreign made products and has repeatedly held that a preference exists for American made products. In *L. Heller & Son, Inc. v. Federal Trade Commission* (191 F. 2d 954, 7th Cir. [1951]) the court in its opinion said:

"A substantial portion of the purchasing public has a general preference for products produced in the United States by American labor and containing domestic materials, where other considerations such as style and quality are equal, and has a prejudice against imported products."

In the case before us the hearing examiner found as follows:

"Not all, but a substantial portion of the purchasing public has a decided preference for products of domestic manufacture over those of foreign make, particularly machinery of any kind, and when sewing

machines are exhibited and offered for sale to the purchasing public and such articles are not marked at all, or are inadequately marked to show their foreign origin, or if marked and the markings are concealed, removed, or obliterated, such purchasing public understands and believes such articles to be wholly of domestic origin."

The evidence in the present case is clear and substantial. The record contains testimony of 23 witnesses who had purchased Universal sewing machines. Four of these witnesses testified that medallions were on the machines they bought, but they did not see the word "Japan," even though they had been using the machines for months. They found the word "Japan" on the medallion only after a repairman or newspaper story caused them to look for it. In one case where a medallion was attached it had been chipped and is of no value as evidence against the respondents since nothing in the record indicates who did the chipping. In three cases the medallions had been removed. In fifteen cases the mark of origin was hidden under the motor, on the bottom of the machine or beneath a metal plate.

One witness said the word "Japan" was so tiny she had never seen it. Another said the word "Japan" was in very small letters and she had not seen it even though she had owned the machine for one year. This machine was Commission's Exhibit 65 and the size of the letters in the word "Japan" is exactly the size of those on the medallion approved by the Customs Service for the use of respondents. Another witness read the word at a distance of about one foot during the trial. She had been using the machine for months and had not seen the word "Japan."

Further light on this question may be gained by an examination of the Commission's Exhibit 7. This was a sewing machine, the head of which was imported by respondents. Around the top of the base of the machine, in gold, is a flowered strip 34 inches long, and $\frac{3}{8}$ of an inch wide. The same strip, four inches long is on the guard on the top of the machine. On top of the horizontal arm of the machine, in gold, are the words, "The Universal Sewing Machine," totalling four inches in length. On each side of the horizontal arm appears, in gold, the word, "Universal" four inches long and in letters $\frac{1}{2}$ inch high. Beneath this word on both sides of the horizontal arm, in gold, appear on a black background, the following: "Reg. U. S. Pat. Off." Also on this arm are three decorative designs, in gold, each approximately $\frac{1}{2}$ inch by one inch.

A substantial number of buyers, rosy-glowed, if the golden flowers on the machine head are what they seem, and bedazzled by all the golden words and golden decorations will fail to see the gold word

"Japan" in $\frac{1}{16}$ of an inch letters on the bottom fourth of a golden medallion well over one and $\frac{1}{2}$ inches high and over one inch wide. A little firefly shines clearly on a dark night. His best effort goes unnoticed in the brightness of the sun.

Only one of the 23 witnesses had the slightest idea that the machine she purchased was made in Japan.

Fourteen of the witnesses were asked if they would have bought the machines if they had known they were of foreign origin. All stated that they would not have made the purchases.

As found by the hearing examiner, the respondents, a short time after June 1, 1949, adopted, with the approval of the U. S. Customs officials, a marking of foreign origin described as follows:

"* * * a metal medallion, hexagonal or oval in shape about $1\frac{1}{2}$ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend 'De Luxe' in raised quarter inch letters, and below that 'De Luxe Family Sewing Machine Quality' in raised letters approximately $\frac{1}{8}$ " in length, and below that the word 'Japan' in raised letters of approximately $\frac{1}{16}$ " in length, * * *."

The hearing examiner found as follows:

"These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word 'Japan' is indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. There is also sufficient evidence in the record that users and purchasers did not see, or seeing, did not comprehend such marking."

We can only conclude that the marking on the medallion was inadequate and that it was not properly attached. In fact, at the hearing an expert quickly removed one of the medallions and stated in the testimony that after removal there was no mark or blur on the machine that would be noticeable to a purchaser. One of the respondents testified that, "It is not easy to remove the medallion, but it can be done."

Eleven of the witnesses were asked if they had a general preference for American made goods and answered in the affirmative. Eight were asked if they had a preference for American made sewing machines and answered in the affirmative. None of the witnesses who had purchased sewing machines made a statement that they generally preferred foreign made goods or that they preferred foreign made sewing machines.

One of the respondents in his testimony said he did not remember receiving any complaints from consumers concerning the country of

origin. This is not surprising inasmuch as the books of instructions handed to the purchasers did not contain the names or address of any of the respondents. Also the 20-year guarantee bond was signed by the dealer and the names or address of respondents does not appear on it. There was nothing in these printed documents to indicate the machine was of foreign origin and if a purchaser did not know, as many did not, that the machine was of foreign origin, they would not likely complain concerning something about which they had no knowledge.

The respondents have pointed out that the medallion they have been using was submitted to, and approved by, the Customs Service. We appreciate fully that this fact, and a fact it is, might well have led them to believe that the government required no further duty under another law.

When a citizen honestly seeks an answer to the question of what he must do to obey the law of the land, common decency, essential to all good government, demands that he not be tossed unnecessarily from one government agency to another.

We think this opinion, in future cases of a similar nature, will serve as a guiding lamp and clarify, for those who follow, the path they can and must take. It will make clear to any importer of sewing machines the markings that have met both the requirements of the Federal Trade Commission and the Customs Service.

In every one of the many sewing machine cases in which an order was issued by the Commission the machine head had been marked to the satisfaction of the Customs Service, it had been admitted in to the United States, and it had moved in commerce, a prerequisite to our jurisdiction. We should consider that the Customs Service has approved the marking, but it is no bar to our proceedings.

If the Customs Service approves a mark that meets the requirements of the Federal Trade Commission law, comity would dictate that we accept it if the issue is presented to us. We should not, through caprice or merely to show our authority, change a mark that will not deceive. On the other hand, we are bound to require a clearer marking if we believe the marking approved by the Customs Service has resulted, and may continue to result, in deception. A clearer marking will protect the ultimate consumer and will have no adverse effect upon the customs inspector in the performance of his duties because, in fact, a clearer marking would be easier for him to read.

The respondents in making a change in the medallion may suffer some inconvenience, but the cost of changing the medallion will not be great. In any event, Section 5 of the Federal Trade Commission Act and Section 304 of the Tariff Act were not enacted for the benefit of

respondents, but for the protection of the ultimate consumer. We do not think it can be maintained that Congress in the Tariff Act, or any amendment to it, intended to change or modify in any particular the authority it has granted the Federal Trade Commission.

The evidence of record in this case is that customers have been deceived as a result of inadequate marking and insufficient attachment of the medallion to the machine head.

One of the respondents' Texas dealers, Son-El Sewing Machine Company, was investigated by the county attorney's office. As the result of adverse publicity, the name of this company has been changed and it no longer handles respondents' machines. The salesmen of Son-El made misrepresentations for which respondents can not be held responsible. Chief of these misrepresentations, such as that Universal sewing machines were manufactured by the makers of Universal traffic appliances and the Singer Company, will be difficult for any dealer to make in the future, under paragraph 2 of our Order requiring the name "Standard Sewing Equipment Corporation" to be used in connection with the trade name "Universal."

Some medallions were removed and there is nothing in the record to indicate that respondents removed them. Respondents can be held responsible only to the extent that the medallions were not securely attached. This aid to misrepresentation of the country of origin will be made ineffective by Paragraph 1 of our Order requiring the medallion to be attached in such manner that it can not readily be hidden or obliterated.

One fact is clear. However great were the shortcomings of Son-El, the record reveals that of twenty-three purchasers in Pennsylvania and Texas the only four of them to get respondents' machines with the medallions intact got them from Son-El. The purchasers of these machines, a former saleslady of traffic appliances, two housewives, and a vocational nurse, testified that they had not seen the word "Japan" although they had the machines in their possession from one month to a full year. *In the whole record this is the best evidence of deception by inadequate marking.* To permit the undeniable deception of four persons out of twenty-three to continue is indefensible. This percentage of deception applied nationwide would effect millions of homes. Such deception can be prevented only by Paragraph 1 of our Order, requiring clear and conspicuous marking of the country of origin.

Upon consideration of all the material evidence in this record, we hold that a preference for sewing machines and sewing machine heads produced in the United States does exist and that the hearing examiner was right in finding that a substantial portion of the purchasing public

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has a decided preference for products of domestic manufacture over those of foreign make and that respondents' imported sewing machines and sewing machine heads are not adequately marked to show their place of manufacture or origin.

The Federal Trade Commission has no control over tariffs or what a consumer buys. Our only duty is to see that an article is adequately marked as to country of origin.

The appeal of the respondents in the matter of marking of foreign origin is denied.

We further direct that Paragraph 1 of the Order of the Initial Decision be modified to read as follows:

"Offering for sale, selling or distributing foreign made sewing machine heads or sewing machines of which foreign made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it can not readily be hidden or obliterated."

The amended complaint charges respondents with deception in the use of the word "Universal" on machines and in advertising. The allegation is that "The word 'Universal' has been used for many years as a trade or brand name by one or more long-established corporations and firms transacting and doing business in the United States whose products, sold under such brand or trade name, are well and favorably known to the purchasing public."

This question has been before the Commission and the courts on many occasions and certain features have been considered as follows:

1. The fact of actual confusion among purchasers—

This is naturally an important element and in some cases relief has been denied where there was no such proof, and the likelihood of substantial confusion was remote. *G. B. Kent & Sons, Ltd. v. P. Lorillard Co.* (1953) 114 Fed. Supp. 621; *Arrow Distilleries, Inc. v. Globe Brewing Co.* (1941) 117 F. 2d 347.

In this case there is considerable evidence of actual confusion. A substantial number of witnesses in support of the complaint testified they were familiar with the line of products sold under the trade-mark "Universal," and thought they were buying from that line. Some were familiar with the name of the manufacturer, Landers, Frary & Clark, while others were not. On the other hand, it was stipulated that respondents could produce ten purchasers of their machines who would testify that the name "Universal" did not indicate any connection with Landers, Frary & Clark.

2. The character of the mark, whether strong or weak—

In *Arrow Distilleries, Inc. v. Globe Brewing Co.* (1941), 117 F. 2d 347, use of the word "Arrow" on beer and ale was permitted even

though another company used it on alcoholic cordials and liqueurs. There was in that case no evidence of actual confusion. The court gave, as examples of strong marks, arbitrary, fanciful, or distinctive words such as "Aunt Jemima," "Kodak" and "Rolls Royce"; but words in common use are given a much narrower scope, such as "Universal," "blue ribbon," "gold medal."

The U. S. Patent Office has issued trade-mark registrations in at least 64 instances and to many different companies of the word "Universal" to be applied to a variety of products. Sometimes, the word is registered with other words or in connection with particular designs. The telephone directories of Manhattan and Philadelphia show respectively 356 and 85 listings of business organizations which use the word "Universal" as part of their names.

3. The nature of the competing products—

It is not necessary that the competing products be identical. Other matters should be considered, such as similarity of appearance or use, whether they are ordinarily handled by the same manufacturer or distributor, whether sold in the same kind of stores, whether they have a common class of purchasers, whether purchased by the public generally, etc. In *Dwinell-Wright Co. v. National Fruit Products Co.*, 140 F. 2d 618, plaintiff had five registrations of "White House" on a line of fruit juices while defendant had three on tea, coffee and salted peanuts. The suit by plaintiff to prevent use of "White House" on a new product—a blend of canned orange and grapefruit juice—was successful. Lack of similarity between brushes and cigars was pointed out in *G. B. Kent & Sons, Ltd. v. P. Lorillard Co.*, 114 Fed. Suppl. 621, whereas in *Admiral Corp. v. Penco*, 203 F. 2d 517, a similarity was found to exist between electric ranges and refrigerators and electric sewing machines and vacuum cleaners.

The testimony in the case before us shows that one witness thought the sewing machine she purchased was all right because she had heard of Universal irons and toasters. Eleven of the witnesses thought the sewing machine was made in the United States because of the trade name "Universal." Five of the witnesses thought the machine was made by Landers, Frary and Clark, whose traffic appliances bear the trade name of "Universal." One witness had several Universal products and bought the sewing machine because she thought it was made by the same company. Another purchased the machine and thought it was made in the United States because he saw that the motor was made in the United States.

The purchasers in some cases were confused and in practically every

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case they were deceived because of the use of the word "Universal" on the machine.

Upon consideration of all the evidence we find that respondents, by placing in the hands of distributors, their sewing machine heads and complete sewing machines, of which the heads are a part, and using the word "Universal" on the horizontal arm, have provided dealers with a means and instrumentality whereby they may, and do, mislead and deceive the purchasing public as to the origin, manufacturer and sponsorship of said machines.

On the other hand, respondents have registered the trade mark "Universal" for use on their sewing machines. They have spent a considerable sum of money in promoting and defending their trade mark. Respondents have prevented, by about twenty-five legal actions, the use of the word "Universal" on sewing machines distributed by others.

We believe that deception can be avoided without the complete excision of the word "Universal." Paragraph 2 of the Order in the Initial Decision should be modified to require respondents to cease and desist from using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondents "Standard Sewing Equipment Corporation."

Thus, the investment of the respondents in the trade name "Universal" will be protected and, at the same time, possible deception of the purchaser will be minimized.

The appeal on the use of the word "Universal" is denied except that the order is modified as directed in this opinion.

It is directed that Order issue accordingly.

Submitted with the appeal is a motion of respondents for an Order dropping Harry Kron as a respondent in this proceeding on the ground that Mr. Kron, on February 24, 1954, severed all connection with the corporate respondents, Standard Sewing Equipment Corporation, and now has no relationship with said corporation. The motion is supported by the affidavit of respondent William J. Hackett to the effect that Harry Kron did, on February 24, 1954, sell all of his stock in the corporation to William J. Hackett and severed all connection with the corporation.

During the hearing and prior thereto, Harry Kron was Secretary-Treasurer of the corporation and had control over its affairs equal to the respondent William J. Hackett. The affidavit does not set

out facts sufficient to justify the relief sought in the motion and the same is therefore denied.

The foregoing decision in this case has been based solely on the record and what follows is for the purpose of presenting precedents set in former cases. These precedents will be helpful to importers in determining what the Commission has held to be inadequate and adequate marking.

Administrative agencies are often criticized on two very important grounds—delay and inconsistency. The Federal Trade Commission has attempted to eliminate every cause of unnecessary delay.

By our new policy of writing opinions we have attempted to achieve consistency and build up a body of meaningful case law. Thus, it is essential that we review our previous action in similar cases.

One such case is that of the *Globe Machine Company*, Docket 5885.

On 27 June, 1951, the Commission issued a complaint against this company. The complaint said, in part:

“In some instances said heads, when received by respondents, are marked with a medallion placed on the front of the vertical arm upon which the words ‘Made in Occupied Japan’ or ‘Japan’ appear. These words are, however, so small and indistinct that they do not constitute adequate notice to the public that the heads are imported.”

An answer by respondent admitted this allegation, and the hearing examiner held that the above words were so small and indistinct that they did not constitute adequate notice to the public that the heads were imported.

On 4 April, 1952, the initial decision of the hearing examiner became the decision of the Commission and the respondents were given 60 days to show the manner and form of compliance with the order not to sell machines or machine heads unless the country of origin was clearly and conspicuously disclosed on the head. It is impossible to speculate with certainty what the Commission would have held concerning the original medallion had the case been tried and considered by them, nor is it necessary to do so. Important to the present case is what the Commission decided later. On 23 June, 1952, the *Globe Company* submitted a medallion it was using as an attempt to comply with the Commission's order. On a gold background, in gold letters, were the words “Made in Occupied Japan.” All letters were $\frac{1}{8}$ of an inch in length. The Assistant General Counsel in charge of Compliance in a memorandum dated 13 July, 1953, pointed out, among other things:

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"In answer to our request, respondents, on June 23, 1952, submitted a specimen of the 'gold on gold' medallion which did not provide the clear and conspicuous disclosure required by the order."

The Assistant General Counsel had rejected this medallion as compliance, and also rejected compliance reports as to other parts of the Order.

When the respondents made no additional report he recommended that the Commission reject the original report of compliance submitted on 23 July, 1952. This report of compliance with a specimen of the medallion was submitted to the full Commission. The report was rejected. This was done by the Commission as an expert body with no testimony. It held that $\frac{1}{8}$ " gold letters on gold was not compliance with the order. The Commission properly used its expert judgment to determine what was not a clear and conspicuous disclosure of the country of origin.

It might be argued that the admission answer admitted sufficient evidence of deception to wholly justify the Commission in supporting the hearing examiner's initial decision that the lettering on the original gold medallion was too small.

Certainly it cannot be argued that the admission answer or consumer evidence, explicit or implied, would support the Commission in rejecting a compliance medallion, gold on gold, with letters twice the height of the original. The Commission, on its own authority, and as a body of experts, said that gold letters $\frac{1}{8}$ of an inch high, if placed on a gold medallion, would still, like the medallion condemned by the admission answer, be too small to prevent deception.

In fact, the Commission invariably has secured compliance with its orders, issued with or without trial, and to this date has never given a decision as to how high a gold letter must be on a gold background to constitute full compliance. On the other hand, the Commission has often held that gold letters far bigger than are used in the present case are deceptive if placed on gold. If the voice of the Commission was the voice of consumer deception in supporting the hearing examiner's findings and order in the Globe case, it was the voice of the Commission alone that said the letters on the medallion offered in compliance were lacking in stature. To accept the medallion in the case before us would be to accept a standard of notice far less than that rejected by the Commission. It could be nothing less than a retreat from the standards previously required in all cases for the protection of the public with respect to marking foreign made sewing machine heads.

In the Globe case the Commission decided the medallion submitted to show the form of compliance was inadequate. Never has that de-

cision been overruled. In fact, it has been followed as a standard of compliance in every subsequent case where an order has been issued with or without full trial before a hearing examiner.

For a more complete consideration of the matter of precedent, with respect to gold medallions similar to the one in the instant case, it will be helpful to review the action of the Commission in the nine sewing machine cases in which full trial was had, beginning with the first case in which an order was issued and ending with the last. Consideration will be limited to the adequacy of disclosure provided by medallions where gold letters were placed on a gold background.

1. In *Bieler and Rapinowitz et al.*, Docket 5891, the hearing examiner in his initial decision found that when medallions with the word "Japan" in raised letters $\frac{1}{4}$ to $\frac{3}{8}$ of an inch in length were used, casual inspection would apprise the purchaser of the country of origin.

On those machines where the word "Japan" was smaller the hearing examiner said:

"Others of these medallions on respondents' sewing machines are in bright color, in raised letters only, with no background coloring to emphasize the raised letters, and with other lettering, such as a brand or trade name of similar size and protrusion, so that the words 'Japan' or 'Made in Japan' are indistinct, difficult to read, unemphasized, and distinguishable only by careful inspection."

An order requiring clear and conspicuous marking was made the decision of the Commission on 28 August, 1952, and an order for compliance was issued. A medallion with the words "Made in Japan" in gold letters approximately $\frac{1}{8}$ inch in length, twice the length of the letters in the case before us, on a gold background was submitted and rejected as not providing the clear and conspicuous disclosure required. The same size gunmetal letters on gunmetal was later accepted as clear.

2. In *Royal Sewing Machine Corporation*, Docket 5892, the Commission found that the word "Japan" on gilt or bronze colored metal bands were because of size and location wholly inadequate. The record does not disclose the size of the letters.

After trial an order requiring clear and conspicuous marking was issued by the Commission on 5 May, 1953. A "gunmetal on gunmetal" medallion was accepted as compliance, letters $\frac{1}{8}$ of an inch in length being, in this color, considered clear and conspicuous.

3. In *Bega Sewing Machine, Inc.*, Docket 5893, the Commission found that the word "Japan" on a bronze colored metal medallion was so small and indistinct that it was not legible to those who bought them *or to the public*. The letters were approximately $\frac{1}{8}$ of an inch

in length, twice the length of the letters on the medallion in the case before us.

After trial, an order requiring clear and conspicuous marking was issued by the Commission on 18 September, 1953. A black on gold medallion was accepted as compliance with the black letters approximately $\frac{1}{8}$ of an inch in length being considered clear and conspicuous.

4. In *Astor Industries*, Docket 5889, the Commission found that the word "Japan" on gold color medallions "is indistinct, difficult to read, unemphasized and distinguishable only by careful inspection." The letters on the medallions were approximately $\frac{1}{8}$ of an inch in length, twice the length of the letters on the gold medallion in the case before us.

After trial, an order requiring clear and conspicuous marking was issued by the Commission on 17 February, 1954. Compliance has not been had due to reported reorganization of the company.

5. In *Pamco, Inc.*, Docket 6012, the Commission found that the word "Japan" placed on a medallion on the vertical arm of the machine "is, however, so small and indistinct that it does not constitute adequate notice to the public that the heads are imported." The record does not show the size of these letters.

After trial, with respect to the sewing machine heads in question, an order was issued on 17 February, 1954, requiring Max Chissik and Arthur Foyer, co-partners, doing business as Sewing Machine Factors, to clearly and conspicuously mark the country of origin. The complaint was dismissed as to all others. After the order was issued respondents claimed withdrawal from commerce.

6. In *Pickow Distributing Corp.*, Docket 5890, after trial the Commission found that the word "Japan" in letters approximately $\frac{1}{8}$ of an inch in length, twice the length of the letters on the medallion in the case before us, on a brass medallion was "indistinct, difficult to read, unemphasized, and distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow." An order requiring clear and conspicuous marking was issued on 10 March, 1954. The compliance report stated the company was in process of liquidation.

7. In *Sewing Machine Sales Corporation, et al.*, Docket 6149, the word "Japan" was placed on a gold medallion in letters approximately $\frac{1}{16}$ of an inch in length. The hearing examiner found that this was not an adequate disclosure that the machine heads were made in Japan. The lettering is identical with that in the instant case. On the basis of the findings an order was issued on 3 August, 1954 requiring clear

and conspicuous marking and "gunmetal on gunmetal" was accepted as compliance.

8. In *Bond Sewing Stores*, Docket 6112, the initial decision of the hearing examiner automatically became the decision of the Commission on 23 November, 1954. The findings in this case are clear. The word "Japan" in gold letters approximately $\frac{1}{16}$ of an inch in length appeared on a gold medallion. The hearing examiner found that the word "Japan" was "not distinct and difficult to read at a distance greater than one foot or so, unemphasized and *distinguishable only by careful inspection*." The word "Japan" in this case is the approximate size of the word "Japan" on the medallion at issue in the instant case. The examiner found "that respondents' imported sewing machines and sewing machine heads are not adequately marked to show the place of manufacture and origin, * * *" and required in his order clear and conspicuous disclosure on the heads as to the country of origin. On 24 January, 1955, the Commission by affirmative action ordered Bond Sewing Stores to comply with the order. The Commission decided in this case that the identical marking used in the case before us was inadequate.

9. In *Mercury Machine Importing Corporation, et al.*, Docket 6011, two gold on gold medallions were offered as Commission exhibits, one with the word "Japan" in letters approximately $\frac{1}{16}$ of an inch in length, the other with letters approximately $\frac{1}{8}$ of an inch in length. After trial a stipulation for a consent order was entered. An order of the hearing examiner requiring clear and conspicuous marking became the decision of the Commission on 4 January, 1955. A gold on gold medallion was tendered to show the form of compliance and was rejected on 28 January 1955. The word "Japan" on this medallion was approximately the size of that on the larger medallion submitted as an exhibit during the trial to show proof of inadequate marking, and twice the size of the letters on the medallion in the case before us.

Briefly, we will now consider six related cases which did not proceed to full trial. In each of these cases a medallion, stamped with the name of the country of origin, was attached on the front of the vertical arm of the machine. After admission answer or consent settlement, the hearing examiner found the marking inadequate as to country of origin and issued an order requiring clear and conspicuous marking.

The six cases are: *Home Machine Supply Inc.*, *Roman-Raichert Co., Inc.*, *Sewing Machine Exchange, et al.*, *State Sewing Machine Corp.*,

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et al., *Japan-America Trading Agency*, and *Mercury Vacuum Stores*. In each case the Commission ordered compliance with the order.

In the case of *Home Machine Supply, Inc.*, Docket 5884, compliance was accepted when "gold letters on gold" were changed to "gunmetal on gunmetal."

In the case of *Roman-Raichert Co., Inc.*, Docket 5886, compliance was accepted when "gold letters on gold" were changed to "black letters on gold."

In the case of *Sewing Machine Exchange, et al.*, Docket 5887, compliance was accepted after "gold letters on gold" were rejected and "silver letters on black" and "gold letters on black" were substituted.

In the case of *State Sewing Machine Corp., et al.*, Docket 5895, compliance was accepted when the "gold on gold" medallion was changed to "gunmetal on gunmetal."

In the case of *Japan-America Trading Agency*, Docket 6014, gold letters on a dark background were accepted in compliance with the order of the Commission.

In the case of *Mercury Vacuum Stores*, Docket 6064, a medallion with "gold letters on black" was accepted as compliance.

In none of these cases referred to above, or in any others considered by the Commission, has a medallion with "gold letters on gold" been accepted as compliance with an order to clearly and conspicuously disclose on the head of the machine its country of origin, not because it was "gold on gold" but solely because no such medallion submitted has been considered sufficiently clear and conspicuous. In the *Globe* case the Commission rejected a "gold on gold" medallion with the lettering twice the length of the lettering on the medallion used by the respondents. In the record of all the cases the only indication of a suitable size is a finding of the hearing examiner in *Bieler and Rapinowitz* that "the word Japan in raised gold letters $\frac{1}{4}$ to $\frac{3}{8}$ of an inch in length would by casual inspection, apprise the purchaser of the country of origin."

Gold letters $\frac{1}{8}$ of an inch in length on gold, invariably, have been the object of orders and rejected as meeting compliance. The play of light on a gold medallion renders such letters, as the Commission found in *Pickow Distributing Corp.*, "indistinct, difficult to read, unemphasized, and distinguishable only by more careful inspection than a purchaser or user would ordinarily bestow."

The play of light on gunmetal does not have the same result and raised letters $\frac{1}{8}$ inch in length on gunmetal have been accepted as compliance with many orders. Also, letters of one color, $\frac{1}{8}$ inch in length, have, because of contrast, been accepted as compliance when

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placed on a background of a different color. What results in the required degree of clarity is for the Commission to decide, and it has spoken often. Its decisions, orders, and compliance requirements in former cases supported findings that the word "Japan" in gold letters $\frac{1}{16}$ of an inch in length on a gold background is not adequate notice to purchasers and the public of the country of origin.

If, in 16 cases, we hold that 12 inches make a foot, precedent requires that we give pause before, in subsequent cases, we hold that 6 inches make a foot.

We have found, in many cases, that the word "Japan," in letters of gold $\frac{1}{8}$ of an inch in length, on a gold background, is not clear. To ignore precedents can result only in unequal application of the law.

To permit the use of inadequate medallions would be to declare that *stare decisis*, as far as the sewing machine cases are concerned, is neither *stare* nor *decisis*. In respect to gold on gold medallions, *stare decisis* would be synonymous with *de minimis*.

Chairman HOWREY concurring in the result:

In the matter of marking of foreign origin I concur but with considerable reluctance. Respondents complied in all respects with the marking requirements of the Tariff Act as interpreted and enforced by the officials of the Customs Bureau. This is all that should be expected of a reasonable and prudent businessman. He should not be required to peddle his markings to various government agencies to ascertain separate and conflicting interpretations. It should be enough, ordinarily, to obtain the approval of the agency having original jurisdiction.

However, if the majority viewpoint in this instance were to be rejected, it would create a very difficult situation from a competitive standpoint. A large number of contrary decisions, many of them issued within the past two years, would have to be revised, reversed or ignored.²

The solution would appear to be for the General Counsel of the Federal Trade Commission to confer with the Customs Bureau and negotiate an inter-agency agreement on marking requirements for imported sewing machines. This agreement when approved by the Commission and the Department of the Treasury should then govern the Commission's Compliance Division in interpreting that portion of the various orders which requires that the markings "clearly and conspicuously" disclose the country of origin.

² See Docket Numbers. 5884, 5885, 5886, 5887, 5899, 5891, 5892, 5893, 5894, 5895, 5896, 5941, 6011, 6012, 6013, 6014, 6015, 6017, 6049, 6064, 6082, 6117 and 6149.

DISSENTING OPINION OF COMMISSIONER GWYNNE

I do not agree with the conclusion of the majority that the evidence is sufficient to prove that the machine heads in question were inadequately marked as to the country of origin (Japan).

In 1946, respondents began the importation of machine heads from England. When this source of supply became inadequate, they began in the early part of 1949 the importation from Japan of machine heads manufactured there under respondents' directions. These machine heads were marked on the rear of the vertical arm by a decalcomania which included the words "Japan" or "Made in Occupied Japan."

It developed that when a motor was attached, this marking was partly covered. Consequently, in the early summer of 1949, respondents received a letter from the Appraiser of Merchandise of the Bureau of Customs of New York City pointing out that: "It is necessary to require that the marking to indicate the country of origin appear on the face of the machine in a place where it is not likely to be defaced, covered or obscured by combination with any other article." The letter suggested that respondents instruct their shippers immediately relative to these marking requirements. Respondents stopped the importation of machine heads and, following discussions with the Assistant Director, a medallion to be attached to the front of the vertical arm was approved in a letter dated June 15, 1949 from the Customs officials, which letter contained the following:

"You are advised that the use of the plate submitted will be satisfactory provided the same is affixed to the upper part of the sewing machine in a place which will not be obscured by the usual attachments, such as a motor, etc., which may be added subsequent to importation and before delivery to the ultimate purchaser."

The evidence is undisputed that since about June 15, 1949 (which was about two years prior to the issuance of the complaint), all machine heads imported have been marked with this medallion which is described in the initial decision as follows:

"* * * a metal medallion, hexagonal or oval in shape about 1½ inches vertical and 1 inch horizontal, in gold or brass finish, bearing the legend 'De Luxe' in raised quarter inch letters, and below that 'De Luxe Family Sewing Machine Quality' in raised letters approximately ⅛" in length, and below that the word 'Japan' in raised letters of approximately ⅛" in length, * * *."

These brass or brass-colored medallions or plaques are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters, so that the word 'Japan' is

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indistinct, difficult to read at a distance of greater than a foot, unemphasized and distinguishable only by careful inspection. * * *"

Some of the machines bought by certain consumer witnesses who testified in support of the complaint were evidently imported prior to the adoption of the medallion above described. However, it is undisputed that such methods of marking had been voluntarily abandoned in favor of the metal medallion about two years prior to the issuance of the complaint. Consequently, the question of the adequacy of the former marking is not here involved. *Federal Trade Commission v. Civil Service Training, Inc.* (1953), 79 Fed. 2d 113.

The only questions involved are (1) is the metal medallion presently in use sufficient to acquaint prospective purchasers with the fact of foreign origin, and (2) is the medallion adequately attached to the machine head.

Hearings were held in Philadelphia on November 29, and 30, 1951 at which various consumer witnesses testified. The majority opinion points out that none of such witnesses bought respondents' machines with the medallion intact. No evidence was presented at these particular hearings having any substantial bearing on the two questions above mentioned.

Hearings were held in Dallas and Fort Worth, Texas beginning on December 8, 1952 and ending December 11, 1952. The consumer witnesses at those hearings bought their machines from Son-El Vacuum Stores, Inc., operating in Dallas and Fort Worth. This company was the subject of an investigation in 1951 by the Office of the District Attorney for Tarrant County, Texas. The assistant in charge thereof testified as to various false representations made by salesmen of Son-El and other deceptive practices in regard to machines sold, which included Universal as well as other machines. There was newspaper publicity in regard to the matter and many of the consumer witnesses learned in that manner of the deceptions practiced upon them and some contacted the District Attorney's Office in regard to them.

The majority opinion states:

"One fact is clear. However great were the shortcomings of Son-El, the record reveals that of twenty-three purchasers in Pennsylvania and Texas the only four of them to get respondents' machines with the medallions intact got them from Son-El. The purchasers of these machines, a former saleslady of traffic appliances, two housewives, and a vocational nurse, testified that they had not seen the word 'Japan' although they had the machines in their possession from one month to a full year. *In the whole record this is the best evidence of deception by inadequate marking.*"

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I agree that this evidence would be very important if it related to the particular medallion in question. However, as I view the record, that is not the situation.

The former saleslady of traffic appliances, Mrs. L. G. Dawson, testified in substance:

When she bought the machine, she did not see any mark of foreign origin. When the story came out in the paper and after she had the machine in her home for a year, she found the word "Japan" on a "little sticker of a thing just stuck on there and says 'Universal Sewing Machine Company Japan.' You can just stick your thumb nail under it and, nick it off."

"It (the medallion exhibited to her) is similar; this is not the same medallion that is on mine."

After examining the medallion which is a part of Commission's Exhibit 65, she said: "This has Universal in large letters here, and mine has it going clockwise around the medallion * * * across the top there 'Universal Electric' and then 'Sewing Machine Company' down there in here. Down at the bottom, it is like this, similar to this 'Japan' in small letters at the bottom of the medallion."

It is my conclusion that the witness was not testifying about the medallion which was adopted by respondents in June, 1949 and which is the only one in question here.

The vocational nurse, Mrs. L. O. Graham, bought the machine introduced in evidence as Commission's Exhibit 65. This machine had a medallion on the front of the vertical arm with lettering which Mrs. Dawson at the hearing read as "The Universal Family Sewing Machine" and then "Japan" in very small letters. The medallion was on the machine when she bought it and she did not notice the word "Japan" until after she read the newspaper article. Here again, it is doubtful that the witness was speaking of the medallion involved in this case.

A total of ten housewives testified at the Texas hearings. Each testified in substance that when she bought the machine, she saw no marking of foreign origin. Later, some of them found a mark indicative of foreign origin on various parts of the machine. For example, Mrs. J. D. Owens found "Japan" inside the bobbin case; Mrs. Allen Jarrell and Mrs. B. L. Westmoreland found "Made in Japan" or "Made in Occupied Japan" behind the motor. These were obviously machines imported prior to June 15, 1949. None of the ten witnesses testified finding a medallion such as the one involved in this case.

It is true most of the machines had the word "Universal" on the horizontal arm. Respondent William J. Hackett gave the names of

five different companies with which litigation had been carried on because of their wrongful use of the name "Universal" on sewing machines. He further said there were in all 25 or 30 such cases. We therefore cannot conclude simply from the use of the name "Universal" that all the machines involved in this case were those of respondents.

The evidence of consumer deception based on the use of the medallion approved by the Customs officials is too uncertain to be of any substantial value.

Of course, the use of a well-known English name such as "Universal" may be considered on the general question of capability of deception. However, it is not disputed that this lettering was put on prior to the importation of the machines and was undoubtedly taken into consideration by the Customs officials when the medallion was approved. The same may be said of the gold ornamentation elaborated upon in the majority opinion. At least, there is no evidence that it was put on after the machines passed the customs inspection.

The initial decision mentions several items of evidence which arose subsequent to importation. Advertising by respondents and five out of seven dealer ads did not advise of foreign origin. The same is true of the instruction books that went with the machine. I do not believe that in this type of case, such omission can be said to be deceptive.

Attention is also called to the fact that motors attached to the machine bear metal labels reading "Universal—Made in USA," "Delco—Made in Rochester, New York," "Simplex—Made in USA," or "Universal Sewing Machine Motor—Made in USA." This is a circumstance to be considered, but the evidence of deception based on such marking is not clear.

Respondent William J. Hackett testified that their machines are sold to about 1,000 dealers and that he did not remember receiving any complaint concerning the country of origin either from a customer or a dealer. It may be true, as suggested in the majority opinion, that most customers did not know the name of the importer; but the dealers undoubtedly knew. Naturally, a dealer such as Son-El would not transmit a complaint. It is interesting to note that respondents quit selling Son-El in the latter part of 1950 which was several months prior to the investigation by the local District Attorney's Office and almost two years prior to the hearings by the Federal Trade Commission. It is also interesting to speculate what the evidence might have been had the consumer witnesses been chosen from customers of dealers who did not indulge in "bait advertising" and other reprehensible practices.

On the second question whether the medallion is adequately attached to the machine head, the evidence is also very meager. The medallion is attached to the vertical arm by two small rivets inserted from the front. Respondent Harry Kron and the manager of Son-El (the Texas retailer) testified that the medallion would be difficult to remove without marring or scratching the machine. On the other hand, the manager of the Fort Worth Singer Sewing Machine Company testified in substance that the medallion can be removed without seriously marring the machine; that the two copper pins holding it can be removed easily by knocking the heads off and driving them through; part of the metal pin which is flush with the vertical arm can be driven through with a punch of the same size into the inside of the arm. The witness did in fact at the hearing remove a medallion. There is very little other evidence on the subject of ease of removal unless it may be inferred from the fact that some medallions obviously were removed.

There is no evidence that the method of attachment was any different than that customarily used in such situations.

Among other things, respondents point out that they have fully complied with the marking requirements of the Tariff Act as interpreted and enforced by the Customs officials. On this point, the initial decision says:

"The fact that respondents' imported sewing machines are inspected and passed by United States Customs officials at the port of entry as being properly and adequately marked so far as Customs laws are concerned, and that respondent has marked its products in accordance with the Customs demands is immaterial and no defense to this proceeding." (*L. Heller & Son, Inc. v. F. T. C.*, 191 Fed. 2d 954).

I agree that it is not a defense. The conclusion of the Customs officials is not a judicial decision which can be plead as *res judicata*. That doctrine applies only to judicial proceedings and not to decisions made ministerially. See 53 C. J. S. p. 27; *Bridges v. U. S.* (1952) 199 Fed. 2d 811; *Pearson v. Williams, U. S. Commissioner of Immigration* (1906) 202 U. S. 281.

However, I do not agree that this evidence is immaterial. Not only is it material, but it should be given considerable weight. This is for two reasons, first, the intrinsic value of the evidence itself, and, second, the necessity for avoiding conflicting rulings by different agencies of the same government. Title 19, Sec. 1304 of the U. S. Code (1946) provides:

"Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, in-

delibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;”

The regulations of the Secretary of the Treasury provide:

“(b) The marking required by such section 304 shall include the English name of the country of origin, unless other marking to indicate the English name of the country of origin is specifically authorized by the Bureau. * * *

* * * * *

“(d) The method of marking shall be one suitable to produce marking on the particular article (or container) which, so far as the nature of the article (or container) will reasonably permit, will be legible to the usual ultimate purchaser of the article and so indelible and permanent as to assure that the marking will remain in a legible condition until the article is acquired by an ultimate purchaser. Stenciling upon such articles as bagging; branding or stenciling upon such material as wood; stamping with a rubber stamp upon such material as paper or cloth, but not upon metal; die-stamping, cast-in-the-mold lettering, etching, engraving, or marking by means of metal plates which bear the prescribed marking and which are securely attached to the article by screws or rivets on metal articles; * * * all the foregoing are ordinarily proper methods of marking. * * *

“(e) Articles (or containers) subject to marking to indicate the name of the country of origin shall be marked on an integral part in a reasonably conspicuous place where the marking can be easily read upon a casual examination of the article (or container) and is not likely to be defaced, destroyed, removed, altered, covered, obscured or obliterated by the treatment or use made of the article (or container) before it reaches the ultimate purchaser. * * *”

The Secretary of the Treasury may authorize the exception of any article from the requirements of the marking under certain circumstances.

In the enactment of Section 1304, Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods, the country of which the goods are a product.

The purpose of this section is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *U. S. v. Friedlander & Co.*, (1940) 27 C. C. P. A. 297. In *U. S. v. Ury*, 106 Fed. 2d 28, the court said that Congress certainly intended to prevent removal or obliteration of a mark by a retailer while the imported article was on his shelf for sale, and yet the article in such a case has passed from foreign to local commerce. The purpose of the act was to apprise the public of foreign origin and thus to confer an advantage on domestic producers. In *Didia v. U. S.* (1939), 106 Fed. 2d 918, the court upheld an indictment for removing labels by the owner of a store while the goods were part of his stock. The goods had been shipped to the defendant by a wholesaler and obviously the defendant was not the importer.

A different situation is presented where goods are imported for purposes of manufacture and as a result of the manufacturing process the imported products lose their identity as such and become new articles having a new name, character and use. In *U. S. v. Gibson Thomsen Co., Inc.*, (1940) 27 C. C. P. A. 267, wood brush blocks and toothbrush handles were imported by a manufacturer of hairbrushes and toothbrushes. At the time of their importation, these articles were "legibly, indelibly, and permanently marked in a conspicuous place (so long as they remained in their imported condition) with the name of their country of origin (Japan), the word "Japan being die sunk on that part of the articles where, after importation, bristles were to be inserted in order to convert the toothbrush handles into toothbrushes and the wood brush block into hair brushes." Consequently, it was held that the importer-manufacturer, rather than the person who bought the completed hairbrush or toothbrush was the "ultimate purchaser" of the imported materials. In *U. S. v. Strauss Import Corp.*, 27 C. C. P. A. 274, a similar conclusion was reached in regard to imported slide fasteners to be used as closures on clothing, bags, etc., which, when so used, became an integral constituent and component part of the finished articles.

There are, of course, cases of goods manufactured in the United States substantially of imported products where the Commission may require a disclosure of that fact in order to prevent deception on the consumer, and this would be true even when the Customs officials require no marking or a marking only sufficient to advise the importer-manufacturer of the foreign origin. In *Heller & Sons, Inc. v. F. T. C.*, (1951) 191 Fed. 2d 954, respondents imported pearls either on strings or in bulk, marked with tags or labels either on the strings

or containers. Respondents removed the tags or labels, fabricated the pearls into necklaces, etc., and distributed them without disclosing that the major portion of the fabricated articles, the pearls, were of foreign origin. A cease and desist order was upheld.

In line with this thought, the Commissioner of Customs, in a circular letter dated August 30, 1945 to Collectors of Customs and Others Concerned, advised as follows:

"The Federal Trade Commission has informed the Bureau that although imported merchandise may be excepted from the requirements of marking to indicate the name of the country of origin under the provisions of section 304, Tariff Act of 1930, as amended, and the regulations thereunder, it is possible that in view of the provisions of section 5 of the Federal Trade Commission Act the marking of such merchandise to show the country of origin may be required by that Commission.

"Therefore, in future cases involving the application of section 304, *supra*, in each case where it is concluded that the imported merchandise is excepted from the requirements of marking the importer shall be informed that the Federal Trade Commission is also concerned with the marking of merchandise and it would be advisable for the importer to ascertain the views of that Commission relative to the application of the Federal Trade Commission Act to the merchandise in question."

In the present case, the Customs officials objected to the marking of the machines with a decalcomania on the back of the vertical arm, on the ground that the attachment of a motor would for practical purposes cover the marking. In this they were obviously thinking of the consumer as the "ultimate purchaser" under the Act. Certainly the former marking was adequate for the protection of the importer. In other words, the Customs officials were seeking to protect from deception the same class of person that the Federal Trade Commission is seeking to protect. The *Heller* case does not hold that the conclusion of the Customs officials is immaterial in the type of case that we now have before us. The court simply held that the Tariff Act giving specific authority over marking to the Customs officials did not by implication take away the jurisdiction of the Federal Trade Commission in cases under Section 5 of the Federal Trade Commission Act, simply because imported goods were involved. In the instant case, however, the question is not one of jurisdiction but of the weight to be given to the admitted fact that the marking in question had been approved by the Customs officials.

We can take judicial notice of the fact that the importation of many different types of goods is passed on by the Customs officials of the Port of New York. It is reasonable to believe that they have developed considerable skill and knowledge in regard to markings that will prevent deception. If the opinion of a consumer witness (whose experience may be limited to a single incident) is of value, the opinion of impartial experienced officers of the government acting in the performance of duties placed upon them by law would seem to be of at least equal value.

Secondly, to ignore the conclusions of the Customs officials will create confusion in the administration of the law. At best it is difficult for the citizen to find his way in the labyrinth of rules and regulations which beset him on all sides. It is not made easier when different agencies of the same government set up conflicting road signs. This thought was well expressed by the late Mr. Justice Jackson in his dissenting opinion in *The Ruberoid Company v. F. T. C.*, 343 U. S. 470 at page 482, in which he points out:

“* * * recent instances in which part of the government appears before us fighting another part—usually a wholly executive-controlled agency attacking one of the independent administrative agencies—the Departments of Agriculture (*Secretary of Agriculture v. United States*, 344 U. S. 298) and Justice (*United States v. Interstate Commerce Commission*, 337 U. S. 426) against the Interstate Commerce Commission, the Department of Justice against the Maritime Commission (*Far East Conference v. United States*, 342 U. S. 570), the Secretary of the Interior against the Federal Power Commission (*United States ex rel. Chapman v. Federal Power Commission*, 345 U. S. 153).”

Courts usually give considerable weight to the conclusions of other courts, even where they are not bound to do so. In *Mast, Foos & Co. v. Stover Manufacturing Co.*, 177 U. S. 485, the court said:

“Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies deference to the opinions of others, since it has substantial value in securing uniformity of decision and discourages repeated litigation of the same question.”

Title 19, Section 1304, lays down a general Congressional policy as to marking of imported articles which is binding on all of us. The law does not require that the marking itself shall be conspicuous, but only that it shall be in a conspicuous place. The importer is required to give notice of foreign origin; there is no requirement that he shall advertise it. Nor is there any mandate that the marking be visible

to all who pass by; some examination is required. The regulation of the Secretary of the Treasury is that marking shall be "in a reasonably conspicuous place where the marking can be easily read upon a casual examination of the article." I think this means the type of examination that would be made by the usual prospective purchaser.

The regulations also provide that marking by means of metal plate which contains the required information and which is securely attached to the article by screws or rivets is sufficient on metal articles. Reasonable skill and diligence should be exercised in putting on markings that will meet the requirements of the law. Nevertheless, in many cases a product can not be marked in such a manner as to insure that it will not be hidden or removed. That the Congress recognized this is shown by the criminal penalty provided in Title 19, Section 1804 (e) of a \$5,000 fine and one year imprisonment for removing or altering any such mark with intent to conceal information given thereby. It is my conclusion that the record does not justify an order against respondents in the matter of marking of foreign origin. That portion of the appeal should be granted.

The majority opinion refers to former cases where consideration has been given to this general subject. Some have to do with settlements and some with statements made in regard to compliance and others were contested cases.

Each case must be decided on its own facts as developed by the evidence. In none of these cases does it appear that the conclusions of the Customs officials as to the sufficiency of a particular marking was given any weight. In fact in *Astor Industries, Inc., et al.*, Docket 5889, and *Pickow Distributing Corporation et al.*, Docket 5890, it was held (citing *L. Heller and Sons v. FTC*) that such evidence was immaterial. I think this conclusion is not supported by the *Heller* case and should be overruled.

In prior statements on this subject, the Commission has discussed "gold on gold," "gunmetal on gunmetal," "clearly and conspicuously disclosing," "unemphasized," etc. In fact the Commission seems to have not only ignored the conclusions of the Customs officials but also the intent of Congress as expressed in its statutes. I agree with the statement in the Concurring Opinion of Chairman Howrey as to the desirability of cooperation with the Customs officials. It seems to me, however, that cooperation should begin in this case where the question is directly raised.

Commissioner MASON joins in this dissent.

SPECIAL OPINION CONCURRING WITH COMMISSIONER GWYNNE'S DISSENT

By MASON, Commissioner:

This is a case about color schemes and lettering on labels for imported sewing machines.

The Tariff Act says you can't bring manufactured products into the United States unless the goods are marked so the casual observer may see where they come from.

The Bureau of Customs of the Treasury Department administers this law—and a right good job it does.

Just why the Federal Trade Commission gets into the act is not apparent. But it is surprising how often an overdeveloped sense of responsibility makes one agency of Government duplicate, overrule or amend the work another has already done.

This is the opposite of the usual governmental practice known as "passing the buck." It is called "grabbing the buck."

The Commission grabbed the buck in the instant case because it felt neither the color scheme nor the size of the letters Treasury approved for defendant's labels really protected the public interest.

Here is what happened up to the time the Federal Trade Commission came into the picture.

While the defendant had always labeled his machines "Made in Japan" (the country of origin), the Bureau of Customs back in 1949 determined the markings were not as plain as they should be.

They told him so.

He changed his marking in accordance with their suggestion.

They wrote him a letter approving the change.

By 1955 the Federal Trade Commission decided it didn't like the Custom Collector's taste. According to the Federal Trade Commission, gold lettering on a gold medallion would no longer do. Gunmetal on gold, or even gunmetal on gunmetal would be quite all right, but even then, the letters should be just a bit bigger.

To give governmental recognition and full force and effect to this great ethnological shift, the Commission has now adjudicated that if defendant wants to use a gold medallion on a sewing machine, it ought to make the letters another color and increase the size of the word "Japan" a sixteenth of an inch.

So much has been said regarding the merits of an eighth of an inch over a sixteenth, and the virtue of gunmetal on gold over gold on gold, that I hesitate to add anything to this already exhausted branch of our knowledge. Suffice to say I am in complete agreement with the opinion of Commissioner Gwynne. I, too, opine that perhaps we had best leave this exotic field to the polished judgment of the ad-

ministrative official originally endowed with the burden of approving foreign marking, namely, the Treasury Department Bureau of Customs.

Not that we Commissioners aren't as cultured and refined as a customs collector—it's just that it takes us too long to be vague on matters he decides so clearly and quickly.

How did the Collector do this?

The 1949 change of marking effected by Customs involved the exchange of three letters.

One, signed by Customs, outlined what should be done.

One, signed by the importer, set forth his method of carrying out what Customs wanted.

And one, by Customs, acknowledged and approved the new marking, as follows:

"You are advised that the use of the plate submitted will be satisfactory provided the same is affixed to the upper part of the sewing machine in a place which will not be obscured by the usual attachments, such as a motor, etc., which may be added subsequent to importation and before delivery to the ultimate purchaser."

There may have been some collateral conversations at the time but, taken all in all, the proceedings were quick, inexpensive, and to the point.

Here was no beating around the bush with a lot of "cease and desist" language.

Customs told the importer just what it wanted. The importer did what he was told to do, and everybody was happy.

The time consumed—a few days.

The paper consumed—three letters.

The Customs Collector had agreeably accomplished his duty.

The businessman had agreeably complied with the law.

And the consumer?

Well, anybody with eyes good enough to thread the needle on the sewing machine could certainly read the Customs-approved gold medallion three inches above it. By so doing, customers could ascertain (if interested) the ancestry, origin and antecedents of the machines they bought.

All this indicates the Collector of Customs devised and used an efficient empirical routine for the protection of the public in marking foreign-made goods. Certainly his day-to-day administration of his duties entailed very little oppression and burden on those whose businesses are subject to his control.

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As against the casual exchange of correspondence when Customs dealt with this problem, compare his administrative action with what took place when the Federal Trade Commission decided it, *too*, should protect the public interest.

Turn we now to the ineluctable and awesome scene as the Federal Trade Commission swung its batteries of lawyers, investigators, hearing examiners, reviewers, chiefs of bureaus and Commissioners into action.

Before drawing the complaint, the Commission engaged seven lawyers to make 79 investigations involving trips to :

<i>City</i>	<i>Number of Trips</i>
New York, N. Y.....	6
Brooklyn, N. Y.....	1
Philadelphia, Pa.....	2
Pittsburgh, Pa.....	2
West View, Pa.....	1
Washington, Pa.....	1
Etna, Pa.....	1
Cecil, Pa.....	1
New Brighton, Pa.....	1
McKeesport, Pa.....	1
Cleveland, Ohio.....	1
Providence, R. I.....	1
Baltimore, Md.....	2
Clinton, Md.....	1
Boston, Mass.....	2
Chelsea, Mass.....	1
Westfield, Mass.....	1
Springfield, Mass.....	1
Chattanooga, Tenn.....	1
Nashville, Tenn.....	1
Jersey City, N. J.....	2
Newark, N. J.....	1
Passaic, N. J.....	1
Hartford, Conn.....	1
Manchester, Conn.....	1
Atlanta, Ga.....	2
Falls Church, Va.....	1

When trial came on, the Commission had to send its prosecutor and its hearing examiner to Philadelphia, New York and Dallas, as well as employ court reporters to cover the extended hearings in those cities.

This represents an outlandish expenditure of Government funds, considering the results obtained. Nor do I believe it amiss to express some concern over the defendant's similar loss in defending himself for doing what Government had already advised him was "satisfactory."

It is cases like this that demonstrate the crying need for the Langer Bill.³

It appears that the defendant had spent \$100,000 in some 25 suits against private parties protecting his right to the labels on his sewing machines. In all of these suits he was successful. But now he had to employ his lawyers, stenographers, court reporters, et al., to again defend his property, but this time against his Government.

And here he did not do so well. For the Commission in its wisdom ordered the defendant to cease and desist from selling foreign-made sewing machines without

"Clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated."

Albeit the defendant and the Bureau of Customs had been rocking along for years in ignorance, both blissfully believing that defendant's labels already did just this. Certainly the above order did nothing to dissipate the fog.

If it weren't for the careful collation of staff comments on foreign marking by Commissioner Secrest in his novel but scholarly majority opinion, we would never know the Commission wanted a different color and a sixteenth of an inch bigger letters. The thing that tells what the Commission wants is not its quasi-judicial order, but the staff's interpretations as to what the order was really driving at.

In other words, we have coated our administrative busybodiness in the mummery of a judicial show to no avail, for no matter how we try to dress up our foreign-marking cases to look like they were quasi-judicial questions, in the end the Federal Trade Commission has to drop its role of court and let its staff act like an administrator.

All of this naturally leads to the question, how many administrators must an importer listen to—Customs, the Federal Trade Commission, and who next?

From a practical standpoint, the logistics of the problem indicate the advantages of direct Bureau of Customs administrative treatment in these cases over the costly and lengthy quasi-judicial process of the Federal Trade Commission.

There are other cogent reasons why we should retire gracefully (even though we at present have the authority to remain) from this type of litigation.

³ S. 1752 introduced in the 83d Congress, 1st Session: "No person shall be liable to the United States Government for * * * penalties because of conduct not in conformity with any statute or other law, if he establishes that his conduct was in conformity with * * * a rule * * * of an agency responsible for administering that law, and if such statement was promulgated to guide him * * *."

Besides reworking the Bureau of Customs field, we have also wandered over into the Patent Office Trade-Mark Operation of the Department of Commerce.

In the instant case, defendant applied for and received a trade-mark registration for its use of the word "Universal." Issuance by the Patent Office of a trade-mark registration carries with it prima facie evidence of validity, ownership and right to use.

We have reversed the Department of Commerce copyright department which gave Standard the right to use the word "Universal" in manner and form as respondent has been using it for years, and all this after it has successfully defended in the courts of the land its right to such a symbol.

Here again there is no doubt but that we have the authority, but see what mischievous interpretations we foster when we command the defendant to cease and desist from

"Using the word 'Universal,' or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent 'Standard Sewing Equipment Corporation.'"

This part of the order is based on the testimony of witnesses, some in Texas, some in Philadelphia, who testified when they saw the word "Universal," they thought the sewing machine was manufactured by Landers, Frary & Clark.

It so happens that Landers, Frary & Clark do not make sewing machines, but nevertheless it might be asked when we require Standard to add its name to the word "Universal" every time Standard uses it, are we in effect giving Landers, Frary & Clark an exclusive and perpetual monopoly to use the word "Universal" by itself?

Certainly on its face it looks like we were, but careful analysis will show this is not so.

Tomorrow Landers, Frary & Clark may haplessly find themselves the butt of a similar proceeding if other witnesses two thousand miles off in another direction are willing to testify that they believed the word "Universal" really indicates that the Fritter Fryer Company or the Zilch Zither Corporation made the machine in question.

When the trade-mark people adjudicate the fact of prior use for an article, they first give notice to the world by Official Gazette so that all who wish may make claims for or file interferences against the use of the word or phrase as a trade-mark.

We have neither the machinery nor the experience to do this.

Yet in the instant case we have overruled the Patent Commissioner's certificate and the administrative decision of the Collector of Customs, invalidating their decisions in both instances on the sole testimony of witnesses called for the prosecution, with no opportunity for any other person to challenge their statements except the defendant.

Opinions and impressions—they blossom everywhere and, with proper selection,⁴ witnesses will always come up with the “right answers”—a dozen for the prosecution—a dozen for the defense—depending on who calls them. Under most circumstances these witnesses clutter up a record and waste the taxpayers' money with no other results than the pitting of one set of propaganda against another.

Nine years ago, in *Federal Trade Commission v. Manhattan Brewing Company*, Docket 4572, I observed:

“Both the Government and defense attorneys lay great stress on their public witnesses. (A public witness is a person you pull off the street or get from the telephone book. They come to court and tell what impression they got from a sign, a label, or an advertisement. Theoretically, they are not generally supposed to know what it is all about until they are on the stand—to believe this would test the credulity of any man.) The witnesses were honest enough. They thought they were giving ‘impressions,’ but for the most part it was predelictions they were revealing. * * *

“Most public witnesses are disposed to stay out of trouble with Uncle Sam. When a Federal officer orders a citizen to appear in court, it's a great relief to discover Uncle Sam only wants you as a public witness instead of as a private defendant. This relief, coupled with pride in helping Uncle Sam, does funny things to people. It expands their virtue out of all proportion. They become parties to a game and they are out to have their side win, especially if their side is all-powerful Uncle Sam.

“As for the defendant's public witnesses, a lawyer never combs the country for witnesses against his own client. Through the years I have become convinced public witness testimony on ‘impressions’ is not worth a ‘continental’.”

In the light of our paltry appropriations, stamping out monopoly, restraints of trade and gross unfair acts in commerce is a grim business. For failure to maintain competitive freedom will slide our economy into either communal or a totalitarian decline.

We should not squander our appropriations on cases such as this,

⁴In the instant case the Government adjourned the trial in New York and went to Dallas, Texas, where a local sewing machine merchant had sold defendant's machines after the foreign-marketing label had been defaced.

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Order

but stick to what Chairman Howrey has often referred to as "hard core violations."

I join in Commissioner Gwynne's dissent.

FINAL ORDER

Respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, having filed on April 12, 1954, their appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral argument; and the Commission having rendered its decision granting in part and denying in part said appeal:

It is ordered, That the order contained in the aforesaid initial decision, be, and it hereby is, modified to read as follows:

It is ordered, That the respondents, Standard Sewing Equipment Corporation, a corporation, and William J. Hackett and Harry Kron, individually and as officers of said corporation, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such manner that it cannot readily be hidden or obliterated.

2. Using the word "Universal," or any simulation thereof, as a brand or trade name to designate, describe or refer to their sewing machine heads or sewing machines of which the heads are a part, unless there appears in connection therewith, in legible and clearly visible marking, the name of the corporate respondent "Standard Sewing Equipment Corporation."

It is further ordered, That with respect to any issue raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the above provisions.

It is further ordered, That the initial decision of the hearing examiner, as modified herein, be, and it hereby is, affirmed.

Chairman Howrey concurring in the result and Commissioners Mason and Gwynne dissenting.

IN THE MATTER OF

E. F. DREW & COMPANY, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AS AMENDED*Docket 6126. Complaint, Oct. 19, 1953—Decision, May 5, 1955*

Order requiring a corporation with principal office in New York City and factory in New Jersey, to cease using in advertising terms or statements which represented or suggested that its "Farm Queen" oleomargarine was a dairy product.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Samuel J. Loewenstein, of New York City, for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission on October 19, 1953, issued a complaint charging the respondent with having violated the Federal Trade Commission Act by the use of unfair and deceptive acts and practices in commerce in the sale of oleomargarine. It was alleged in the complaint that respondent had disseminated advertisements concerning its product under the trade name "Farm Queen Oleomargarine" in such a way as to be misleading in material respects and constituting false advertisements, as such term is defined in Sections 12 and 15 of the Federal Trade Commission Act, in that they serve as representations or suggestions that respondent's product is a dairy product which is contrary to the fact. It is further alleged that the use of the words "Farm Queen" as a trade name for respondent's oleomargarine is also misleading in a material respect in that it serves as a representation or suggestion that respondent's product is a dairy product. It is further alleged that the use by respondent of the foregoing practices had the capacity and tendency to mislead and deceive a substantial portion of the purchasing and consuming public into the erroneous and mistaken belief that respondent's oleomargarine is a dairy product, and into the purchase thereof in the reliance upon such erroneous and mistaken belief. It is also alleged that respondent's said practice placed in the hands of dealers and other distributors a means and instrumentality to mislead the purchasing and consuming