

IN THE MATTER OF
HERBERT B. SYKES TRADING AS SYKES HERNIA
CONTROL SERVICE ET AL.

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

Docket 6118. Complaint, Aug. 13, 1953—Decision, Mar. 8, 1956

Order requiring an individual in St. Petersburg, Fla., to cease representing falsely in advertisements in newspapers and magazines that his "Sykes Hernia Control" device was radically different from a truss; that it would completely cure many hernias and would hold all securely in place at all times and under all conditions; and that he and his representatives conducted clinics where sufferers from hernia might be examined and treated by a physician.

*Mr. Jesse D. Kash and Mr. William M. King for the Commission.
Davies, Richberg, Tydings, Beebe & Landa, of Washington, D. C.,
for respondents.*

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondent Herbert B. Sykes, an individual trading as Sykes Hernia Control Service, and Respondent Griffith and McCarthy, Inc., a corporation, have engaged in acts and practices which are in violation of the Federal Trade Commission Act—particularly that they have misrepresented a device for use by individuals suffering from hernia.

After the issuance of said complaint and the filing of respondents' answers thereto, hearings were held, at which testimony and other evidence in support of and in opposition to the allegations of the complaint were received before the above-named hearing examiner, duly recorded and filed in the office of the Commission, and proposed findings of fact and conclusions of law were submitted by counsel. Upon the entire record, the hearing examiner, having determined that this proceeding is in the public interest, makes the following findings of facts and conclusions.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Herbert B. Sykes, since 1931, has been engaged in the sale of a device, as that term is defined in Section 15

of the Federal Trade Commission Act, as amended,¹ known as "Sykes Appliance," later changed to "Sykes Hernia Control," which was and is advertised and sold to those suffering from hernia or rupture. The business was first located in Michigan City, Indiana, and was operated under the name "Sykes Manufacturing Company"; then was moved to Chicago, Illinois and operated under the trade name "Sykes Service"; moved again, in 1950, to St. Petersburg, Florida, and operated as "Sykes Orthopraxy Service," then as "Sykes Hernia Control Service." On May 29, 1953, respondent, together with his son Robert A. Sykes, and William H. Winters, executed articles of incorporation, which were duly filed on June 4, 1953, in the office of the Secretary of State of Florida, for two Florida corporations, namely, Sykes Manufacturing, Inc., of St. Petersburg, and Sykes Hernia Control Service, Inc. Respondent Herbert B. Sykes subscribed for two shares of stock, Robert A. Sykes for 49 shares, and William H. Winters for 49 shares in each corporation, that being all of the stock. Respondent Herbert B. Sykes became secretary and a director of each of the corporations. Sykes Manufacturing, Inc., was and is a corporation set up, among other things, to manufacture the device, and Sykes Hernia Control Service, Inc., is the selling corporation.

By contract dated June 5, 1953, between Sykes Hernia Control Service, Inc., and Herbert B. Sykes and his wife, Lucille G. Sykes, wherein it is recited that the corporation "desires to hire Sykes in order to keep exclusively to itself his valuable services," the said Sykes agreed to give all of his services exclusively to the corporation to assist it in advertising and selling the aforesaid device. In consideration for these services, this corporation agreed to pay to Sykes, during his lifetime, 10% of its monthly gross receipts less refunds to customers, with a guarantee of a yearly minimum of \$20,000, and, in the event that Sykes' wife should survive him, to pay the same amount to her during the remainder of her lifetime. By another contract of June 5, 1953, the Sykes Manufacturing Company, Incorporated (obviously erroneous for Sykes Manufacturing, Inc.) agreed to guarantee the payment of Sykes' salary.

By a bill of sale dated June 8, 1953, respondent Herbert B. Sykes transferred the entire assets, including the trade name, of the business operated by him as Sykes Hernia Control Service to Sykes Manufacturing, Inc., for a named consideration of \$10.00.

¹ Sec. 15 (d) The term "device" (Except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

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Also on June 8, 1953, Sykes Manufacturing, Inc., entered into a contract with respondent Herbert B. Sykes, wherein it is stated that the total purchase price of the assets of the business transferred to it was \$40,000, to be paid to Sykes in annual payments of \$10,000 each, the first payment to be due on June 1, 1954. The contract further provides that in the event the corporation fails to pay any installment when due, Sykes may declare the whole balance to be due, and bring suit for that amount.

Herbert B. Sykes served as secretary and director of each corporation until about two weeks prior to March 10, 1954, when he transferred his two shares of stock in each corporation to William H. Winters, without consideration, and, by resignation, severed his official connection with both corporations.

PAR. 2. Prior to establishment of the aforementioned corporations, respondent Herbert B. Sykes, acting under his various trade names, established branch offices and distributorships in a number of cities throughout the United States, and issued franchises to persons who established offices in other specific territories. He provided advertising matter and, to the best of his ability, controlled the advertising used by these various offices. He participated in their profits, and in some instances paid their rent and other office expenses.

Parts for making up the devices involved in this proceeding were transported from respondent's principal place of business in the various States in which he was located to the branch offices, distributorships, franchise-holders, and traveling representatives located in various other States of the United States and in the District of Columbia, and Respondent Herbert B. Sykes maintained a course of trade in said device in commerce among and between the various States of the United States and in the District of Columbia. The volume of his business was substantial. This business has been and is now being carried on by the two Florida corporations.

PAR. 3. Respondent Griffith and McCarthy, Inc., is a corporation organized and existing under the laws of the State of Florida, with its office and principal place of business located in the St. Petersburg Times Building, St. Petersburg, Florida. Said respondent is now, and for more than one year last past has been, engaged in the operation of an advertising agency. In such capacity said respondent prepared advertising matter for respondent Sykes, and either delivered the same to Sykes for use by him and his distributors, or caused the same to be published in various newspapers throughout the United States. All the advertising prepared by this respondent was suggested by, approved and frequently revised

by respondent Sykes. The sole witness who appeared from the advertising agency stated that he did not think anything was ever prepared for Sykes that Sykes himself did not change. According to the testimony, this respondent had no part in the preparation or dissemination of the advertising matter in which the great bulk of the claims attacked in the complaint appeared. The record is unclear as to the part taken by this respondent as to other advertising. Accordingly, it is found, as suggested by the proposed findings submitted by counsel in support of the complaint, that the proof is insufficient to warrant a finding that this respondent has violated the Federal Trade Commission Act as charged.

PAR. 4. In the course and conduct of his business respondent Herbert B. Sykes disseminated and caused the dissemination of various advertisements concerning said device by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements in various newspapers and magazines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device.

PAR. 5. Among and typical of the advertisements disseminated or caused to be disseminated by said respondent are the following:

Sykes Hernia Control is not a "truss." Unlike a truss, the Sykes Hernia Control does not press on the pelvic bone structure in any way. Nor does it use straps, belts or buckles. It thus employs entirely new mechanical features and, *most important*, serves quite a different function—the physical correction of Hernia and Rupture.

MEN

Tired of Trusses? Let us prove that (1) you need never buy another truss; (2) your rupture troubles may vanish forever; and (3) that hernia disappears completely without surgery or injections in many cases. Check some of the testimonial letters from our file.

Sykes Service consists of lifetime service in the correction of your condition with a series of revolutionary new appliances which have no equal on the market today. The wearer is not burdened with troublesome straps, leather, or the soggy odorous parts that have always made wearing trusses so obnoxious and inadequate. We are doing what the medical profession has long considered impossible in the control of hernia and rupture. Very rapid improvement has been reported by 8 or 9 out of every 10 people fitted—and in the course of several months, many gratefully tell us that their hernia no longer comes out.

Sykes Hernia Control Service means that both Rupture and Hernia may now be successfully overcome without resorting to surgery. You do not have to go to the hospital. You do not have to lose time from work. You don't have to use up your savings. From the moment you are fitted with a modern Sykes Control your rupture or hernia is immediately held securely and muscles and organs are maintained in their proper position. Relief is permanent, and

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nature usually, quickly, begins to restore muscular tissue to near normal condition.

SORRY

No rupture cripples! * * * We PROMISE immediate relief and lifetime service. Many report "hernia disappears" in a few months. Lift, strain, climb as if you had never been ruptured.

I've had two unsuccessful surgeries and used several types of trusses that did not hold my large double hernia. In November, I started using the Sykes Hernia Control and I can truthfully state that I feel much better. The hernias are no longer a problem, having almost completely disappeared. * * *

Fitted with Sykes hernia control on December 19, 1949, for hernia—hernia gone in 3 months time. * * *

* * * I have had a hernia for a period of 10 years and after wearing a Sykes Appliance for a period of fifteen months am completely cured.

After 40 years of hernia and about 16 trusses, Sykes Hernia Control Service has corrected my hernia in just two months—Even when I take off the control and strain, no sign of the hernia appears.

You will be able to lift heavy objects, strain in any position, climb, swing a sledge hammer if that is your work.

* * * June 4, 1951. Am 22 years old. Have had hernia about 15 years, as large as my fist. Started with Sykes Control August 5, 1950. Was doing heavy lifting on beer truck—since then it has been held and no longer comes out—can even leave off when not doing heavy work—played ball when doing without it—never came out—and the hernia is now gone completely.

I suffered two strangulations and had to call my doctor at three o'clock in the morning. After much trouble he got a replacement. Then after two months I had another strangulation, which was very serious. The doctor ordered an operation, but I refused.

A short time later your service man came to Pittsburg. I contacted him and purchased a control in June 1951.

I am almost completely healed—I haven't had a bit of trouble. I can work at anything I care to—stoop and bend, climb or lift—and even push a lawn mower without any discomfort whatsoever.

For 35 years I've had hernia trouble. I am a post operative case. Both sides are very bad. * * * I came to you of Sykes Hernia Control and got your appliance about two years ago. That was the end of my trouble.

The unique cantilever design of the Sykes Control stimulates circulation in the abdominal tissues and assists nature in building greater abdominal muscle tone and strength.

PAR. 6. Through the use of the statements contained in the aforesaid advertising, respondent Herbert B. Sykes has represented, and represents:

1. That the Sykes device is not a truss, is radically different from a truss, and is a revolutionary device;
2. That it will retain all ruptures or hernias;
3. That its use will improve the condition of hernia or rupture in a great majority of the cases of persons fitted, and many will be completely cured;

4. That the design of said device stimulates circulation of blood in abdominal tissues and assists nature in building greater abdominal muscle tone and strength, and in restoring muscular tissue to a more normal condition;

5. That said device will hold a rupture or hernia securely in place at all times and under all conditions of activity and strain.

PAR. 7. A hernia, frequently referred to as a rupture, is a protrusion of an organ or part through an opening in the walls of its natural cavity. A truss is an appliance to support a weakened or injured part and to retain the protrusion that may have taken place, as in a hernia.

1. The Sykes device is a truss, similar in design and principle to many other trusses on the market which depend upon the use of a spring to provide the pressure necessary to retain a hernia. It is not revolutionary, nor does it employ new mechanical features, although in some details it varies from other trusses which serve identical purposes.

Respondent's device consists of a frame of heavy spring steel wire, .192" (slightly more than $\frac{3}{16}$ of an inch) in diameter, covered with rubber tubing. The free ends of the wire frame are posterior and have pads attached which press against the hip muscles under tension when the device is in use. The wire is shaped to conform to the size and contour of the wearer's body, and is bent at the front to provide for the attachment of a pad or pads which can be adjusted to fit directly over either a single or a double hernia. These pads vary in size and shape to conform to the individual requirements of each user and, when properly adjusted, are held in place by the spring-steel tension. All pads are of foam rubber covered with cloth and attached to a metal disc. The spring steel frame provides elasticity which allows a certain freedom of movement on the part of the wearer.

2. The device will not retain all hernias. The fact is that no device or combination of devices will do that. There are incarcerated or strangulated hernias which would be made materially worse, with results which might be fatal, if respondent's device or any other truss were used. There are irreducible hernias in which the protruding parts cannot be pushed back into their normal cavities, because, in many instances, they have adhered to the walls through which they protrude. Such hernias cannot be retained by respondent's device. Likewise there are other types and sizes of hernia which cannot be retained by any truss.

The usefulness of respondent's device is limited to the retention of reducible hernias.

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3. The use of said device will not cure any form of hernia, nor will it improve the condition of the hernia in most cases. Although the medical profession is not in complete agreement, the general consensus is that restoration of the weakened or damaged tissue can be brought about only by physical repair, which requires a surgical operation. An injection treatment for hernia was used formerly upon the theory that if the two edges of the ruptured tissue were irritated, a healing process would be induced which would cause them to unite, but this theory and this treatment have been practically abandoned. Surgery is now generally accepted as the only effective and reliable means of correcting and curing hernia. A truss merely provides support and has no curative effect.

4. A hernia is due, usually, if not always, to a structural weakness or defect. The impaired tissue through which the protruding organ or part extends may be, but is not ordinarily, muscular tissue. A truss helps to retain the protrusion by lending support to any muscles involved therein. It does not build muscle. Pressure of the truss upon the affected area would interfere in some degree with the circulation of blood, and to that extent an atrophying rather than a stimulating effect upon muscle tone and muscle development would be induced. The consensus of the expert opinion adduced in this proceeding is that the use of respondent's device does not stimulate circulation, contribute to the improvement of impaired muscular tissue, or assist nature in building muscle tone and strength.

5. Respondent's device is a good truss, but, like other trusses, it is not effective unless the retaining pad rests directly over the break in the cavity wall with sufficient, continuous pressure to constitute a barrier to the protrusion of the part or organ involved. It must be adjusted from time to time, and is affected by body movement; hence it cannot be depended upon at all times to provide the exact degree of tension in the precise spot necessary to hold a hernia in place.

PAR. 8. In the course and conduct of his business, and for the purpose of inducing the purchase of Sykes Hernia Control, Respondent Herbert B. Sykes has also caused advertisements to be inserted in newspapers and other advertising media, of which the following is typical:

Visit your nearest Sykes Division Office or write for a date when the Sykes specialist will hold a clinic in your vicinity.

PAR. 9. Through the use of the language quoted in the preceding paragraph and other statements of a similar nature, respondent

Herbert B. Sykes has made representations that have led or have the tendency to lead members of the public to believe that he and his representatives conduct clinics where persons suffering from hernia may be examined and treated by a physician.

PAR. 10. Respondent Herbert B. Sykes is not a physician, and there is no evidence in the record that any of his former franchise holders, distributors or representatives are physicians or have had medical training. The implications are all to the contrary—that the franchise holders, distributors and representatives were qualified only as salesmen; all the knowledge they have of the Sykes device and of hernias in general is that which they have acquired through association with said respondent; and none of them are physicians. The use of the term “clinic” in context with the other language of respondent’s advertisements implies that the clinics to which readers of these advertisements are urged to come are for examination of, advice concerning, and treatment of the physical ailments incident to their hernias, by a qualified physician.

PAR. 11. Respondent Sykes’ 1953 contract with Sykes Hernia Control Service, Inc., obligates him to a lifetime of service in promoting the sale of, and in selling, said device, and there is evidence of record that in July, 1954, he was actively engaged in selling the device. His compensation under the contract is partially determined by the volume of sales of the device. Under these circumstances, the contention of respondent Sykes that he is no longer actively engaged in the business and that therefore an order should not be issued against him is not supported by the evidence.

PAR. 12. In an order issued on December 11, 1953, denying a motion by respondent Sykes to dismiss the complaint in this proceeding because the assets of his business had been sold to the two corporations mentioned herein, the hearing examiner suggested that the complaint be amended to include the two corporations as parties respondent. Answer date was extended to January 15, 1954, so that the suggestion could be acted upon prior to answer, if considered proper, but no amendment of the complaint resulted. The record does not disclose that either of the two corporations, Sykes Hernia Control Service, Inc., or Sykes Manufacturing, Inc., of St. Petersburg, has ever used any of the objectionable advertisements or misrepresentations, or engaged in any of the practices which are the subject of the complaint, and neither of said corporations has been made a party to this proceeding.

CONCLUSIONS

The complaint, insofar as it relates to respondent Griffith and McCarthy, Inc., a corporation, should be dismissed.

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The aforesaid acts and practices of respondent Herbert B. Sykes, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

Accordingly, it is ordered, That respondent Herbert B. Sykes, an individual trading under his own name or any other name or trade designation, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale of a device designated as Sykes Appliance, or any product or device of substantially similar construction or design, whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or through implication:

- (a) That said device is not a truss;
- (b) That said device is revolutionary;
- (c) That the use of said device will retain hernias or ruptures unless limited to reducible hernias or ruptures;
- (d) That said device will cure hernias or ruptures;
- (e) That the use of said device stimulates the circulation of blood, contributes to the improvement of impaired muscular tissue, or assists nature in building muscle tone and strength;
- (f) That said device will hold ruptures or hernias securely in place under all conditions of activity or strain.

2. Disseminating, or causing to be disseminated, any advertisement which contains any of the representations prohibited in Paragraph 1 of this order, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

It is further ordered, That respondent Herbert B. Sykes, an individual trading under his own name or any other name or trade designation, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale of a device designated as Sykes Appliance or any product or device of substantially similar construction or design,

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whether sold under the same name or any other name, do forthwith cease and desist from, directly or indirectly:

Representing or causing to be represented, that respondent Herbert B. Sykes, or his agents or representatives, conduct or operate clinics where professional medical experts, specialists, or physicians will be present to consult with, examine, advise or treat persons suffering from hernia, unless and until such is actually the fact.

It is further ordered, That the complaint herein, insofar as it relates to respondent Griffith and McCarthy, Inc., a corporation, be, and the same hereby is, dismissed.

ON APPEAL FROM INITIAL DECISION

By MASON, Commissioner.

This matter is before the Commission on an appeal filed by counsel supporting the complaint from the hearing examiner's initial decision of August 4, 1955. Counsel supporting the complaint urges that the hearing examiner's findings of fact are in error as to two points. He further urges that, if the Commission so determines, the initial order should be amended to accord therewith. Respondents filed no brief in answer to the appeal brief of counsel supporting the complaint and oral argument was not requested.

The respondents were charged with dissemination of false and misleading advertising of a truss device for use by individuals suffering from hernia or rupture. The hearing examiner entered a finding of fact that

"The usefulness of respondent's device is limited almost exclusively to the retention of inguinal, umbilical and femoral hernias."

Counsel in support of the complaint objects to the absence of the word "reducible" in front of the word "inguinal" and the presence of the word "femoral" in the said findings. We find the expert testimony of record shows that respondent's trusses are useful only in connection with reducible hernias.

Dr. Frederick B. Brandt testified on direct examination as follows:

"Well of course it must be a reducible hernia. If it is not a reducible hernia, then a truss is an unsatisfactory and possibly a very dangerous thing to use" (T. 267).

There is other unqualified testimony to the same effect. We conclude, therefore, that the finding as to the usefulness of respondent's truss based on this record should be limited to reducible hernias.

As to the second point:

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In contending that the examiner erred in including the word "femoral" in Paragraph 7 (2) of the findings, counsel in support of the complaint in effect argues that the record shows that respondent's truss is not useful for the femoral type of hernia. Careful analysis of all of the evidence does not support that contention. It shows, on the other hand, that the value or usefulness of respondent's truss cannot be related exclusively to any particular kind or class of reducible hernia.

Witness Brandt called in support of the complaint testified that respondent's truss would be "adaptable for reducible inguinal hernias for palliation" (T. 273); that, not infrequently, a truss would be used for "support for an incisional hernia which is not umbilical, or for a lumbar hernia" (T. 298); and that respondent's truss might be useful for the umbilical variety (T. 299). Dr. Caulfield also testified that respondent's truss would be effective in retaining a navel hernia (T. 179).

We, therefore, substitute for the last two sentences of Paragraph Seven (2) of the examiner's findings the following:

"The usefulness of respondent's device is limited to the retention of reducible hernias."

That the order may comport with the Commission's ultimate findings of fact, the words "inguinal, femoral and umbilical" will be deleted from Paragraph 1 (c) of the initial order to cease and desist.

It is so ordered.

FINAL ORDER

This matter having come before the Commission upon appeal from the hearing examiner's initial decision, filed by counsel supporting the complaint, and the matter having been heard on the whole record, including brief in support of the appeal (no brief in opposition to said appeal having been filed and no oral argument having been requested); and the Commission having granted said appeal in part and denied it in part and directed modification of the initial decision in the manner set forth in the accompanying opinion:

It is ordered, That the last two sentences of Paragraph 7 (2) of the findings of fact contained in the initial decision be, and they hereby are modified to read as follows:

"The usefulness of respondent's device is limited to the retention of reducible hernias."

It is further ordered, That Paragraph 1 (c) of the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

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"c. That the use of said device will retain hernias or ruptures unless limited to reducible hernias or ruptures."

It is further ordered, That the initial decision, as so modified, shall, on the 8th day of March, 1956, become the decision of the Commission.

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

IN THE MATTER OF

LEON WOLFF TRADING AS
L. W. MAIL ORDER SURVEY, ETC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6431. Complaint, Oct. 19, 1955—Decision, Mar. 8, 1956*

Consent order requiring an individual in Los Angeles, Calif., selling a Survey or Guide having to do with the establishment and operation of a mail order business, to cease advertising falsely in newspapers, periodicals, etc., that anyone could start a successful mail order business by purchase and use of his Survey, and for only a few dollars; that the successful operators of mail order businesses named had purchased the Survey, and that the large incomes cited were typical and had been achieved by hundreds of small operators who had purchased it; that the Survey revealed confidential facts which had made fortunes for purchasers; that he was its author and one of the foremost experts in the United States on mail order business problems; and that installment purchasers could obtain a refund of all amounts paid if not satisfied.

Before *Mr. William L. Pack*, hearing examiner.

Mr. George E. Steinmetz for the Commission.

Mr. Ralph B. Herzog, of Beverly Hills, Calif., for respondent.

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 Leon Wolff, an individual trading as L. W. Mail Order Survey and as L. W. Publishers, hereinafter referred to as respondent, has 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 Leon Wolff is an individual trading as L. W. Mail Order Survey and as L. W. Publishers. Respondent is now, and for more than one year last past has been, engaged in the promotion, sale and distribution of a Survey or Guide having to do with the establishment and operation of a mail order business and known as the "L. W. Survey." Respondent's office and principal place of business is located at 805 Larrabee Street, Los Angeles, California. Said Survey or Guide is sold directly to purchasers in various States of the United States by the respondent.