

Complaint

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IN THE MATTER OF

LITTLE, BROWN AND COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT¹*Docket 5900. Complaint, June 29, 1951—Decision, Feb. 8, 1956*

Consent order requiring a Boston publisher to cease fixing and maintaining resale prices and terms and conditions of sale of the publisher's editions of books which it sold to its retail book seller customers while permitting book clubs to sell their own editions of the same books in competition with such retailers at any prices and on any terms they might determine.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Fletcher G. Cohn and *Mr. Lewis F. Depro* for the Commission.

Haussermann, Davison & Shattuck, of Boston, Mass., for respondent.

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

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Antitrust Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Little, Brown and Company, Inc., hereinafter referred to as respondent, has violated the provisions of Section 5 of the said Federal Trade Commission Act and Section 2 (a) of the said Clayton Antitrust Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Sec. 13), 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 these respects as follows:

COUNT I

PARAGRAPH 1. Respondent, Little, Brown and Company, Inc., is a corporation organized and existing under the laws of the State of Massachusetts with its principal office and place of business located at 34 Beacon Street, Boston, Massachusetts.

PAR. 2. Respondent is now, and for many years last past has been, engaged directly or indirectly in the publication, sale and distribu-

¹ For consent settlement of Count III of complaint, see 48 F.T.C. 869.

tion of popular fiction and non-fiction books, commonly known as trade books.

Respondent is one of the major book publishers of said trade books in the United States. The name Little, Brown and Company came into being in 1837. At that time it conducted a retail book store and engaged in some publishing. From 1847 on, it engaged primarily in publishing and with the turn of the century, Little, Brown was entrenched as one of the leading publishers in the general field. It does not own its own printing plant and its printing is done by other concerns with whom it enters into contractual relationships.

Respondent sells and distributes its trade books to retail book sellers for resale to the public, and to wholesalers or jobbers for resale to retail book stores and others, including public libraries and educational institutions. Editions of said trade books so sold and distributed are known as publisher's editions.

Respondent, as part of its business, enters into agreements, understandings or contracts with the authors of trade books, whereby the respondent is granted by the authors the exclusive rights to make, publish and sell in book form the literary works of said authors, including the right or privilege of making the hereinafter described understandings or agreements with book clubs.

PAR. 3. In the course and conduct of its business for many years last past, respondent has been, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Antitrust Act, as amended by the Robinson-Patman Act, in that it ships or causes to be shipped publisher's editions of said trade books, and printing plates from the States in which said trade books and said plates therefor are produced, to purchasers or to lessees thereof located in other States and in the District of Columbia; and there is, and has been at all times herein mentioned, a continuous current of trade and commerce in said books between and among the several States of the United States and in the District of Columbia.

Also, by virtue of and pursuant to, the contractual relationship of respondent with book clubs, as hereinafter set forth, the latter, in the course and conduct of their businesses, are enabled to, and do, ship or cause to be shipped from the States in which they are published, to purchasers located in other States and in the District of Columbia, the book club edition of books printed from the plates of particular titles leased to them by the respondent and which book club editions are sold in said commerce in competition with the aforesaid publisher's editions of such books.

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PAR. 4. Except in so far as it has been affected, as hereinafter alleged, respondent, in the course and conduct of its said business in commerce, has been and is now in competition with persons, firms and other corporations, some of which were and are engaged in similar businesses in commerce.

Also, except in so far as it has been affected, as hereinafter alleged, many of said jobbers or wholesalers were and are, in competition, some in commerce, with each other, and many of said retail book sellers were, and are, in competition, some in commerce, with each other and with said book clubs in the retail sale of said trade books.

PAR. 5. Respondent also, as part of its business, is now entering into and has, for many years last past, entered into agreements or understandings with so-called book clubs by which said clubs are granted exclusive delegated rights to publish, sell and distribute certain titles of said publisher's editions in what are known as book club editions. Book clubs are organizations engaged in the business of publishing trade books and in the sale and distribution thereof by the mail order method at retail. Among the book clubs with which respondent made said agreements or understandings are the Book-of-the-Month Club and The Literary Guild of America, Inc. Under said agreements or understandings, the terms of which are hereinafter more particularly alleged, printing plates are leased by the respondent to the book clubs for use in printing book club editions. There is a publisher's edition of each title of which there is a book club edition, and both editions are contemporaneously available, are alike, the same, or practically the same, in design, format, quality, size and appearance, and are sold in competition with each other.

PAR. 6. The said agreements or understandings between respondent and the book clubs provide that, in consideration of leasing the aforesaid printing plates together with additional rights granted the book clubs as herein set forth, the clubs pay to respondent certain specified royalties, the total amounts of which are dependent, directly or indirectly, upon the number of copies of book club editions sold by said book clubs.

Under the provisions of the agreements or understandings which respondent has with each of the book clubs, the club receives from the respondent the exclusive delegated rights to use the printing plates of books of the particular titles selected by said club for a specified period which usually is for two or more years. During such period, the book club is enabled to exercise such exclusive rights in producing, selling and offering for sale the books printed

from the plates thus selected, at any price and on any terms or conditions that the said club may determine.

Respondent, by suggestion or other means, has fixed and maintained specific minimum prices for the resale by its retail book seller customers of the publisher's editions of the books bearing the titles covered by the aforesaid agreements or understandings with the book clubs, from the dates of publication thereof. Said fixed resale prices, in some instances, are in excess of the prices which the book club charges its purchasers for the book club edition of the same titles.

Said agreements or understandings between respondent and the book clubs, on occasion, also provide that respondent shall fix and maintain specific minimum prices for the resale of the publisher's editions of the books bearing the titles covered by said agreements or understandings for certain specified periods.

PAR. 7. Furthermore, in accordance with, and pursuant to, its understandings or agreements with said book clubs, the respondent has refused to offer, or to grant, such leasing of plates and such other rights to its retail book seller customers who, in selling or offering to sell the publisher's editions, compete with said book clubs in their retail sale of the book club editions of the same title.

PAR. 8. The establishment and maintenance of said specific minimum resale prices, which respondent has fixed in the manner hereinbefore described, for the resale by its retail book seller customers of the publisher's editions of such books which are sold in competition with the book club edition of said books, gives the book club an unfair competitive advantage.

PAR. 9. As a result of the respondent leasing the printing plates for a particular title to a book club in the manner hereinbefore described, it is selling and distributing, and knowingly and intentionally granting the means of selling and distributing, in commerce, for resale within the United States and in the District of Columbia, a publisher's edition and a book club edition of the same book, which editions are, in effect, of the same grade and quality, and which are sold in competition one with the other. The respondent is indirectly discriminating between its retail book seller customers, to whom it sells, for the purpose of resale, such publisher's editions, and its book club customers, to whom it leases the plates from which it knows that such book club editions will be printed, by imposing the aforesaid restrictions and conditions only on the resale of such publisher's editions by its retail book seller customers and by granting the leasing and other rights, hereinbefore set forth, only to its book club customers.

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PAR. 10. The result and effect of such understandings, agreements, suggestions, contracts, arrangements, discriminations and of the system itself, have been, and are; that the competition between the respondent's retail book seller and book club customers has been, and is now, substantially lessened, that the said book club customers have received an unfair competitive advantage over said retail book seller customers and have tended, and are now tending, to create in said book club customers a monopoly in the sale and distribution, in commerce, in the books, the titles to which said book clubs have leased the printing plates.

PAR. 11. The acts, practices, methods, understandings, agreements and suggestions of respondent, as hereinabove alleged, are all to the prejudice of the public, have a dangerous tendency to, and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution in commerce of trade books within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have a dangerous tendency to destroy, hinder and prevent the resale by respondent's retail book seller customers not only of publisher's editions of the books sold in competition with the book club editions of such books, but also of other trade books; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allega-

tions of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. The allegations of Paragraph 5 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 6. Respondent, by contracts, agreements, understandings, suggestions or other means, has fixed and maintained, and now fixes and maintains, at least for specified periods, the minimum prices at which the publisher's editions of certain of its trade books are to be resold by its retail book seller customers.

PAR. 7. Also respondent, in some instances, illegally has attempted to fix and maintain, and has fixed and maintained, such minimum prices at which the publisher's editions of certain of its trade books were to be resold by some of its retail book seller customers, even though such customers did not enter into any contract or agreement with respondent regarding such prices but such contracts or agreements had been entered into within the same State by and between respondent and others of its retail book seller customers.

PAR. 8. The contracts, agreements, understandings, suggestions or other means whereby respondent has fixed and maintained and now fixes and maintains, at least for specified periods, the aforementioned minimum resale prices for its publisher's editions of certain of its trade books are also illegal, at least with reference to some of such books, including those the titles to which are selected and the printing plates for which are leased by the book clubs, in the manner hereinbefore described, in that they are not sold or resold in free and open competition with commodities of the same general class, that is, with trade books produced or distributed by others. Respondent is the only publisher of the publisher's editions of the trade books which it sells and distributes in the United States.

PAR. 9. Respondent has maintained the direct observance of said fixed resale prices on the publisher's edition of such books and has enforced indirect observance by prohibiting, in connection with the resale thereof at said fixed prices, the granting of any premium, gift, dividend, or any other thing of value.

PAR. 10. Under the provisions of the understandings or agreements which the respondent has with the book clubs, these clubs received not only the exclusive delegated rights for a specified period to use the printing plates for the publication of the book club edition for the particular titles which the club has selected, but the said clubs were permitted to, and do, sell such editions in competition with the said publisher's editions of the same titles at any price and

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on any terms or conditions they may determine. Respondent's retail book seller customers have thereby been placed at a competitive disadvantage in the sale and distribution of such publisher's editions.

PAR. 11. The acts, practices, methods, and agreements of respondent, as hereinbefore alleged, are all to the prejudice of the public, have a dangerous tendency to and have actually frustrated, hindered, suppressed, lessened, restrained and eliminated competition in the sale and distribution of trade books in commerce within the intent and meaning of the Federal Trade Commission Act; have resulted in an unfair competitive advantage to respondent's book club customers over respondent's retail book seller customers; have the capacity and tendency to restrain unreasonably and have restrained unreasonably interstate commerce in such products; and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PARAGRAPH 1. The allegations of Paragraph 1 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 2. The allegations of Paragraph 2 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 3. The allegations of Paragraph 3 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 4. The allegations of Paragraph 4 of Count I of this complaint are incorporated by reference and made a part of the allegations of this Count to the same extent as if such allegations were set forth in full herein.

PAR. 5. Respondent in the course and conduct of its said business, in commerce, has been for many years last past, and more particularly since June 19, 1936, and is now, either directly or indirectly discriminating in price between different purchasers of its said trade books by selling such products to some purchasers at higher prices than it sells such products of like grade and quality to other purchasers, and many of such other purchasers are engaged in active and open competition with the less favored purchasers in the resale of such products within the United States, except as it has been affected as herein alleged.

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Respondent has priced and sold its publisher's editions at list prices, which are the minimum resale prices fixed by contract or otherwise by respondent, less specific discounts allowed to each class of purchasers among which are jobbers or wholesalers.

Respondent has priced and sold said books to some jobbers or wholesalers at said list prices with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	Discount (percent)
1-2	40
3-24	41
25-49	42
50-99	43
100-249	43½
250-499	44
500-999	45
1,000-2,499	45½
2,500-4,999	46½
5,000 and over	47

Respondent has priced and sold said books to other jobbers or wholesalers who are in competition with those jobbers or wholesalers receiving the aforementioned discounts above described, at said list prices, with the following schedule of discounts being applicable thereto:

Number of copies ordered of same title:	Discount (percent)
1-49	43
50-99	44
100-249	44½
250-499	45
500-999	45½
1,000-2,499	46
2,500-4,999	47
5,000-9,999	48
10,000-24,999	49
25,000 and over	50

PAR. 6. The effect of the aforesaid discriminations or of any appreciable part thereof has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and said jobbers or wholesalers are respectively engaged, or to injure, destroy or prevent competition with respondent or with said jobbers or wholesalers who receive the benefit of said discriminations or with the customers of either of them.

PAR. 7. The aforesaid acts and practices of respondent are in violation of subsection (a) of Section 2 of the Clayton Act, as

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amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13).

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C.A. 45) the Federal Trade Commission on June 29, 1951, issued its complaint in this proceeding and duly served same upon respondent, a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal office and place of business located at 34 Beacon Street, Boston, Massachusetts. Said complaint was issued simultaneously with similar complaints, charging substantially the same violations of law, against five other publishing firms one of which was that against Doubleday & Company, Inc., Docket 5897. Counts I and II of the complaint herein were substantially similar to Counts I and II in the Doubleday complaint. Counsel in all of these proceedings agreed that since the issues were substantially the same in Counts I and II that the proceeding against Doubleday & Company, Docket 5897, would be fully tried first and after the taking of evidence in that case was closed, counsel in the other cases further agreed that the record in the matter of Doubleday & Company, Inc., Docket 5897, would be taken by them as the record in each of the individual cases. Under date of August 31, 1955, the Commission issued its final order in the Doubleday case which order has not been appealed from.

Thereafter, on December 12, 1955, there was submitted to the undersigned examiner an agreement between the respondent and counsel supporting the complaint providing for the entry of a consent order which is identical with the order of the Commission in the Doubleday case in so far as it applies to Counts I and II of that case. By the terms of said agreement respondent admits all the jurisdictional facts alleged in the complaint served upon it; the parties thereto agree that the record may be taken as if findings of such jurisdictional facts had been duly made in accordance with such allegations; agree that such agreement disposes of this proceeding; agree that the answer of respondent herein to the complaint shall be considered as having been withdrawn; agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; agree that the agreement shall not become a part of the official record until and unless it becomes a part of the decision of the Commission; agree that the agreement is for settlement purposes only and does not constitute an admission by respondent

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that it has violated the law as alleged in the complaint. By such agreement respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered into in accordance with this agreement. Such agreement further provides that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondent, and that when so entered it shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted. The hearing examiner further finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and that the proceeding is in the public interest and in accordance with such agreement hereby enters the following order.

ORDER

It is ordered, That respondent Little, Brown and Company, Inc., a corporation, its officers, representatives, agents and employees, 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., Section 45) do forthwith cease and desist from:

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, 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 booksellers purchasing from respondent compete with one another in the sale of such work.

It is further ordered, That any and all other charges contained in the complaint are herewith dismissed.

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DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of February, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein 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 to cease and desist.

Decision

IN THE MATTER OF

JOSEPH NEWGARDEN, SR., TRADING AS
WESTBROOK STUDIOSORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6382. Complaint, June 29, 1955—Decision, Feb. 8, 1956

Order requiring a photographer in Willoughby, Ohio—charged with making false representations on certain form permit post cards mailed to all residential patrons of certain post offices in four States to promote the sale of his pictures—to cease representing falsely that he was conducting a photographic contest to select "The Child of the Year," that pictures of the child selected would be featured in a series of newspaper and magazine advertisements, that he would pay the selected child the usual modeling fee and award him a one-year contract, and that he would pay one dollar to each child at the time of posing.

Mr. William R. Tincher, counsel supporting the complaint.

Mr. Joseph Newgarden, Sr., pro se.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondent on June 29, 1955, charging him with having engaged in unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act. Said complaint, in substance, charges respondent with having falsely represented that he was conducting a photographic contest and with having made certain false and misleading statements in connection therewith. A copy of said complaint and notice of hearing were duly served upon respondent. No written answer to the complaint was filed by respondent.

Following the issuance of the aforesaid complaint and service thereof upon respondent, a hearing was held before the undersigned hearing examiner, theretofore duly designated to hear this proceeding, on October 17 and 18, 1955, in Cleveland, Ohio. At the opening of such hearing respondent, who appeared without counsel, was permitted to make oral answer to the complaint, placing in issue the main allegations thereof. Testimony and other evidence were thereafter offered in support of and in opposition to the allegations of the complaint, which testimony and other