

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent McCrory Corporation, a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering **for sale, sale or distribution** of clothing or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the word "Mills" or any other word of similar import or meaning in or as a part of respondent's corporate or trade name, or representing in any other manner, that respondent is the manufacturer of the clothing and the other merchandise sold by it unless and until respondent owns and operates, or directly and absolutely controls, the manufacturing plant wherein such clothing or other merchandise is made.

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

IN THE MATTER OF

STANDARD CAMERA CORPORATION ET AL.

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

Docket 8469. Complaint, Feb. 21, 1962—Decision, Nov. 7, 1963*

COMPLAINT

Order vacating initial decision which amended the complaint by substitution of a word altering the original theory behind the complaint and was therefore beyond the power of the hearing examiner to authorize, and dismissing complaint charging importers of cameras manufactured in Soviet-occupied Germany for distribution to retailers, with failing to disclose the country of origin of the cameras.

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Standard Camera

* Reported as amended by order of hearing examiner dated April 20, 1962.

Corporation, a corporation, and Mark S. Lulinsky and Jerome H. Adler, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Standard Camera Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 500 Fifth Avenue, New York, New York.

Respondents Mark S. Lulinsky and Jerome H. Adler are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of cameras to retailers for sale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said cameras, when sold to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. When merchandise, including cameras is offered for sale to the purchasing public and such merchandise is not marked, or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin.

PAR. 5. Certain of the cameras sold by respondents are imported into the United States from that part of Germany occupied by the U.S.S.R. Respondents have failed to so mark these said cameras, or the containers in which they are sold, as to adequately and clearly disclose the country of origin of said cameras.

PAR. 6. A substantial portion of the purchasing public prefers merchandise that is not manufactured in territory occupied by U.S.S.R., including the said cameras sold by the respondents.

PAR. 7. By the aforesaid practice, respondents place in the hands of retailers a means and instrumentality by and through which the retailers may mislead the public as to the origin of said cameras.

Initial Decision

63 F.T.C.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cameras of the same kind and general nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory occupied by U.S.S.R. are of other origin and into the purchase of substantial numbers of said cameras by reason of such erroneous and mistaken belief.*

PAR. 10. The aforesaid practice, as herein alleged, was, and is, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitutes, unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5(a) (1) of the Federal Trade Commission Act.

Mr. Frederick McManus and Mr. Charles J. Connolly, counsel supporting the complaint.

Kaye, Scholer, Fierman, Hays & Handler, by *Mr. Sidney A. Diamond*, of New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JANUARY 29, 1963

The complaint herein charges failure to mark "adequately and clearly" the country of origin (that part of Germany occupied by the U.S.S.R.) of cameras imported for resale in the United States—in violation of Section 5 of the Federal Trade Commission Act, which relates generally to unfair trade practices and unfair methods of competition. A main defense is that the specific country of origin marking, GERMANY USSR OCCUPIED, on the cameras was, according to stipulation herein, approved by the Bureau of Customs, as complying with the Tariff Act provision 19 U.S.C. § 1304, which relates expressly to country of origin markings on imports. The present decision sustains the complaint, in general. It is expressly found that the Praktica camera offered as proof was and is not marked "adequately and clearly" to reveal country of origin. However, as to Praktica, the other type of camera offered in proof, bearing the same specific marking, this decision does not find the marking insufficient—due to larger lettering and other relevant considerations—although it does find that the marking as stamped in small letters on the bottom of the box container is insufficient.

* Reported as amended by order of hearing examiner dated April 20, 1962.

1238

Initial Decision

A cease and desist order issues even though respondent corporation prior to issuance of the complaint herein ceased importing the camera or reselling to consumers, and contracted them away to another company, and even though the latter has consented to a cease and desist order as to markings.

However, the cease and desist order issued herein is not directed against either of the individual respondents as such.

Pleadings and Procedures

The complaint herein alleges a preference for goods not manufactured in U.S.S.R. occupied territory, as follows:

PARAGRAPH SIX: A substantial portion of the purchasing public prefers merchandise that is not manufactured in territories occupied by U.S.S.R., including the said cameras sold by the respondents.

By order of April 20, 1962, after pre-hearing conference, the hearing examiner took "official or judicial notice of this allegation of the complaint" with leave to respondents to prove the contrary of the allegations, and leave to complaint counsel to introduce rebuttal evidence. Respondents offered no such contrary proof, nor did complaint counsel offer supporting evidence, so that the facts as to preference for non-U.S.S.R. cameras rest solely on the notice taken by this examiner.

In addition, the complaint was amended by said pre-hearing order (and a separate order) to change one word in Paragraph Nine, so as to allege that the markings on the cameras have the capacity to mislead consumers into the belief that the cameras, although manufactured in territory occupied by the U.S.S.R., are of "other" origin, i.e., instead of "domestic" origin, as pleaded in the complaint as originally worded.

The complaint also alleges, Paragraph Four, that when merchandise, including cameras, is unmarked or inadequately marked to show foreign origin, the consuming public believes it to be of domestic origin. Complaint counsel's motion to take official notice of this allegation was denied by the hearing examiner in the aforementioned pre-hearing order of April 20, 1962, as follows:

ORDERED, that the said motion is denied, i.e., insofar as the allegations apply to the cameras involved in this case, as identified in the stipulation of facts and the camera exhibits, disclosing fairly complicated cameras definitely not in the low price bracket, and conspicuously marked with trade names indicating a foreign origin.

No proof was offered in support of said allegation, and, of course, none in opposition thereto. Said allegation accordingly is unproved, as relating to the cameras here, which, as the examiner also finds,

Initial Decision

63 F.T.C.

even disclose themselves as of German origin, by the German names around the lens and in other ways. The amendment of Paragraph Nine, above noted, so as to refer to misrepresentation that the cameras are "other" origin instead of "domestic" origin, evidences complaint counsels' abandonment of the legal theory of the domestic origin representation embodied in Paragraph Four. At the pre-hearing conference the examiner stated that he considered Paragraph Four as "dead" (Tr. 65). Respondents seem to regard it that way (Tr. 235).

The cameras are not identified in the complaint except as coming from that part of Germany occupied by U.S.S.R., *i.e.*, East Germany.

It was at the pre-hearing and the hearing proper that the cameras were identified as of two kinds, the Praktica and the Praktina, already referred to. Prior to the hearing a formal motion to dismiss was made on the ground of discontinuance of the alleged practices. The examiner denied the motion, and respondents' petition for review was disallowed.

The hearing was held in New York City on October 1, 1962, and October 2, 1962. There were no consumer nor expert witnesses called for either side.

At the close of the hearing the examiner dismissed the complaint as against respondent Jerome H. Adler, who had been counsel for respondent corporation in the conduct of its business, although he withdrew at a fairly early period. A motion to dismiss as to respondent Mark S. Lulinsky, the corporation's president, was denied at the hearing.

Leave was given to both sides to submit proposed findings and a legal memorandum. There were submissions of five pages from complaint counsel, and 76 pages from respondents' counsel.

Insufficiency of Mark GERMANY USSR OCCUPIED

The Praktica camera (CX 1) was and is manufactured near Dresden, traditionally a well-known center of good cameras, now located in that part of Germany occupied by the U.S.S.R. Praktica is a 35-millimeter single-lens reflex camera, which is a fairly complicated camera and of a specific and unique nature, although there are a number of manufacturers making such a single-lens reflex camera. The 35-millimeter single-lens reflex camera originated prior to World War II in the Dresden area of Germany. However, since the end of World War II such reflex cameras, comparable at least to Praktica, have been manufactured in West Germany. Praktica retails in the United States for about \$75, without accessories or additional lenses.

Praktica has a chrome or chrome-like metallic top, with plenty of free space for markings on this metallic top. On this metallic top, using part of the free space, are three horizontal moveable knobs, presumably of the same material as the top—two of them bearing numbers for camera adjustments, and one of them being merely the unnumbered rewinding knob used in winding the film.

The country of origin marking GERMANY USSR OCCUPIED appears somewhere on this chrome-like ensemble if you can find it. But it does not appear on any of the silvery free space of the top, perhaps even stamped black to be readable by contrast. Nor does it appear on either of the two numbered knobs, readings from the numbering of which might disclose to the user any country of origin marking if it were placed thereon.

Where does the marking GERMANY USSR OCCUPIED appear? After most careful scrutiny and repeated examination one finds that it appears on the rewinding knob, and then merely on the outer circular rim of the knob's flat top. The marking is simply cut into the metal of this top, without any coloring being added. Moreover, the marking is in letters less than $\frac{1}{16}$ " high, going much less than half way around the circle of the rim.

This squeezed-in country-of-origin lettering is for all practical purposes silver on silver, evanescent if not invisible, and obscured even by light. This is so on casual observation. It is also so on much more than casual observation, so that even non-casual purchasers can be deceived, despite respondents' contention to the contrary.

The hearing examiner has no hesitation whatever in holding that by ordinary Federal Trade Commission standards this disclosure of foreign origin is and was inadequate, and that the specific marking in question does not "adequately and clearly" disclose the country of origin of Praktica.

It is true, as respondents point out, that there were no consumer witnesses in this case. But the Commission, and the examiner, may properly formulate conclusions on questioned markings predicated on personal observation and an assessment of the probability of their being seen by consumers who are supposed to see them.* The examiner rules as a matter of law that the specific country of origin marking as it appears on Praktica is inadequate by reason of its small lettering, its position, and the other considerations pointed out above.

*See *Charles of Ritz Distributors Corporation v. F.T.C.*, 143 F. 2d 676, 680 (CCA 2, 1944), *Zenith Radio Corporation v. F.T.C.* 143 F. 2d 29, 31 (CCA 7, 1944).

Customs Approval Uncontrolling

However, respondents as their main point urge that the Federal Trade Commission is foreclosed, or virtually foreclosed, from holding the country of origin marking inadequate in this case, by reason of the fact that this GERMANY USSR OCCUPIED marking was approved, according to stipulation herein, by the United States Bureau of Customs as complying with the marking provision of the Tariff Act, 19 U.S.C. § 1304.

The cases are to the contrary of what respondents contend. *Heller & Son, Inc. v. F.T.C.*, 191 F. 2d 954 (CA 7, 1951), quoted with approval *In the Matter of Baldwin Bracelet Corp.*, Federal Trade Commission Docket No. 8316, decided December 18, 1962 [61 F.T.C. 1345]. The law is merely that as a matter of quasi-comity, and of orderly government procedure, the Commission will consider with respect such an approval by the Bureau of Customs, even though the approval is not a judicial or semi-judicial determination. *Matter of Standard Sewing Equipment Corporation*, 51 F.T.C. 1012 (1955).

Moreover, the statute under which Customs approves country of origin markings is fairly narrowly worded, as contrasted with the broad sweep of Section 5 of the Federal Trade Commission Act.

* * * * *

What has been stated above, first on the insufficiency of the marking by Commission standards, and then on the non-binding effect of Customs approval of the marking, may without more be sufficient to dispose of this case, at least so far as the allegations as to deception are concerned. However, in view of the extensive brief of respondents the matter will be pursued further. A further possibility of deception will be pointed out, arising out of an additional, and larger, GERMANY marking on the Praktica. Toward the close of this discussion there will also be found a *Note on Customs Approval*, analyzing the statutory language and direction thereunder, as well as the cases. Part of the discussion, also, will be devoted to the defense of discontinuance and lack of likelihood of resumption, as well as non-liability of respondents individually.

Additional GERMANY Marking Misleading

Respondents emphatically assert in their post-hearing law memorandum, that in those cases where the Commission in the past has refused to be bound by Bureau of Customs approval or action in connection with the country of origin markings, the Commission's refusal has been based on some element additional to or other than

merely its disagreement with the Bureau's approval of a particular country of origin marking. For example, respondents point out, there were some additional marking or words tending to misrepresent origin, or some other misleading feature. (See Note on Customs Approval, *infra*, referring to these cases.)

Even assuming that such an additional element is necessary, or persuasive, there actually is such an additional element in this case. The examiner notes that there is a further and additional marking on the Praktica, large and bold, white lettering on black background, consisting of the single word GERMANY. This additional marking, in the examiner's opinion, is reasonably a representation that the camera comes from West Germany, not East Germany—in other words, that it comes from the Germany recognized by the United States and would be so understood by a substantial segment of retail purchasers. This additional white marking GERMANY is cut into the bottom of a black circular ring in front of the camera, the depth of field scale ring. The GERMANY on this ring can easily be seen by tilting the camera about 25°, or just handling it. The examiner believes that even a curious shopper would be more likely to see this additional GERMANY on the numbered or scaled circular ring than the GERMANY USSR OCCUPIED on the otherwise blank rewinding knob. The examiner believes that a shopper seeing the GERMANY, particularly a non-sophisticated shopper, satisfied thereby that he would be getting a German camera—Germans having a known lead in cameras—might thus be lulled into not looking any further for a country of origin marking and thereby kept from seeing the tiny GERMANY USSR OCCUPIED on the rewinding knob.

Moreover, a retailer overanxious to sell might deliberately tilt or turn the camera so as to show the GERMANY marking, distracting attention from the GERMANY USSR OCCUPIED, and thus utilize the instrumentality of deception placed in his hands by respondent corporation.

There is nothing in this case to show that the Bureau of Customs gave any consideration to this separate GERMANY marking nor, of course, is there any evidence that it was on the camera when the GERMANY USSR OCCUPIED marking was approved. Moreover, the Tariff Act, 19 U.S.C. § 1304, and orders issued thereunder, under which approval was given, seem directed at one affirmative country of origin marking, irrespective of any additional marking or of any instrumentality of deception theory. (See Note on Customs Approval, *infra*.)

Initial Decision

63 F.T.C.

History of the Marking

In addition, respondents point to their past adherence to Custom's directions, when they used even a different GERMANY USSR OCCUPIED marking, giving them a compliance record which might possibly bear on the claimed unreasonableness of the present Commission challenge or of the actual issuance of a cease and desist order. However, the pertinent facts are not in respondents' favor.

Originally the Bureau of Customs did not require of importers the present type of marking, cut into the metal of cameras, but was satisfied in the country of origin marking was stamped in white indelible ink on the non-metal body of the camera. This is the way GERMANY USSR OCCUPIED originally appeared on the Praktica, as shown by RX 1, to wit, on the black non-metal back of the camera. However, the Bureau of Customs itself decided that it was wrong in permitting this type of marking under the Tariff Act, 19 U.S.C. § 1304. It so stated in a memorandum dated December 1, 1959 (RX 31), which declares that this type of marking

does not result in a marking which is as legible and conspicuous as required under section 1304 * * *.

Interestingly enough, this former Praktica (RX 1) with the ink-stamped marking on the back also carried the additional marking GERMANY prominently on the lower part of the depth of field scale ring in front, much as the present Praktica carries it. In addition, this former Praktica carried the mark GERMANY a second time, to wit, very prominently right on the chrome-like flat top. Of course, again there is no evidence as to whether the GERMANY marking, either of them, was placed on this former Praktica before or after clearance by Customs.

As to the new form of marking, the one now followed by Praktica, the said memorandum of December 1959 simply provides that

an acceptable form of marking of the name of the country of origin is by means of diesinking or etching on a conspicuous metal surface of the camera in a legible and conspicuous manner.

Now what would be the most obvious "conspicuous metal surface" on which to place the country of origin wording? It would be, of course, right on the flat chrome-like top, indeed, by adding to the GERMANY already there the words USSR OCCUPIED—black on silver. But apparently respondent corporation was not interested in such simplicity and such obvious conspicuousness.

Even with other chrome-like metallic surface available it chose for the required marking one of the unnumbered knobs on top of the camera, the one least likely to invite attention to the marking. The

1238

Initial Decision

GERMANY USSR OCCUPIED, as already pointed out, was squeezed into the rim on top of the rewinding knob, appearing in tiny letters, silver on silver. (As to that GERMANY which originally appeared on the metal top proper of the camera, it is no longer to be found on the present Praktica.)

In the examiner's opinion this marking on the present Praktica was merely pro forma conformance, at the best, with the literal wording of the § 1304, Tariff Act, and the Custom's memorandum of December 1, 1959, and represents a willingness on the part of respondent corporation to make the most minimum disclosure as to which approval could be obtained from Custom's personnel interpreting the same as applied to various types of cameras. It indicates a complete disregard of the salutary and older provisions of the Federal Trade Commission Act and the principles of fair dealings as between retailers, as well as between retailers and consumers, which underlie them.

Unsophisticated Consumers

Respondents also argue that ultimate purchasers of Praktica are sophisticated people who would carefully examine every mark and word on the camera, including the GERMANY USSR OCCUPIED mark in particular, and indeed would probably know in advance, from having read camera manuals or otherwise, that Praktica comes from the Dresden area and therefore from that part of Germany occupied by the U.S.S.R. In support of their argument, respondents state that Praktica is an expensive camera and that, as a 35-millimeter single-lens reflex, it is a complicated one of a specific and unique kind.

Actually, Praktica, with its retail price of about \$75, not including accessories or additional lenses, is expensive only in a very relative sense and complicated only in a less relative sense. On the one hand, like all the single-lens cameras, it is not sold in drug stores or the usual department stores. On the other hand, it seems to be at the beginning or lower end of 35-millimeter single-lens cameras, in price and even in complexity. Its price of substantially less than \$100 would give it a definite appeal to that always large class of diletantes who, with little actual knowledge, dote on doing what the true lovers of art are supposed to be doing, and to non-sophisticates who simply have a little more money to spend than average persons.

Material Preference for Non-U.S.S.R. Cameras

As already stated, the hearing examiner, in his Order After Pre-Conference, took official notice of Paragraph 6 of the complaint, with

Initial Decision

63 F.T.C.

leave to respondents to submit evidence to the contrary (Rules, §4.12(c)), which they did not do. The notice taken by the examiner indicates that there is a material preference among consumers for cameras not manufactured in territory occupied by the U.S.S.R.

The taking of this notice seems particularly justified in respect to Praktica. As already noted, this camera selling at \$75 or so, is in the lower level of these single-lens reflex cameras, and can be assumed to have a definite appeal to dilettantes and non-sophisticates, among other consumers. Furthermore, cameras comparable to Praktica are made in West Germany.

That there is a general prejudice in this country against goods coming from the U.S.S.R. or territory dominated by it is beyond doubt. Indeed in some substantial segment of our American society the prejudice, even apart from patriotic reasons, is very strong due to the anti-religious regime controlling the U.S.S.R. In *Standard Sewing Equipment Corporation*, 51 F.T.C. 1012, 1024 (1955), this Commission said in its opinion:

Further, a vast majority of people in the United States have a general preference for products made in the United States over those made in the many nations behind the iron curtain.

That such a prejudice might not exist, or that it might be suppressed, among ultra-sophisticated camera users, intent only upon getting what they regard as the best cameras, is quite true. But such a prejudice does and must of necessity exist in a substantial segment of purchasing consumers when non-ultra-sophisticates are well represented among them.

Praktina

Respondent corporation also imported another 35-millimeter single-lens reflex camera from the Dresden area of East Germany. This is the Praktina, which very roughly has the same general appearance as Praktica, although it is definitely a more advanced camera and has additional features, including an electric motor. It sells at retail, without accessories or additional lenses, from \$150 to \$200, depending upon the lens.

Complaint counsel contends that the country of origin markings on Praktina are inadequate in the same way as on Praktica. However, there are differences to be considered:

First, Praktina is more expensive and more complicated, thus appealing more definitely or exclusively to sophisticated consumers. A 30-millimeter single-lens reflex camera comparable to Praktina is

1238

Initial Decision

not made in West Germany, according to the evidence in this case, presented by respondents.

Secondly, although GERMANY USSR OCCUPIED appears on the rim of the rewinding knob, as in Praktica, the letters are much larger. This is because there is a considerably larger rim on which the letters are placed. The letters are actually about $\frac{1}{8}$ " high, and they are well spread so that the marking occupies over half of the circular rim. Thus, from whatever angle the knob is likely to be viewed, at least a large part of the marking stands out clearly, inviting attention to the remainder.

Thirdly, the remaining half of the circular rim of the knob contains a prominent black arrow which, although designed to indicate the direction in which to wind the knob, also serves to point effectively to the marking GERMANY USSR OCCUPIED.

Fourthly, the knob containing GERMANY USSR OCCUPIED is placed on top of a separately moving knob, which is numbered and the use of which, therefore, directly calls attention to GERMANY USSR OCCUPIED.

Fifthly, there is no additional mark of GERMANY, standing by itself, either on the circular numbered ring or anywhere else. Thus there is no direct or explicit representation of a West German origin.

Accordingly, it is difficult to hold that Praktina fails to disclose country of origin. The pertinent facts as to Praktina are different from those as to Praktica. Applied to Praktina, and Praktina alone, respondents' brief is persuasive.

However, the proof in this case is sufficient based only as to Praktica. The complaint, as already noted, mentions only cameras generally.

The result reached here eliminating Praktina could possibly be reached considering only the different size and degree of conspicuousness of GERMANY USSR OCCUPIED, i.e., without considering the other differences noted above. One is caused to wonder whether the Customs officials had only Praktina before them in approving Praktica as well, although this is pure speculation.

The exoneration here of Praktina may seem awkward in result inasmuch as both Praktina and Praktica are, according to the record, subject to a Commission consent order signed by another company, which now handles the cameras instead of respondent corporation. However, facts must be faced as they are. Reasonable enforcement may still possibly include identical new markings on both cameras.

Moreover, Praktina is not completely exonerated. It should be noted that the attractive blue paper box in which Praktina is packed

Initial Decision

63 F.T.C.

(CX 2A), and presumably sold to the consumer, contains the Praktina name prominently and elaborately printed on the top but contains no country of origin marking except that on the outside bottom of the box there is stamped in small letters GERMANY USSR OCCUPIED.

In the hearing examiner's opinion, this marking on the Praktina container does not "adequately and clearly" disclose the country of origin, and the allegation of Paragraph Five of the complaint is to this extent proved. Although one would guess that a similar situation as to containers prevails in connection with the Praktica, there is no proof in the record of this.

As to consumer preference it should be also noted that the examiner still adheres to the official notice taken by him prior to the hearing, i.e., applying to Praktina as well as Praktica, that a substantial segment of camera consumers prefer cameras manufactured in countries not occupied by the U.S.S.R.

Discontinuance and Similar Defenses

Even if a violation of the Federal Trade Commission Act is definitely regarded as proved, respondents contend that the facts show that public interest does not warrant the issuance of a cease and desist order. This is based mainly on the fact that respondent corporation has signed an agreement to sell all of the cameras in question to another company, that it is engaged in the liquidation of these cameras by deliveries to this other company, and that this company has signed a Commission cease and desist order pursuant to which the cameras are now being marked. Respondents admit that the contract provides for the recapture by respondent corporation of cameras not delivered by September 30, 1964, but contend that the possibility is remote.

Respondents claim not only that the corporation has given up this business, but that it has done so because it was unprofitable, and not because of Commission investigation of its camera markings or the issuance of the Commission complaint.

Respondents also seem to stress a lack of intent to violate or flout the law, as well as a general unlikelihood of the resumption of the camera business. See *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 435 (1941), and *Matter of Transogram Company, Inc.*, F.T.C. Docket No. 7978 (September 19, 1962) [61 F.T.C. 629].

The salient facts may be summarized as follows:

Respondent corporation is a wholly owned subsidiary which was set up by Standard Tobacco Company, Incorporated, a large organi-

1238

Initial Decision

zation, which got into the East Germany camera business through selling American tobacco to East Germany. Respondent corporation eventually took over this camera business, and imported and sold the Praktica and Praktina. It engaged a licensed customs broker, who had handled such cameras before, to look after such markings as might be required by the Bureau of Customs. The directions of the Bureau of Customs as to markings were followed as heretofore described, namely, by minimal compliance at least in respect to Praktica.

The Commission's investigator began talks with respondent corporation's representatives in December 1960. In May 1961 the corporation ceased importing cameras from East Germany because, or largely because, it was unprofitable, and contracted to sell its Praktica and Praktina cameras to another company, as stated above, subject to the right of recapture of cameras undisposed of by September 30, 1964. Except for a few sales to fulfill orders on hand, the corporation has made no deliveries of Praktica and Praktina cameras, other than to this company, since September 1961.

Commencing June 1961 respondent corporation began the process of giving up its offices, including show rooms, a camera vault, and other facilities, and letting go of its personnel. It actually gave up its offices in March 1962, and now simply has offices of a limited kind with the parent corporation.

In December 1961, apparently, respondent corporation was advised by the Commission that a complaint might be filed against it. The complaint herein was actually served about the end of February 1962.

On May 29, 1962, the company to which the corporation contracted to sell the cameras signed a Commission consent order under which the Praktica and Praktina camera, along with others, are being marked in accordance with clearance from the Commission's Compliance Division.

The president of respondent corporation, respondent Lulinsky, has testified that as far as "the cameras" are concerned "we are out of business" (Tr. 339). He was asked, "Do you intend to resume the camera business at any time, Mr. Lulinsky?" He answered, "None in my life" (Tr. 145).

First of all, the examiner is not too much impressed by the fact that the corporation, new in the business, entrusted the question of Customs country of origin markings to a supposed expert or quasi-expert as to Customs requirements. In the examiner's opinion, this completely ignored the equally important question of complying with the broader provision of the law enforced by the Federal Trade Commission.

Initial Decision

63 F.T.C.

It is true that a business concern may possibly be forgiven for believing that Customs approval of country of origin marking is general government approval. But such forgiveness cannot extend where, as here, the compliance seems to have been the ultra-minimum required by the Customs memorandum purporting to enforce the Tariff Act, and where it was clearly deficient, as found here, under the Federal Trade Commission Act. On the issue, therefore, of public interest in issuing an order, the examiner believes that there was more or less flagrant disregard of the law, rather than innocent violation thereof. Moreover, this seems to be absolutely clear if due weight is given to the use by respondent corporation of the additional marking GERMANY.

Secondly, respondent corporation's alleged abandonment of these camera imports in May 1961, when it signed the contract with the other company, came after the Commission initiated its investigation in December 1960, in other words, after the hand of the Commission was already on its shoulder. The Commission in its discretion, and in determining public interest, may issue a cease and desist order although the acts complained of are abandoned after it starts investigation, or even before. *Spencer Gifts, Inc. v. F.T.C.*, 302 F. 2d 267 (CA 3, 1962). *Gimbel Brothers, Inc.*, F.T.C. Docket No. 7834 (October 17, 1962) [61 F.T.C. 1051, 1066]. Moreover, respondent corporation did not actually move over into the parent company's offices until a month after the complaint herein was issued, and three months after it was advised that a complaint might issue. The fact that the record shows that the business in these cameras was discontinued because it was unprofitable does not necessarily mean that the decision to discontinue might not also have been at least partially predicated on other factors, such as difficulties with the Commission over markings.

Thirdly, apart from the recapture clause in the contract there are possibilities that the corporation will again be immersed in the camera business. Under the contract the purchasing company "guaranteed" a payment of \$500,000 for the cameras, and delivered notes of \$15,000 each aggregating that amount, payable monthly, with the entire unpaid amount due on any default. Thus, on a default respondent corporation would presumably be in a position to take judgment and perhaps even have to take over the company's business, including the cameras and the selling organization, to effectuate its judgment. This provision as to the notes came out quite incidentally in some testimony (Tr. 146-8). Only excerpts of the contracts are in evidence. Respondents' counsel did not produce the contract, and seemed most reluctant about having it in evidence (Tr. 103-105).

1238

Initial Decision

Fourthly, it is altogether possible that U.S.S.R. credits for tobacco sales may still figure in some future deal whereby respondent corporation will import East German cameras—even if it does not itself distribute them, requiring setting up a new organization, an obstacle to resumption stressed by respondents. Or it might import other East German articles.

Fifthly, and most important, is the recapture clause in the contract (CX 4). If by September 30, 1964, the buyer has not taken delivery of all the merchandise it has the option of immediately accepting the balance or of paying “an aggregate principal amount equal to twelve and one-half percent (12½%) of such remainder of such Praktica-Praktina open account indebtedness” and relinquishing the undelivered merchandise to respondent corporation.

As already stated, respondents admit that there is thus a possibility that respondent corporation may recapture a portion of these cameras, although they contend that the possibility is slight. However, it is not to the public interest that the Commission should gamble on this possibility, one way or the other. Moreover, there is nothing to prevent the respondent corporation and the buyer from modifying the agreement to provide for further recapture rights, say, in lieu of default procedures if a monthly note is not paid.

After all, the respondent corporation is still a corporation and is still admittedly active, at least on the limited basis of liquidating the cameras through the other company. The very fact that respondent corporation opposes the cease and desist order so vigorously argues against regarding the corporation merely as dormant, as against which the issuance of a cease and desist order would not be indicated.

Respondent corporation doth protest too much. Moreover, the strong position it takes as a matter of law against the controlling effect of Commission determination over Bureau approval, in respect to country of origin marking, is another reason for issuing a cease and desist order herein, if only for the educational effect on respondent and importers generally. See *Spencer Gifts, Inc. v. F.T.C.*, *supra*.

Individual Respondents

Respondent Mark S. Lulinsky was, and is, an officer of respondent corporation, and without doubt has in general controlled its acts and practices, subject, of course, to the desires of the parent corporation, of which he has also been an officer.

However, despite general control and direction by him, the record is clear that he turned over the matter of Customs markings to the employee brought in by him who knew Customs marking practices in regard to cameras manufactured in U.S.S.R. occupied territory.

Initial Decision

Moreover, this is not a case very much like that of the one-man corporation, as generally understood, in which one man owns all the stock, is the officer in control, has few employees, if any, and in general language is the corporation.

Furthermore, there are no special circumstances warranting the necessity for an order herein directed against this officer in his individual capacity, as distinguished from his official capacity.

True, as the examiner notes, Mr. Lulinsky's directions to the employee or employees brought in to take care of markings seem to have been limited to Customs instructions (Tr. 252), without any reference to Federal Trade Commission requirements. However, this blind spot is more excusable in respect to the officer of the corporation than the corporation itself.

As to respondent Jerome H. Adler, also named individually in the complaint, a motion to dismiss was granted toward the close of the hearing. Mr. Adler was general counsel and vice president of respondent corporation, but resigned on December 22, 1960. The facts were developed exhaustively by his counsel, and there is no evidence that he had anything to do with the markings involved in this proceeding, nor even enough to justify his having been named individually in the complaint herein.

Note on Customs Approval

The Tariff Act, 19 U.S.C. §1304, quoted below, provides for a country of origin marking in a "conspicuous place" and also provides that the Secretary of the Treasury shall have power to make regulations described therein in connection with such markings.

Pursuant thereto there was issued a regulation stressing that the marking be "legible and conspicuous" (19 CFR, § 11.8(d)).

There have also been issued so-called Treasury Decisions, published in the Federal Register, relating to the wording of markings on German products so as to comply with § 1304. In 1946, for instance, it was directed that all parts of the German area (except East Prussia and a Polish-administered area) might be designated in the marking as Germany (T.D. 51527). In 1953, it was directed that the marking for Soviet Zone products should read "Germany Soviet Occupied", or "U.S.S.R." substituted for "Soviet" (T.D. 53281(3)). The same thing was directed in 1960 (T.D. 55104).

As we have already seen, respondents, with Custom approval, originally stamped their cameras, in white ink on the non metallic back, with the GERMANY USSR OCCUPIED.

1238

Initial Decision

However, there is a memorandum, dated December 1, 1959 (RX 31), signed by the Acting Commissioner of Customs, and partially quoted above, which reads more fully as follows:

Blind marking by diesinking on other than a metal surface of an imported camera does not result in a marking which is as legible and conspicuous as is required under section 1304 of the Tariff Act of 1930, as amended, and is not acceptable.

Effective immediately as to entries for consumption and warehouse, an acceptable form of marking of the name of the country of origin is by means of *diesinking or etching on a conspicuous metal surface of the camera in a legible and conspicuous manner.*

Please notify importers concerned immediately.

Respondents refer to this memorandum as a "mandate." Obviously, it is not a regulation like 19 CFR § 11.8(d) referred to above. So far as appears herein, or the examiner knows, it is not a Treasury Decision nor published in the Federal Register.

The testimony in this case is that upon the receipt of a copy of this memorandum respondent changed its marking procedure so that GERMANY USSR OCCUPIED was cut into the top of the metal rewinding knob, as appears in the cameras in evidence, and the result was approved by Customs, as already noted in this decision. The procedure was described by Mr. Lulinsky, the president of respondent corporation, as follows (Tr. 325):

When goods arrives, the Customs House gives notice that the goods have to be marked properly. We mark the goods according to what the Customs House has told us. Then they send an inspector who examines the goods that have been marked and if he finds that they are correct gives a report to the Customs House and we get the release. It's only after that time that we are permitted to distribute the goods.

He added that this was the procedure followed as to the cameras here in question.

Mr. Lulinsky's testimony is the evidence as to the nature of the determination process constituting the approval by Customs which is claimed by respondents to be binding on this Commission. In other words, Customs told them that the marking should be on the metal, they put the marking on the metal, and the inspector so reported to his superior in Customs. So far as the evidence in this case shows with any clarity the inspector, or other Customs official, may have seen the larger marking on the Praktina, not the smaller one on the Praktica. Moreover, there is nothing in this record to show that the additional marking GERMANY was considered by the Customs officials nor that it was on the cameras when they inspected them.

Initial Decision

63 F.T.C.

Complaint counsel herein has stipulated (CX 3) that the markings herein "were made pursuant to prior consultation with officials of the United States Bureau of Customs and according to their directions" (par. 9), that they were "approved by the United States Bureau of Customs" (par. 11), and are "in accordance with 19 U.S.C. §1304" (par. 12). However, the stipulation seems to be limited to the specific marking GERMANY USSR OCCUPIED, the only marking actually mentioned in the stipulation (par. 8) to wit, as follows:

8. All of the 35-millimeter single-lens reflex cameras imported by respondent Standard Camera Corporation have been marked as follows: "GERMANY USSR OCCUPIED." This does not blind counsel in support of the complaint in the event contrary information is developed under cross-examination.

The Tariff Act, 19 U.S.C. §1304(a), provides that every article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations—

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether it be printing, stenciling, stamping, branding, labeling, or by any other reasonable method in a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorizing the exception of any article from the requirements of marking if—

* * * * *

Section 1304(b) applies to the marking of containers, but it will be noted that by its express wording, marking of containers is prescribed only when the article itself need not be marked, *i.e.*:

(b) Whenever an article is excepted under subdivision (3) of subsection (a) of this section from the requirements of marking, the immediate container, if any, of such article * * * shall be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of such article, subject to all provisions of this section * * *.

19 U.S.C. §1304 seems to impose a narrower standard than markings which "adequately and clearly" disclose the country of origin as alleged in the complaint herein, or which can be used by a retailer as an "instrumentality" of deception, as alleged in the complaint.

First of all, § 1304 seems to be preoccupied with the existence of just one adequate marking, irrespective of other perhaps confusing,

1238

Initial Decision

if not contradictory, markings. § 1304 provides that the article "shall be marked * * * to indicate * * * country of origin * * *" It provides that the Secretary of the Treasury may determine the "character" of acceptable words to indicate country of origin, and that he may require the "addition of any other words" (subtraction is not mentioned) "to prevent deception or mistake as to the origin of the article." Moreover, there is nothing in this Section to indicate any deference to the Commission "instrumentality" theory, the requirement stated therein being merely to "indicate to an ultimate purchaser", which is a far cry from the truly broad language of Section 5 of the Federal Trade Commission Act sweepingly referring to unfair trade practices and unfair methods of competition.

Secondly, there is no requirement in the Section that the wording or marking on the article will be as *clear and adequate* "as the nature of the article will permit", but merely that the article will be marked "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article or container will permit." However, it would seem that this Commission, in its wide discretion, may determine that the size of the lettering should be sufficiently large and conspicuous, reasonably, "as the nature of the article will permit", and that it is under a duty to determine here that lettering should not be shunted to a limited space on a little knob.

Possibly corroborative of this interpretation of § 1304 as somewhat narrow in scope, is the regulation issued thereunder referred to above, to wit, 19 CFR § 11.8(d), stressing that the markings be "legible and conspicuous" and emphasizing "permanency."

Finally, as noted above, there is nothing in § 1304 prescribing markings on containers of articles unless the articles themselves are exempt from markings—a limitation which, of course, does not exist under the Federal Trade Commission Act.

Heller & Son, Inc. v. F.T.C., 191 F. 2d 954 (CA 7, 1951)* is a case in point on the general principle that this Commission is not bound by Bureau of Customs approval of country of origin markings. There the argument was made that Congress, by enacting the marking provision of § 1304 "withdrew regulatory jurisdiction over this subject from the Commission" (p. 956). The opinion states that an examination of the Tariff Act

discloses no language expressing an intention on the part of Congress to repeal § 5 of the Federal Trade Commission Act, or to diminish the authority or the power of the Commission to prevent deceptive trade practices * * *

Accordingly, the Commission's order to cease and desist was upheld.

* This case is quoted with approval in a recent Commission case. *In the Matter of Baldwin Bracelet Corp.*, F.T.C. Docket No. 8816 (December 18, 1962) [61 F.T.C. 1345].

Initial Decision

63 F.T.C.

The opinion in *Heller* also states that Congress in enacting § 1304 "was concerned solely with the extent to which the Treasury Department, incidentally to its collection of customs duties, should regulate the labeling of imported goods." (p. 957.) Respondents here attempt to impair the soundness of *Heller* (as well as *Standard Sewing, infra*), by referring to *U.S. v. Mersky*, 361 U.S. 431 (1960) which in effect refers to § 1304 as being for "the protection of the ultimate consumer in the United States" (p. 440), and "the protection of the public from deceit" (p. 440).

However, the examiner here holds that this public purpose of § 1304 is quite clear and could not have been lost on the Court of Appeals in *Heller*. The Section expressly refers to a marking "in such manner as to indicate to an ultimate purchaser in the United States" the country of origin. The opinion in *Heller* merely indicates that, in respect to § 1304 and its undoubted interest in the ultimate purchaser, Treasury should regulate the labeling of imported goods "incidentally to its collection of customs duties."

In the matter of *Standard Sewing Equipment Corporation*, 51 F.T.C. 1012 (1955), the facts are sufficiently close to the facts in the present case. There the importer had marked its sewing machines "Made in Occupied Japan" or "Japan", but in letters so tiny and otherwise not readily seen (as testified to, there, by consumer witnesses) that the markings were held by the Commission to be deceptive.

Respondents here point out that there were also other markings on the sewing machines, in that case, indicating an American origin, such as conspicuous metal labels on the motors reading "Made in the U.S.A." and conspicuous use of a trademark suggesting manufacture in the United States. However, in the opinion of this examiner, these additional markings have a comparable counterpart in the additional GERMANY marking in the present case.

In *Standard Sewing Equipment*, too, the Bureau of Customs had approved the specific markings, to wit, Made in Japan, or Japan. The Commission in its opinion held that it was not bound by this approval by Customs, although also holding that the approval was entitled to weight in considering the adequacy of the markings.

Respondents here challenge *Standard Sewing Equipment* on the ground that the Commission opinion was signed by only two members of the Commission. A third member concurred in the result but protested the action of the Commission, contrary to Customs, as being unfair to business, which should not be compelled to shop around the government to find out what is a proper marking. Two other mem-

bers dissented on the sufficiency of the evidence to prove misbranding, their opinion being mostly a revaluation of the consumer testimony, but also holding that Customs approval of a country of origin marking is entitled to much weight. It will be noted that all three opinions in the case agree that an opinion by Customs is entitled to some weight, or measure of respect.

The hearing examiner holds as follows:

First, there is no rule of law prohibiting the Federal Trade Commission from arriving at a different conclusion on a matter, assuming that there is an identical question upon which both it and another government agency such as the Bureau of Customs may have jurisdiction. At the most, only a principle of comity is involved, pursuant to which the Commission in its wise discretion may elect not to announce a conclusion different from that of a more or less coordinate agency. The principle of comity is not too easily invoked in the present case since the Federal Trade Commission is preeminently an agency dealing in unfair trade practices, even to an extent greater, unfortunately perhaps, than monopoly practices, its other great area of activity. The Bureau of Customs, more basically the Secretary of the Treasury, obviously has an area of activity of which unfair trade practices, as exhibited in inadequate country of origin markings, are a small part, but only a very small part.

Secondly, the approval here by the Bureau of Customs does not even represent a semi-judicial determination, such as a Federal Trade Commission determination fully circumscribed by the Administrative Procedure Act. Customs approval represents only an *ad hoc* clearance by inspectors or other personnel, and this is definitely true on the facts shown in this case. Certainly the Commission cannot permit itself, in the name of comity, to be bound by every clearance or approval which may have been wangled out of Bureau subordinates in the hurly-burly of all products coming into the United States requiring country of origin identification.

Thirdly, the hearing examiner grants that adequate consideration and respect should be paid to the approval of the Bureau of Customs and to the need of importers for consistent determinations from different agencies. However, the actual facts of approval herein hardly compel the rubber-stamping of the approval by Customs but definitely indicate contrary action. Even if the approval by Customs is to be regarded in the nature of evidence, as respondents contend, it need not control in the absence of other evidence, as they also contend, since the Commission under all the circumstances may deem it insufficient in weight or for other legal reasons, or may counter it with its own expertise regarded as equivalent evidence.

Initial Decision

63 F.T.C.

Fourthly, it is hardly clear on this record, and as to this respondents would seem to have the burden of proof, that the Bureau of Customs had the same question before it as the Commission does now. There is no proof as to what cameras the Customs inspector had before him in clearing the marking, *i.e.*, both the Praktica and Praktina cameras or just the Praktina. Furthermore, the Bureau seems to have passed solely on the adequacy of the marking GERMANY USSR OCCUPIED without considering the larger and separate GERMANY marking. This would be consistent with a clearance given by a subordinate as to conformity with a Customs memorandum pursuant to statute—or with the absence of the GERMANY marking at the time of clearance.

Fifthly, there is an additional legal question which the Commission has before it, considering applicable Commission case law, as to which there is no proof or indication that the Bureau gave any consideration at all—namely, whether, as charged in the complaint, the inadequate markings (which in their generality as alleged would include the GERMANY marking) resulted in putting into the hands of retailers a means and instrumentality of deception.

Sixthly, there is the question of the insufficient marking of the containers of the camera, a question before the Bureau of Customs only when the imported article itself is excepted from marking under § 1304(a)(3).

FINDINGS OF FACT

The following are the Findings of Fact herein, constituting the essential facts in this case.

All proposed findings not found herein, or not hereinabove found, are disallowed, although disallowance of a proposed finding does not necessarily mean that proof has been insufficient.

1. (a) Respondent Standard Camera Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 500 Fifth Avenue, New York, New York.

(b) Respondent Mark S. Lulinsky, whose address is also 500 Fifth Avenue, New York, New York, is and has been an officer of said corporation, to wit, president, in general charge and control, but he did not and has not formulated, directed, and controlled the below described acts and practices of respondent corporation in connection with the marking of cameras from U.S.S.R. Occupied Germany, but entrusted the matter of country of origin markings to a special employee having familiarity and actual experience with such requirements, at least as enforced by the Bureau of Customs. There

are no special circumstances to charge him with individual responsibility for any deceptive markings made by respondent corporation, and the fact that he did not instruct the employee as to Federal Trade Commission requirements is not found to be a sufficient special circumstance.

(c) Respondent Jerome H. Adler was general counsel and vice president of said corporation, but he resigned in December 1960, and he was not in general charge and control of said corporation, nor did he formulate, direct and control the below described acts and practices of the respondent corporation in marking cameras from U.S.S.R. Occupied Germany.

2. Respondent corporation was, up to about October 1961, and going back some years, engaged in the importing, advertising, offering for sale, sale and distribution of cameras to retailers for sale to the public. These cameras are known as Praktica and Praktina. They are 35-millimeter single-lens reflex cameras, and therefore may be regarded as complex cameras of a unique kind. However, Praktica retails in the United States for as little as \$75, and is not as complex as Praktina, so that Praktica, at least, has popular, rather than only a limited, sophisticated appeal. Praktina retails at \$150 to \$200.

3. In the course and conduct of its business, at least up to about June 1961, respondent corporation caused the said cameras when sold to be shipped from its place of business in the State of New York to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintained a substantial course of business in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Said Praktica and Praktina cameras sold by respondent corporation were imported into the United States by it from that part of Germany occupied by the U.S.S.R. A camera comparable to Praktica, but no camera comparable to Praktina, has also been manufactured in West Germany.

5. (a) Respondent corporation failed to mark the Praktica cameras so as to disclose adequately and clearly the country of origin thereof. This is due primarily to the smallness of the lettering of the marking GERMANY USSR OCCUPIED and the inconspicuous place in which the marking appears. Moreover, there is also a confusing and larger GERMANY marking on said Praktica, implying a West German origin.

(b) The Praktina was adequately and clearly marked by respondent corporation, due to the larger lettering of GERMANY USSR

Initial Decision

63 F.T.C.

OCCUPIED, the absence of the separate GERMANY marking, as well as to other factors, including perhaps the presumably greater sophistication of ultimate purchasers of this camera. However, respondent corporation failed to mark the paper box container in which Praktina is sold so as to adequately and clearly disclose the country of origin thereof. (There is no proof in this case as to any container of the Praktica.)

6. A substantial portion of the purchasing public prefers merchandise that is not manufactured in territory occupied by the U.S.S.R., including the said cameras Praktica and Praktina sold by respondent corporation.

7. By the aforescribed practices respondent corporation placed in the hands of retailers means and instrumentalities by which retailers may mislead and have misled the public as to the origin of said cameras particularly of Praktica, but also of Praktina due to the inadequate marking on its container.

8. In the conduct of its business and at all relevant times herein respondent corporation was and has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of cameras of the same kind and general nature as those sold by said respondent.

9. The use by respondent corporation of the afore-described practices had and has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory of the U.S.S.R. were of other origin, presumably of West German origin, and into the purchase of substantial numbers of said cameras by such erroneous and mistaken belief.

Customs Approval

10. The specific marking GERMANY USSR OCCUPIED, on both the Praktica and Praktina was approved by the Bureau of Customs as complying with the Tariff Act 19 U.S.C. § 1304, i.e., the marking was cleared by an inspector as being in compliance with that Section and instructions or directives issued thereunder, although § 1304 is much more narrowly worded than Section 5 of the Federal Trade Commission Act.

11. This Customs approval was not a judicial or quasi-judicial determination. Nor did it extend to, or comprehend, the additional larger marking GERMANY on the Praktica. Nor did it extend to the marking on any container of either Praktica or Praktina.

1238

Initial Decision

12. Conformity by respondent corporation with Customs requirements was of a most minimal nature at the best, and it represented a reckless disregard of general principles of fairness such as are embodied in the Federal Trade Commission Act.

Alleged Discontinuance

13. An investigator of the Federal Trade Commission interviewed officials of respondent corporation as early as December 1960 in respect to the camera markings.

14. In May 1961, after deciding to go out of the camera business as formerly conducted by it, on the ground that it was unprofitable, as publicly announced, respondent corporation entered into a written contract to sell substantially all of its Praktica and Praktina cameras to another company, with deliveries and payments from time to time.

15. However, the contract provides that if by September 30, 1964, the inventory is not exhausted, the purchasing company may relinquish the balance to respondent corporation, upon a certain percentage payment, so that, as the examiner finds, there is a substantial possibility that respondent corporation will be in this camera business again.

16. The contract also provides for a "guarantee" by the purchasing company of \$500,000, with monthly notes of \$15,000 each, the entire unpaid balance due on any default, so that in case of default respondent corporation will presumably be in a position to take judgment and execute on the purchasing company's inventory of Praktica, Praktina, and other East Germany cameras handled by it—again bring about a substantial possibility of respondent corporation's being back in its former camera business, perhaps even with the sales organization of the purchasing company.

17. Furthermore, respondent corporation got into the East Germany camera business through credits established in East Germany by its parent tobacco company as the result of sales of tobacco to East Germany, so that the recurrence of any such credits could again bring it into the importation of these cameras, if not other East German products requiring marking.

18. Thus the fact, as here found, that the purchasing company has signed a Federal Trade Commission consent cease and desist order, under which it is marking these and other cameras of U.S.S.R. origin, is not too material on the issue of whether or not it is to the public interest to issue a cease and desist order against respondent corporation as to these cameras or other East German products.

Initial Decision

63 F.T.C.

CONCLUSIONS OF LAW

1. The aforescribed practices, of failing adequately to disclose the country of origin of cameras imported and sold by respondent corporation were and are all to the prejudice of the purchasing public and of respondent corporation's competitors, and constitute unfair and deceptive acts and practices in violation of Section 5(a)(1) of the Federal Trade Commission Act.

2. Approval by the Bureau of Customs of the country of origin markings herein, under the pertinent provision of the Tariff Act, 19 U.S.C. § 1304, is not binding on the Federal Trade Commission in respect to requirements under Section 5 of the Federal Trade Commission Act.

3. There is sufficient likelihood of resumption of the unlawful and inadequate marking practices herein to warrant issuance of a cease and desist order based on public interest, and the public interest is also invoked by the mere pro forma conformity with customs requirements in clear violation of Federal Trade Commission requirements by the markings involved herein.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents herein.

ORDER

It is ordered, That respondent Standard Camera Corporation, a corporation, as well as its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cameras and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling products which are, in whole or in substantial part, manufactured in territory occupied by the U.S.S.R. without clearly and conspicuously disclosing on such products, and, if the products are enclosed in a package or container, also disclosing on such package or container, in such manner that it will not be obliterated, that such products are manufactured in whole or in part in territory occupied by the U.S.S.R.

2. Furnishing or otherwise placing in the hands of retailers and dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner hereinabove inhibited.

1238

Opinion

It is further ordered, That the complaint herein is dismissed as to respondents Mark S. Lulinsky and Jerome H. Adler, individually.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This case is before us on respondent corporation's appeal from the hearing examiner's initial decision finding it to have violated Section 5(a)(1) of the Federal Trade Commission Act, 66 Stat. 631 (1952), 15 U.S.C. 45(a)(1) (1958). The examiner's dismissal of the complaint as to respondents Mark S. Lulinsky and Jerome H. Adler, individually, was not appealed by counsel in support of the complaint.

The respondent corporation imports cameras manufactured in Soviet-occupied Germany for distribution to retailers. The complaint, issued on February 21, 1962, alleged in essence that Standard Camera failed to mark its imported cameras so as to adequately disclose their country of origin, and that as a result of said inadequate marking, the purchasing public was misled into believing that they were of domestic origin. Insofar as the language of the complaint is pertinent to the issues to be discussed, it is reproduced here:

PARAGRAPH FOUR: When merchandise, including cameras is offered for sale to the purchasing public and such merchandise is not marked, or is not adequately marked showing that it is of foreign origin, such purchasing public understands and believes that such merchandise is of domestic origin.

* * * * *

PARAGRAPH NINE: The use by respondents of the aforesaid practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory occupied by U.S.S.R. are of domestic origin and into the purchase of substantial numbers of said cameras by reason of such erroneous and mistaken belief.

At the prehearing conference, the hearing examiner noted that the cameras to be used as exhibits appeared to be of foreign origin. On that basis, he refused to take official notice of the truth of the allegation embodied in Paragraph Four of the complaint, as applied to such cameras. Counsel supporting the complaint thereupon formally moved that Paragraph Nine of the complaint be amended by striking out the word "domestic" and substituting in its place the word "other." The examiner granted this motion. The allegation in Paragraph Four of the complaint, although not stricken, was regarded as "dead" by the examiner.¹ Subsequent proceedings

¹ Initial Decision, p. 1242.

Opinion

63 F.T.C.

were predicated upon Paragraph Nine of the complaint, as amended. In his initial decision, the examiner found that the labeling practices of the respondent corporation " * * * had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that cameras manufactured in territory of the U.S.S.R. were of other origin, presumably of West German origin * * * " ² The respondent corporation now asserts, *inter alia*, that the examiner was in error in permitting the above amendment, because it was not reasonably within the scope of the proceeding initiated by the original complaint. For the reasons hereinafter stated, we agree. In view of our disposition of the case, respondent's remaining assignments of error will not be discussed.

Our Rules of Practice empower a hearing examiner to allow appropriate amendments to the pleadings.³ Such power is limited, however, by the caveat that the amendments must be "reasonably within the scope of the proceeding initiated by the original complaint."⁴ Where the effect of the amendment is an alteration of the underlying theory behind the complaint, or where it alleges substantially different acts or practices on the part of the respondent, or where it requires different determinations with respect to the belief that a violation has occurred and that the public interest is jeopardized, the hearing examiner is without power to authorize it. *Food Fair Stores, Inc.*, Order Disposing of Interlocutory Appeal and Directing Issuance of Amended and Supplemental Complaint, 53 F.T.C. 1274 (1957); *Giant Food Shopping Center, Inc.*, Docket No. 6459, Order Disposing of Interlocutory Appeal and Directing Issuance of Amended and Supplemental Complaint, May 8, 1957; *Waltham Watch Company*, Docket No. 6914, Order in Disposition of Motion Certified by Hearing Examiner, March 26, 1958; *Hoving Corporation*, Order Disposing of Motion Certified by Hearing Examiner and Directing Issuance of Amended and Supplemental Complaint, 55 F.T.C. 2067 (1959); see *Capitol Records Distributing Corporation*, Order Remanding Record to Hearing Examiner and accompanying opinion, 58 F.T.C. 1170 (1961). Thus, where an amendment impinges upon powers exercised exclusively by the Commission, it is incumbent upon the hearing examiner to certify the matter to us for determination.

In the instant case, the complaint originally issued by the Commission was premised upon that line of cases holding that the purchasing public has a preference for domestic products and that where

² Initial Decision, Findings of Fact, par. 9, p. 1262.

³ Rules of Practice, § 3.7(a)(1), 28 Fed. Reg. 7080, 7087 (July 11, 1963); Rules of Practice, § 4.7(a)(1), 27 Fed. Reg. 4609, 4617 (May 16, 1962); Rules of Practice, § 4.7(a)(1), 26 Fed. Reg. 6015, 6017 (July 6, 1961).

⁴ *Ibid.*

1238

Opinion

merchandise manufactured abroad is not adequately marked showing that it is of foreign origin, the American consumer believes it to be of domestic origin.⁵ This theory was dropped from the case at the prehearing conference when the examiner observed that respondent's cameras were obviously of foreign origin and declined to take official notice of Paragraph Four of the complaint as it pertained to these cameras. The subsequent amendment of the complaint charged the respondent with duping the purchasing public into believing that the cameras were manufactured in some unspecified foreign place not occupied by the Union of Soviet Socialist Republics. The complaint as amended was thus predicated upon a preference by the purchasing public for goods manufactured in countries and places other than those occupied by the Soviet Union. In that instance, the issue to be decided was whether unlawful deception resulted from the respondent's alleged failure to adequately indicate that its obviously foreign cameras emanated from a country occupied by the Soviet regime. This was in sharp contrast to the question posed by the complaint as originally issued—whether actionable deception resulted from a failure to show that cameras which the public might assume were of domestic origin were actually manufactured abroad. Such an amendment altered the underlying theory behind the complaint, and thus necessitated different determinations with respect to the belief that a violation of law had occurred and with respect to the nature and degree of the public interest involved. Decisions on factors such as these are reserved for the Commission. See *Capitol Records Distributing Corporation, supra*. Accordingly, we hold that the above amendment was not reasonably within the scope of the proceeding initiated by the original complaint and therefore was beyond the power of the hearing examiner to authorize.

Evidence adduced at the hearing indicated that the respondent found the importation of cameras unprofitable and abandoned the business after our investigation was initiated, but prior to the issuance of the complaint.⁶ Respondent's only business activity at present is the liquidation of its inventory, and we are assured that there are no plans to resume the camera business. The purchaser of respondent's inventory is currently marking the cameras in accord with a consent order.⁷ In certain circumstances specified in the con-

⁵ E.g., *L. Heller and Son, Inc. v. Federal Trade Commission*, 191 F. 2d 954 (7th Cir. 1951); *American Trade Co., Inc. v. Federal Trade Commission*, 211 F. 2d 239 (2d Cir. 1954); *Lifetime Cutlery Corp.*, 57 F.T.C. 1265 (1960); *Oxwall Tool Co., Ltd.*, Docket No. 7491, 59 F.T.C. 1408, December 26, 1961; *Manco Watch Strap Co., Inc.*, Docket No. 7785, 60 F.T.C. 495, March 13, 1962; *Baldwin Bracelet Corp.*, Docket No. 8316, 61 F.T.C. 1345, December 18, 1962.

⁶ Initial Decision, Findings of Fact, pars. 13, 14, p. 1263.

⁷ In the *Matter of Camera Specialty Co., Inc.*, Docket No. C-143 (May 29, 1962) [60 F.T.C. 1652].

Complaint

63 F.T.C.

tract for sale, respondent would be entitled to repossess portions of its inventory and, in this manner, re-enter the field. However, on the basis of the entire record and in the light of attending circumstances, the Commission does not feel that the degree of public interest is sufficient to warrant the issuance of an amended or supplemental complaint.

For the aforementioned reasons, an order will issue setting aside the initial decision and dismissing the complaint. Rules of Practice, § 3.24(b), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

ORDER DISMISSING THE COMPLAINT

This matter having been heard by the Commission upon the appeal of respondent, and upon briefs and oral argument in support thereof and in opposition to said appeal; and

The Commission having considered said appeal and the record herein, and having determined, for the reasons stated in the accompanying opinion, that the initial decision should be vacated and set aside and the complaint dismissed, subsequent Commission action, if required, not being barred by the dismissal of the complaint herein:

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

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