

Decision

IN THE MATTER OF
DOUBLEDAY AND COMPANY, INC.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND OF SEC. 2 (a) OF THE CLAYTON
ACT

Docket 5897. Complaint, June 29, 1951—Decision, Aug. 31, 1955

Order requiring a publishing house in Garden City, N. Y., to cease discriminating in price by requiring that retailers, but not book clubs, sell at fixed minimum resale prices books which it sublicensed the clubs to publish, and by selling publishers' editions to some wholesalers or jobbers at lower prices than to their competitors.

Mr. Fletcher G. Cohn, Mr. Lewis F. Depro and Mr. Paul H. LaRue for the Commission.

Satterlee, Warfield & Stephens, of New York City, for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae*.

Newman & Katz, of New York City, and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for American Booksellers Association, Inc., *amicus curiae*.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The Proceedings

This proceeding began on June 29, 1951, with the issuance by the Commission of a four count complaint against the respondent. Simultaneously there was issued complaints against five other large and prominent book publishers substantially the same as the first two counts in this proceeding.¹ Since the four counts in this proceeding are in reality four different actions, clarity will be served if their particular charges are set out separately hereinafter when each individual count is separately discussed. Suffice it to say here that the first three counts in this proceeding charge a violation of the Federal Trade Commission Act through the use by respondent of unfair methods of competition by reason of unreasonable restraints of trade imposed by it upon its distributive outlets and that the fourth count charges respondent with price discrimination in the sale of its publications in violation of Section 2 (a) of the Clayton Act [U. S. C. Title

¹ A third count in each of these five cases charging price discrimination was subsequently dismissed by the Commission.

15, Sec. 13]. After answer, 48 hearings were held, resulting in the accumulation of 4693 pages of testimonial evidence and 369 exhibits, all duly filed in the Office of the Commission. When the case was rested by counsel in support of the complaint on October 21, 1952, counsel for respondent moved to dismiss, which motions were ruled upon by the hearing examiner on March 2, 1953, and promptly appealed to and argued before the Commission, decision thereon being entered September 23, 1953. Thereafter, respondent's defensive evidence was received and a short rebuttal followed, the case then being closed for further proof-taking on June 10, 1954. The proceeding now comes on for final consideration by the hearing examiner, heretofore duly designated by the Commission, on the complaint, answer thereto, testimony and other evidence, proposed findings, conclusions and briefs submitted by counsel and brief submitted by counsel for the Book of the Month Club, Inc. (by leave) from which the hearing examiner finds that this proceeding is in the interest of the public and makes findings of facts, conclusions drawn therefrom and order as will hereinafter appear.

Count I. Pleadings, History and Issues

The complaint in this count charges that respondent as copyright licensee from an author to print, publish and sell the author's work, sublicenses the Book of the Month Club, Literary Guild of America and other "book clubs," to print, publish and distribute to their members exclusively the same work, as a "book club edition"; that it refuses to similarly sublicense anyone else; that it contracts in these sublicensing agreements to fix and maintain the retail price of the books which it, the respondent, sells to jobbers and retail bookstores; and further contracts and agrees therein not to release for sale such books until the book clubs distribute their own editions to their subscribers, and that such contractual provisos are in restraint of trade and are unfair methods of competition.

Upon motion to dismiss filed by respondent at the close of the evidence offered by counsel in support of the complaint, the hearing examiner, acting on the principal that a copyrightee or his licensee may legally agree to or do anything which accomplishes no more than to preserve or exploit the monopoly given him, but he may not by restrictions or restraints add to that monopoly, extend it or increase its effective orbit of operation, ruled that the exclusivity and simultaneous publication provisions were legal but that the price maintenance provision was not because it extended restraint below and beyond the orbit of the licensee's own field. On appeal, the Commission affirmed the ruling on the exclusivity provision, reversed on the simultaneous

release provision and did not rule on the price maintenance provision because respondent had not appealed that particular ruling. In its reversal the Commission ruled the simultaneous release provision to be a restraint beyond the scope of the copyright protection but said the question then was whether or not the restraint was reasonable and remanded the matter to the hearing examiner for determination of that issue, listing as relevant factors in that determination the following:

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

On the partial record then before him and at the insistence of counsel, the hearing examiner was of the opinion that the restraint was unreasonable. Since then evidence of the reasonableness and necessity of the restraint has been taken, and a rather full picture of the book club operation has been portrayed, as well as some rebuttal evidence. The picture now is markedly different.

The questions for decision on this Count are:

1. Whether the simultaneous publication or release agreement is a reasonable or unreasonable restraint of trade.
2. Whether the agreement by the respondent with a book club that the former will "fair trade" the copyrighted trade books which it sells to retailers or jobbers, and exempt the book club from such resale price maintenance is an unfair method of competition.

Upon these issues and the record the following findings of fact are made:²

1. Respondent, Doubleday and Company, Inc., is a corporation under the laws of the State of New York with its principal office and place of business located at 501 Franklin Avenue, Garden City, Long Island, New York. It is, and has been since prior to 1900, under one corporate name or another, engaged in the publication, sale, and distribution of popular fiction and nonfiction books, commonly known

² Specific fact-findings are numbered seriatim through all four counts to aid counsel in referring thereto on the inevitable appeal. Background or explanatory paragraphs are unnumbered.

as trade books, which it sells to (1) wholesalers or jobbers for resale to libraries and retail bookstores, (2) to retail bookstores, and (3) to libraries and directly to the reading public through retail bookstores owned and operated by it. In 1952 it ranked second among domestic publishers in number (300) of titles published. Its volume in trade books is \$7,000,000 a year. It directly owns and operates a large printing plant at Hanover, Pennsylvania. It also owns all the outstanding stock of the Country Life Press Corporation, which latter owns and operates a large printing plant located at Garden City, Long Island, New York.

2. In the conduct of such business respondent has been, and is now, engaged in commerce, as that term is defined and understood in the Federal Trade Commission and Clayton Acts, under which this proceeding is brought, in that respondent ships or causes to be shipped its publisher's editions of trade books from the States in which are located its several places of production and business to purchasers thereof located in other States and the District of Columbia and in that there has been as continuous a current of trade and commerce as respondent could achieve in said books between and among the various States of the United States and the District of Columbia.

3. Respondent has been, and is now, in competition with other publishers of trade books and with many of its customers, both wholesale and retail. Jobber customers of respondent have been and are in many instances in competition with each other and, to a lesser degree, with respondent for the business of libraries and retail booksellers. Retail booksellers, customers of respondent, have been and are, at times and in many localities, in competition with each other for the consumer market, and in many instances in those States wherein are located respondent's retail bookstores, in competition with those stores, for the consumer market.

4. To procure manuscripts for publication, respondent, for stipulated lump payments and royalties, procures from an author the latter's license as copyrightee to print, publish and sell exclusively the author's work, which license includes the right to sublicense a book club (an organization which independently produces or publishes books for direct mail order distribution to its subscribers) to print, publish and sell a "book club" edition of the same work, provided that the author receives one-half, or some other percentage, of the publisher's receipts from such sublicense. In the case of well known or "established authors" and in the case of "best sellers," all of these sums are very substantial.

5. Thereafter, respondent makes such manuscript available to a first edition book club, such as the Book of the Month or Literary Guild,

for perusal and possible selection. If these book clubs deem the manuscript a good selection for their subscribers, think it will sell well and profitably, they sublicense from respondent the exclusive right to print, publish and sell a book club edition of the work, to lease the publisher's printing plates for that purpose, or make their own therefrom, paying for the lease and sublicense a substantial sum of money and in addition agreeing to pay a stipulated royalty for each copy of the book sold to their subscribers. These sublicenses contain also the two provisions under attack here, a provision that the respondent's publication date will not precede the book club's, and in the case of the Literary Guild, but not in the case of the Book of the Month Club, a provision that the respondent will "fair trade" the resale price of its edition and exempt such club from any such resale price maintenance. In the case of the Book of the Month Club (hereinafter designated as B. O. M. C.) the agreement was that respondent would not enter into any fair trade contract except on terms which would exclude B. O. M. C. from such contract.

6. Book club editions are sold in direct competition in commerce with the publisher's edition of the same work, and with publisher's editions of other works, directly to the public by the book clubs. These book club editions are practically the same in design, format, quality and size and appearance as the publisher's editions of the same work and carry the respondent's name as publisher thereon because the original publisher is the author's representative in respect to that book. Many of these book club editions have the same dust packets as are on the publisher's editions of the same title, although there is plainly printed thereon that it is a book club edition or selection. There is some evidence that the similarity was so great that book club editions have been returned for credit to retail book stores selling only the publisher's edition.

7. B. O. M. C. is an independent corporation having no relationships, corporate, stockholding, directorial, blood or otherwise, with respondent. Literary Guild on the other hand is a wholly-owned subsidiary of respondent whose first vice-president is also president of Literary Guild. Respondent's president, director and chairman of the board is vice-president and director of Literary Guild and the latter's book club editions are printed at respondent's Hanover, Pennsylvania, plant.

8. In reselling the publisher's edition, the retail bookseller is under a definite price disadvantage, vis-a-vis the book club. As was said before in this case, it is obvious that the retail bookseller, paying respondent \$2.10 for a book which he must resell for \$3.50, cannot sell

it at that price to potential purchasers who may obtain the same book for anywhere from nothing, in case it is a premium or gift or bonus, up to \$2.00 or so by subscribing to a book club for a year and buying eleven or other number of books at prices individually low also, by comparison. There is substantial evidence in the record from retail booksellers that they have been unable to sell, or have lost sales by reason of cancellations and returns, against this competition. There is testimony also of a general decline in retail book business, principally in basic stock, which titles, however, book clubs rarely, if ever, publish; the closing of bookstores—although the secretary of the American Bookseller's Association, to which 90% of them belong, testified that its membership has remained about the same, withdrawals being about offset by new members; that some booksellers order less when a book has been selected by a book club than when it has not; that with some booksellers, their sales of the publisher's editions which are also book club selections, are less than if the book had not been selected; that book club selections are the fast selling cream of the crop and the slow moving books are left to the bookseller to sell; and that book club selections, because of their lower price, have created a consumer belief that the bookseller is overcharging with consequent bad public relations. Against this there was substantial testimony of publishers, backed by specific examples of cases, where the selection by a book club of a particular book greatly enhanced the sale of that book in the retail bookshop—testimony which in two instances was corroborated by two very large retailers. Although this has happened with specific books, by and large the retail bookseller is under a competitive disadvantage, vis-a-viz, the book club with the majority of the latter's selections, not as severe as claimed but nevertheless definite. It is this price disadvantage which has been the focal point of the prosecution.

9. Instead of starting with an illegal practice, or one which might or might not be, dependent on its effect, illegal, here the start has been with an existing condition, and an inquiry backward, not only to ascertain the cause but on a priori assumption that that cause must, of necessity, be illegal. Until it was decided that the exclusivity provision was legal, the main attack was upon it. Since then, the artillery has been concentrated upon the left flank—the simultaneous publication provision, which until the prosecution evidence was half completed, had not appeared specifically in the case at all, and was not on counsel's "index expurgatorious" as the villain of the bookseller's plight. Instead of the effect being an element of illegality or a measure thereof, in this case, it has been used as the lodestar to which practice or agreement has been merely background or illumi-

nation. The record clearly reveals that the primary, if not the sole, cause of the bookseller's handicap vis-a-vis the book club is the price disparity between the same books offered by both—simultaneous release is not the sole nor the primary cause—at most, it is a contributing cause. The contention that it is, is a mid-trial afterthought of counsel.

10. But the Commission has flatly rejected this approach, as has the hearing examiner. Effective competition is necessarily bruising—the fact that a fighter is knocked out or badly mauled does not necessarily import a “fixed” or foul fight. As the Commission has expressed it:

“Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent.”³

11. There is evidence in the record that booksellers have sent out circulars, advertised and selected, and as a result have procured substantial prepublication orders for a forthcoming publisher's edition by a popular author, only to have the publisher postpone the publication date after a book club had selected the work with the result of having many of those prepublication orders cancelled because the customer had read the book, it was a book club selection and could be obtained there at less money.

12. The Commission's opinion further held that, on the partial record before it, this simultaneous release provision was a restraint, that, in consonance with prevailing legal precedent, it was not illegal per se, the inquiry being whether such restraint was reasonable or unreasonable, this in turn to be determined by all the circumstances of the operation, with special emphasis on the “special needs of the licensee [the book clubs] for the competitive advantage afforded by the license.”⁴

13. Respondent has presented considerable substantial evidence on this point. One of these “special needs” is the public demand for “newness.” B. O. M. C. was organized in 1926, Literary Guild in 1927, and until 1931 or thereabouts purchased “selections” from publishers at discount and resold them to their subscribers at the same price as retail booksellers. When book costs advanced, however, the book clubs started leasing plates and doing their own publishing. The testimony of their organizers and directing heads down to the present, as well as their releases, establishes that the idea for both was

³ Opinion on appeal from Hearing Examiner's rulings on respondent's motion to dismiss, September 23, 1953.

⁴ *U. S. v. Paramount Pictures Inc., et al.*, 334 U. S. 131, 145.

the selection of a new and current book each month by a board of judges or selectors, and the furnishing of that book to the subscriber upon publication. The pristine character of these popular books—fiction and current non-fiction—was stressed for many years. While it is true that in many instances the advertisements of these book clubs over the past few years has stressed price lowness, premiums, alternate selections, bonus books, etc., and now newness, nevertheless the newness theme has also been stressed in some of them. Moreover, after many years of emphasis on newness, and selection for current interest by a board of authors and literary people, public acceptance on that basis has become ingrained, as the testimony of one book club member clearly indicated, without reiterated insistence on that theme. The Hearing Examiner is fully convinced on this record that “newness” is as important an appeal to the potential subscriber as is price and a “must” to the current subscriber. There is no doubt that most of the books selected are “new.”

14. An exhibit showing the respondent's sales of such book published in 1952 (all kinds and types) indicates conclusively that the greatest sale is in the first month, slightly less in the second month after publication and then sales rapidly decrease until by the fourth month and thereafter, returns for credit are greater than sales. This demand for “newness” is also evidenced by constant complaints from book club subscribers, if their books are delivered later than the same book appears in a retail bookseller's—a number of letters of which are in evidence. There is also substantial evidence of subscribers threatening to quit as such, if they receive books later than they are purchasable in book stores, and some, that they would not have joined if this time element were missing.

15. The record also shows that postponement of an announced publication date by the publisher is frequently caused by other factors, such as bringing a book out in a different or more favorable season, printing or other production breakdown or delays; that the announcement of a publication date is not regarded in the industry as binding on the publisher; that it also happens that an announcement that a book, scheduled for publication, has been selected by a book club, increases prepublication orders; that retail booksellers circularize their customers as much as six months in advance of publication, whereas book clubs have but a month in which to do so; and there is testimony also that one bookseller increases his orders when he learns that a forthcoming publication has been selected by a book club.

16. On this question of timeliness, the record also shows that in a five month period, the publication dates of 9 out of 18 selections by

Literary Guild were postponed by the publishers to correspond with the Literary Guild's publication dates and that other instances, with specific books, have occurred where retail booksellers are solicited for and give prepublication orders for the publisher's editions months before publication; that this occurs before any book club announcement to its members of the selection of the same work as a book club edition; that publication date for the publisher's edition is usually fixed before the manuscript is delivered to the book club for decision on selection; that retail booksellers frequently circularize their customers months in advance of the publisher's announced publication date to secure prepublication orders; and that postponement thereof, coupled with announcement of the work's selection by a book club does cause cancellation of these prepublication orders given to the bookseller, in one instance as high as 50%.

17. Book club officials testified that their ability to publish simultaneously with the trade edition was vital to their business; that it was a cornerstone thereof; and that 90% of the membership take and will insist on a newly published edition rather than an old or previously published alternate. Granting personal motive in the testimony of those presently interested, this evidence is strikingly confirmed in great detail by the founder of the Literary Guild, who in 1934 sold that organization to respondent and who is now a publisher having no connection with a book club. All of them stressed the fact that except in the case of alternates or bonus books, their business is publishing new books, not reprints or previously published books.⁵

18. This public demand for "newness" or "timeliness" is also evident from the fact, not in the record, but a matter of common knowledge, that people will pay money to a rental library to get to read a book just out, or one being discussed, although they can get the same privilege for nothing by waiting on the list at the public library.

19. Another evidence of the importance of timeliness to the consumer is the tremendous publicity and advertising build-up which precedes publication. Publishers and booksellers spend fortunes "to achieve maximum publication impact" for the trade edition. Reviews, trade announcements, special offers, plus violent advertising inevitably arouse interest in a forthcoming book and stimulate buyer interest. Upon publication it disappears. The same book appearing later is inevitably as dated in the public mind as yesterday's newspaper.

20. B. O. M. C. spends 2 million and Literary Guild \$1,600,000 annually for advertising and circularizing. Literary Guild's annual

⁵ Alternates are not new books and these are selected in place of new books by 20% or more of Literary Guild's membership each month.

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investment and other costs for 1953 was between 6 and 7 million, its credit losses alone amounting to \$325,000 and its cost for free books to new members \$1,300,000 a year. It cost Literary Guild \$5.00 to obtain a new member with a 50% annual turnover in membership. B. O. M. C. has the same turnover. It costs Literary Guild 82.2 cents to sell each of its members.

21. Without competitive equality in reaching the book reader, the book club would go out of business, at least out of the new book business, and become merely a reprint house. This would affect at the moment 1,270,000 subscribers who would then be compelled to depend on libraries, rental or public, to read, or the retail bookseller, to buy, newly published works.

22. Equally important, financially at least, is the provision under attack, to the publisher, who receives such a substantial amount of income from its sublicense to the book club, with this proviso in it, that it frequently represents the difference between profit and loss in its total operation. The testimony is that without the proviso under attack, the book club would deal directly with the author, leaving the publisher out in the cold. Whether the author would realize more from such a change than he does under the present system, the record does not show.

23. Last we come to the public, the book buyer. These book clubs do a nationwide business. While it is true that anyone accessible to and serviced by the U. S. mail can buy books from a retail bookseller if he wishes, it is not true that it is as easy as subscribing to a book club. In the former case, he must first know of the forthcoming books. Then he must separately order and pay for each. There are hundreds of communities in the United States where bookstores are not reasonably accessible. A survey by Literary Guild shows that of 20,180 communities in which it has 245,225 members, only 1,473 of these towns with 148,980 members, have bookstores, whereas 18,707 towns have no bookstores although the Literary Guild in these communities has 96,245 members.⁶ Thus, 40% of its members live without benefit of local bookstores. Obviously, too, from these figures there must be many to whom bookstores are accessible but who prefer to send in one yearly order for new books rather than go to a bookstore for each purchase. This may be a plus coverage or substitute coverage. With a few exceptions, there are no satisfactory statistics in the record as to the extent which bookstores, by mail order, satisfy the remote consumer market. These exceptions cannot be regarded

⁶ Approximately 300,000 of Literary Guild's members receive their selections through department store book departments.

as typical of the 1500 others. As to B. O. M. C. 32% of its members live in communities of 10,000 population or less, another 32% in communities whose population ranges from 10,000 to 100,000.

24. The mass mail order servicing of these hundreds of thousands of subscribers is an expensive, laborious and time-consuming job and that "time" is of the essence. After the editorial board of a club has selected a title it takes three to five months to produce a book and another 28 days, at a minimum, for distribution. These book clubs must edit, produce and distribute monthly club magazines to announce each month's selection. The requisite details of this are tremendous. This is necessary because the book club must know prior to distribution whether the member will take that month's selection or some alternate, and rejection slips mailed with the magazine are frequently returned at the last moment. Then follows a mad scramble of packaging, addressing and mailing each member's selection. The whole process requires the services of 1,000 employees for B. O. M. C. and 1,400 for the Literary Guild. Five months is, apparently, the absolute minimum between selection and delivery.

25. Another aspect of "special needs" is that a book club cannot operate on isolated sales as can a bookstore. The latter may return for credit stale or non-moving merchandise—the book club cannot—its investment has already been made. The normal loss of one-half of its membership annually points this up. The club risks its entire success on twelve books a year—a bookstore does not. The tremendous sums it has spent on advertising are not recoverable if the book is unpopular—the book club must obtain most of its members solely through this means. It has in addition advanced and gambled very substantial sums in acquiring the sublicense—all of it non-recoverable, an expense unknown to the bookseller.

26. If, as contended for, and proved, by counsel in support of the complaint, newness, or timeliness, is an economic need of the retail bookseller, it cannot be any less a need to the book club, because both compete for the same bookbuyer on many of the same books. Respondent's evidence outlined, but not detailed above, clearly establishes that this need of the book club is indeed a special need.

27. These then are the "special needs" of the licensee—the book club. Do they make the restriction reasonable? The Paramount case,⁷ apparently regarded by the Commission as controlling, is a far weaker plea for the reasonableness there found than is presented here. In that case the Court was asked to and did sanction a refusal by the licensor to license suburban theaters to show first-run (new) motion

⁷ 334 U. S. 131, 145.

pictures for a time long enough to permit competitive downtown theaters to exhibit this same film at far higher consumer exactions, which were shown to be not only possible of exaction but necessitous to the favored theaters by reason of higher operating costs. The latter seemed to justify allowing the favored theaters to skim the financial cream off the milk, leaving the suburban theaters to the remains. Hence, there was in that case an approval of chronologically competitive inequality—of permitting some to reach the market first and reap the consequent profits—newness being there, as here, of prime appeal. Here, on the other hand, the proviso attacked does no more than provide for competitive equality in reaching the market. The Hearing Examiner and those who sit above him are here asked to destroy that equality and to prevent the book club from reaching the market until after the retail bookseller has exploited it alone.⁸

28. The Commission, in its prior opinion in this case, said of the exclusivity provision:

“We are not unmindful of the public interest. Disadvantage to retail booksellers may be perpetrated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs and a large section of the public. On balance, the overriding public interest (as well as the law) seems to lie with the views of the Hearing Examiner.”

29. Adopting this as a *ratio decidendi* of the instant question, we have on the one hand some 1,550 retail bookseller's each with a minimum stock of 300–400 titles and a minimum investment in books of \$3,600.00,⁹ located roughly in ratio to population density, under competitive price disadvantage with the book clubs, competing at such disadvantage directly with book club selections in popular fiction and non-fiction, taking on sidelines of stationery, greeting cards and gifts to supplement a profit margin not exceeding 2% on books alone, with some mortality but, according to their spokesman, the secretary

⁸ It has been obvious to the Hearing Examiner since early in this proceeding that the real drive here was in some way and by some means to increase the book club's costs so that it would have to sell at the same or very similar price of the bookseller. There could have been no other purpose in the offer of testimony at Cleveland, Ohio, of a publisher, also a book club owner, as to comparative costs of publication. Beyond the doubtful power to order, even indirectly, a book club to increase to “parity” its prices, the enforcement of such an order, as a practical matter would be ridiculous to attempt. The leverage in this drive was first supplied by the attack on the exclusivity of the grant, when that failed, the objective seemed to be that if prices could not be equalized then some presently enjoyed right or benefit be taken away or destroyed—hence, the heavy fire on the “time equality” or “chance at the market equality” provision. Change of front and shift of position has also characterized respondent's position, but these are explained to some extent by the failure to attach a proposed order to the complaint when issued, by the vagueness of the complaint and by the shifting of the attack.

⁹ These are mostly basic stock, rarely if ever in competition with book club selections.

of their association, not appreciably significant in total operating units. About one-half of these do a gross business of \$25,000 a year, the others, more. All of them need a discount margin of from 38 to 40% to operate, and up to 80% of their book trade is in current "timely" books.

30. On the other hand, we have the publishers, whose income from these book club sublicenses means the difference oftentimes between profit and loss, and the fact, that if the attacked provision is forbidden, this income would disappear either through the book club dealing directly with the author, or going into the reprint business only. In the latter event, the author, too, would lose substantially. As to the public, the record fairly reveals that over their nearly thirty years of operation, the book clubs have expanded the market of bookbuyers, reaching thousands to whom bookstores are not easily accessible, and in densely populated areas, where such stores are accessible, nevertheless reaching other thousands on plus sales—buying books they would not buy from the bookstore, buying more books than they would, were it not for the book club operation, buying books because of the lower price from book clubs instead of from the bookstore—books, nevertheless, which they might not buy from the bookstore in any event. Particularly is this true of those who spend only a fixed total sum on books per year.

31. Another most significant factor as to public interest here is that the relief sought will not reduce book prices. Bookseller witnesses were unanimous in their desire for price maintenance, and the secretary of the American Bookseller's Association said his membership was practically unanimous against any change therein. That they were equally unanimous against the provision attacked here is, of course, to restate the obvious. The Hearing Examiner does not see on this record how the consuming public will be benefited price-wise, servicewise, qualitywise or any other wise by the corrective action sought. Only that segment of the public comprised of retail booksellers can benefit by giving them a monopoly of the most profitable sale period.

32. Still another aspect is presented by the fact that many retail booksellers take subscriptions in their own bookstores for the book clubs for a fee of 30% of the subscription price—thus, in effect, nourishing in their very bosom the economic viper they claim to be killing them. In fact, the record shows that 300,000 of Literary Guild's 770,000 members subscribed through department store book departments. The record does not show how many bookstores do this, nor how many such subscriptions are taken by each nor by all, nor what

their fees for doing so amount to individually, or the average, or in the aggregate, so that fiscal comparisons with their average or actual investment, income or sale volumes are impossible, but certain it must be that their claimed economic injury must be bruising rather than lethal or they would not thus feed the mouth which bites them. The glib excuse given by some that "if you can't beat 'em, jine 'em" is wholly inconsistent with any claim that the injury is mortal.

33. On balance then (to use an expression used by the Commission previously in this case in another connection) the overriding public interest clearly seems to the Hearing Examiner in favor of sustaining the attacked provision and the practice which it expresses as a reasonable restraint of trade under all the circumstances of this case. The finding therefore is that the agreement between respondent and any book club, or the practice without an agreement between them, to release for public purchase the publisher's edition and the book club edition of the same literary work, simultaneously, is a reasonable and therefore legal restraint of trade.

34. Respondent has been sublicensing the book club rights since the early 1930's. Up until 1938 or shortly thereafter there were obviously no provisions relating to "fair trade" in these licenses but since then respondent has agreed therein that it does or will "fair trade" its publisher's edition through its distributive outlets and would in effect exempt the book club therefrom. These provisos have not been all uniform, but the fact is that respondent does maintain prices under the Federal Fair Trade Laws in fifteen States on all its publications. Recently these provisions have been omitted from the sublicenses, but it is immaterial here that they were not included up until 1938 or thereabouts or have been recently dropped out. It is likewise immaterial that the book clubs were formed long before the enactment of Fair Trade Laws, that they then undersold as they do now or that they were not formed to accomplish that end. The fact remains that respondent's bookselling retailers have been and are now legally bound to resell in fifteen States only at prices fixed by respondent. Of course, this charge can only apply to that area and to those books which the book club selects and which are likewise sold by respondent's customer retailer.

35. The competitive effect on the retail bookseller is obvious to the Hearing Examiner. Nothing which has been added to this record since his ruling on respondent's motion to dismiss has changed the factual picture in this respect. As was said before, the provisions and the act effectively insulate the book club from price competition on its own distributional activities, and restricts pricewise one avenue of distribution while holding a price umbrella over another and com-

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petitive avenue. Respondent's retail bookseller is in a price strait jacket, the book club is free to sell the same book at any price it will. Below the level set by respondent, price competition has been eliminated between the two.

36. The exemption of B. O. M. C. from price maintenance by respondent is a waste of paper. B. O. M. C. is entirely independent of respondent and deals with it at arm's length. It is not, and cannot be, under its sublicense from respondent the "vendee" spoken of in Section 5 (a) (2) of the McGuire Act. It is the sole producer of its branded product—the book club edition. Respondent cannot legally fix the resale price of the branded product of another—there is no resale price of respondent to fix and it does not own the brand. B. O. M. C. is thus exempt by operation of law—not by any contract which can add nothing to the law.

37. In the four States—New York, Pennsylvania, Massachusetts and Louisiana—where respondent maintains wholly owned retail bookstores, respondent, through them, is in competition with both B. O. M. C. and with its customer retail booksellers in endeavoring to sell to the reading public the same literary work. These retail outlets of respondent are located in New York City and Rochester, New York; Philadelphia and Hanover, Pennsylvania; Boston, Massachusetts and New Orleans, Louisiana. The number of retail booksellers who buy from respondent and resell its trade books located in the same cities are respectively 891, 26, 124, 1, 70 and 21 and respondent's total sales volumes to these outlets in these cities was, in 1952, \$1,757,542.66, whereas respondent's sales to respondent's own outlets for the same period totaled \$194,878.09.

38. Outside this area, however, respondent is not in competition with B. O. M. C. nor with its retail bookselling customers. The latter are in competition with each other but not with respondent. The complaint in this count charges only unfair methods of competition—it does not charge unfair acts or practices. There cannot be an unfair method of competition unless there is competition between the one charged and the alleged victim.

39. The finding, therefore, is that as to B. O. M. C., any contract, agreement or understanding between it and respondent, providing that respondent will "fair trade" its publisher's editions to its retailer customers in New York, Pennsylvania, Massachusetts and Louisiana of any book which is, or may be, selected by B. O. M. C. for book club production, is an unfair method of competition as to such retailer customers with whom both respondent and B. O. M. C. compete in the area described.

40. As to the Literary Guild, this is a wholly owned subsidiary of respondent with interlocking officers. For practical purposes, on this record, Literary Guild is a part or division of respondent. In this situation, respondent is, through Literary Guild, in direct price competition with its retail bookseller customers for the consumer market on those books selected by Literary Guild, sublicensed from respondent, and sold in the 15 States noted. In this situation, respondent, with its right hand compels its retailer customers to sell at a fixed price, and with its left hand, undercuts its own customers in the same market on substantially the same product at lower prices. Since Literary Guild competes nationwide with all retail booksellers, including all or practically all of the respondent's retailer customers, there is in this situation no area limitation, except the 15 States where respondent presently "fair trades" its books. The finding is, and any prohibition must necessarily be, limited of course to just those books published by respondent which are also selected by Literary Guild.

41. The fact that Literary Guild has thus undercut pricewise the retail bookseller since the early 1930's, long before "Fair Trade Laws" were enacted; that it sells not only the books of respondent but those of other publishers; that it was not organized for that specific purpose, is, it seems to the Hearing Examiner, beside the point. It is not motive, but the effect upon it, in which the public is interested.

42. The fact that retail booksellers have for many years favored and voluntarily observed suggested resale retail prices is immaterial. If they do so voluntarily and suffer competitive injury, that is their affair and no concern of the law. But here they are not free to do so.

43. It is likewise immaterial at whose instance or for whose benefit this resale price maintenance was agreed upon, or whether the book club coerced the publisher or vice versa into such an agreement. The fact still remains that the respondent has prevented its retail bookseller customers from competing pricewise with it, respondent, below a level fixed by respondent, while respondent, through its own agency, the Literary Guild, undercuts that price. It likewise freezes them, well aware that B. O. M. C. is unrestricted.

44. In the Hearing Examiner's opinion this is clearly an unfair method of competition on the part of respondent, and it is a directly contributing cause to the demonstrated price plight of the retail bookseller.

45. While the above findings are necessarily limited geographically by present practices, there is nothing to prevent respondent from "fair trading" in many more than the present fifteen States, and nothing to prevent it from opening wholly owned retail outlets in additional "fair traded" States, thereby widening the orbit of its compe-

tition, and increasing the impact of the unfair method of competition found. Hence the order, hereinafter set out, is not, and should not be, limited as are the findings of fact.

Count II

The charge here is vertical price fixation, or, in lay language, "fair trading" respondent's copyrighted books. There is no dispute that respondent does so. This, of course, is illegal, absent an exempting statute. Respondent defends on that basis—the Miller-Tydings and subsequently the McGuire Act, which expressly permit this as to a branded commodity "which is in free and open competition with commodities of the same general class produced or distributed by others."

To this, counsel in support of the complaint assert that copyrighted trade books are not and cannot be, by reason of the copyright monopoly, in free and open competition, one with the other, and further contend that the competition meant by the statute means only such effective competition that if the price of one commodity is set too high, the price of some other commodity will cause loss of sales of the first commodity and force a lowering of its price—in other words—price competition.¹⁰

The Hearing Examiner, however, is of the opinion that this decision is too narrow to be applied to all industries, and on this record, to the publishing industry. The Eastman case involved colored versus black and white photographic film, part of the former, the roll of which would fit only cameras made by the film producer. The record here shows that as to some purchasers at some times books compete on price, subject matter, author, style, authenticity and treatment. Price competition is not the only form of competition, nor the only form recognized by the antitrust laws.

The issue under this count, then, is whether or not respondent's copyrighted trade books are in free and open competition in price or otherwise with those of other publishers and thereon, in addition to the findings of fact heretofore made under Count I, *supra*, the facts are further found as follows:

46. There is substantial evidence in the record from several booksellers, offered by counsel for proponent, that 75-80% of their customers ask for a particular title when coming in to buy and that any effort by the bookseller to persuade such customers to buy instead a different book, on the same or different subject matter, or at a lower price was abortive, that as to this 75 or 80%, even though the price was thought to be too high, the customer would postpone purchase of that particular

¹⁰ Eastman Kodak Co. v. F. T. C., 158 F. 2d 592.

book until a later date, rather than purchase a cheaper substitute of the same type. With the remaining 20%, substitution was presumably possible and achieved, or else these customers were browsers or shoppers. Several of these witnesses were book dealers, and two others were managers of book departments in large department stores in Washington and Cleveland. One of the latter, proponent's chief and most informative witness, admitted that children's books—juveniles—did compete pricewise and otherwise, that these constituted 25–30% of her volume¹¹; that 20% of them were copyrighted and that mystery stories also competed to some extent.

47. This evidence is in line with the contention of proponent counsel that the retail bookshop being the market place, that it is therefore the sole place for determining whether competition exists between copyrighted trade books. It would be hard to imagine any product where this generalized sophistry, nostalgically reminiscent of Adam Smith, would be less applicable than in the sale of books. Modern advertising and display are thereby ignored as well as the distinctive, if not unique, character of books as compared to dishtowels or rutabagas. New books, particularly fiction and non-fictional commentaries on present day problems and recent history, and memoirs are reviewed in detail by most newspapers of large circulation. The best known examples are, of course, the book review sections of the New York Times, the New York Herald and the Chicago Tribune. Reprints of these are frequently sent out by booksellers. In addition to this, the latter, and department stores with book departments, customarily send out descriptive circulars, inserts and stuffers with monthly bills. On top of this is the widespread advertising of publishers describing forthcoming books. All of this material shows the author, the publisher and the price. The record shows that this material is widely, even avidly, read and that the competitive forces determining selection are then present in the home, the office and the discussion group. Small wonder it is that such a high percentage of book buyers come into the book shop for adult reading with their selection determined.

48. Against this evidence of booksellers, respondent offered the testimony of the Chief Librarian of the Brooklyn Public Library, which has 57 branches with 700,000 registered borrowers and which spends \$600,000 a year buying new books. In these purchases, price is the most important factor, general appeal is next. Out of the 10,000 to 11,000 titles published each year, 7,000 to 8,000 are read for selection

¹¹ Tr. 2423.

by his staff and about 5,000 are purchased. Books compete for his purchase on price.

He further testified that except for those doing research work or school assignments, most patrons come into the library looking for a book on some subject. This is particularly true of fiction and of the "how to raise bees" or "build a garage" type. The library also puts out selected lists of a number of books in a given category and conducts discussion groups of various books in the same general class. His experience is that it is easier to substitute one novel for another in the same general area than in any other book category. Witness had no experience selling books—only in buying them, and no distinction is made by him between copyrighted and non-copyrighted books.

49. The President of McGraw Hill Publishing Company also testified that his company published 300 books in 1953, the result of going over some 5,000 submitted manuscripts, 65 of which were in the trade book field, 100 in the college textbook field, 15 in the school book field, 40 in the industrial and business field, and 40 in the technical field. He stated that his company "fair trades" its books, that the price at which a book can be sold frequently determines whether he will publish it or not, that in determining the retail price of an offering he must and does consider the price at which a book on the same subject matter published by his competitors is being sold. He has had to lower the price on his trade books because of the price of a book published by another publisher. He wants his books to compete on price and authority with those of other publishers and selects manuscripts, produces and prices on that basis. Consequently, he was firmly of the opinion that trade books—not technical books—do compete pricewise and otherwise with other copyrighted trade books.

50. To the same general effect was the testimony of responsible officials of Houghton Mifflin Company, Harper & Brothers, Simon and Schuster, Inc., Little, Brown and Company, Inc., Random House, Inc. and Viking Press, Inc., all of which are publishing houses of substantial size, publishing a wide variety of books in the same classes as respondent. All of them do a gross volume in excess of two million dollars a year and publish from 65–125 new copyrighted trade books each year. From $\frac{1}{4}$ to $\frac{1}{3}$ of this volume is in juveniles with most of them, and "westerns" and mystery stories account for another substantial segment. All of these witnesses testified that they fix their retail prices for their books with a keen eye to the offerings of others—both as to subject matter and price; that rarely can they obtain, with

any profitable volume, more than \$3.00 to \$4.50 for fiction or \$2.50 for a mystery story; that to charge more than what other publishers charge for the same class of book would ruin sales; that they have lowered a previously fixed retail price on one of their books when another publisher did on a comparable book; and that they have had to likewise lower a previously fixed retail price when their salesmen reported that individual book buyers were complaining to retail book-sellers about the price.

51. They further testified, with one exception, that they spend in excess of 10% of their sales volume in extensive consumer advertising of their new trade books and furnish free, tens of thousands of a new book to reviewers and critics. All of them were of the opinion that copyrighted trade books do compete with other copyrighted trade books in price as well as subject matter and that this competition was most dominant and noticeable in juveniles, "westerns" and mystery stories, in all of which classes, two of them testified substitution of one book for another could be and was made to the customer.

52. Five of these seven publishers are respondents in the five companion proceedings to this one and with the same charge involved, therefore, these witnesses cannot be said to be disinterested. However, the other two publishers, whose officials testified, are completely disinterested and their testimony corroborates a substantial part of that of the five. Additional corroboration is to be found elsewhere in the record, the detailing of each bit of which would unduly extend this decision. In addition to that, the vice president in charge of respondent's sales testified in detail to the same effect.

53. The buyer for all the Brentano stores testified that the purchase volume there is about 3 million a year, and comprises the books of all publishers, copyrighted and non-copyrighted. These books are widely advertised by Brentano's by circulars (mailing list 70,000), periodical advertising and discussion groups so that the trade book of one publisher is contrasted with the trade books of other publishers and competes for the eye, ear and the mind of the advertising target. She testified on the basis of 20 years of bookselling and supervision of that selling that many people are browsers and shoppers; that the trade books of one publisher definitely competes in price with those of another publisher; that as little as 50¢ will switch a customer's choice from one fiction book to another; and that she has seen much "impulse buying" engendered by attractive and eye-catching displays, where a previous idea of purchasing a particular book was switched to the purchase of another. This price competition applies to all categories but not in every case or every time. Her estimate was that 50% of

the people who come into Brentano's stores come in with a specific book in mind to buy, that the other 50% come into shop and browse, but that in the case of a book department in a department store the percentages were 25% and 75% respectively. The witness had many years of experience selling books in a large department store. She also testified that price resistance was a basis for purchase substitution of one trade book over another in all fields of current books. She testified that substitution takes place in one-half of the instances where the customer has asked for a specific book upon entering. In her purchases for the Brentano chain, she is always price conscious. Fifteen to twenty percent of these purchases are in juveniles. Most of this testimony was illustrated by specific examples. She further testified that there is no one reason why people buy books, the reasons are innumerable.

54. Another bookseller, doing \$45,000 with an inventory of \$15,000, and making 40 book sales a day employing 3 clerks in Larchmont, suburban New York City, for 7 years, testified that book jackets, type, displays (not on shelves but on tables where accessible, and particularly in the front window) all influenced the customer's selection. Changing from wall shelves to tables markedly increased his business. Ninety percent of his customers are regular customers personally known to him or his clerks. About 50% of the 40 books which he sells per day are asked for specifically by the customers when they come in but these customers, nevertheless, always examine the books before buying, and frequently compare them with others. When he makes a suggestion for a substitute, he suggests a variety rather than a single book. Fifty percent of his customers to whom he makes sales come in with no specific book in mind but shop around for a selection. His store traffic is approximately 200 people a day. He further testified that when the book specifically requested by a customer is out of stock he is able to substitute another and based on his experience, he is of the opinion that books do compete with one another in price, subject matter, and physical appearance. Substantially the same testimony was given by respondents' vice president in charge of its 30 retail stores, who had several decades of experience in the retail sale of books.

55. Another bookseller, located on East 57th Street in New York City, testified that $\frac{2}{3}$ of his store traffic are regular customers; that he specializes in books of the Catholic religion and that $\frac{2}{3}$ of his trade is in that type of book and that he has 3 employees and an inventory of \$20,000. Approximately 50% of his customers come in with a specific title in mind and usually mention that they have seen a book

review or an advertisement about that particular book or that someone has told them about it; that they all want to examine the book before they buy it and that sometimes they reject it and they ask what the price is if they do not already know from the book review or the advertisement. He further testified that he is frequently able to substitute one book for another and that he frequently hears the argument that a book is too expensive, in which case he offers another book on the same subject matter and that sometimes the customer buys it, sometimes not. He also was of the opinion that open and accessible display was most important in selling books and that when he makes a suggestion for a substitution he names several substitute books. In approximately $\frac{1}{3}$ of the cases where such suggestions are made, the substitute is bought. He further testified that price is a most important factor in sales potential and that copyrighted trade books in his store compete one with the other. Two-thirds of his customers have charge accounts, many order over the phone but even then very often they ask for a clerk to discuss the book to buy. He further testified that he wished he could say that it was the book's intrinsic or its literary merit that sold it but that he thought that often it was a colorful jacket—that bad jackets or bad print could kill the sale of a book of good quality.

56. Finally respondent produced 5 book purchasers whose testimony as to their book buying habits was so variant as to warrant its rehearsal in some detail. The first witness was, at the time of testifying, a literary agent and had been a writer—in fact, had spent a great portion of her adult life with authors, book publishers and the literary world. She spent an average of \$75 a month on books and had hundreds in her personal library. She had definitely developed literary tastes and knew what was coming out long in advance of publication. She orders a substantial number of her books before publication and only reads book reviews after publication. The only influence they have on her is that if they are bad she takes the books back. It was evident that she not only had definite and fixed ideas in the purchase of books but in a great many other things as well. She testified that she was highly selective in her purchases; that she was not a browser; that she knows very definitely when she goes into a bookstore just what she wants; that she is not influenced by the price of the book except where a price difference exceeds \$25.00; that she frequently does not know the price of a book when she buys it as price makes no difference to her and that no one could substitute one book for another.

57. Another young man testified that he spent \$200–\$300 a year on books and had been buying them for his personal use for 18 years.

His method of buying was to go to a bookstore and if he had a definite book in mind, ask for it, look it over and if it did not appeal to him after looking it over, he would then put it down and browse for something else. Book reviews, dust jackets, displays and price all influenced his purchase. He testified that 75% of the time that he entered a bookstore, that he did so to browse. The other 25% of the time he went in to buy a definite book but did not always buy that book because if it did not appeal to him upon examination, he might leave without buying anything or come out with some other book. He was of the opinion that books were a commodity of the same general class and that they were in price competition for his dollar. However, he did not permit substitution on gift purchases. In many instances price switched his choice from one book to another.

58. The third witness, a housewife, testified that she bought from 30-40 books a year; visited bookstores about 3 times a month; spent from 2 to 3 hours at a visit; that 70% of the time she went into the bookstore with some idea of the type of book she wanted and then shopped around among all the books of that type, narrowing her choice from several to a maximum of 10 and that the other 30% of the time she went in to buy a particular book. She testified further that her purchases were influenced by the manner of displays, by the dust jackets, paper, number of lines to the page, price, book reviews, discussions with her friends and by book advertisements. She testified further that she always takes prices into consideration and compares books and that, so far as she is concerned, books are in competition one with another. She testified that at times she asks the bookstore clerk's opinion, particularly if she has gotten acquainted with the clerk and that if a book she wants is out of stock sometimes she takes another, sometimes not, depending upon the type of book. When she buys books for gifts she does take substitutes.

59. The fourth witness bought from 15-20 books a year, visiting bookstores 2 to 3 times a month for that purpose and only 10% of the time does she have a specific book in mind. She is a browser and compares books as to subject matter, authority, literary style and price. She spends from 2 to 3 hours at a bookstore when she goes in and if she has a definite category in mind, will look at 10 books and will examine from 4 to 5 thoroughly. She further testified that book reviews, advertisements, dust jackets, displays and word of mouth discussions all influenced her purchases and that she frequently purchases substitutes. Lastly, she said that 25¢ or 50¢ difference in price would not cause her to buy one book over another but that \$1.00-\$2.00 did and that books definitely compete for her purchasing favor.

60. The last witness of these consumer witnesses maintained a personal book library of 5,000 to 7,000 volumes and reads from 15 to 25 books a month, was a bookstore browser and bought specific books about 50% of the time. He further testified that he was definitely price conscious except where he wanted a specific title; that no one thing ever determines his book purchases; that the displays, reviews, advertisements, jackets and price all play a part and that price plays a greater part in non-fiction than in fiction.

61. The testimony of these book consumers shows in more variant detail what is apparent on the face of the record as a whole and that is that there is no such thing as a typical book buyer; that there is no pattern in consumer book buying; that the attraction, and therefore the competition, varies from book to book, authority to authority, style to style, subject matter to subject matter, reader to reader and furthermore varies from time to time with any one given reader, or, stated otherwise, that books compete for the consumer's purchase on subject matter, authority, treatment, authenticity, documentation, literary worth, format, printing, illustration and price. It is also apparent that these competitive forces are not constant but are constantly varying—that while price may be the paramount consideration at one time with a customer, at another time it plays no part whatsoever. The picture is not all black as counsel in support of the complaint would paint it, nor all white as counsel for the respondent sees it.

62. The record does abundantly show that books in certain rough categories do compete pricewise most of the time, namely, juveniles, mysteries and westerns and the record further shows that these account for about 16% of respondent's sales.

63. On the other hand, textbooks, research books, authoritative books and reference books very seldom, if at all, compete on a price basis because if a surgeon or other scientist wants a particular work, he must have it, and price is of no concern. Likewise, a student or researcher must own and consequently use a specific book, as a carpenter uses his tools. These, however, account for only .06% of respondent's sales.

64. Fiction competes in price with some people all of the time and with others at some times. At other times it does not. Non-fiction is in the same category, depending upon the book buyer's literary taste, the fields of his reading interest, his need or desire for a particular type of memoir, autobiography or commentary on current events. These two categories comprise 84% of respondent's business.

65. There is a direct conflict in the evidence of booksellers as to whether most people buy specific books without regard to other books, pricewise or otherwise, and whether one book can be substituted for the sale of another. But the testimony of the publishers, giving specific

examples, uncontradicted on this record, that they must and do lower prices because of the prices of other books on the same subject matter; the testimony of book buyers as to their purchasing habits, that they shop and browse, and compare; and that price differences determine and change ultimate selections for purchase, makes a clear preponderance of evidence that the great majority of books are in free and open competition with each other even on the narrow theory of the Eastman Kodak case¹² insisted upon by counsel in support of the complaint. On the broader theory that in the book publishing industry competition must mean competition in subject matter, author, treatment, etc., as well as competition in price, the evidence is overwhelming that copyrighted trade books are commodities of the same general class and are in free and open competition with each other for the consumer's dollar.

66. In addition to all this, the evidence affirmatively shows that 700,000 members of the Literary Guild and 500,000 members of the Book of the Month Club purchase up to 12 or more books a year, solely on the basis of price, sight unseen, contents unknown, and with all other factors entering into book appeal likewise unknown and wholly dependent upon the selection made by the Club. Much of the evidence offered by counsel in support of the complaint is to the effect that these book club members purchase because they obtain the same books for less money than they can purchase them in bookstores. With all other factors, except price, unknown and selection entirely dependent upon a Club Board, it cannot be argued that these books which cover the entire range of subjects and categories published by respondent, except the .06% of medical and scientific books sold by them, do not price compete and, from the Book Club standpoint effectively compete on price, one with other.

67. Counsel in support of the complaint most insistently urge that respondent's copyrighted trade books are nonfungible commodities and since sold under legal monopoly they cannot as a matter of law be in full and open competition with the similarly copyrighted by differently authored books of other publishers. Without discussing the rather novel idea of whether two products which, from the evidence, are in full and open competition as a matter of fact that they nevertheless may not be as a matter of law, it is sufficient to note that the Supreme Court has held that the news dispatches of different writers¹³ and the dress designs of different originators¹⁴ not only can be, but are, in competition one with the other, that although the latter were not copyrightable, the former were, and to observe further each was the "crea-

¹² 158 F. 2d 592.

¹³ Associated Press v. U. S., 326 U. S. 1.

¹⁴ Fashion Originators Guild et al. v. F. T. C., 312 U. S. 457.

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tive product of the intellect" of a given mind just as is the work of an author. And 37 state legislatures by expressly including the word "publisher" in their state fair trade laws are obviously of the considered opinion that copyright does not prevent competition.

68. The finding therefore is that respondent's copyrighted trade books effectively compete on price in substantially all instances with the copyrighted trade books of other publishers, and that they always compete in subject matter, treatment, style, literary merit, format, type, documentation and author with the copyrighted trade books of other publishers, and are accordingly within the immunity of the McGuire Fair Trade Act, so far as the question of competitors is concerned. It follows that Count II should be dismissed.

Count III

The charge here is that respondent through its ownership and operation of retail stores is a retailer and as such competes for consumer purchases with its purchasing consumer outlets and that the McGuire Act¹⁵ expressly exempts from its immunity of vertical price fixation price maintenance "contracts or agreements * * * between persons, firms, or corporations in competition with each other."

69. The facts are simple and largely undisputed. Respondent price maintains its dictated list price on its books in fifteen States under the provisions of the McGuire Act. In four of these States—New York, Pennsylvania, Massachusetts and Louisiana—it owns, controls and operates 16 retail stores. The relief sought is accordingly confined to this area and to copyrighted trade books published and sold by respondent.

70. In the area described, respondent sells to independent retail bookstores as follows: New York City, 891; Rochester, 26; Philadelphia, 124; Hanover, Pennsylvania, 1; Boston, 20 and New Orleans, 21. Sales of respondent's books to these stores by respondent for the fiscal year ended April 3, 1953 and sales by respondent to its own retail outlets for the same period were as follows:

	<i>Independent book retailers</i>	<i>Respondent's own stores</i>
New York City.....	\$1,285,923.75	\$164,490.10
Rochester	25,908.14	2,484.84
Philadelphia	175,275.05	6,009.70
Hanover	13.89	1,721.15
Boston	238,269.60	16,092.29
New Orleans.....	32,152.23	4,080.01
	1,757,542.66	194,878.09

¹⁵ Sec. 5 (a) (5) of the Federal Trade Commission Act (15 USC 45).

These figures do not include sales to stores located in the suburban or contiguous areas of the above-named localities, but they do show that respondent's own retail stores sell less than 10% of respondent's total sales volume in the six cities listed and from other statistics in the record 8.22% of respondent's total sales in the four state area.

71. The Commission has already found and the record shows that respondent's own retail outlets and its independent retail bookseller purchasers do compete with each other for consumer custom. Since both resell to consumers at respondent's fixed list price, the former by executive direction and policy, the latter by force of "fair trade" contracts, there is no price competition between them in such resale of respondent's books.

72. There is no suggestion in the record that a bona fide relationship of seller and buyer did not exist between respondent and its retail book-selling customers, or that respondent, as a retailer, connived or agreed with such customers to maintain prices.

73. For the purpose of this decision, it is assumed that all non-signer bookstore customers were bound by any contract or agreement signed with respondent by any one of them in any of the four States. It is immaterial whether respondent's retail business has increased or decreased over the years, or whether its competition through its retail stores has injured or affected its bookstore customers.

74. The issue on these facts is thus: Are respondent's "fair trade" contracts and resultant retail price rigidity or fixation legal under the McGuire Act, or do they make out the exemption quoted above and therefore are illegal?

75. These facts are indistinguishable, except in area coverage or number of outlets, from those in Docket No. 6040, in the matter of Eastman Kodak Company decided by the Commission January 6, 1955. In that case it was held that by the proviso partially quoted above Congress did not intend to withhold the immunity conferred by the McGuire Act from partially integrated producers and hence the fact that such a producer also sells at retail in competition with its customer, legally bound to resell at the same price, is not illegal. The Hearing Examiner is bound by this decision and bound to follow it. Further discussion is academic and unnecessary and it follows that Count III should be dismissed.

Count IV

The charge here is that respondent has sold the same books at different prices to different purchasers competing with each other in the resale thereof, resulting in actual or probable substantial injury

to competition in both the selling and reselling lines of commerce and in a tendency toward monopoly in the selling line, all in violation of Section 2 (a) of the Clayton Act (U. S. C. Title 15, Sec. 13). To this charge five defenses are interposed by respondent: (1) that its discount, and resultant price differentials are cost justified; (2) that such price differentials were adopted by respondent in response to changing conditions affecting the market for and the marketability of the books sold by respondent; (3) that such price differentials were made by respondent in good faith to meet the equally low prices, discounts, services and facilities furnished by respondent's competitors; (4) that such price differences are not price differences at all but are compensation by respondent to its customers for services and facilities rendered by the latter, varying in degrees and amounts in accordance with the amount of such compensation and that respondent has made such compensation available on proportionally equal terms to all of its customers; and (5) that some of its discounts to those of its customers performing the dual function of both retailer and wholesaler are in fact an average between respondent's wholesaler and retailer discounts based on the percentage of duality.

On the issues thus drawn, findings of fact, in addition to those heretofore made on the three preceding charges or counts in this complaint, are made as follows:

76. On each publication, respondent establishes a retail or consumer price, and the price at which such publication may be purchased by reselling distributive outlets is arrived at by granting a discount from this list price. Thus retailers bought from respondent at 40% off this list, wholesalers at 46% off list and those doing a dual business at 43% off list. There were at times different discount gradations between these figures, but these were most common and typical.

77. Only three of respondent's many customers purchased from it at a discount of 46% off list. These were the American News Company, the largest wholesaler or jobber of books in the United States, reselling nationwide, 80% of its volume being from the resale of magazines, 20% being in the resale of books, stationery and toys. In 1947, 30% of its sales of trade books were to libraries, 70% to retail bookstores and in 1953 these percentages were 55% and 45% respectively. Through a wholly owned subsidiary, the Union News Company, it resells books and magazines at retail, including books purchased from respondent at the latter's lowest price of 46% off list.

78. The second price favored customer is A. C. McClurg Company of Chicago which wholesales not only books but stationery, office

supplies, school supplies, toys, gifts, housewares, sporting goods and dinnerware—less than 40% of its business being in books, which are resold to retail book dealers and libraries. It also operates two retail stores at which it resells books purchased from respondent at 46% off list, directly to consumers at list.

79. The third 46% discount purchaser is Baker and Taylor, wholesaling to retail book dealers and libraries, the latter accounting for 40% of its sales and consisting of 5,000 to 6,000 accounts.

80. All of these three accounts have enjoyed their 46% discount for more than 20 years, all of them are in competition with each other in reselling to retail book dealers and libraries, and all of them are in competition with one or more of respondent's customers who buy at less than 46% discount from list, usually 43%, and who resell as jobbers to retail book dealers and particularly to jobbers.

81. The officials or owners of eight or nine of these latter testified to their business details, their purchases from respondent and their attempts to resell particularly to libraries. All of them in such activity were in active competition with one or more of the three customers of respondent described above, and with one or more of each other. No useful purpose could be served by rehearsing here the details of their individual operations. Suffice it to say, they were all established for a number of years, all were substantial in inventory and sales volume, with one possible exception, all had found that libraries buy on bids, for the most part and since libraries operate on strict budgets, that price is the primary and, in most instances, the sole consideration. All testified that they had repeatedly lost bids to American News Company, Baker and Taylor or A. C. McClurg because of the slightly lower prices quoted by the latter, that even when they bid prices which left them no profit, they were still underbid by one of these three who of course had a 1% to 3% greater margin on which to bid. The testimony is that $\frac{1}{4}$ to $\frac{1}{2}$ of 1% off list will switch library business. This, and the loss of bids was corroborated by the testimony of two public librarians. With one of the latter, price was the only consideration in buying, with the other, if two bids were equal in price, the contract would go to the bidder offering the fastest and best service but price was the first and primary consideration.

82. The record shows that competition between wholesalers, jobbers and "subjobbers" for the trade book business of libraries is active and keen, that over a period of years this business has increased, while the resale of trade books by these distributors to retail book dealers has decreased; and that the proportion of sales to libraries of two

of the three "Big Three" wholesalers (as they seem to be called in the industry) has increased in recent years over their respective sales of trade books to retail book dealers.

83. It is obvious that in a market where sales are sensitive to, and even determined by, as little as $\frac{1}{4}$ or $\frac{1}{2}$ of 1%, that the 3% differential with which respondent favors these "Big Three" puts at their disposal an ability to quote and resell at a profit, lower than any of their competitors, so unfavored by respondent; that the discount differential here involved is substantial and that its effect may be substantially to lessen competition and have a tendency toward monopoly in this reselling line of commerce.¹⁶ The record here goes further, however, and shows repeated instances of loss of business directly traceable to this discount differential and a slow but steady growth over a period of years in the library business of the favored.¹⁷

84. There is no substantial evidence, however, that these price differences have substantially lessened competition with respondent or tended to create a monopoly in it, nor that there is a reasonable probability that they may do so. For aught in the record, respondent's competitors may grant the same, similar or even greater discounts to the same purchasers, the price disparities may be even greater, their sales may have increased or diminished—there are simply no facts in this record from which seller-line injury or monopoly may be inferred.

85. For first defense to this showing, respondent alleges but has not proved that its price differences, to different competitor purchasers, make only "due allowance for differences on the cost of manufacture, sale and delivery resulting from the differing methods and qualities" in which books are sold by respondent. No accounting analysis of these operations was presented. Respondent's responsible official admitted that respondent has never made a detailed cost study or survey to justify its discount differentials, either before or since June 19, 1936; that because of its widespread and varied operations and the complexities involved, it was impossible or impractical to do so; and that it has never made any analysis of its cost of sales or distribution of its trade books to any purchaser, nor has it ever made any detailed investigation to determine the nature of the services which may have been performed or offered by the unfavored jobbers in competition with the "Big Three." Accordingly, the finding is that this defense is not sustained.

86. Next respondent defends on the ground that the discount and price differentials referred to were adopted by respondent in response to changing market conditions. There is nothing in the record to

¹⁶ F. T. C. v. Morton Salt Company, 334 U. S. 37.

¹⁷ The sufficiency of proof to make out a prima facie case has in effect been determined. Motion to dismiss was denied and not appealed to the Commission.

show any changing market conditions, nor to show that respondent fixed its discount differentials in reference to any particular market conditions. In fact, the "Big Three" have enjoyed their maximum differentials since prior to 1925 and respondent's discount schedules have remained unchanged from prior to 1925 to 1953, when this proceeding was well along in trial. This defense is wholly unsustained even in bold outline, let alone in detail.

87. Respondent next contends in its answer, at least, that its discount differentials were made by it in good faith to meet the equally low price, discount, service and facilities furnished by competitors of respondent to the purchasers concerned.¹⁸ It is, of course, implicitly mandatory from the law itself that to meet the equally low price of a competitor that the price so met must be shown. The record here does not show at what prices competitors of respondent sold or offered to sell to respondent's customers. The only evidence on this point is the testimony of respondent's vice president in charge of sales, the respondent's competitors did have a subjobber price classification, but at what price, what competitor, to whom or when is unknown. He also said that he "assumed" Harper & Bros. was selling full jobbers as full jobbers but that he did not know what other publishers were selling at. An official of A. C. McClurg Company, one of the "Big Three" testified that his firm did not receive the same discount from the other 300 publishers from whom it bought as it did from respondent; that from some the discount was greater than that extended by respondent, from others it was lower, although he did say it was lower from the Mac-Millan Company than from respondent. Here again one is left in the dark as to just what prices respondent claims to have met, whether they were equally low, to whom they were extended, when and under what conditions. Respondent has failed to show a meeting, as required by the sanctioning statute, let alone whether the price met was equally low, or whether it was in good faith. Needless to say the further requirements of *F. T. C. vs. Staley Mfg. Co.*, 324 U. S. 746 and *Standard Oil Company vs. F. T. C.*, 340 U. S. 231, that the discriminatory price claimed to have been made to meet the equally low price of a competitor in good faith must be temporary, localized, individualized, defensive rather than aggressive and not part of a pricing system, and that the price so met must be a lawful price, or believed to be such, have likewise not been shown. There is no evidence in the record on these points.

88. The fourth defense of respondent and the one on which the only substantial evidence was offered is that respondent's price and

¹⁸ Section 2 (b) of the Clayton Act, Title 15, Sec. 13 USC.

discount differentials are not actually what they are called, but are really payments by respondent to its customers as compensation for services and facilities of value to respondent furnished and made available by such customers, and not furnished or made available by purchasers who do not receive such differentials, which compensation is available on proportionally equal terms to each of respondent's customers.

89. At first blush, this appears to be a pleader's retrospective attempt to convert a charge of price discrimination under Section 2 (a) of the Act, to one of discrimination in payments made to customers for services rendered by them in violation of Section 2 (d) of the same Act. The record abundantly shows, however, that respondent did not operate that way. Since 1920 respondent has granted varying discounts from retail list on its sales, has carried such transactions on its books as price differences, has published and maintained price discount schedules as such, and so far as the record shows has never advanced the idea of payments to a customer instead of prices charged a customer, until the answer filed in this case. Respondent at no time formulated or made known a list of "services" for which it would pay stipulated sums over given periods graduating "proportionally" the sums to the services either quantitatively or qualitatively, although the Act commands that such be made "available." Available certainly connotes advice by respondent, and knowledge by all of its customers.

90. Nor from this record did respondent ever ascertain what "services or facilities" its unfavored customers (those purchasing at 40% or 43% or some other figure less than 46% off list) could furnish, or their character, quality or amount, although there is substantial evidence in this record that some of them did furnish some of these services in lesser degree. Nor did it ever formulate or disseminate any base or standard, either optimum or minimum, to which other "services" or "facilities" qualitatively or quantitatively could be "proportionalized." This is fatal.

91. As was said in *Elizabeth Arden Sales Corporation v. Gus Blass Company*, 150 F.2d 988 (CCA 8) :

There is another fallacy in appellant's argument which is inescapably conclusive of the situation. On the findings of the trial court and the evidence, appellant's furnishing of clerk's services, or payment of clerk's salaries to appellee and Cohn Co., cannot be claimed to have ever had any established or determinable basis or standard whatever. The allowance had been fixed in both instances at the time the purchase of goods began and there it simply remained. The amount was arrived at by personal negotiation and individual agreement, nor was it based on any other guiding factor, such as a difference in the character of the stores and the type of facilities afforded for handling appellant's products, if that could have been made to constitute a valid legal distinction.

We think it must be held that a seller engaged in commerce who furnished clerk's services or pays clerk's salaries in unequal amounts to customers competing in the distribution of its products, which amounts have no other bases or standard than the seller's discretion or favor, and as to which there is no competitive way for such customers to qualify for proportional or equal levels, is to the extent of any differences in such amounts guilty of discrimination.

* * * * *

That which was discriminatory when done, because wholly unrelated to any proportionalized bases or standard, cannot subsequently * * * be artificially tailored into proportionally equal terms by fixing it to some imaginary basis or standard that has in fact never existed.

The Court here also quotes with approval the holding of the Federal Trade Commission in the matter of Elizabeth Arden, et al., Docket No. 3133, 39 FTC 288, subsequently appealed to the Second Circuit and affirmed there in 156 F. 2d 132. The claim by respondent, therefore, that it was operating on a compensation rather than a discount basis, or stated otherwise, that it can defend as if the charge was under Section 2 (d) instead of Section 2 (a) of the Act, must be and is rejected.

92. This defense must be regarded, was treated during trial and is here treated as claiming that price differences charged competing customers are justified on the basis of services performed and facilities furnished by the price favored customers on their merchandise in the resale therefor. Much evidence was tendered by respondent on this point. In general, it consisted of testimony by officials of the price favored "Big Three" of their multimillion dollar sales volumes, that they stock the books of all publishers, maintain huge and variegated inventories, both dollarwise and unitwise, maintain branch sales rooms and warehouses throughout the nation or substantial portions thereof, travel a substantial number of salesmen, maintain huge numbers of employees in their warehouses to fill orders, large and small and to process them, service thousands of retail book dealers in delivery and credit, issue thousands of expensive catalogues periodically, all of which costs a great deal of money (merchandising cost, 10% of sales), which costs would have to be borne by respondent and other publishers if they did not perform these functions.

93. This proffered testimony was to the effect, also, that the retail bookseller, customarily gives his first order in quantity, usually directly to the publisher; that reorders in units of as little as one, go to the jobber; that that is the type of order that is more expensive to process than an original order; that their service saves the retail book dealer and library much expense because the latter can in one order

procure from them one or more copies of the books of many publishers instead of having to make out a separate order for each different publisher. This is corroborated by the testimony of one book dealer and one librarian also. Furthermore, delivery from these wholesalers is far quicker than from any publisher. Respondent's vice president in charge of sales added that if the "Big Three" did not perform these services, respondent's distributive costs would skyrocket because it would have to greatly expand its order department, employ more salesmen, issue more catalogues and that some of these services were not feasible for respondent to perform.

94. All of this evidence is in the record on tender only, the Hearing Examiner having rejected all of it for the reason that prices cannot under the present law be varyingly fixed on the basis of what a customer does with his own merchandise in an effort to resell it. Pricing by customer service inevitably means pricing by customer, the very result the law was obviously intended to prevent. In *Southgate Brokerage Co., Inc. v. F. T. C.*, 150 F. 2d 607 at 610-611, the Court held:

The crucial fact is that all of the services upon which it relies are services rendered in connection with its own purchases, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself.

* * * * *
For sellers to pay purchasers for purchasing warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.

Although that case was under a different section of the law,¹⁹ the principle is the same and is reinforced by the fact that that section expressly included an escape hatch of "except for services rendered" not provided for in the section here involved.

95. This view is further reinforced by the fact here that the officials of the price-favored "Big Three" did not furnish these services on the basis of discounts or the amount thereof which they received from respondent or other publishers. They furnish the same services in reselling their purchases of books from all publishers alike, even though the discounts they received from other publishers, vary in amount among themselves and vary from those of respondent. It is thus impossible to say on this record that there was any relation between services, qualitatively or quantitatively, and discounts or price differences. Furthermore, it is only the seller's costs, not the buyer's, which may be shown defensively under the law itself.

96. The fifth and last defense of respondent is that because some of its price disfavored customers are dual function resellers, it was

¹⁹ Section 2 (c) of the Clayton Act, 15 USC 13.

unable to determine what proportion of resales were as jobbers to libraries and retailers and what proportion were as retailers to consumers, and therefore respondent simply averaged between extreme (46%) and minimum (40%) discounts as a rough approximation of these resale proportions. There is no evidence that such a determination was impossible. There is no evidence that respondent made any intelligent or reasonable effort to determine this. It is common knowledge that in a number of industries, manufacturers who sell to dual-function resellers, grant their jobbing discount only on periodical proof from the customer of the amount of merchandise resold as a jobber. There appears in this record no effort to do this, and no reason why it could not be done.

97. Furthermore, one of the "Big Three" operates two retail stores of its own, and another, American News Company, through its wholly owned subsidiary, Union News Company, does an extensive retail business, although both received what is here contended to be, solely, a jobber's discount without any averaging.

98. The holding is that this defense is not a valid defense, and, even if valid, is not sustained by the record.

99. It follows that the showing made of price discrimination has not been rebutted, and the finding therefor is that respondent has discriminated in price between its customers competing in the resale of books purchased from respondent, with both actual and potential substantial lessening of competition and tending to create a monopoly in such buyer or customer line of commerce and that such price discrimination has injured and prevented resale competition by those paying the higher prices with those paying the lower prices.

ORDER

It is ordered, That the respondent, Doubleday and Company, Inc., a corporation, its officers, agents, representatives and employees,²⁰ directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books, in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act [15 U. S. C. A. Sec. 45] and the Clayton Act [15 U. S. C. A. Sec. 13] do forthwith cease and desist from:

1. Entering into, maintaining, or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance,

²⁰ Since the factual picture, due to interlocking officers and directorates, and the manifold subsidiary and affiliated enterprises, owned, partly owned or controlled by respondent, is so different than that presented in *R. J. Reynolds Tobacco Co. v. F. T. C.*, 192 F. 2d 535, 540-4, this phrase is here included.

undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail book sellers purchasing from respondent compete with one another in the sale of such work.

2. Discriminating, directly or indirectly, in the price of trade books published by it by selling to any purchaser at net prices higher than the net prices charged any other purchaser, competing in fact in the resale and distribution of said books.

It is further ordered, That the motions of counsel for respondent to dismiss the entire complaint, and so much of Count I thereof as is covered by Par. 1 of this order, supra, and to dismiss Count IV of the complaint be, and the same hereby are, denied.

It is further ordered, That the motions of counsel for respondent to dismiss that part of Count I of the complaint not covered by Par. 1 of this order, supra, and to dismiss Counts II and III of the complaint are hereby granted, and the described portions of the complaint are herewith dismissed.

Chairman HOWREY delivered the opinion of the Commission.

The complaint in this case, in four counts, charged respondent Doubleday and Company, Inc., with engaging in unfair methods of competition in violation of the Federal Trade Commission Act and with discriminating in price between certain of its customers in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

Count I challenged three aspects of respondent's agreements with book clubs¹ whereby the clubs were sublicensed to publish and distribute separate editions of books selected from literary works also published by respondent, namely, (1) the granting of publishing rights to book clubs while refusing to grant similar rights to competing book sellers;² (2) the "simultaneous release" provision whereby it was agreed that publication of publisher's editions would not precede the publication of book club editions of the same book; and (3) the fixing of resale prices under "fair trade" laws on publisher's editions while exempting the book clubs from any form of resale price maintenance with respect to their editions.³

¹ Notably Book-of-the-Month Club and respondent's subsidiary The Literary Guild of America.

² This issue was decided in favor of respondent in an earlier interlocutory appeal.

³ Respondent's agreements with Literary Guild refer to specified resale price maintenance for publisher's editions of books sold through retail book sellers which also appear in book club editions, whereas its agreements with Book-of-the-Month Club exempt the latter from any resale price maintenance contracts that may be negotiated by respondent for the resale of its own editions.

The gist of the second count was that respondent's efforts to fair trade its publisher's edition of copyrighted books through retail book sellers was unlawful because such books were not in "free and open competition" with copyrighted books of other publishers and were therefore not within the resale price maintenance exemption of the Miller-Tydings and McGuire Acts.

Count III, no longer in issue, dealt with respondent's efforts to "fair trade" its books in a situation where it occupied a dual role as a publisher and a retailer operating some 25 stores in four different States. The theory of the charge here was that establishment of resale prices through retail book sellers would, so long as respondent operated retail stores, amount to a "horizontal" price fixing arrangement beyond the immunity of the Miller-Tydings Amendment or the McGuire Act.

Finally, Count IV charged respondent with violating Section 2 (a) of the amended Clayton Act by discriminating in favor of certain jobbers or wholesalers to the injury of others competing with them and to the injury of respondent's competitors.

The case is before the Commission for the second time. The Commission previously heard an interlocutory appeal from the ruling of the hearing examiner which dismissed Count III, and held that the first and second aspects of the book club agreements attacked in Count I were legal and protected by copyright. With respect to the latter we upheld the examiner's ruling as to the exclusive grant of publishing rights to the book clubs but remanded as to the second aspect holding that the simultaneous release provision was beyond the protection of the Copyright Act. The lawfulness of such provision, we said, should be determined, after reviewing all the evidence in the light of appropriate standards, according to whether the prior publication prohibition was reasonable or unreasonable.

All of the Commissioners voting on the previous appeal favored remand as to Count III but for different reasons. However, since the remand, the Commission has rendered a decision In the Matter of *Eastman Kodak Company*, Docket 6040, involving the same issue. The examiner has now dismissed Count III upon the authority of this decision and counsel in support of the complaint have not appealed that ruling.

The hearing examiner found that the simultaneous release provision was reasonable and therefore lawful. He held the agreements with book clubs agreeing to impose resale price maintenance on publisher's editions, under conditions which favored book clubs, were illegal. And he found respondent's price discriminations in the form

of discounts to the so-called "Big Three" jobbers, The American News Company, A. C. McClurg Company, and Baker Taylor Company resulted in competitive injury in violation of the amended Clayton Act.

Counsel in support of the complaint have appealed the examiner's dismissal of Count II and his findings with respect to the simultaneous release provision. Both counsel in support of the complaint and respondent have appealed the examiner's holding with respect to the resale price maintenance phase of Count I. In addition, respondent challenges the examiner's finding that the price discrimination charge has been sustained.

With two exceptions, namely, the scope of the order under Count I and a ruling on the relevancy of certain evidence under Count IV, we believe the examiner's disposition of this case to be correct. His initial decision is well documented and contains a thorough analysis of all the facts and issues involved. Our comment, therefore, will be limited to the two exceptions.

We are of the opinion that the examiner's view of the resale price maintenance phase of Count I and his proposed order thereunder are unduly limited. The effect upon competition is clear from the record. As the examiner said, "(T)he provisions . . . effectively insulate the book club from price competition on its own distributional activities, and restricts price-wise one avenue of distribution while holding a price umbrella over another and competitive avenue. Respondent's retail book seller is in a price strait-jacket. The book club is free to sell the same book at any price it will."

The unfair competitive advantage then, is the gravamen of the charge and respondent's operation of retail stores in New York, Pennsylvania, Massachusetts and Louisiana does not spell the legality or illegality of the disparate price treatment. We hold, therefore, the examiner's finding of illegality as being limited to the four States where respondent operates retail stores to be too narrow.⁴

If paragraph 38 of the initial decision holds that the finding on this phase must be restricted because of the complaint's failure to charge "unfair acts or practices," we disagree.

Neither do we agree with the distinction, based on respondent's ownership of Literary Guild, made by the examiner in ruling on this issue, between the agreements with Book-of-the-Month Club and Literary Guild. As we have indicated, the illegality of respondent's practices in this phase of the case arises from the unfair competitive

⁴The examiner's ruling on this point, in singling out the areas where respondent sells its own editions at fair trade prices, along with other retail stores, would seem to have the effect of saying to respondent that it should not treat the competing book clubs more favorably than it does itself.

position imposed on retail book sellers who must compete with favored book clubs selling free of any resale price restraint. Respondent's ownership of Literary Guild affords no more basis for predicated finding of illegality than respondent's operation of retail outlets, and the distinction made between the Literary Guild and Book-of-the-Month Club agreements we think ill-founded.

Accordingly, we would modify and enlarge the order to prohibit respondent from agreeing with any book club, exempted from any resale price restraint, to impose resale price maintenance, with respect to books selected by such book clubs, upon retail book sellers in areas where the book club and retail book sellers compete with one another.

In connection with Count IV, the price discrimination charge, respondent attempted to show that the discounts allowed the so-called "Big Three" jobbers were in reality functional discounts by which respondent compensated integrated jobbers for services rendered. The evidence on this issue is in the record on tender only, the hearing examiner having ruled that the asserted defense was unavailable on the ground that the law does not permit price differentials on the basis of what a customer does to resell his own merchandise; in other words that the character of the selling of the purchaser and not the buying determines functional classification.

This principle is not without limitation or qualification.

Inasmuch as the functional discount, as applied to our present dynamic economy and constantly changing methods of marketing, presents a difficult and perplexing problem, a brief historical discussion is in order.

Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions. The typical functional discount system provided for graduated discounts to customers classified in accordance with their place in the distribution chain, namely, wholesaler, retailer and consumer in diminishing amounts. They were intended to reflect, at least from an economic viewpoint, the seller's estimates of the value of the marketing functions performed by the various classes of customers.

Inasmuch as traditional discounts of this type, as any other price differentials, remained lawful under the Robinson-Patman Act unless engendering adverse effects on competition, the ordinary discounts to wholesalers and retailers were considered entirely legal. The single function middleman presented no problem of classification, for he bought as well as sold in one distributive role, that is, strictly as a wholesaler or strictly as a retailer. A discount granted to such wholesalers did not injure retailers who received no equivalent price reduc-

tion, since they did not compete for the consumer's business. By virtue of the "injury" prerequisite in Section 2 (a) of the act, therefore, functional discounts to single-function distributors were considered above legal reproach. The controversy, rather, centered on the more complex types of distributors that were beginning to dominate our market structure—distributors whose functions ranged from only partial performance of the wholesale function to those who were almost wholly integrated, that is, who were both wholesalers and retailers and often consumers as well.

Under these conditions classification of buyers became unprecise and shifting in meaning. Wholesalers and retailers no longer comprised clear-cut separate links between the producer and the ultimate consumer, each responsible for a clearly defined set of duties. Marketing functions became scrambled, with many permutations and combinations. Many jobbers and brokers contributed genuine and important services, though assuming only a part of the traditional full-time wholesaler's job. More often there was the contrary trend toward integration of distributive functions. Manufacturers created their own outlets. Retailers integrated into wholesaling, and wholesaling into retailing, either by outright ownership or by cooperative arrangements. The number of patterns was legion and diverse.

This proliferation of modern marketing methods defies definition, neat nomenclature or descriptive labels.

No useful purpose would be served, therefore, by reviewing past proceedings in this area of multiple-function distributors, involving for the most part agricultural supplies, where the Commission turned the discount on the selling functions of the purchaser and not his buying functions.⁵ It is enough to say that functional discounts to dual distributors under present marketing methods remain in a suspended state of confusion. The stormy and still undetermined *Standard Oil* decision, which has been characterized by some critics as holding not only that the purchaser's resale activities determine his eligibility for a functional discount but also that the supplier must police resale prices, has, insofar as this issue is concerned, settled nothing.⁶

⁵ See *Agricultural Laboratories, Inc.*, 26 F. T. C. 296 (1938); *Hansen Inoculator Co.*, 26 F. T. C. 303 (1938); *Albert L. Whiting*, 26 F. T. C. 312 (1938); *Nitragin Co.*, 26 F. T. C. 320 (1938); *Sherwin-Williams Co.*, 36 F. T. C. 25, 40-41 (1943)—this element was subsequently dismissed without prejudice.

⁶ *Standard Oil Co.*, Docket No. 4389, 41 F. T. C. 263 (1945); modified, 43 F. T. C. 56 (1946); modified and affirmed, 173 F. 2d 210 (C. A. 7, 1949); reversed and remanded, 340 U. S. 231 (1951); modified by Commission, January 16, 1953; certified to 7th Cir., March 26, 1953; remanded to Federal Trade Commission, January 18, 1954; reconsideration denied by Commission, January 7, 1955; now pending again before 7th Cir.

In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

We believe, therefore, that the evidence offered by respondent on this point was relevant and should have been admitted.

However, respondent was not prejudiced by the examiner's ruling in this instance. We have treated all the evidence tendered on this point as being in the record and find it insufficient. It failed to establish any reasonable relation between the amount of discounts allowed and the value of services or facilities furnished by the Big Three.⁷ Furthermore, the preferential discounts allowed the Big Three were enjoyed by them for as long as twenty-five years without any effort on respondent's part to determine what services were in fact rendered or how the benefit or savings, if any, inured to the respondent. From the record it appears that the Big Three as well as respondent treated the higher discounts as price reductions and not payments or allowances for services rendered.

To the extent indicated the appeal of counsel in support of the complaint is allowed. In all other respects, both appeals are denied, and the examiner's decision, as modified, is affirmed.

⁷ In view of our ruling we do not consider, as did the examiner, the *Southgate Brokerage* case, 150 F. 2d 607, which arose under the brokerage section of the Robinson-Patman Act, as controlling. Further, we do not agree with the examiner's statement in finding No. 95 to the effect that only the seller's costs may be shown "defensively" under the law.

Commissioner Gwynne concurs in the result. Commissioners Mead and Secrest concur in the result with separate opinions. Commissioner Mason dissents as to the cease and desist order in Count I.

Commissioner Secrest concurring in the result:

I think the decision of the majority is proper. However, I believe that the hearing examiner's ruling with reference to respondent's fourth defense under Count IV is correct.

Count IV charged that respondent had sold the same books at different prices to different purchasers competing with each other in the resale thereof, resulting in actual or probable substantial injury to competition in violation of Section 2 (a) of the Clayton Act (U. S. C. Title 15, Sec. 13). To this charge respondent interposed five defenses, the fourth of which was that its differentials in price were not actually what they were called but were in reality payments by respondent to its customers as compensation for services and facilities furnished. Respondent argued that these services and facilities were available only through its favored customers and were not furnished or made available by purchasers who did not receive its differentials, and that its differentials were made available on proportionally equal terms to each of its customers.

During the course of the hearings respondent presented a number of witnesses to testify that its "Big Three" customers, to whom respondent allowed preferential discounts of 46% as compared to 40% to 43% allowed to unfavored customers, rendered services or facilities which were of benefit to the respondent and that the additional differential was a means of compensating these customers therefor. The hearing examiner ruled that such testimony was improper as a defense to a Section 2 (a) case and excluded the testimony but permitted its incorporation physically into the record as offers of proof. The opinion of the majority states that this evidence offered by respondent was relevant and should have been admitted. I disagree. As found by the hearing examiner,

"* * * prices can not under the present law be varyingly fixed on the basis of what a customer does with his own merchandise in an effort to resell it. Pricing by customer service inevitably means pricing by customer, the very result the law was obviously intended to prevent. In *Southgate Brokerage Co., Inc. v. F. T. C.*, 150 F. 2d 607 at 610-611, the Court held:

"The crucial fact is that all of the services upon which it relies are services rendered in connection with its own purchases, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself."

* * * * *

“For sellers to pay purchasers for purchasing warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.”

A service where the benefits inure exclusively to the seller is one thing. It is quite another where the service helps the buyer, even though such service may benefit the seller by resulting in larger purchases from him. Enforcement of the law would be extremely difficult if not impossible, if, in each 2 (a) case, the Commission were required to divide a common service which may benefit both the buyer and the seller. Each case would require an operation as delicate and difficult as the separation of Siamese twins.

Functional classification of customers for discount purposes should be conditioned on their character as sellers, not on the performance of any services to their supplier. To hold otherwise would lead to pricing by individual customers which would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods. For example, in the instant case, the majority held that the record did not establish that the “Big Three” did render the additional services and facilities claimed by the respondent. However, if they had held to the contrary, respondent would have been able to justify discriminations in price by which its “Big Three” customers could have undersold their smaller counterparts at the same functional level. I believe that the evidence tendered by respondent on this point was properly excluded by the hearing examiner as irrelevant to the issue, and concur in his conclusion that only the seller's cost, not the buyer's, may be shown defensively under the law. Otherwise, I concur in the opinion of the majority.

Commissioner MEAD, concurring in the result:

I disagree only with reference to the position of the Majority respecting the evidence received in the form of an offer of proof in defense of the price discrimination charge under Count IV of the complaint.

Under the view expressed by the Majority, a seller charged with discriminatory pricing practices may successfully defend against such charges by showing the rendition by the favored buyer of services in connection with its own purchases, ownership or resale of the goods purchased. Whether or not this is good economics, I am not prepared to say. I agree with the hearing examiner, however, in that it is not the law as expressed in the Robinson-Patman Act. Under that Act, a price discrimination, as described, unless justified in the manner therein set forth, is unlawful if the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly

or to injure, destroy or prevent competition. This, of course, applies to discriminatory discounts based on distributional functions performed by the buyer as well as to any and all other price differentials. To hold otherwise is to not only read into the law a provision which is not there, but is to also completely disregard express provisions which are there. It also paves the way for the ultimate annihilation of small retail dealers who are unable, by reason of their inability to perform the same marketing functions as their larger dual-functioning competitors, to successfully compete with them.

OPINION DISSENTING AS TO THE CEASE AND DESIST ORDER IN COUNT I

MASON, Commissioner:

My non-concurrence on one facet of the majority's views on Count I must not be taken as disapproval of the exposition of the law and facts on the other counts. I concur entirely with the majority expressions in the instant case except for those on the resale price maintenance phase of Count I.

The temptation to assume an omniscience that can smooth out all the market inequalities of a "fair trade" controversy leads the Commission into difficulties. I believe the practical effect of this part of the order would be either a wholesale nullification of fair trade in the book field or a violation of the Sherman Act.

The cease and desist order here appears to prohibit the publisher from selling books at a "fair trade" price when licensing another company to manufacture and sell the same articles at prices to suit its own fancy. The Commission in trying to protect small business apparently wants the big book club companies to toe the fair trade line also.

It might be suggested that the respondent could comply with this order by agreeing with the second manufacturer that it, too, should fair trade the same books.

If the respondent were to comply with the Commission's cease and desist order as above suggested, it would find itself under indictment for violating the Sherman Antitrust Law by the Department of Justice for agreeing with other manufacturers (the book clubs) to fix prices.¹

¹ At least with respect to its agreement with the Book-of-the-Month Club and probably as to the agreement with the Literary Guild, too, if we are to pay our respects to the Kiefer-Stewart decision, 340 U. S. 211, that contract would be illegal also.

Does this leave only one alternative for the respondent here—that is, to refuse to fair trade its product at all? If so, this is a plight the retailers will not stomach with gratitude.

Heretofore, the Commission has consistently taken the position that it is not within its province to exercise control over resale price agreements. The Commission has regarded the McGuire Act as barring any antitrust authorities from concerning themselves with the rights and obligations brought into existence by State laws. Enforcement has been left exclusively to State courts.²

The charge of the complaint limits the cease and desist order to banning an agreement. An agreement is a contract between two or more parties. In my opinion, there is nothing in the order preventing respondent from unilaterally determining that it will fair trade the books it publishes and in the same manner determine that it will say nothing about prices to other manufacturers that it licenses. Thus, they still will be free to price their own products as they see fit. Whether this violates the concepts of those State statutes which were enacted in accordance with the permission of the McGuire Act or Miller-Tydings Amendment is the individual concern of each State.

I doubt if the majority opinion gives the opponents or the advocates of fair trade any reason to regard the Federal Trade Commission as a new forum to settle grievances on this State problem. In effect it really says:

“A plague on both your houses.”

FINAL ORDER

Counsel in support of the complaint and respondent Doubleday and Company, Inc., having respectively filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard on briefs and oral arguments of counsel, and the Commission having rendered its decision granting in part and denying in part the appeal of counsel in support of the complaint and denying the appeal of respondent and affirming the initial decision as modified:

It is ordered, That the paragraph numbered 1 of the order contained in the initial decision be, and it hereby is, modified to read as follows:

“Entering into, maintaining, or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club

² Paraphrased from the press release of February 21, 1955, re an application of retail jewelers to get the Federal Trade Commission to proceed against jewelry manufacturers who had forced some merchants to sell at fair trade and by their acts allowed others not to.

Order

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or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail book sellers purchasing from respondent compete with one another in the sale of such work."

It is further ordered, That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order contained in the initial decision as modified herein.

Commissioner GWYNNE concurring in the result, Commissioners MEAD and SECREST concurring in the result with separate opinions, and Commissioner MASON dissenting as to the cease and desist order in Count I.

Complaint

IN THE MATTER OF

MERIT PHARMACAL COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6314. Complaint, Mar. 22, 1955—Decision, Aug. 31, 1955

Consent order requiring sellers in Chicago to cease making false claims in advertising as to the effectiveness of their "X-TRON" hair and scalp preparations.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Henry Junge and *Mr. Richard G. Bodenshtab*, of Chicago, Ill., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Merit Pharmacal Company, a corporation, and A. B. Marks, M. A. Marks and A. Skadler, individually and as officers of Merit Pharmacal Company and also doing business as Apex Pharmacal Company and as Apex Pharmacal Distributing Company, and Anthony J. Kemp, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Merit Pharmacal Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 3704 W. North Avenue, Chicago, Illinois. Respondents A. B. Marks, M. A. Marks, and A. Skadler are the officers, and Anthony J. Kemp is the General Manager of the corporate respondent. These individuals formulate and control the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter alleged. The individuals also are and have been doing business from the same address as that of the corporate respondent as Apex Pharmacal Company and as Apex Pharmacal Distributing Company. The address of respondents A. B. Marks and M. A. Marks is 2626 W. Iowa Street, Chicago, Illinois, that of respondent A. Skadler is the same as that of the corporate respondent;