

IN THE MATTER OF
FARM JOURNAL, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 6388. Complaint, June 30, 1955—Decision, July 17, 1956

Order requiring the publisher of the country's largest agricultural magazine, which had acquired the assets of its leading rival, the oldest and second largest magazine in the field, to divest itself of the right to use the names and lists of subscribers and advertisers of the acquired magazines.

Mr. John T. Walker, Mr. Raymond L. Hays and Mr. Philip R. Melancton, Jr., for the Commission.

Moffett, Frye & Leopold and Mr. George M. Brodhead, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint herein issued June 30, 1955, charging respondent with violation of section 7 of the Clayton Act (15 U.S.C. 18) as amended December 29, 1950, in that it acquired a substantially competitive farm publication, the Country Gentleman—Better Farming, thereby substantially lessening actual and potential competition or tending toward a monopoly in any line of commerce in which both were engaged. The answer of respondent admitted most of the descriptive, statistical, and acquisitional facts pleaded, and denied the conclusions of competitive effect and lines of commerce as asserted in the complaint. Pretrial conferences were held October 25 and 26, 1955, and thereafter 20 hearings for evidence reception began on October 31, 1955, and ended February 2, 1956, resulting in 2,260 pages of transcript, 400 exhibits offered by counsel in support of the complaint, and 276 by respondent. The reception of evidence was closed February 2, 1956, and thereafter proposed findings of fact and conclusions, and brief in support thereof, were submitted by counsel in support of the complaint on March 16, 1956. The same in opposition thereto were filed by respondent's counsel on April 27, 1956. Reply brief of counsel for complaint was filed May 23, 1956. Upon consideration thereof, and the entire record herein, the hearing examiner makes the following:

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1. Respondent Farm Journal, Inc., is a corporation under the laws of the State of Pennsylvania with its principal office located at 230 West Washington Square, Philadelphia 5, Pennsylvania. It

causes to be printed, published, sold, and circulated to subscribers in interstate commerce, as that term is defined and used in the Clayton Act, two monthly magazines, Farm Journal and Town Journal. The former is an agricultural magazine whose editorial content covers all phases of farming and whose appeal is to farmers and to those interested in farming. The latter is a magazine whose editorial content covers all phases of suburban living and whose appeal is to suburbanites who, although living for the most part in the open country, small towns, county seats, or in the suburbs of large cities, do not engage in farming for a livelihood. Both magazines are sold entirely direct to subscribers and not on newsstands.

2. In 1943 respondent purchased a weekly magazine known as Pathfinder, with a circulation of approximately 400,000, and continued to publish under that name until 1955 when it was changed to Town Journal. During that period it was converted to a monthly, its editorial format changed, and its circulation increased to an average net paid of 1,627,273 for the six months' period ending June 30, 1955.

3. Farm Journal has been continuously published as a nationally distributed farm magazine since 1877 with progressively increasing national circulation and advertising. Its subscription price is \$1.00 a year or 8.33 cents per copy, the latter being proportionately lower on longer term subscriptions. Its average net paid circulation in the United States for the six months' period ending June 30, 1955, was 2,869,640. Approximately 50 percent of its editorial content is devoted to the business of farming; about 35 percent to matters of special interest to farm women; and the remainder to fiction, humor, and miscellaneous features. Subscription sales accounted for about 10 percent of Farm Journal's gross revenues. In 1950 these were \$922,280 and in 1954 they were \$1,109,597. Circulation costs alone exceeded Farm Journal's gross revenue from subscription sales. In 1950 Farm Journal's gross advertising revenue was \$8,353,385 and in 1954 was \$9,789,629. Up until the November 1952 issue, Farm Journal was published in one monthly national edition. Beginning with the 1952 edition it was, and has been since, published in three separate regional editions called the Central-East Edition, circulated in 24 eastern and midwestern states (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, and the District of Columbia) with a total net paid circulation of 2,001,139 for the six months' period ending June 30, 1955; the Southern Edition,

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having a net paid circulation of 529,286, circulated in 13 southern states (Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas); and the Western Edition, with a net paid circulation, for the same period, of 339,215, circulated in 11 western states (California, Oregon, Washington, Colorado, Idaho, Arizona, New Mexico, Wyoming, Nevada, Montana, and Utah). Beginning with the April 1956 issue respondent will publish Farm Journal in four regional editions called Eastern, Central, Southern, and Western.

4. Since 1953 advertisers may purchase space in Farm Journal on a full-run basis, or in the Central-East and Southern editions jointly, or in the Western Edition alone. Beginning in April 1956, advertisers may purchase space in any one, two, or all regional editions.

5. Curtis Publishing Company (hereinafter referred to as Curtis) is a corporation under Pennsylvania laws with its executive offices located at Independence Square, Philadelphia, Pennsylvania, and is engaged in printing, publishing, and circulating in interstate commerce, as that term is defined in the Clayton Act, to all 48 states various publications. As of June 6, 1955, these were The Saturday Evening Post, a general weekly; Ladies' Home Journal, a women's monthly; Holiday, a travel and recreation monthly; Better Farming—Country Gentleman (hereinafter referred to as Country Gentleman), a general interest farm monthly; and Jack and Jill, a children's monthly. Only the latter did not carry advertising.

6. Curtis is a highly vertically integrated concern growing its own lumber, processing pulp, and making its own paper, editing, printing, and publishing the named magazines and circulating same through a wholly owned subsidiary, Curtis Circulation Company, which distributes nationally in interstate commerce, not only its own magazines but those of a long list published by other publishers.

7. Country Gentleman was sold largely on subscription, only 1.4 percent of its total circulation being single copy sales, whereas 32 percent of the circulation of The Saturday Evening Post, 34 percent of the Ladies' Home Journal, and 21 percent of Holiday were single copy sales on newsstands. All of its magazine sales in 1954 accounted for 31 percent of the total revenues of the four Curtis magazines carrying advertising, advertising accounting for the balance of 69 percent. In the case of Country Gentleman, the circulation revenue accounted for 18 percent and advertising 82 percent. The manufacturing and delivery costs for an average issue of Country Gentleman were 15 cents per copy, whereas gross circulation revenue was 5 cents per copy.

8. The average net paid circulation of the five Curtis magazines for the six months period ending June 30, 1955, was as follows: The Saturday Evening Post 4,621,096; Ladies' Home Journal 4,813,724; Holiday 832,697; Country Gentleman 2,556,099; Jack and Jill 716,000. In each of the years 1946 through 1954, Curtis showed a profit on its total operations, after taxes, of about \$5,000,000, net profit to total revenues ranging from a high of 4.1 percent in 1950 to a low of 2.5 percent in 1954.

9. Country Gentleman was acquired by Curtis in 1911. It was then the oldest agricultural publication in the nation, then published under the name Country Gentleman, which had begun in 1830 as the Genessee Farmer. Curtis continued this long career until August 31, 1955. Beginning in September 1952, and running to February 1953, various changes were made in the publication. The size was cut down from 680 lines to 429 lines, the name changed from Country Gentleman to Country Gentleman—Better Farming, and the magazine was regionalized into four editions by a two-page insert. Throughout its ownership by Curtis and until its death in August 1955 Country Gentleman was a monthly general interest farm magazine providing, through its editorial columns, coverage of all farm interests, matters of special interest to farm women, and some fiction.

10. In the six months' period ending June 30, 1955, Farm Journal had an average net paid monthly circulation, substantial in all of the 48 states, of 2,869,640 copies, and Country Gentleman, for the same period, had comparable domestic circulation of 2,456,679, substantial in all of the 48 states. No other agricultural publication covering all phases of farming enjoyed at this time either significant or substantial circulation in all 48 states and none had a total net paid circulation of more than a million and a half. Advertising revenue for the year 1954 showed Farm Journal receiving \$9,789,629; Country Gentleman \$7,107,935. The next nearest general interest farm magazine sold some \$6,000,000 worth of advertising space, the second nearest \$4,500,000, and others less than \$3,000,000.

11. On June 6, 1955, respondent and Curtis entered into a letter agreement, the terms of which were subsequently included in a formal agreement of September 1955 with only minor variations, whereby (1) Curtis transferred to respondent all its right, title, and interest to its publication Country Gentleman, including the names Better Farming and Country Gentleman, effective with the September 1955 issue. A requirement of the letter agreement that Farm Journal carry these names "Better Farming" or "Country

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Gentleman" on its cover or in a prominent place inside for at least twelve issues was eliminated in the formal agreement and use of the names made optional; (2) Curtis transferred to respondent a list of all of its domestic Country Gentleman subscribers, with addresses and expiration dates; (3) Farm Journal assumed full liability for fulfilment of domestic subscriptions to Country Gentleman to be discharged by substitution of Farm Journal where subscribers had R.F.D. addresses, or substitution of Farm Journal or Town Journal for other subscribers, as respondent made arrangements with them, or by cash refund where required by subscriber except that Curtis agreed to reimburse respondent for one-half of all such cash refunds paid by respondent subject to a maximum of \$50,000 payable by Curtis on that account. Each substituted subscription would be for the same number of issues as would otherwise have been due on the replaced subscription whether they be corresponding issues or future issues through extension of existing subscriptions for Farm Journal or Town Journal. Curtis' liability for its unexpired Country Gentleman subscriptions as of August 1, 1955, was \$2,816,147.65; (4) Curtis agreed to furnish respondent a list of advertisers who, as of June 6, 1955, had placed orders for advertising space in September 1955 and subsequent issues of Country Gentleman; (5) respondent agreed to purchase from Curtis a minimum of \$100,000 worth of advertising space annually in The Saturday Evening Post until a total of \$500,000 had been expended; (6) respondent agreed to give Curtis, free, \$100,000 worth of advertising space each year for five years in either Farm Journal or Town Journal, or both. This annual obligation was to be reduced by one-half of the excess of The Saturday Evening Post advertising space, including above minimum requirement, purchased by the respondent in the particular year; (7) respondent agreed to pay Curtis each year, for a period of five years beginning with the February 1956 issue of Farm Journal, a sum equivalent to 15 percent of the dollar value of all paid advertising appearing in Farm Journal in excess of 450,000 agate lines in any one year, such payments not to exceed \$500,000 in any one year, or a total of \$2,000,000; (8) respondent agreed to purchase from the New York & Pennsylvania Company, a Curtis subsidiary, at a specified price, subject to adjustment, a minimum of 3,500 tons of paper a year for ten years, terminable by either party at the end of five years.

12. The considerations which led to this agreement on the part of Curtis were testified to in considerable detail by its president. He gave gross advertising revenue and net profits for Country Gentleman as follows:

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Year	Advertising revenue	Profit or loss
1948.....	\$9,001,472	\$616,872
1949.....	8,678,480	284,193
1950.....	8,805,816	248,983(L)
1951.....	8,805,523	545,797(L)
1952.....	8,572,732	1,736,046(L)
1953.....	7,699,277	1,612,244(L)
1954.....	7,107,935	2,480,877(L)

In the 45 years from 1911 to 1955 Country Gentleman showed profits in 12 years 1919, 1927, 1928, 1929, 1930, 1942, 1943, 1944, 1945, 1946, 1947, 1948, and 1949, and losses all the other years, these losses averaging about \$500,000 over the entire period. These figures are exclusive of general company overhead, and in his opinion the magazine absorbed more overhead than it created. Curtis, however, was at no time faced with actual or imminent insolvency, having never shown less than \$4,000,000 net profit.

13. The above individual losses were the primary reason for discontinuance. There were, in addition, other underlying or causative reasons also. All Curtis equipment had been designed for 680 line publications. This prevented running advertising copy into page margins, although competing publications could and did offer this to advertisers. Competitors also, such as Farm Journal, contracted out their magazine printing to commercial printers whose wide variety of equipment permitted them to accept editorial and advertising material at much shorter closing dates than Curtis could. Curtis thus could not print as late news as some of its competitors. Its circulation costs had increased, due to the decreasing number but increasing larger size farms; turnover in sales force increased to the point where supervisors spent more time in hiring new replacements than in training them, subscriptions tended to be for shorter periods, increasing the expense of securing renewals. The witness estimated that it would have cost Curtis some five million or more to overcome these handicaps by the purchase of new pressroom equipment alone and it was not felt that the candle was worth the game.

14. Curtis' annual statements for the four preceding years show profits after taxes as follows:

1951.....	\$4,849,920.65
1952.....	4,403,936.37
1953.....	4,468,027.19
1954.....	4,516,682.83

and that as of December 31, 1954, it had undivided profits and surplus after taxes and dividends of \$15,953,968.12.

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15. These factors led to the decision in April 1955 to sell or discontinue publication. However, in 1952, discussions had been held with the officials of another farm publication—Farm & Ranch, Southern Agriculturist—on a buy or sell basis, but they came to nothing as it became apparent they were in no position to buy. From December 1950 through part of May 1955, discussions were held with officials of Capper's Farmer, the third largest farm magazine, circulation-wise, after Farm Journal and Country Gentleman, but Capper's could not, as of May 19, 1955, undertake a negotiation of that size. The same day Curtis' chairman of the board got in touch with Howard Pew, the principal stockholder of respondent, and within twelve days thereafter, very frequent conferences resulted in the agreement of June 6, 1955.

16. Prior to June 6, 1955, Farm Journal had never advertised in Curtis' Saturday Evening Post, except one insertion five to seven years before, and Curtis had never advertised in Farm Journal. Respondent had never before purchased any paper from Curtis or any of its subsidiaries.

17. Almost immediately after the execution of this agreement of June 6, 1955, Curtis gave respondent access to its list of subscribers with their addresses, gave it impressions of their address plates, delivered to it, its list of advertisers who had placed orders for advertising to appear in issues of Country Gentleman subsequent to August 1955. Advertisers were notified the publication would cease after the August 1955 issue. Advertising contracts are cancellable up to a specific closing date, and Farm Journal immediately contacted these advertisers to continue with, or substitute Farm Journal for Country Gentleman. It likewise went over Country Gentleman's list of subscribers, eliminated duplications (those who subscribed to both Country Gentleman and Farm Journal), separated the remainder into those with R.F.D. addresses and those without, and sent out letters to all, urging R.F.D. subscribers to substitute Farm Journal for Country Gentleman, urging non-R.F.D. subscribers to substitute Town Journal for Country Gentleman, and offering duplicate subscribers extensions to their Farm Journal subscriptions commensurate with the unexpired portion of their Country Gentleman subscriptions. In each class, refund in cash as an alternative was tendered.

18. As of December 1955, these refunds amounted to about \$1,000.00 out of a total subscription liability of \$2,816,147.65. Out of 2,250,812 Country Gentleman subscribers' names turned over by Curtis to respondent, Farm Journal found 1,333,556 nonduplicates or new names. Letters urging substitution went out to about 1,092,000

non-R.F.D. former Country Gentleman subscribers and 630,000 replies were received as of November 1955, of which 53 percent elected to take Town Journal, the remainder Farm Journal. As of December 1955 respondent had increased its circulation of Town Journal from a June 1955 level of 1,600,000 by 375,000 and of Farm Journal from 2,870,000 (guarantee plus bonus) to a guaranteed circulation of 3,400,000 (bonus unstated), although respondent actually delivered 3,950,000 of its November 1955 issue. As a result of this increased circulation, both guaranteed and actual, respondent increased its advertising rates in Farm Journal by approximately 16 percent, effective with its February 1956 issue. The aggressive solicitation of Country Gentleman's list of advertisers, coupled with Farm Journal's huge bonus circulation subsequent to June 1955 and before its increase in advertising rates in February 1956, also resulted in a substantial increase in Farm Journal's advertising, both in lineage and revenue (from \$543,060.20 in August 1955 to \$1,031,897.51 in September 1955).

19. As of now, the possible absorption is practically complete, as to subscriber and advertiser novation, and Farm Journal, as of November 1955, was still being published as "Farm Journal and Country Gentleman."

20. The foregoing facts, as above found, are not in serious dispute, but since the statute forbids acquisition of either capital stock or other assets "where in any line of commerce in any section of the country, the effect of such acquisition * * * may be to substantially lessen competition, or tend to create a monopoly," the fight centers around the effect, which in turn depends upon the definition and limitation of "line of commerce." As in all these proceedings, proponent's effort is to narrow as much as possible the applicable line or lines of commerce because the quantitative aspect (share of market, etc.) of the acquisition is thereby pro tanto enhanced, whereas respondent seeks to widen the orbit of competition in order to dilute such effect.

21. Definition and delineation of line of commerce is, of course, the most difficult problem, and since this is the first Commission proceeding to reach this stage, under the statute as amended in 1950, there are no Commission precedents, except the interlocutory ruling in the Pillsbury Mills case, Docket No. 6000, and no exactly applicable court decisions. It is plain, however, and all counsel concede, either expressly or by implication, that Country Gentleman had two products to sell—news and information to subscribers—a vocational magazine—and space therein to advertisers.

22. Counsel for proponent contends for a definition of line of commerce solely in geographical terms—area where these products

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are sold—a “national” magazine sold in a “national” market, whereas counsel for respondent contends for a definition in terms of product. “Line of commerce” to this hearing examiner connotes line of business in which the acquiree was engaged—in other words, what is being produced and sold—a product, whereas geographic definition simply connotes where that product is sold in competition with other products, not the market but rather the breadth, depth, or extent of that market. The fact that Congress included the words “in any section of the country” bears this out. In other words, line of commerce, relevant market, or orbit of competition must be determined by the competitive characteristics of the product sold by the acquiree, only one of which is the area in which it is sold. The Pillsbury ruling tends to confirm this.

23. Counsel for respondent, on the other hand, claim that the advertising market (line of commerce, relevant market, orbit of competition, are used synonymously herein) is in reality two separate markets, one for the advertising of agricultural goods such as cotton pickers or mechanical milkers, and the other for advertising of general use goods used by all regardless of vocation, such as towels, shoes, or radios. The basis for this contention is that 70 percent of respondent’s gross revenue is from the sale of advertising space and 75 percent of this comes from the sale of advertising space for general use products.

24. Whether the sale of advertising space is regarded per se as one market, or as two, as contended for, is immaterial in view of the definition of relevant markets hereafter made. Respondent has proved that in the sale of advertising space for general use products it competes to some extent with practically every magazine published—of which there are some 800—with radio, television, billboard, and circulars. But the Supreme Court has held in *Times-Picayune Publishing Co. vs. U.S.* 345 U.S. 594, 612:

For every product substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose “cross-elasticities of demand” are small.

25. Respondent has proved through its officials and its advertising expert witnesses that these “cross-elasticities of demand” between *Country Gentleman* and *Farm Journal* on the one hand, and the mass media on the other hand, are small indeed for what the former have to sell. There is very little competition between these two vocational magazines and all other magazines for subscribers. What there is, is the type of competition which exists between current

fiction and a new book on brain surgery for a physician's patronage. There is likewise no discernible competition for the advertising of beehives, sprayers, or other vocationally demanded products. And, according to respondent's evidence, Country Gentleman, Farm Journal, or any other farm magazine are excluded by advertisers who use mass circulation or media consistently, either because their product is insufficiently appealable to farmers, such as canned milk, or because it represents an unwarranted additional expense, since they must use general news, fictional, or other mass circulation media in any event. They are likewise excluded from most other vocational, but nonfarm product advertising, whereas general media are not, at least to the same extent.

26. The competition for advertising of general use products between general news and fiction magazines on the one hand, and vocational or specialty magazines on the other, is indirect rather than direct. Very few, if any, producers of general use products advertise in a vocational or specialty magazine only. The process from this record seems to be the reverse. The first step for an advertiser of general use goods with the resources for buying mass circulation of any kind is to fix his advertising budget for the year. The next step is to decide whether he will employ printed media, radio, television, or even billboards. If more than one is selected, then funds are allocated between them. The third step then, if periodical media is selected, or shares, is to decide on which general news or pictorial periodical of mass circulation will be used. Up to this point there is no direct competition between vocational or specialty periodicals with any of the other media, because, as stated before, such special audience periodicals are almost never selected alone for advertising in mass fashion, general use products. After these three choices have been made, then, if the advertiser has sufficient funds and believes a potential to exist in the farm, fashion, sports, or other special audience, he will select one or more periodicals from those fields. Hence, the competition is indirect rather than direct, postponed rather than consistent from the beginning. This is pointed up, in the case of farm magazines at least, by the record fact that 50.5 percent of all advertising expenditures in 1954 was in general magazines and only 2.8 percent in farm magazines, and the latter percentage has been declining. It is not "effective competition." *Fashion Originators' Guild, et al. v. F.T.C.*, 312 U.S. 457; *Standard Oil Co. v. U.S.* 337 U.S. 293. As was stated by the Senate Judiciary Committee in its report on the 1950 amendment to section 7:

It is intended that acquisitions which substantially lessen competition as well as those which tend to create a monopoly, will be unlawful if they have the

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specified effect in any line of commerce, whether or not that line of commerce is a large part of the business of any of the corporations involved in the acquisition.—Senate Report No. 1775, 81st Congress, 2nd Session, page 5.

and the House Committee Report:

The test * * * is not intended to be applicable only where the specified effect may appear on a nationwide or industry-wide scale.

It is noteworthy also that the relevant market was limited to farm publications, regardless of type of advertising carried, in *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Company*, 293 U. S. 268, 88 F. 2d 979. In spite of respondent's consistent attempt to widen the area and at the same time to fragmentize its activities, the basic fact is that farm publications are a distinct and separable class of periodicals, entirely different in their audience and their appeal to advertisers, from general news and fiction carrying periodicals.

27. Under the Supreme Court ruling referred to, and the record in this case, the boundary of the two relevant markets in this case is drawn to include all general interest farm publications which sell their magazines to farmers and to those interested in farming, and which sell advertising space for the sale of both agricultural products and general consumer goods. Excluded are television, radio, and all other nonfarm magazine advertising of general use products. Excluded also are agricultural magazines which are devoted to specialized segments of farming such as *Turkey World* and the *American Fruit Grower*, and largely for the same reasons.

28. If the "acceptable substitute" theory for discerning direct competition is used the result is the same. A subscriber to *Country Gentleman* or *Farm Journal* is, for the most part, one who is interested in news and information of all phases of farming, farming in general, for survival reasons, and he will not accept *The Saturday Evening Post*, the *New Yorker*, or *Life* in lieu thereof, nor will he take the *Turkey World* or the *Beekeeper's Gazette* instead. These he may buy in addition to his *Country Gentleman* or *Farm Journal*, but not in place of them. Advertisers know this, and they know that, except for the advertising fraternity and competitors, very few, if any, people buy magazines just to read the advertisements, or view television just to watch the irritating commercials. Hence, their "cross-elasticities of demand" roughly follow those of the subscribing public. See on this point *Oxford Varnish Corporation v. Ault & Wiborg Corp.*, 83 F. 2d 764; *U.S. v. Klearfax Linen Looms*, 63 F. Supp. 32; *Eastman Kodak Co. v. F.T.C.*, 158 F. 2d 592; *In re Doubleday & Co., Inc.*, D. 5897 F.T.C. *In re Vanadium Alloys Steel Co.*, 18 F.T.C. 194.

29. The appellate tribunals may, however, reject this definition of the relevant markets and adopt respondent's contention and, therefore, to forestall remand for a finding of fact on the contention of respondent, it is found that there is insufficient evidence in the record to show any substantial lessening of competition or tendency toward monopoly in such competition as exists between respondent and all other media in the sale of advertising space for the advertisement of general use goods. Although this portion of respondent's business dollarwise can be roughly approximated, both before and after acquisition, there is in the record no figure showing the value of all advertising of general use goods only, by all media, with which to compare respondent's. It must, however, of necessity, be so huge as to make respondent's share either "before or after" seem minuscule.

30. Before going on to analyze the effects of the acquisition in the relevant markets, as above defined, one strenuous contention of counsel for proponent must be decided. This is that prior to September 1955 there were only two "national" farm magazines—Farm Journal and Country Gentleman—that all other general interest farm magazines were either regional or local, that Farm Journal, by the acquisition, eliminated its only "national" competitor, thereby becoming the only "national" farm magazine. This contention, as discussed above, is an attempt to define the relevant market in terms of area covered only, and because it is basically wrong and an oversimplification, as discussed above, is rejected. But implicit in it is the further question of whether Farm Journal is, in fact, one magazine with substantial circulation in all 48 states, or three separate and distinct magazines, with substantial regional circulations. Because this obviously affects the competitive picture, the fact must be determined.

31. While it is true that Farm Journal, beginning with its November 1952 issue, came out in three editions, as above found in paragraph three, all three of those editions have since been published by one editorial staff, under one editorial policy, under one common ownership and name, and were operated as a single fiscal entity. There are in the record, all three editions of each issue from November 1952 to and including October 1955. Respondent claims that the magazine, since November 1952, is not a national farm magazine, but, in reality, is three regional farm magazines, asserting that editorial variances bear this out. While it is true that cotton news and information, for instance, appear only in the Southern Edition, and there are other regional variances, these account for no more than 20 percent or less of the total space used, and an

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examination of the many issues in the record as exhibits convinces the hearing examiner that Farm Journal is, in fact, one general interest farm magazine with substantial circulation in all 48 states.

32. Thus, a tabulation of page differences between the three editions, using the Central East Edition as a base for all issues, November 1952 through August 1955, shows as percentage of pages differing to total pages in the edition ranging from a low of 4 percent to a high of 21.7 percent, the general approximate being about 11 percent, and a breakdown of Farm Journal's lineage advertising which could be bought on a regional basis shows that for 1953 only 4.4 percent of advertising ran in less than all three editions in 1953. Comparable figures for 1954 showed 10.18 percent taking advantage of regionalization, and 13.72 percent doing likewise in the first seven 1955 editions. Thus, 95.6 percent of Farm Journal's advertising stayed on a national basis in 1953, 89.22 percent in 1954, and 86.28 percent in 1955. On the basis of advertising revenue 97.02 percent of Farm Journal's advertising remained on a national—all-edition basis in 1953, 94.17 percent in 1954, and 93.32 percent in 1955. Hence, the regionalization of Farm Journal cannot be said to have had any substantial effect on its advertisers. The overwhelming majority of such advertising was still being bought on a national coverage basis.

33. This is further borne out by its own announcement of the purpose of regionalization appearing in its first Southern Edition, November 1952:

You will continue to get the same interesting features you have always liked in your Farm Journal but *in addition* you will have a report of the important things going on in the South. Farm Journal will continue to be a national magazine, but one that meets your needs even better than before. The big value of a national magazine is that it brings you news that matters to you, wherever you live from wherever it may happen, from anywhere in the 48 states.

From this representation to its subscribers and the public it is apparent that the so-called regionalization was an addition, not a change or division, and that Farm Journal remained a national farm magazine. Examination of the three editions of any issue confirms this.

34. Further evidence of this is contained in a letter from one of respondent's employees to an advertising agency under date of August 13, 1952, reading as follows:

We don't claim that this is a move to compete editorially with the regionals and state papers in their particular field. It is merely a move to make us a better *national* farm paper. We aren't going to try to be a second rate imitation of any regional media.

* * *

We claim that 100% of the Farmer's Wife is of interest to farm women wherever they may live. Women's interests don't change according to geography, except in very minor respects. We claim, likewise, that perhaps 85% of the man's part of Farm Journal has been of interest to farmers *wherever they* may live. The other 15% has admittedly been too local, too regional, to apply more than locally. To that extent we have had a flaw in our editorial pattern and we have always known it. Even with that flaw there we have managed to hold first place in farmers' esteem.

Now then, this new move is simply one to replace that 15% with something that *will* be of interest to every farmer. In other words, we believe that we can now be close to 100% interesting to farmers, rather than 85% just as we have been 100% interesting to women. We firmly believe we can do this. If so, it will be an important improvement that will make Farm Journal even a *better* national farm magazine than it has been, and better than anybody else will have.

That's the whole idea, Ray. We think it is sound and will result in a better Farm Journal. All we are doing is improving our previous national pattern; we are staying a national in our thinking and operation.

35. Finally, in an advertisement inserted in Advertising Age, Chicago Tribune, New York Herald Tribune, Printers' Ink, Sales Management and Tide in the early months of 1955, Farm Journal informed the advertising fraternity that "more than ever before, advertisers everywhere have come to know the unmatched power of Farm Journal"; classified itself and Country Gentleman as the only two national farm magazines, and gave its advertising revenue for 1954 as nearly 10 million dollars as compared with 7 million for Country Gentleman. Various other letters, memoranda, circulation maps, and representations, uniformly show that respondent regarded and held itself out to be a national farm magazine with only one other national competitor—Country Gentleman.

36. It is true that the term "national" magazine has variant meanings to different people and to different vocations, nevertheless, the record here shows its most common meaning to be that which respondent intended to convey in its competitive activity, namely, a magazine with substantial circulation in all 48 states—national coverage. Respondent cannot in this proceeding escape a classification and definition which it used against its competitors to obtain business.

37. Prior to August 1955, Country Gentleman, in spite of its very slight regionalization, was also a "national" farm magazine in the same sense, and the only one, besides Farm Journal.

38. The finding, therefore, is that both Country Gentleman and Farm Journal at and before the acquisition were each essentially one magazine, each with substantial circulation in all 48 states. But whether one magazine, or three, and regardless of the war of semantics, the really important thing is that only these two maga-

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zines, prior to September 1955, could offer an advertiser substantial coverage of farm households in all 48 states and that since then, Farm Journal alone can do so.

39. How, then, has the acquisition affected competition in the two relevant markets as above defined? Taking the space market first, there are no advertising volume figures in the record for all general interest farm publications. However, all the farm publications which carry any substantial or significant amount of advertising are members of, and submit their advertising statistics to, a nonprofit organization known as Farm Publications Reports, Inc., whose compilations of this submitted data are accepted and used by the advertising fraternity and by counsel here as accurate and authoritative. The 1953 and 1954 statistics are as follows:

Year	Total advertising	Agricultural advertising only	Percent of total
1953.....	\$53,523,194	\$22,193,012	41.5
1954.....	52,940,220	23,100,368	43.6

Of this Country Gentleman did:

Year	Total advertising	Agricultural advertising only	Percent of total
1953.....	\$7,645,578	\$2,102,542	27.5
1954.....	7,118,478	2,047,188	28.8

and Farm Journal did:

Year	Total advertising	Agricultural advertising only	Percent of total
1953.....	\$10,164,624	\$2,389,758	23.5
1954.....	9,779,629	2,309,430	28.8

On a percentage share of total the following appears:

Country Gentleman

Year	Total advertising	Agricultural advertising
1953.....	14.28	9.47
1954.....	13.45	8.86

Farm Journal

Year	Total advertising	Agricultural advertising
1953.....	18.99	10.77
1954.....	18.47	10.00

Thus, Country Gentleman and Farm Journal together accounted for 33.27 percent in 1953, and 31.92 percent in 1954, of all advertising placed in all farm publications having any significant amount of advertising. Such shares cannot be regarded as insignificant or competitively ineffective, particularly in view of the fact that the other 38 publications have substantially lower advertising rates.

40. It cannot, of course, as is argued, be assumed that Farm Journal, by the acquisition, can retain all the advertising revenue of Country Gentleman as well as its own, because of duplications and particularly in view of its sizable increase in its advertising space rates, effective February 1956. But the record shows its ability to do so on the same rate base, since the increase went into effect. Thus, its gross advertising revenue for August 1955, the last month of Country Gentleman's existence, was \$543,060.20, whereas in September 1955 it leaped to \$1,031,847.51, almost double. For October and November 1955, gross advertising revenues were \$1,243,572.29 and \$1,288,206.10 respectively. In February 1956, Farm Journal was selling advertising at the rate of 500,000 to 510,000 agate lines as compared to its pre-acquisition rate of 450,000 agate lines. (There are no dollar revenue figures in the record.) That this was foreseen and calculated is evidenced by the provision in the acquisition agreement whereby Farm Journal agrees to pay Curtis 15 percent of all advertising revenue in excess of 450,000 agate lines for five years, but not exceeding \$500,000 in any one year, or a total of \$2,000,000 beginning with the February 1956 issue of Farm Journal, and by the testimony of Curtis' president, as experienced a man as can be found in the publishing and advertising fields, that he calculated Farm Journal's advertising would, as a result of the acquisition, increase up to 20 percent of its pre-acquisition volume and he was going to have his company share in the excess.

41. The figures given above in paragraph 39, however, include advertising revenue from farm specialty magazines which, in the examiner's opinion, should not be included, and have been excluded from the relevant space market. There were ten of these specialties included in the 40, and subtracting their advertising revenue leaves a total for the remaining 30 of \$49,277,456 for 1953, of which Farm Journal accounted for \$10,164,624, or 20.6 percent, and Country Gentleman accounted for \$7,645,578, or 15.5 percent. In other words, these two had 36.1 percent of all the advertising revenue of all the general interest farm publications which did any significant advertising in 1953. The next nearest had nearly \$6,000,000 and the next nearest to that about \$4,000,000. Only 8 out of the 30 had advertising revenue in excess of \$1,000,000 in 1953 be-

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sides Country Gentleman and Farm Journal. Comparable figures for 1954 are \$48,689,160 total, \$9,779,629, or 20.1 percent, for Farm Journal, \$7,118,478, or 14.6 percent, for Country Gentleman, and relatively the same ranking for the others. It can hardly be said that these quantitative shares of the relevant space market are either insignificant or unsubstantial.

42. Respondent contends that comparisons on a revenue basis are unfair and the comparisons should be on a lineage or space basis. The examiner early in the hearings shared that view but, since the proceeding has been fully tried, rejects it, because it is the revenue from the space sold, rather than the number of lines, which furnishes the sinews of war in the competitive race, and the statute under which this proceeding is brought is directed squarely at concentration of economic power. Of two magazines selling the same number of lines, one may realize only \$1,000, the other \$8,000. Rates vary with power to cover and penetrate, lineage does not so accurately measure this.

43. This quantitative view is, however, not the only one of importance. Prior to the death of Country Gentleman there were only two farm publications with substantial circulation in all 48 states, now there is only one. An advertiser now has only the choice between advertising in Farm Journal or paying from 1½ to 2 times as much for as broad a circulation by advertising in from 8 to 12 sectional farm magazines. Country Gentleman and Farm Journal had the lowest rates per thousand of circulation in the nation. While it is true, as respondent contends, that Farm Journal now, and both it and Country Gentleman formerly, did compete for advertising with all other general interest farm publications, it is nevertheless true that the latter could not compete with them for nationwide advertising and cannot now compete with Farm Journal for it. The importance of this nationwide advertising is shown by the fact that 90 percent of Farm Journal's advertising is of such character.

44. Against this, respondent presented the testimony of three advertising executives, one each from two of the largest agencies in the nation, and that of the publisher of a sectional farm magazine. Their testimony, taken together, is so confusing and even contradictory on some points as to leave the net impression that there is no defined pattern in the placements of advertisements; that it is highly flexible, constantly changing, that it varies with many imponderables, with the seller, his tastes, his products, his sales area, his potential, his resources, and his competition. Most of their testimony concerned general use product advertising; one had only

one client who did agricultural product advertising, another had no such client. All had advertised in both Country Gentleman and Farm Journal. Two expressed the opinion that the demise of the former had no effect on advertising competition, that no magazine was in a position to eliminate its competitors. One was of the opinion that the demise of Country Gentleman was a benefit to the farm product advertising market because it and Farm Journal were essentially alike and now he only had to bother with one to reach the same market. All agreed that prior to the acquisition, competition between Country Gentleman and Farm Journal was active, "keen," "intense," at "white heat," that since the acquisition there is now only one farm magazine with significant, substantial, or "adequate" farm circulation in all 48 states. All had placed advertising in Country Gentleman in substantial amounts, and in the case of one agency, that amount so spent had, since its demise, gone to other farm publications, mostly of sectional or regional coverage, but also some of it had gone to Farm Journal. This witness stated that in his experience relatively few advertisers of general use goods were interested in buying space in two magazines going to substantially the same audience in the same way—that such an advertiser would take one but not both, and that as a result of the acquisition, Farm Journal has increased its competitive position with advertisers considerably. Another stated that in 1935 there were four farm magazines having adequate circulation in all 48 states, now there is only one; that, over the years, the farm population and the number of farms operated has steadily declined, that the farms are larger in size, more efficiently operated and produce more; with per capita income higher, and dependence on machinery greater, with the result that a farmer's requirements are broader and that he is consequently more interested in advertising than before; and that there are general use goods which are basically national from an advertising standpoint and which require nationwide advertising. This can be achieved by a combination of regional or sectional farm magazines but at substantially higher cost than from a nationally circulated magazine such as Farm Journal, which has the lowest per thousand rate in the field.

45. The president of Prairie Farmer Publishing Company testified that his magazine has substantial circulation in Indiana, Illinois, Michigan, and Wisconsin; that 75 percent of its advertising revenue comes from agricultural product advertising; that for advertising of both sorts it competed keenly with Country Gentleman, Farm Journal, Capper's Farmer; that it had very little circulation competition from Country Gentleman, although the R.F.D. circu-

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lation figures as of June 30, 1955, show 290,566 for *Prairie Farmer* in the four states mentioned against 239,844 for *Country Gentleman*, which to this examiner is not unsubstantial. He further testified he experienced very little competition for subscriptions from general magazines such as *Life*, *Time*, etc.; that his magazine has benefited advertising-wise from the discontinuance of *Country Gentleman*; that his competition for advertising has not diminished as a result; that the growth in *Farm Journal*'s circulation as a result of the acquisition has presented no particular problem to him; that advertisers, particularly with a new product, will first use a state farm magazine, then a regional, and then graduate, when growth permits, to using a farm magazine such as *Farm Journal* for national circulation; that national advertising has been increasing as compared to local advertising in recent years. He knew of no farm publication, now having a circulation in excess of a million, which had started in the past 20 years, but could remember at least two which had discontinued in that time, besides *Country Gentleman*.

46. On the above, then, and upon the record as a whole, the conclusory finding is that in the market for advertising of both kinds, in general interest farm publications, the acquisition by *Farm Journal* and the consequent demise of *Country Gentleman* has substantially lessened competition and tended toward monopoly, in that line of commerce, by the removal from that line of commerce of one of the only two general interest farm magazines having substantial circulation in all 48 states, that advertisers now have only one source available to them therefor, that the vigorous and effective competition which *Country Gentleman* formerly provided has now been eliminated, and that in all probability these effects of the acquisition will continue.

47. Turning now to the other relevant market—subscriptions—one consideration must be disposed of before analysis. Respondent insists that because only 25 percent or so, of its and *Country Gentleman*'s income came from the sale of the magazine itself, the subscription market is unimportant. While advertising may be "the life blood of publications such as these," circulation is the heart which pumps it. There must be a magazine and it must be sold before there is any advertising space to be sold, and while the amount of circulation alone is not the sole attraction to advertisers—quality, kind, dispersion, etc., also being considered—nevertheless, it is the primary and most important factor in fixing advertising rates and in attracting advertisers. The market for advertising space thus depends upon the circulation market. Furthermore, this

insistence by respondent that its acts be evaluated solely from the standpoint of its profit, wholly ignores the fact that this case must be viewed and decided from the standpoint of the public in whose interest, and to protect whose interests, it is brought. The public is primarily, if not wholly, concerned with respondent's only excuse for existence—the furnishing of helpful news and information to an important vocational segment of the public, the farmers, not with the “huckstering” which accompanies that service. Therefore, the circulation or subscription market is the more important of the two.

48. Quantitatively, or statistically, the subscription or circulation market or line of commerce shows that Farm Journal, as a direct result of the acquisition, has increased, in only six months, from a minimum guarantee of 2,850,000 to a similar guarantee of 3,400,000, or 18.2 percent. This is a minimal gain, the actual distribution, or “bonus” circulation is higher. In 1954 there were 4,907,206 farms. The latest figure for farm households is that of 1950—5,721,022. A coverage of 3½ million or more of either of these is not only significant but impressive, particularly in view of the nearest competitor's circulation strength—1,360,789 as of June 30, 1955. Such a growth in and of itself is striking and substantial in such a short period of time, and becomes still more so when contrasted with its pre-acquisition growth, against Country Gentleman's competition.

Year	Circulation	Percent increase or decrease over previous year
1950.....	2,846,217	
1951.....	2,866,881	+0.7
1952.....	2,851,707	— .5
1953.....	2,876,162	+ .9
1954.....	2,875,293	(1)

¹ Increase less than 0.05.

Country Gentleman's comparable figures were:

Year	Circulation	Percent increase or decrease over previous year
1950.....	2,289,913	
1951.....	2,262,886	—1.2
1952.....	2,380,766	+5.2
1953.....	2,500,328	+5.0
1954.....	2,449,703	—2.0

Thus overall Farm Journal's circulation remained relatively static, while Country Gentleman's on the whole gained.

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49. That the acquisition gain was broad and widespread is shown by a comparison between Farm Journal's R.F.D. circulation as of June 30, 1955, and as of February 1956, six months after the death of Country Gentleman, and the coverage obtained is shown by the number of farms in each state, and total known R.F.D. circulation in each state.

	June 30, 1955, R.F.D. cir- culation	February 1956 R.F.D. circulation	Percent in- crease	1954 number of farms ex- cept where noted	Total known R.F.D. cir- culation in State as of February 1956
Alabama.....	18,071	38,401	112.5	¹ 211,512	173,127
Arizona.....	2,559	2,732	6.8	9,321	8,427
Arkansas.....	15,752	23,942	52.0	145,075	191,662
California.....	46,268	54,499	17.8	¹ 137,168	111,479
Colorado.....	14,247	17,368	21.9	40,749	78,965
Connecticut.....	9,783	11,687	19.5	12,753	36,863
Delaware.....	5,263	6,357	20.8	6,297	16,636
Florida.....	9,042	11,359	25.6	57,543	52,769
Georgia.....	20,274	42,983	112.0	165,524	196,113
Idaho.....	16,796	19,369	15.3	38,735	60,735
Illinois.....	109,300	141,671	29.6	175,543	515,776
Indiana.....	106,223	133,899	26.1	153,593	495,654
Iowa.....	111,486	131,687	18.1	192,933	481,709
Kansas.....	53,737	76,778	42.9	120,167	279,713
Kentucky.....	30,957	46,850	51.3	193,487	213,740
Louisiana.....	15,887	23,781	49.7	¹ 124,181	96,964
Maine.....	10,420	15,744	51.1	23,368	54,434
Maryland.....	22,700	26,406	16.3	32,500	61,557
Massachusetts.....	7,864	11,122	41.4	17,361	34,731
Michigan.....	110,039	128,503	16.7	¹ 135,589	371,163
Minnesota.....	83,495	97,597	16.9	165,225	465,798
Mississippi.....	12,073	26,604	120.4	215,915	149,005
Missouri.....	67,163	102,964	53.3	¹ 230,045	317,997
Montana.....	7,475	9,651	29.1	33,059	40,913
Nebraska.....	51,720	67,028	29.6	100,846	251,588
Nevada.....	601	820	36.4	2,857	1,550
New Hampshire.....	5,508	7,001	27.1	10,411	26,208
New Jersey.....	21,923	23,953	9.3	22,686	72,935
New Mexico.....	2,771	3,072	10.9	21,070	16,290
New York.....	92,496	107,364	16.1	105,714	343,159
North Carolina.....	36,002	66,052	83.5	267,906	387,044
North Dakota.....	14,932	20,603	38.0	61,939	139,530
Ohio.....	141,394	169,288	19.7	177,074	470,731
Oklahoma.....	25,981	35,923	38.3	118,979	247,345
Oregon.....	28,085	33,047	17.7	54,442	74,470
Pennsylvania.....	124,378	136,401	9.7	¹ 146,887	363,145
Rhode Island.....	1,515	1,806	19.2	2,004	5,785
South Carolina.....	12,352	25,646	107.6	124,203	139,793
South Dakota.....	22,035	28,954	31.4	62,520	158,649
Tennessee.....	34,806	55,062	58.2	203,149	239,334
Texas.....	48,637	71,918	47.9	292,946	564,424
Utah.....	2,808	3,121	11.1	22,825	12,106
Vermont.....	7,308	9,647	32.0	15,981	38,276
Virginia.....	28,702	40,729	41.9	136,416	189,953
Washington.....	33,334	41,291	23.9	65,175	103,224
West Virginia.....	16,989	23,060	35.7	68,583	54,643
Wisconsin.....	85,134	101,995	19.8	153,558	431,881
Wyoming.....	2,726	3,485	27.8	11,392	25,805

¹ 1950.

50. The above statistics take on added significance in view of respondent's evidence that from an advertiser's standpoint, 25 per cent coverage of farm households is deemed adequate, and when it is noted, that the least percentages of gain shown above are, for the most part, in states where Farm Journal already had the greatest circulation, such as New Jersey and Pennsylvania, that Farm

Journal leaped into first place circulation-wise over all regional and local competition in such states as California, Connecticut, Illinois, Kansas, Missouri, and Oregon, and gained second place in Arizona, Idaho, Iowa, Maine, Massachusetts, Montana, New Mexico, Rhode Island, Washington, Wisconsin, and Wyoming.

51. It is worthy of note, also that this gain was strictly quality circulation—entirely farmers, because Country Gentleman's rural but nonfarm circulation to the extent of nearly 400,000 was converted to Town Journal. For agricultural product advertisers, this segment of circulation was largely wasted, whereas Farm Journal's gain is now a lucrative potential for such advertisers.

52. From any point of view, the acquisition has eliminated from the circulation market a competitor with the second largest nationwide circulation—17.1 percent of all known farm magazine circulation—in favor of the magazine with the largest such circulation, that the latter has become not only the only general interest farm magazine with nationwide circulation, but that it has become the dominant farm magazine, circulation-wise, in many states. No other general interest farm magazine is within hailing distance of it, in either resources or circulation, the importance of which has been pointed out and hereinabove found.

53. The hearing examiner finds the conclusion inescapable that, by reason of the acquisition above described, competition in the circulation or subscription line of commerce for general interest farm periodicals has been substantially lessened and that there is already apparent an incipient tendency toward monopoly.

54. Since the statute under which this proceeding is brought was aimed, among others, at concentration of economic power, it is significant at this point that not only has Farm Journal increased its circulation position by 20 percent but that its twin, Town Journal, has increased its position also by 33 $\frac{1}{3}$ percent in the rural nonfarm area, giving the two of them, sold by respondent at the countryside level, a potent position of some 5,000,000 among rural citizens.

55. There remain for disposition three defense contentions. Respondent raises the defense of the "failing company doctrine" (*International Shoe Co. v. F.T.C.*, 280 U.S. 291) relying on the facts above found in paragraphs 12 through 15. But these and other facts in the record are far different than those disclosed in the "shoe" case. There the absorbed company had no surplus, but instead a deficit of over 4 million dollars; here Curtis had a surplus of nearly 16 million dollars, more than ample for the capital outlay its president said would be needed to shorten its closing dates and otherwise revitalize, without bank borrowing. In the "shoe" case, the acquired

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company owned approximately 15 million dollars to banks, and nearly 2 million on current bills, whereas here Curtis had no such debts, was current, and making a profit of over 4 million a year, and paying dividends. In further contrast, in the "shoe" case, the acquiring company was in excellent financial and competitive position. Respondent here had consistent net annual losses ranging from \$75,000 to over \$800,000 in the years 1951 through 1954, the net loss in the latter year being in excess of \$100,000.¹ Furthermore, losses on Country Gentleman were not new. In its 45 years of ownership the publication had shown an individual profit in only 12. The record here does not show that Curtis had to sell, or that it had no other reasonable, possible, or feasible alternative. Rather it shows an uncompelled decision to sell at what certainly cannot be regarded as a distress consideration in the exercise of business judgment profitwise. It would be naive to assume, as respondent contends, that Curtis could not continue with Country Gentleman. If so, all respondent had to do was wait for the horse to die, and then pick the bones, free, or near free—certainly not at any such liabilities as it assumed. Respondent must have been well aware that Curtis with its healthy surplus could have, and might have, failing sale, "modernized"; and well aware that it might also find a purchaser in some competitive farmer publication. It would also be naive to assume that the disappearance of Country Gentleman as a competitor, not specifically provided for in the acquisition contract, but unmistakably required thereby, was not a powerful motivating factor in the negotiations, and the considerations contracted for. The defense is accordingly rejected.

56. Respondent has consistently contended throughout this proceeding, and now contends, that the current list of subscribers to Country Gentleman, the list of current advertisers in Country Gentleman, and the registered names Country Gentleman and Better Farming which respondent acquired under its contract with Curtis, under the contract described in paragraph 11 above, are not assets as that term is used in section 7 of the Clayton Act. This contention was the principal ground of respondent's motion to dismiss this proceeding at the close of the case in chief. The legislative history of the 1950 amendment to section 7 of the Clayton Act, the amendment itself, and its purpose, persuade the hearing examiner that the term "assets" as used therein means property or property rights, real or personal, tangible or intangible, which is subject to transfer and which has been used by the seller and could be used.

¹ Exact financial data of operating and profit and loss statements are in the record as sealed exhibits, hence definite figures are not here set out.

by the buyer competitively. All three of these items had been so used and could be so used and were so used by respondent. That they had value to respondent is not debatable. Good will, which is as inseparable from a business, as reputation is from a person, has long been held to be property, and the name under which a business operates is part thereof and just as inseparable. While the name Better Farming was of comparatively recent vintage and not so well known to the public, the name Country Gentleman had been nationally known as that of a widely accepted farm magazine since 1911. Its value is evidenced by the fact that respondent still carries it on its Farm Journal. Both names were registered by Curtis. Both, by the contract, were sold, assigned, and transferred to respondent. It is well settled that trade-marks, trade-mark rights, and trade names are property, have value, and subject to sale, transfer, and assignment—*American Photographic Publishing Co. v. Ziff-Davis Publishing Co.*, 135 F. 2d 569, to cite one of many such cases.

It is true, of course, that a subscription list is not assignable. But what respondent received here was a list of names and addresses with a definite potential, a right to solicit them to substitute for a magazine which they were informed was discontinuing, one very similar (the high rate of novations attests to both the similarity and the full competition between the two), an exclusive right of persuasion. That this was a highly valuable competitive "asset" can hardly be disputed. Specifically on this point such a subscription list has been treated as an asset in *Toledo Newspaper Co. v. Commissioner*, 2 Tax Court 794, and in *Toledo Blade Co. v. Commissioner*, 11 Tax Court 1079, 180 F. 2d 357. The list of current Country Gentleman advertisers, from a competitive standpoint, is in the same position.

Finally, it is inconceivable to the hearing examiner, with the picture of the periodical publishing industry which this record portrays, that such experienced men in the field as respondent's officials, and in respondent's then financial condition, would have undertaken to pay several millions of dollars for intangibles of no value, that which is not "assets." Curtis, as of December 31, 1955, had already entered on its corporate records as "Profit from the Sale of Better Farming" \$2,816,145.79 representing its transfer of unfilled subscription liability to respondent.

57. The last defensive contention of respondent is that the order submitted by counsel for the complaint is, in part at least, ultra vires of the Commission, and that since no order can be drawn to restore the status quo ante the controversy is moot and the proceeding should

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be dismissed. The contended for order would require respondent to cease and desist from using the names Country Gentleman and Better Farming, from satisfying the unfulfilled subscriptions to Country Gentleman by substituting Farm Journal therefor, and from soliciting former subscribers to Country Gentleman to substitute Farm Journal therefor, for the unexpired portion of their subscription. From a practical standpoint the second and third prohibitions are ex post facto. The activity which these prohibitions would stop has been fully accomplished. From a legal standpoint, this would prevent respondent from fulfilling more than 800,000 new contracts which it entered into with farmers who are not respondents in this proceeding. The Commission has no general equity power. Furthermore, what respondent received from Curtis under the acquisition contract was not the right to substitute but the right to solicit substitution. Curtis was powerless to assign subscriptions, or confer upon respondent the right to substitute.

58. The submitted order would further require respondent to divest itself of the right to use the names Country Gentleman and Better Farming, of the right to substitute Farm Journal for Country Gentleman, and of the list of subscribers to Country Gentleman. Since there was no right to substitute conveyed, respondent cannot divest itself therefrom. The remainder of the order is possible legally, and proper, but as a practical matter divestiture of the subscribers' list now will accomplish nothing. Respondent has, by now, extracted all the juice from that fruit as well as from the list of current Country Gentleman advertisers. Neither list has any value in the market except as lists of names, and the record fairly reveals that, as such, they are valueless. Lacking general equity power, the Commission cannot set aside, modify, or redraft the acquisition contract, nor can it compel resumption of publication of Country Gentleman.

59. It would be difficult, indeed, to find an acquisition which would better point up the procedural inadequacy and ineffectiveness of section 7 of the Clayton Act as amended, when its objectives are considered, than that presented here. It is not just a case of too little and too late, from a trial standpoint. A pre-acquisition waiting and examination period, made mandatory by statute, coupled with the power to seek injunctive relief from the courts, would have kept the eggs in the basket until it had been determined whether it was to the public's interest to scramble them, instead of, as here, trying to unscramble them. If the record now before this examiner had been presented for precontract approval, this proceeding would probably have been unnecessary. General equity power likewise would accomplish much.

60. Divestiture is only half the objective of the statute, as the examiner construes it, and its legislative history and purpose. It does take away, and prevent the further use of competitive tools and weapons illegally acquired, but the aim, it would seem, is broader than that—namely, to restore to the relevant markets those competitive weapons to an active and vigorous use in the hands of the seller, or into those of a new entrant, so that competition may continue with its former vigor. This, as respondent contends, is impossible. Country Gentleman is dead, and the “assets” which it turned over to respondent are now without value to any newcomer or, indeed, to any farm publication now in the field. When his corn is taken from him and the horse dies, it is the height of vanity to strew the bare corncobs on his grave. All that can be accomplished, then, is simple divestiture of the two trade names and the two lists, although, in the examiner’s opinion, this at most may only disturb, but will not diffuse the coalescence which has taken place. It is in that belief, then, that possibly such divestiture may accomplish that limited purpose, that the order hereinafter set out is entered.

CONCLUSIONS OF LAW

1. That which respondent acquired under its contract with Curtis Publishing Company, dated June 6, 1955, are “assets” within the meaning of that term as used in section 7 of the Clayton Act as amended.

2. The financial and competitive situation of Curtis Publishing Company as of June 6, 1955, or immediately prior thereto, affords no defense to respondent for the acquisition provided for in the contract between the parties of that date.

3. That acquisition has had the effect of substantially lessening competition and tending to create a monopoly in the relevant lines of commerce in violation of section 7 of the Clayton Act as amended.

4. The Commission is powerless to rescind, alter, or redraft the acquisition contract, or to abrogate directly or indirectly the more than 800,000 novations which respondent has procured with former subscribers to Country Gentleman.

5. The controversy in this proceeding is not entirely moot. Some corrective action may still be partially achieved.

ORDER

It is ordered, That respondent Farm Journal, Inc., a corporation, and its officers, directors, agents, representatives, and employees shall, within a time to be fixed by the Commission, divest itself of all of its right, title, and interest in and to:

(a) the names “Better Farming” and “Country Gentleman,”

(b) the list of all domestic subscriptions to the publication known as Country Gentleman or Better Farming as furnished to it by the Curtis Publishing Company, and

(c) the list of all advertisers who, on June 6, 1955, had placed orders for advertising space in issues of Country Gentleman after the August 1955 issue, furnished to respondent by the Curtis Publishing Company.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 17th day of July, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the date by which respondent, Farm Journal, Inc., shall comply with the order contained in said initial decision be, and it hereby is, fixed as January 1, 1957.

It is further ordered, That the respondent shall, on or before January 1, 1957, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order.

Decision

IN THE MATTER OF
ROGERS-UNITED CORP. ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6163. Complaint, Feb. 5, 1954—Decision, July 18, 1956*

Order requiring a corporation in New York City, engaged in conducting a "Family Puzzle Contest," to cease representing falsely—in seeking to induce participants to remit for the entire set of their puzzles—that they were distributors of watches and that their puzzle was part of a nationwide program to advertise "Cressine" watches, actually non-existent; that said watches were precision made, shock resistant, dustproof, etc.; and that the watches would be distributed to participants immediately upon submission of all the puzzles and required fees.

Mr. John W. Brookfield, Jr., for the Commission.

Mr. Seymour Post of Harris, Corwin & Post, of New York City, for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves certain acts and practices by the respondents in the course of interstate commerce, which are alleged in the complaint to be unfair and deceptive and in violation of the Federal Trade Commission Act. This initial decision finds generally that the allegations of the complaint have been established by the evidence and are true, and that the proposed order included in the notice portion of the complaint should be entered against each of the respondents.

The complaint herein was issued on February 5, 1954, charging in substance that respondents in the course of promoting a puzzle contest originating in the City of New York through advertisements disseminated through various other states had caused numerous contestants to participate in the puzzle contest and to send money to the respondents, each upon the promise of receiving from respondents a fine "Cressine" watch upon the completion of the puzzles. It was further alleged that in the course and conduct of respondents' puzzle contest that such "Cressine" watches were advertised and offered to the public through respondents' puzzle contest upon the claim that respondents were distributors of watches and that the puzzle contest was merely a part of their nationwide program of introducing and selling such watches to the public; and that respondents further represented and guaranteed to each contestant