

accordingly:

*It is ordered*, That respondents Prestige Records, Inc., a corporation, and Robert Weinstock, Selig Weinstock and Joan Weinstock, individually and as officers of said corporation, 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.

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IN THE MATTER OF

McGRAW-HILL PUBLISHING COMPANY, INC., ET AL.

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

*Docket 6971. Complaint, Dec. 5, 1957—Decision, Nov. 18, 1960*

Order dismissing, for failure of proof, complaint charging New York City publishers of magazines and periodicals with using deceptive promotional material to sell advertising space in two of their magazines, including representations that a readership survey showing favorable results with respect to "The American Automobile" had been conducted by New York University, and that a survey chart indicating current reader interest as between their "Electrical Merchandising" magazine and a competitor's magazines was based on a survey more than three years old.

*Mr. Charles S. Cox* supporting the complaint.

*Mr. Orison S. Marden* and *Mr. Haliburton Fales* of *White & Case*, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint charges that each respondent named in the caption hereof violated the provisions of Section 5 of the Federal Trade

Commission Act. Each respondent through its counsel, denied the violation alleged against it and filed a motion to dismiss the complaint on the ground that the matters complained about were two isolated transactions, had been discontinued prior to issuance of the complaint and will not be resumed in the future. In support of its motion to dismiss, the respondent McGraw-Hill Publishing Company, Inc., stated that the violation charged against it had been discontinued in November, 1955, more than two years before issuance of the complaint. The other respondent, McGraw-Hill International Corporation, in its motion to dismiss, stated that the violation charged against it had been discontinued in August, 1956, more than one year prior to issuance of the complaint, and would not be resumed. (The complaint was issued on December 5, 1957). The motion to dismiss was accompanied by the affidavits of responsible officers of the corporate respondents.

Counsel supporting the complaint filed a reply opposing the motion to dismiss and denied that either respondent had discontinued the practices complained about. Oral argument was heard before the Hearing Examiner in support of and in opposition to the motion to dismiss. At the oral argument, counsel supporting the complaint re-affirmed his denial that neither respondent had discontinued such practices, as stated in the affidavits, and asserted that, at the very time of the oral argument, respondents were continuing to engage in unlawful practices similar to those complained about. Upon the basis of the assertions made by counsel supporting the complaint that the unlawful practices alleged in the complaint had not been discontinued by respondents, the Hearing Examiner denied respondents' motion to dismiss the complaint and ordered that the hearing proceed on the allegations contained in the complaint and on the matters set forth in the motion to dismiss. Hearings have been held and completed. At the conclusion of the Commission's case-in-chief, counsel for each respondent elected to rest its case on the record as developed by witnesses who were called to testify by counsel supporting the complaint, including some of respondents' officers and employees. Proposed findings of fact, conclusions of law, and order have been submitted by respective counsel and oral argument had thereon before the Hearing Examiner. These have been considered. All findings of fact and conclusions of law not specifically found or concluded herein are rejected. In appraising and evaluating the credibility and the weight to be given to the testimony of the various witnesses who testified, the Hearing Examiner has taken into consideration his observation of said witnesses and their demeanor while testifying on the witness stand. Upon the basis of the entire record, the Hearing Examiner makes the

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following findings of fact and conclusions of law, and issues the following order:

## FINDINGS OF FACT

1. The respondents McGraw-Hill Publishing Company, Inc., hereinafter called "MHPCo," and McGraw-Hill International Corporation, hereinafter called "MHICorp" are corporations organized and doing business under the laws of the State of New York. The principal place of business of each corporation is at 330 West 42nd Street, New York 36, New York.

2. The respondent MHPCo. is in the publishing business, publishing directly or through its subsidiaries approximately thirty domestic magazines. These magazines are circulated and distributed on a paid subscription basis to subscribers and other persons located in various states of the United States and the District of Columbia. One of these publications is "Electrical Merchandising" which the respondent MHPCo. has been publishing for more than fifty years. The respondent MHPCo. has at all relevant times been in substantial competition in commerce with other corporations, firms and individuals engaged in the publication, promotion and sale of magazines and periodicals.

3. The respondent MHICorp. is also in the publishing business, publishing five magazines for distribution outside the United States and is in substantial competition in commerce with other corporations, firms and individuals engaged in the publication, promotion and sale of magazines and periodicals. One of the magazines published by MHICorp. is "The American Automobile," a monthly magazine, which began publication more than thirty years ago. This magazine is devoted to the promotion and advertising of American automobiles, parts and accessories for export and is sold on a subscription basis to approximately 38,000 subscribers located in various parts of the world, exclusive of the United States. The only exception being 15 or 20 copies sold to foreign buying commissions located in the United States interested in purchasing the products advertised in the magazine.

4. In the course and conduct of the business of each respondent, said respondents employ salesmen who call on customers and prospective customers for the purpose of selling advertising in respondents' magazines. In connection with their sales presentations, these salesmen sometimes use readership surveys which compare the circulation and usefulness of respondents' magazines with those of competitors. It is the use by respondents of certain printed promotional material describing two of these surveys which form the basis of the complaint in this proceeding. Findings of Fact with

respect to each of the two charges complained about will be made and discussed separately and in the order in which they are alleged in the complaint.

5. The first charge, set out in Paragraph Five of the complaint, is that the respondent MHICorp., in soliciting advertising space in its magazine "The American Automobile," represented that a readership survey showing favorable results for said magazine had been conducted by New York University when in truth and in fact said survey was not conducted by New York University but was conducted by respondent MHICorp. in collaboration with a New York University professor acting in his individual capacity and not as a representative of New York University. From this it is seen that the thrust of the complaint is not directed toward the survey itself. The charge is that MHICorp. represented that the survey had been conducted by New York University whereas, in fact, it was conducted by respondent MHICorp. in collaboration with a New York University professor acting in his individual capacity and not as a representative of New York University. The respondent MHICorp. admits that, in conducting the survey, the professor was acting in his individual capacity and not as a representative of New York University. It follows, therefore, that the questions to be resolved in connection with this charge are: (1) Did the respondent MHI Corp. represent that the survey had been conducted by New York University?, and (2) Was the survey conducted by respondent MHICorp. in collaboration with Professor Krieghbaum?

6. The idea for the survey was conceived by Mr. Russell F. Anderson, published of "The American Automobile," as an aid to its eleven salesmen in selling advertising space in the magazine. Mr. Anderson was personally acquainted with Hillier Krieghbaum, Associate Professor of Journalism at New York University and aware of his reputation in advertising circles as an authority on communications. Mr. Anderson believed that Professor Krieghbaum would be an excellent man to conduct the survey. At that very time Professor Krieghbaum was heading the work under a grant of \$80,000 from the Rockefeller Foundation for a study on scientific research writing in the field of communications. After several discussions with Professor Krieghbaum, Mr. Anderson employed Professor Krieghbaum to supervise the conducting of the survey. This was in the fall of 1955. The survey was designed to evaluate all media channels available to firms engaged in selling automotive products abroad and to study the methods and practices of these companies in placing their advertising. Mr. Anderson, on behalf of the respondent MHICorp., agreed to provide the station-

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ery, printing, stenographic and clerical help for the preparation, mailing and tabulation of the questionnaires to be used by Professor Krieghbaum in conducting the survey. Since the idea for the survey was the brainchild of Mr. Anderson and he was familiar with the information sought to be elicited from the automotive export companies with respect to their advertising practices, Mr. Anderson prepared a draft of a form of questionnaire setting forth his ideas to the questions to be asked. Mr. Anderson then submitted it to Professor Krieghbaum for his suggestions and approval. Professor Krieghbaum revised and re-edited the draft which had been submitted to him by Mr. Anderson. The questionnaire was then mimeographed and mailed by respondent MHI Corp. to approximately 100 companies in the United States who were then exporting automotive products. Later a similar type of questionnaire was mailed to approximately 400 jobbers and distributors located outside the United States who had been named by the domestic exporters who had responded to the first questionnaire. Each company which answered the questionnaire signed and return the completed questionnaire to Professor Krieghbaum. After examining and analyzing the questionnaire, Professor Krieghbaum forwarded them to the respondent MHI Corp. for tabulation. By reason of this assistance rendered by respondent MHI Corp. to Professor Krieghbaum, counsel supporting the complaint urges that the survey was not Professor Krieghbaum's but was a MHI Corp. survey, compiled by MHI Corp. in collaboration with Professor Krieghbaum. Although Professor Krieghbaum had the benefit of the draft of questionnaire form which had been prepared by Mr. Anderson and received the assistance of employees of the respondent MHI Corp. in mailing and tabulating replies to the questionnaires, nevertheless Professor Krieghbaum supervised the entire operation in connection with the survey and all major decisions respecting the method and techniques employed in conducting the survey were made by Professor Krieghbaum. Therefore, it is found that in all substantial respects, the survey was the work of Professor Krieghbaum and is, in fact, Professor Krieghbaum's survey even though he received technical and clerical assistance from employees of respondent MHI Corp. in conducting the survey. It is further found that Professor Krieghbaum conducted the survey in his individual capacity and not as a part of his duties as an Associate Professor at New York University, although the University was aware of his activities in making the survey. In fact, the University encourages its professors to engage in such outside projects so long as these projects do not interfere with the official duties of such professors.

7. From the information contained in the returned questionnaires, Professor Krieghbaum prepared the text of a 16-page booklet setting forth his findings of the survey. (CX-1). The booklet is entitled "AUTOMOTIVE EXPORT ADVERTISING." Approximately 5,600 copies of the booklet were printed by the respondent MHICorp. The outside cover is of blue paper and, in blue letters prominently outlined in a dark brown ink box approximately 5" x 6 $\frac{1}{16}$ " are the words "AUTOMOTIVE EXPORT ADVERTISING \* \* \* BY HILLIER KRIEGHBAUM." The other words on the cover are in smaller, brown letters, without any box. Under the name of the author "BY HILLIER KRIEGHBAUM" at the bottom of the page are the words, in smaller brown type, with no box, "Associate Professor of Journalism, Communication Arts Group, NEW YORK UNIVERSITY". On the inside front cover of the booklet the names of 51 companies who participated in the survey by answering the questionnaire are listed, also a picture and biographical sketch of the author, Professor Krieghbaum. Page 1 of the booklet outlines the purpose of the survey and the manner in which it was conducted. The remainder of the booklet is devoted to an analysis of the information obtained from the questionnaires and a discussion of the findings made from the survey. Copies of the questionnaires are shown on pages 14, 15 and 16. The booklet clearly and prominently states that Professor Krieghbaum is the author. No statement is made in the booklet that New York University was in any way or manner connected with its authorship or sponsorship.

8. After the booklet (CX-1) was printed, approximately 2,200-2,300 copies were mailed on July 19, 1956 to approximately 500 advertising agencies in the United States, Europe, the Far East, and Latin-America. The remaining 1,700-1,800 copies of the 2,200-2,300 copies were distributed to companies exporting automotive products who were on MHICorp's. promotion list. On this mailing, the booklet (CX-1) was mailed alone, without any covering material. The second distribution of the booklet (CX-1) occurred on August 3, 1956 when copies were mailed to participating companies with a letter of thanks from Professor Krieghbaum for their cooperation in the survey. The evidence offered in support of the allegation in the complaint that respondent MHICorp. represented that the survey had been conducted by New York University consists of two printed pieces which respondent MHICorp. distributed in promotion of the survey. These two promotional pieces are identified as CX-2 and CX-3A, and were distributed *after* (underscoring mine) the first two distributions of CX-1, as described above.

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Each exhibit was received in evidence and will hereafter be discussed in the order of their use by MHI Corp.

9. CX-3A will first be discussed. CX-3A is a newsletter dated August 15, 1956, issued by respondent MHI Corp. The newsletter is issued twice each month. The first page of the newsletter carries the heading "AUTOMOTIVE EXPORT NEWSLETTER," "The American Automobile & El Automovil Americano." The newsletter is addressed to "Dear Sir:" and is followed by "NYU completes 9-months survey of automotive export advertising: A nine month's case study of the methods and practices of the largest companies engaged in automotive exporting has just been completed by Hillier Krieghbaum, Associate Professor of Journalism, New York University \* \* \* \* \* Copies of the booklet summarizing the results, can be obtained from Hillier Krieghbaum, Associate Professor of Journalism, Communication Arts Group, New York University, Washington Square, New York 3, N.Y." It is the introductory line of this newsletter "NYU completes 9-months survey of automotive export advertising" which counsel supporting the complaint contends is a representation by respondent MHI Corp. that New York University conducted the survey. This Hearing Examiner does not agree with such an interpretation. The first sentence of the newsletter should be read in its entirety. If the entire first sentence is read, it clearly states that Hillier Krieghbaum, Associate Professor of Journalism, New York University, made and completed the survey. The first part of the first sentence "NYU completes 9-months survey of automotive export advertising" is and should be considered as an introductory or so-called "headline" to the first paragraph of the newsletter. A reading of the first sentence clearly states that the survey was made by Professor Krieghbaum. It is found therefore, that the use by respondent MHI Corp. of the words "NYU completes 9-months survey of automotive export advertising" in the first line of the newsletter (CX-3A) does not establish the allegation of the complaint that respondent MHI Corp. represented that New York University conducted the survey.

10. CX-2 is a promotional piece in the form of a one-page memorandum dated August 20, 1956, from Russell F. Anderson, publisher of "The American Automobile," which accompanied the third distribution of Professor Krieghbaum's booklet (CX-1). This memorandum (CX-2), in the handwriting of Mr. Anderson, was placed in an envelope along with CX-1 and mailed to the same 2,200 or 2,300 persons and firms which were on the promotional list of "The American Automobile" and to whom the first two mailings of CX-1 had been sent on July 19 and August 3, 1956, respectively. This covering memorandum CX-2, in the handwriting of Mr. Anderson,

consists of a single page on the stationery of "The American Automobile," Office of the Publisher, dated August 20, 1956, and is addressed to "Dear Sir". Reproduced and imprinted in the middle of the page of the memorandum is a part of a newspaper article containing the headline "NYU COMPLETES MAJOR SURVEY OF AUTO EXPORT ADVERTISING". Immediately under the headline just quoted, and in Mr. Anderson's handwriting, is the explanatory statement that the survey had just been completed by Hillier Krieghbaum, Associate Professor of New York University, and that the survey was financed by "McGraw-Hill." The wording of the memorandum, CX-2, calls the addressee's attention to the survey (CX-1), a copy of which was enclosed with the memorandum. Counsel supporting the complaint contends that the headline "NYU COMPLETES MAJOR SURVEY OF AUTO EXPORT ADVERTISING" reproduced in the memorandum constitutes a representation by respondent MHI Corp. that the survey was conducted by New York University. Such an interpretation is strained and stilted. Although the headline is a misstatement of fact, the headline should not be considered alone, isolated from the copy immediately below the headline. Certainly no advertising agency or department would be misled and purchase advertising on the strength of this headline. He would read and inquire further. When the memorandum (CX-2) is read in its entirety, it is clear that the memorandum states that the survey had been made by Professor Krieghbaum, not by New York University. Professor Krieghbaum's survey report (CX-1) accompanied the memorandum (CX-2). Any person reading the memorandum would immediately see that the survey was conducted by Professor Krieghbaum, and especially advertising agencies and departments. These were the only persons who received the memorandum. The exhibits complained about were not distributed to the general public. CX-1, CX-2, and CX-3A were only distributed to prospective purchasers of advertising space in "The American Automobile," a discriminating and skeptical audience. This audience consisted of advertising agencies and advertising departments of companies exporting automotive products. Each person or firm which received the two promotional pieces complained about, (CX-2 and CX-3A), also received CX-1, which also clearly stated that Professor Krieghbaum was the author of the survey. Furthermore, any person reading the promotional pieces complained about (CX-2 and CX-3A) would, before placing any advertising on the mere strength of the copy complained about in the two promotional pieces (CX-2 and CX-3A), read and examine the survey itself (CX-1). By reading CX-1, it would also be apparent that Professor Krieghbaum con-

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ducted the survey, not New York University. A preponderance of the evidence clearly shows that the two promotional pieces complained about, CX-2 and 3A, when read and considered in their entirety, do not represent nor convey the impression, nor were they intended by respondent MHICorp. to represent or convey the impression, that New York University conducted the survey. Furthermore, neither CX-1, CX-2, nor CX-3A is likely to represent or convey the impression that New York University conducted the survey, rather than Professor Krieghbaum. It is found, therefore, that the use by the respondent MHICorp. of the booklet CX-1, the printed survey by Professor Krieghbaum, the memorandum (CX-2), as well as the newsletter (CX-3A), do not establish the allegation of the complaint that MHICorp. represented that the survey had been conducted by New York University.

11. The second charge of the complaint is directed toward the respondent MHPCo. This charge, set out in Paragraph Six of the complaint, is that the respondent MHPCo. published and disseminated a survey chart (CX-5) representing that the comparative percentages on said chart indicated current trade coverage or reader interest as between MHPCo's magazine "Electrical Merchandising" and a competing magazine, whereas "such readership coverage claims were not based on a recent or current survey but were based on a survey more than three years old," thus tending to deceive the purchasing public and unfairly diverting business to respondent from its competitors.

12. As an aid in promoting the sale of advertising space in its magazine "Electrical Merchandising", respondent MHPCo., in 1951, employed Crossley, Inc., Princeton, New Jersey, a firm specializing in Marketing and Opinion Analysis, to make a consolidated radio and television reader preference survey of dealers on the customer lists of television manufacturers. It was originally intended that ten television manufacturers participate in the survey but, as finally constituted, seven manufacturers took part. The purpose of the survey was to obtain for each manufacturer's advertising department and agency the trade publication preference of its own dealers plus those of a sizeable segment of the industry's retail outlets. Seven television manufacturers, Admiral, Arving, Bendix, Motorola, Philco, Stewart-Warner, and Zenith agreed to participate and send postcard questionnaires to 2,500 radio and appliance dealers on their customer lists. The respondent MHPCo. supplied the postcards for Crossley's use in the survey. These postcards contained two questions for the dealers to answer and instructed each dealer to answer the two questions on the postcard and return to the participating manufacturer. The questions were: 1. "Which trade

publications do you read regularly?" and 2, "Which one do you find most useful in your business?" The postcard questionnaires were addressed and mailed in the fall of 1951 by each manufacturer to its own dealers. 1,986 usable replies were received to the questions propounded in the postcard questionnaires. The returns were addressed to and received by the respective participating manufacturer who tabulated them. The individual returns were then delivered by each manufacturer to Crossley, Inc. Crossley then eliminated any duplications and made a composite tabulation and report of its findings from the survey. Its report and findings were delivered to "Electrical Merchandising" on or about June 11, 1952. Crossley, Inc. retained possession of the postcard replies and they were never delivered to the respondent MHPCo. In August, 1952, the respondent printed the results of the Crossley survey in booklet form (CX-6). The booklet (CX-6) describes the manner in which the survey was conducted, i.e., by sending a postcard questionnaire to specified persons, and lists the names of the companies participating in the survey, a specimen of the postcard questionnaires which were used and the results of the survey as certified by Crossley, Inc. (CX-6). The survey booklet (CX-6) shows on its face that the results of the survey were transmitted to "Electrical Merchandising" on June 11, 1952.

13. Thereafter, but prior to March, 1954, a television manufacturer inquired of an "Electrical Merchandising" salesman for information on duplication, i.e., the extent to which the same reader may subscribe to and read two different magazines. (Advertisers are necessarily interested in duplication for the reason that, where duplication of readership of two or more magazines exists, an advertiser in each magazine has increased his costs without increasing his audience coverage). When the "Electrical Merchandising" salesman notified his superior of this inquiry, the respondent MHPCo. requested such duplication figures from Crossley, Inc., since Crossley had possession of the postcard responses which contained this information. MHPCo. requested the duplication figures as between respondents' "Electrical Merchandising" and "Television Retailing." ("Television Retailing" was formerly known as "Electrical Retailing," "Radio Retailing," and "Radio-TV Retailing," published by Caldwell-Clements, Inc. "Television Retailing," a monthly magazine with "controlled" circulation, became known as "Mart" as of the September, 1953 issue. By "controlled" circulation is meant that the magazine was delivered free to persons in the industry who asked for it as contrasted to a magazine with a paid circulation).

14. Crossley, Inc. obtained the duplication figures from the responses to Question No. 1 in the Crossley survey, to-wit: "Which

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trade publications do you read regularly?" The duplication figures were obtained in the following manner: To ascertain the number of persons who read "Electrical Merchandising" only, as between "Electrical Merchandising" and "Television Retailing (Mart)," Crossley counted the number of persons who had stated in their reply to Question No. 1 that they read "Electrical Merchandising" and did not say that they read "Television Retailing (Mart)." To ascertain the number of persons who read "Television Retailing (Mart)" only, as between the two publications, Crossley counted the number of persons who stated that they read "Television Retailing (Mart)" and did not say that they read "Electrical Merchandising." To ascertain how many persons read both publications, Crossley counted the number of persons who said that they read both "Television Retailing (Mart)" and "Electrical Merchandising."

15. After MHPCo. received the duplication figures from Crossley, Inc., MHPCo. prepared a chart which compared the readership coverage of "Electrical Merchandising" with "Television Retailing (Mart)." The chart was prepared upon the basis of the duplication figures furnished by Crossley, Inc. The respondent MHPCo. printed the chart in March, 1954. It is this chart (CX-5) which forms the basis of the second charge complained about which is contained in Paragraph Six of the complaint. This chart (CX-5) compared "Electrical Merchandising" with the competing publication "Television Retailing (Mart)" and stated that:

2 out of 3 (66.9%) Read Electrical Merchandising.

1 out of 2 (51.7%) Read Electrical Merchandising only.

By adding Mart (Successor to TV Retailing) to Electrical Merchandising you increase your . . .

. . . Audience by 33%.

. . . Costs 82%.

\* From 7 Company Study supervised and tabulated by Crossley Inc. Rates from January 26, 1954 SRDS (12 Time B&W Page).

16. Three hundred copies of this chart (CX-5) were printed by MHPCo. in March, 1954. Copies of this chart were distributed by MHPCo. to its salesmen for inclusion in their sales kits for future use in the event questions of duplication should arise in the course of their sales presentations in selling advertising space in "Electrical Merchandising." Respondent's salesmen used CX-5 from March, 1954 until November, 1955, when CX-5 was withdrawn from respondent's salesmen and its use discontinued. No general mailing and distribution was made of the chart. Occasionally a copy of the chart was left with a prospect. When the chart (CX-5) was printed in March, 1954, 200 additional copies of the Crossley survey (CX-6) were also printed. Copies of the Crossley survey (CX-6)

were also carried by salesmen in their kits. The chart (CX-5) does not state on its face the date when it was prepared nor the date when the Crossley Survey (CX-6) was prepared. However, CX-5 states that it is based on the Crossley Survey (CX-6) and the Crossley Survey (CX-6) states that the survey was completed and the results delivered to MHPCo. on June 11, 1952.

17. The phrase "Rates from January 26, 1954 SRDS (12 Time B&W Page)" at the bottom of CX-5 is a reference to the date of the publication "Standard Rate and Data Service," a directory setting forth advertising rates, distribution, etc., of magazines and newspapers. This publication is almost constantly used in advertising circles and is commonly referred to as the advertising man's "Bible." There is no reasonable probability that an advertising space buyer would consider the reference above quoted as being the date of the Crossley Survey, as contended by Counsel supporting the complaint. Advertising men were the only persons who were exposed to CX-5 and CX-6. Any buyer or prospective buyer of advertising space who may have examined CX-5 would naturally examine and study the Crossley Survey (CX-6) in connection with CX-5 before purchasing space in "Electrical Merchandising." He would not purchase space on the basis of CX-5 alone. One of the many contentions of counsel supporting the complaint is that, since the results of the Crossley Survey were published in booklet form in August, 1952 (CX-6), and CX-5 was not prepared and published until 1954, the information showing duplication in CX-5 was not *current* (underscoring mine), whereas, CX-5 represents that it was based on current information. CX-5 does not make such a representation, either directly or by implication. CX-5 does not state on its face when it was prepared. CX-5 states on its face that the duplication figures shown in the chart (CX-5) were based on information obtained from the Crossley Survey (CX-6) which, to the knowledge of most advertising agencies and prospective space buyers, was completed and published in 1952. Any agency or prospective space buyer who did not actually remember the year when the Crossley Survey (CX-6) was completed and publicly distributed could and would examine the survey (CX-6) and ascertain the date when it was completed and published. Certainly no buyer of advertising space would purchase space on the strength of CX-5 alone. Most assuredly, he would refer to CX-6. This is so because CX-5 states on its face that it is based on CX-6. Moreover, when do the findings of a survey begun in June, 1951, and completed in June, 1952, cease to be *current*? (underscoring mine). The burden of proof rests with counsel supporting the complaint to establish the allegations of the complaint. CX-5 was used by respondent's

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salesmen during the period from March, 1954, when CX-5 was printed, until November, 1955, when its use was discontinued. In the absence of testimony to the contrary, such as testimony that there was a more recent survey, etc., it cannot be said that the duplication figures in CX-5 which were obtained from the Crossley Survey (CX-6), were not current (underscoring mine), or that the persons who purchased or were likely to purchase advertising space in "Electrical Merchandising" did so on the strength that CX-5 was based on a more recent survey than the Crossley Survey (which was completed in June, 1952). To repeat, CX-5 was not distributed nor exhibited to the general public. Its use was confined to professional advertisers who are experienced in evaluating survey charts and promotional advertising material. None of the media buyers who testified at the hearing stated that they were misled as to the date of CX-5 nor as to the date when the duplication figures underlying CX-5 were obtained. Accordingly, it is found that no space buyer was deceived or likely to be deceived by CX-5 as charged in the complaint. It is further found, from a preponderance of the evidence, that surveys play a minute part in the eyes of a media buyer in helping him to decide whether to purchase advertising space in a particular magazine. From the evidence, it is found that a media buyer would not purchase advertising space in "Electrical Merchandising" on the strength of CX-5 alone, without an examination of CX-6, the Crossley Survey itself.

18. Counsel supporting the complaint advances many additional reasons why CX-5 and CX-6 are false and deceptive. Each of these contentions will not be discussed in detail. Some of these contentions are the following: CX-6 was not a Crossley survey, but was actually a McGraw-Hill survey; MHPCo. singled out "Television Retailing-Mart" for special treatment and prepared CX-5 for the purpose of damaging "Television Retailing-Mart" financially, causing it to lose advertising revenue and putting it out of business; and that "Television Retailing" was not succeeded by "Mart," as represented by CX-5. These contentions are not supported by the evidence. The Crossley Survey (CX-6) was conducted by Crossley, Inc., not by the respondent MHPCo. The circumstance that the manufacturers participated in the survey to the extent of mailing out the postcard questionnaires and receiving the replies did not make it any less a Crossley, Inc. survey. After the television manufacturers received the replies to the questionnaires and delivered them to Crossley, Inc., Crossley, Inc. tabulated the returns and issued its report and findings (CX-6). The survey is properly characterized as a Crossley, Inc. survey.

19. With respect to the contention that respondent singled out "Television Retailing-Mart" for special treatment by preparing CX-5, the evidence establishes the contrary. At the time respondent requested Crossley Inc. to furnish it with the readership duplication figures as between "Electrical Merchandising" and "Television Retailing-Mart," respondent also requested the duplication figures as between respondent's magazine "Electrical Merchandising" and two other top competing magazines, "Retailing Daily" and "Electrical Dealer." From these figures, respondent prepared RX-10 and RX-11 which compared the readership coverage between "Electrical Merchandising" and "Retailing Daily" and "Electrical Dealer," respectively. Thus, it cannot be said that respondent singled out "Television Retailing-Mart" for special treatment.

20. With respect to the contention that CX-5 caused "Television Retailing-Mart" to lose advertising revenues, the evidence shows that, beginning in September, 1953, after "Television Retailing" had been succeeded by "Mart," the number of pages of display advertising in "Mart" dropped considerably and continued at that approximate level until 1956. For the first six months of 1956, the advertising revenues increased by approximately 9% while the advertising revenues of "Electrical Merchandising" decreased. In this connection, it is significant to note that CX-5 was not printed until March, 1954, six months after the advertising revenues of "Mart" had begun to drop with the first issue of "Mart" in September, 1953. Certainly, this diminution of advertising revenue which began in September, 1953, cannot be attributed to CX-5, since it was not printed until March, 1954.

21. Mr. Maurice Clements, former president of Caldwell-Clements, Inc., publisher of "Television Retailing-Mart," was the principal witness who testified in support of the allegations of the complaint, especially with respect to the second charge, contained in Paragraph Six of the complaint. Mr. Clements attended each session of the hearing at which oral testimony was received. In addition, an attorney for Mr. Clements attended each session of the hearing. This attorney sat at the side of counsel supporting the complaint at the counsel table, conferred with counsel supporting the complaint during the interrogation of witnesses at the hearing and handed written notes to counsel supporting the complaint during his interrogation of witnesses. The evidence also shows that Mr. Clements' attorney supplied counsel supporting the complaint with some of the exhibits offered in evidence by counsel supporting the complaint. These facts, as well as the actions and demeanor of Mr. Clements during his

attendance at sessions of the hearing and while testifying as a witness, observed by the Hearing Examiner, demonstrate Mr. Clements' animosity toward the respondents and his personal interest in the outcome of this proceeding. For these reasons, the Hearing Examiner does not accord the testimony of Mr. Clements the same weight and credibility it might otherwise receive.

22. Some of the other contentions urged by counsel supporting the complaint are: that respondent used CX-5 in a surreptitious manner; respondents are so huge that they can not only break a magazine, but break advertising agencies by boycotting them; and that respondent is a giant and it is just as right to issue a cease and desist order against respondents as it is against the "small ones." The evidence does not establish the contention that respondent used CX-5 in a surreptitious manner. The relative size of respondents has no relationship to the determination of whether a cease and desist order should be issued. Such an order should issue only upon the basis of evidence showing deception or a capacity to deceive, in respondents' advertising. When each and all of respondents' advertising pieces complained of as being false and deceptive are considered, especially in view of the limited, sophisticated, and experienced audience to whom they were directed and exposed, it cannot be said, under a reasonable and fair interpretation of the evidence, that respondents' advertising is false and deceptive as alleged. This hearing examiner has carefully considered the testimony of each of the witnesses who were offered in support of the complaint, as well as the documentary evidence and pleadings, in the record. Upon the basis of the entire record, he is unable to make a finding that respondents' advertising is false and deceptive as alleged. Such a finding can and should only be made upon a record of clear and convincing evidence. Such a record has not been made here. This is not to suggest or infer any lack of expertise or ability on the part of counsel supporting the complaint. Counsel has prosecuted the case with zeal and vigor. However, sufficient evidence to support the allegations of deception is lacking and it cannot be created by counsel supporting the complaint, however diligent and industrious he may be.

23. During the hearings, in addition to offering evidence in support of the allegations of the complaint, counsel for the Commission also offered evidence against respondents' motion to dismiss the complaint. The motion to dismiss was based, among other things, on the grounds of abandonment and discontinuance of the practices complained about, prior to issuance of the complaint. Counsel supporting the complaint argues that respondents are in a poor position

to request dismissal of the complaint after they were given an opportunity, prior to the filing of the complaint, to enter into a stipulation agreement with the Commissioner to cease and desist from engaging in the practices complained about. In reply, respondents state that they refused to enter into such stipulation agreement for the reason that they did not consider such practices unlawful. The fact that respondents declined to execute the stipulation agreement does not prejudice their right to move for dismissal of the complaint. Respondents' motion to dismiss is bottomed on the doctrine announced and followed by the Commission in *Wildroot Company, Inc.*, (D. 5928), *Argus Cameras, Inc.*, (D. 6199), *Bell & Howell Co.*, (D. 6729), and *Ward Baking Company* (D. 6833), where, if it is found that unusual circumstances exist and the practices complained about have been voluntarily discontinued by the respondents, the Commission may dismiss the complaint on the theory that the purpose of the complaint has been accomplished. In their motion to dismiss in the present case, respondents urged that the acts complained of are not in fact actionable and at worst are isolated, insubstantial instances of human oversight which have long since ceased; that the violation charged against MHPCo. was discontinued in November, 1955, more than two years prior to issuance of the complaint on December 5, 1957, and the violation charged against MHICorp. was discontinued in August, 1956, more than one year prior to issuance of the complaint. Respondents certify that the practices complained about will not be repeated in the future.

24. As bearing on the question of discontinuance of the practices complained about, counsel for the Commission claims that CX-27 supports his contention that respondents have not discontinued the practices complained about as they state in their motion to dismiss. (It should be kept in mind that the first charge in the complaint alleges that the promotion pieces CX-2 and CX-3A distributed by respondent MHICorp. in connection with the Krieghbaum Survey, CX-1, are false and deceptive). CX-27 is an advertisement which appeared in the August, 1951 issue of "Electrical Merchandising." The advertisement (CX-27) referred to "Electrical Merchandising" as "The Best Seller" and states that "Electrical Merchandising" was bought by more people in the appliance-radio-TV industry than any other trade publication in the field. The advertisement further states that an analysis of surveys of leading appliance-radio-TV dealers of leading manufacturers shows that "Electrical Merchandising" rates number one among other publications in the field. The name of the competing publications are not shown but are listed as publications "A," "B," "C," "D," and "E." It is the contention of coun-

## Findings

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sel supporting the complaint that this advertisement is deceptive and is evidence tending to show that respondent had not discontinued the false and deceptive advertising complained about. The false and deceptive advertising complained about (CX-2 and CX-3A) were mailed by respondent in August, 1956. CX-27 appeared in the August, 1951 issue of "Electrical Merchandising," five years prior to respondents' use of CX-2 and CX-3A. An advertisement (CX-27) which appeared in 1951 is not appropriate evidence to show *continuance* (underscoring mine) of a practice which occurred in 1956. Only deceptive advertisements which respondent may have published and distributed subsequent to (CX-2 and CX-3A) are competent evidence to show that respondent was continuing to publish and distribute deceptive advertisements. (The complaint does not charge that CX-27 is false and deceptive. CX-27 was furnished to counsel supporting the complaint by counsel for Mr. Clements and was offered by Commission counsel as evidence to show that respondent had not (as of the date of respondents' motion to dismiss) discontinued the practices complained about. The evidence offered by counsel supporting the complaint does not show CX-27 to be false and deceptive. When CX-27 appeared in the August, 1951 issue of "Electrical Merchandising," there were approximately one half dozen recent surveys which indicated that "Electrical Merchandising" ranked first in the appliance-radio-TV industry trade. The format of the advertisement "The Best Seller" (CX-27) was modeled after an illustration which appeared in the book review section of the "New York Times." The illustration listed the popularity of certain books. This advertisement (CX-27) appeared only one time, in the August, 1951 issue of "Electrical Merchandising."

25. CX-26, a survey conducted by Erdos and Morgan among appliance-TV dealers dated February, 1958, is another survey used by "Electrical Merchandising" and which counsel supporting the complaint alleges to be false and misleading. As to this survey, the evidence shows that, in 1957, the respondent MHPCo. employed the firm of Erdos and Morgan, specialists in marketing and research, to conduct a survey among appliance-TV dealers. Six of the leading manufacturers of radio, television receivers and electrical appliances were each asked to supply Erdos and Morgan with the names of a random sample of approximately 1,200 retailers of their products across the country. The manufacturers who participated were RCA, Whirlpool, Kelvinator, Westinghouse, Admiral, Hoover and General Electric. Between the 18th and 23d of November, 1957, Erdos and Morgan sent a letter, questionnaire and stamped reply envelope to approximately 6,000 of their dealers asking them

which appliance TV trade publication they found most useful in sales-making ideas and which they found most useful for the advertisements contained in it. Erdos and Morgan received the replies from dealers, tabulated them and prepared a survey report dated February, 1958. The report showed that "Electrical Merchandising" was named by more retailers than any other magazine in reply to the two questions asked. "Mart" which had been sold by Caldwell-Clements, Inc. in 1956, ranked second. The Erdos and Morgan survey was printed in a four-page booklet CX-26, dated February, 1958. The booklet (CX-26) listed the names of the companies which participated in the survey, the methods used, the results obtained, and reproductions of the questions asked in the questionnaires. The survey (CX-26) was mailed to the entire promotional list of "Electrical Merchandising" of approximately 2,800 and copies were also supplied to salesmen and all branch offices of respondent. The survey was conducted by Erdos and Morgan in accordance with standard practices of marketing and research organizations and the survey report issued by Erdos and Morgan was true and correct to the best of their knowledge and belief. On May 26, 1958, respondent MHPCo. placed an advertisement in "Advertising Age" which stated, among other things: "Researchers Erdos and Morgan merely confirmed what appliance Pros have long known: more dealers choose 'Electrical Merchandising' for 'sales-making ideas' and for 'usefulness of advertisements' than choose the next two publications combined" (CX-25).

26. In September or October, 1957, Bittenheim Publishing Company, the publisher of "Mart," purchased "Electrical Dealer." In deciding how to report the results of the Erdos and Morgan survey in view of this occurrence and in view of the fact that "Retailing Daily" had changed its name to "Home Furnishings Daily" on April 1, 1957, representatives of respondent MHPCo. conferred with Dr. Erdos and Mr. Morgan as to how the listing should be made in the survey as a result of these developments. "Electrical Dealer" and "Mart" had been separate publications for years and since the Erdos and Morgan Survey sought information concerning readership interest over a period of time prior to November, 1957, it did not appear appropriate to combine the responses with reference to the two magazines. Space buyers were familiar with the facts concerning the two publications.

27. When Bittenheim acquired "Electrical Dealer," it did not retain any of the personnel of "Electrical Dealer." After acquisition, the format of "Mart" remained the same and its circulation remained much the same. Counsel supporting the complaint contends that the Erdos and Morgan Survey (CX-26) is false and

misleading because the replies to the questionnaires which listed "Mart" as the trade publication found most useful should have also included the replies which listed "Electrical Dealer" as the most useful because at the time the questionnaires were mailed out, in November, 1957, Buttenheim Publishing Company, the then publisher of "Mart" magazine had also purchased "Electrical Dealer" which was a competing magazine. Counsel supporting the complaint further argues that, since the publisher of "Mart" also owned "Electrical Dealer" in February, 1958, when the Erdos and Morgan Survey was completed and publicly distributed, the replies should have been combined because at the time the Erdos and Morgan Survey was completed the publisher of "Mart" also owned "Electrical Dealer." Such a line of reasoning does not logically follow. The questionnaires, as stated above, were inquiries to dealers as to which publications they (the dealers) had found most useful in their business. The questionnaires were mailed during the month of November, 1957. Necessarily, the inquiry concerned publications which the dealer had used and was familiar with prior to 1957, at which time "Mart" and "Electrical Dealer" were separate publications.

28. Counsel further argues that the Erdos and Morgan Survey is deceptive because it consolidates and combines the replies from dealers who listed the publications "Home Furnishings Daily" and "Retailing Daily" as being most useful in their business. This is of no real significance and is explained by the fact that "Home Furnishings Daily" and "Retailing Daily" is one and the same publication. Only a change in name. On or about April 1, 1957, the name of the publication "Retailing Daily" was changed to "Home Furnishings Daily." Possibly, some of the dealers who listed the name "Retailing Daily" in their reply to the questionnaire were not aware that the name of the publication "Retailing Daily" had been changed to "Home Furnishings Daily."

29. On the other hand, there is in evidence a promotional piece (RX-12), dated May 5, 1958, signed by Mr. Edward George Allen, publisher of "Mart" magazine, which was distributed to the trade. In this piece (RX-12), Mr. Allen praised the Erdos and Morgan Survey and commended "Electrical Merchandising" for sponsoring the study. RX-12 further stated that the publisher of "Mart" magazine was proud of the fact that, in the Erdos and Morgan Survey, "Mart" magazine showed up a strong second to "Electrical Merchandising" in dealer preference. Accordingly, it is found that the contentions of counsel supporting the complaint with respect to respondents' motion to dismiss have not been sustained.

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Order

## CONCLUSIONS

Since evidence has been received on the entire case and it has been found that the allegations of the complaint have not been established by a preponderance of the evidence that respondents prepared and distributed false and deceptive advertisements, the complaint should, therefore, be dismissed.

## ORDER

*It is ordered,* That the complaint be, and it hereby is, dismissed.

# AUTOMOTIVE EXPORT ADVERTISING

## A Study of the Methods and Practices of the Largest Companies Engaged in Automotive Exporting...

- ...How Companies Define Advertising Objectives
- ...How Advertising Budgets are Planned
- ...How Advertising Outlets are Evaluated
- ...How Advertisers Assess Publishing Practices
- ...How Advertisers Appraise Circulation Methods
- ...How Companies Rank Magazines
- ...How Readers Grade Magazines

FEDERAL TRADE COMMISSION  
DOCKET NO. 6971  
IN THE MATTER OF *Inc. Straw Hill*  
DATE *10/29/58* WITNESSES *As. L. L. L.*  
AED REPORTING CO., Official Reporter  
By *Marking*

## BY HILLIER KRIEGHBAUM

Associate Professor of Journalism  
Communication Arts Group  
NEW YORK UNIVERSITY

Order

57 F.T.C.

FEDERAL TRADE COMMISSION

DOCKET NO. 6971 COMMISSION EXHIBIT NO. 2

IN THE MATTER OF McGraw-Hill

DATE 10/29/53 WITNESS McGraw-Hill

ACE REPORTING CO., Official Reporter

By McGraw-Hill

McGRAW-HILL INTERNATIONAL CORPORATION  
330 WEST 42nd STREET, NEW YORK 36, N. Y.

OFFICE OF THE PUBLISHER

August 20, 1954

Dear Sir,

Perhaps you've already obtained a copy of this since it has been rather heavily publicized.



But if not, you will certainly want a copy (which I attach) since it is the most complete survey ever undertaken of automotive export advertising. It was financed by McGraw-Hill.

I'd like to call attention to the overall results particularly to advertisers 1) who are working on 1957 budgets and 2) those who use split schedules.

On these findings, I'll rest my case...

Russell F. Anderson

Order

~~Exhibit 4~~

FEDERAL TRADE COMMISSION

IN THE MATTER OF Mr. Granville

IN THE MATTER OF The Estate of August 19, 1956  
100-100000-100000 WITNESS Cincinnati

ACE REPORTING CO., Official Reporter

By 1/11/11

**African Shipping Rates Go Up:** Ocean freight rates to South and East African ports and harbors in Madagascar, Mauritius and Reunion islands will be increased moderately on Oct. 1 because of constantly rising operating costs, it has been announced by the Gulf South and East African Conference of New Orleans, La.

**Australian Auto Imports Curbed:** The Australian Department of Trade has announced that imports of fully assembled motor vehicles from the dollar area would be reduced by 50 per cent and unassemble chassis by 30 per cent. Imports or components from the dollar area for manufacture of vehicles in Australia are not affected. The reductions, which will be made under the new import restrictions announced last month are the same as those applying to vehicles from sterling and non-dollar areas.

C - 3A - 2.19

Order

57 F.T.C.

## HILLIER KRIEGHBAUM

ASSOCIATE PROFESSOR OF JOURNALISM · COMMUNICATION ARTS GROUP

NEW YORK UNIVERSITY  
WASHINGTON SQUARE, NEW YORK 3, N.Y.PRESS RELEASE

A nine months' case study of the methods and practices of the largest companies engaged in automotive exporting has just been completed by Hillier Krieghbaum, Associate Professor of Journalism, New York University.

Purpose of the survey, which also included media preferences research in 44 countries, was to evaluate media channels available to firms engaged in selling automotive products abroad and the methods and practices of these companies in placing their advertising.

"The study", in the words of the preface, "was undertaken to make an analysis of a cross-section of export advertising. The automotive industry was selected because this field has ranged from six to ten per cent of all export advertising during recent years and because it includes easily identifiable products."

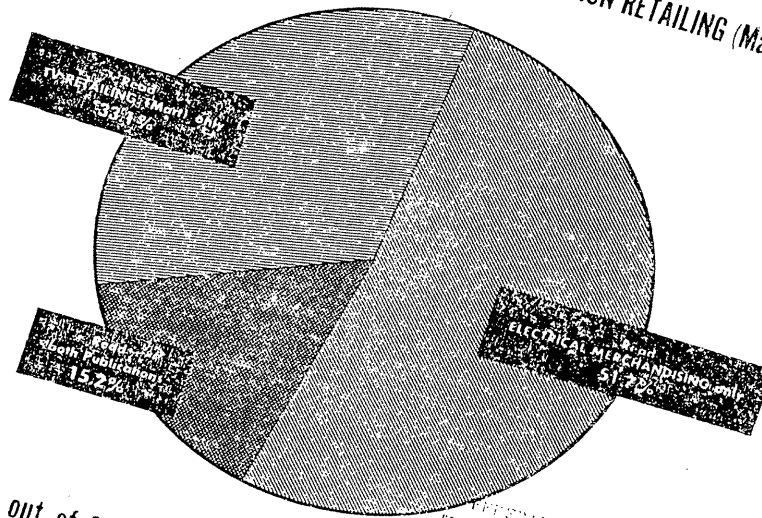
Fifty-one firms, which represented a sizable portion, if not the majority, of automotive export advertising billings, cooperated in the study. They supplied information on their methods and practices as they related to defining their advertising objectives, how they planned their budgets, how they assessed publishing practices and circulation methods, and how they ranked magazines as to their effectiveness.

The companies participating in the case study also supplied names and addresses of their overseas distributors, jobbers, or other outlets, in 44 countries and this group in turn was surveyed to determine how overseas readers evaluated media channels being employed by automotive exporters and their advertising agencies.

Copies of the booklet, summarizing the results, can be obtained from Hillier Krieghbaum, Associate Professor of Journalism, Communication Arts Group, New York University, Washington Square, New York 3, N.Y.

FEDERAL TRADE COMMISSION  
COMMISSION EXHIBIT NO. 4  
DOCKET NO. 471  
IN THE MATTER OF NEWS GROUP  
DATE 12/29/57 BY  
ACE REPORTING CO., Official Reporter  
W. H. H. H.

Here's what happens when a  
TV manufacturer advertises in  
ELECTRICAL MERCHANDISING and TELEVISION RETAILING (Mart)\*



2 out of 3 (66.9%) READ ELECTRICAL MERCHANDISING  
1 out of 2 (51.7%) READ ELECTRICAL MERCHANDISING  
By adding Mart (successor to TV Retailing) to ELECTRICAL MERCHANDISING  
you increase your . . .

... Audience by 33%  
... Costs 82%

\*From 7 Company Study supervised and tabulated by Crossley Inc.  
Rules from January 26, 1954 SRDS (12 Time B&W Page)

#### DECISION OF THE COMMISSION

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint herein for failure of proof, and the Commission having considered the matter, including the briefs and oral arguments of counsel and the record as a whole, and having determined that the initial decision constitutes an appropriate disposition of the proceeding:  
*It is ordered*, That the appeal of counsel in support of the complaint be, and it hereby is, denied.  
*It is further ordered*, That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.

Complaint

57 F.T.C.

IN THE MATTER OF

SAM ASHKENAS ET AL. TRADING AS  
B. A. FUR COMPANYCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 7884. Complaint, May 12, 1960—Decision, Nov. 23, 1960*

Consent order requiring furriers in Nassau, N.Y., to cease violating the Fur Products Labeling Act by labeling, invoicing, and advertising fur products deceptively with respect to the name of the animal producing the fur; by invoicing fur products falsely to show that imported furs contained therein were domestic; by advertising "Factory prices direct to you" when part of the fur products thus advertised were purchased from outside supply sources; and by failing in other respects to comply with requirements of the Act.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sam Ashkenas and William Ashkenas, individually and as copartners trading as B. A. Fur Company, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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. Sam Ashkenas and William Ashkenas are copartners trading as B. A. Fur Company with their office and principal place of business located at 18 Lake Avenue, Nassau, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the advertising and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled, or otherwise falsely and deceptively identified with respect to the name or names of the animal or