

IN THE MATTER OF

NEW YORKER MAGAZINE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2(d) OF THE CLAYTON ACT

Docket 7388. Complaint, Feb. 5, 1959—Decision, July 6, 1960

Consent order requiring the publisher of the "The New Yorker" magazine—with sales in 1957 exceeding \$15,000,000—and its national distributor, to cease violating Sec. 2(d) of the Clayton Act by making payments or allowances for services or facilities furnished to customers operating retail outlets in

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railroad, airport, and bus terminals and in hotels and office buildings—and on the basis of individual negotiation—which were not made available on proportionally equal terms to all competing customers.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues this complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent New Yorker Magazine, Inc., is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 25 West 43d Street, New York, N.Y. Said respondent has been engaged and is presently engaged in the business of publishing and distributing a magazine under the copyrighted title of "The New Yorker", distribution being made through respondent Curtis Circulation Company, Inc. Respondent publisher's sales of "The New Yorker" in 1957 exceeded \$15,000,000, more than \$1,500,000 of which were sales to retail outlets.

PAR. 2. Respondent Curtis Circulation Company, Inc., (hereinafter referred to as Curtis Circulation) is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at Independence Square, Philadelphia, Pa.

Curtis Circulation has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. In this capacity it has performed and is now performing various services for these publishers. Among the services performed and still being performed by Curtis Circulation for the benefit of these publishers, and more particularly for respondent New Yorker Magazine, Inc., in connection with the sale and distribution of publications of said publishers, are the taking of orders; distributing, billing and collecting from customers; and participating in the negotiation of various promotional arrangements with the retail customers of said publishers.

In its capacity as national distributor for respondent publisher in dealing with the customers of said respondent publisher, Curtis Circulation served and is now serving as a conduit or intermediary for the sale, distribution and promotion of "The New Yorker", which is among the most popular and widely circulated magazines in the United States. This magazine is distributed throughout the

various States by Curtis Circulation through local distributors to retail customers.

PAR. 3. Respondent publisher, through its conduit or intermediary Curtis Circulation, has sold and distributed and now sells and distributes its magazine "The New Yorker" in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of magazines sold to them by respondents. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondents competing in the distribution of this magazine.

PAR. 5. As an example of the practices alleged herein, respondents have made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of "The New Yorker". Among the favored customers receiving payments in 1957 in connection with the purchase of respondent publisher's magazine was The Union News Company of New York. In 1957 respondents paid this customer more than \$13,000 for promoting "The New Yorker".

Respondents made said payments to their favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

Respondent Curtis Circulation has also acted as a conduit or intermediary for other independent publishers in making payments similar to those alleged herein in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

PAR. 6. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. J. Wallace Adair and Mr. Jerome Garfinkel for the Commission.

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Hetkin, Jervis & Hetkin, by *Mr. Herman Jervis*, of New York, N.Y., and *Pepper, Hamilton & Scheetz*, by *Mr. Wilbur H. Haines, Jr.*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on February 5, 1959, charging Respondents with violation of § 2(d) of the Clayton Act (U.S.C. Title 15, § 13), as amended by the Robinson-Patman Act, by paying or contracting for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale or offering for sale of magazines sold to them by Respondents, such payments or allowances not having been made available by Respondents on proportionally equal terms to all their other customers competing in the distribution of such magazines, and Respondents not having made such payments among their favored customers on proportionally equal terms.

Thereafter, on April 25, 1960, Respondents, their counsel and counsel supporting the complaint herein entered into an Agreement Containing Consent Order to Cease and Desist, which was approved by the Director and Associate Director of the Commission's Bureau of Litigation, and thereafter, on May 9, 1959, submitted to the hearing examiner for consideration.

The agreement identifies Respondent The New Yorker Magazine, Inc. (erroneously named in the complaint as New Yorker Magazine, Inc.), as a New York corporation, with its office and principal place of business located at 25 West 43rd Street, New York, New York, and Respondent Curtis Circulation Company (erroneously named in the complaint as Curtis Circulation Company, Inc.) as a Delaware corporation, with its office and principal place of business located at Independence Square, Philadelphia, Pa.

Respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

The agreement is entered into subject to the condition that the initial decision based thereon shall become the decision of the Commission on the same date that the initial decisions in Dockets 7384, 7385, 7386, 7387, 7389, 7390, 7391, 7392, 7393, 7394, 7611, 7612, 7613, 7614, and 7615 become the decisions of the Commission.

Respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and

conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the order to cease and desist, as contained in the agreement, when it shall have become a part of the decision of the Commission, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order; the word "customer" wherever used in said order means anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent; and that the agreement is for settlement purposes only and does not constitute an admission by Respondents that they have violated the law as alleged in the complaint.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order to Cease and Desist; finds that the Commission has jurisdiction over the Respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That each of the named respondents, The New Yorker Magazine, Inc. and Curtis Circulation Company, its officers, agents, representatives or employees, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale, of magazines, paper back or comic books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of any magazine, paper back or comic book published, sold or offered for sale by such respondent, unless such payment or consideration is affirmatively offered or otherwise made available on proportionally equal terms to all of its other customers competing with such

avored customer in the distribution of such magazine, paper back or comic book.

DECISION OF THE COMMISSION AND ORDER EXTENDING TIME FOR FILING
REPORT OF COMPLIANCE

Pursuant to § 3.21 of the Commission's Rules of Practice, the hearing examiner's initial decision in this proceeding shall, on the 6th day of July 1960, become the decision of the Commission.

It is ordered, That the time within which the respondents may file their report, setting forth the manner and form in which they have complied with the order to cease and desist, as required by § 3.26 of the Rules of Practice, be, and it hereby is, extended until further order of the Commission.

The Commission on January 10, 1961 issued an order to file report of compliance, as follows:

The Commission, by order entered June 30, 1960, having noted that the hearing examiner's initial decision in this proceeding should, on July 6, 1960, become the decision of the Commission, and having directed that the time within which the respondents may file a report of compliance with the order to cease and desist contained in said decision be extended until further order of the Commission:

It is now ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

Commissioner Mills not participating.