

Dissenting Opinion

IN THE MATTER OF

THE NEW AMERICAN LIBRARY OF  
WORLD LITERATURE, INC., ET AL.

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

*Docket 5811. Complaint, Sept. 19, 1950—Decision, Jan. 11, 1965*

Order modifying an earlier modified order dated Jan. 13, 1955, 51 F.T.C. 583, which prohibited a New York City publisher from issuing abridgements of or retitlings of previously published books without conspicuous notice of such changes on the title page and jacket of the book, by (1) making more explicit the locations where the disclosure must be printed, and (2) excepting from the prohibition any book originally published outside the United States in a language other than English.

DISSENTING OPINION\*

By MACINTYRE, *Commissioner*:

I dissent from the action of the Commission in granting the petitions for modification of the orders in these cases, because this step was taken on the basis of data which has not been adequately verified. These modifications substantially relax respondents' obligations to disclose that the titles of their reprints have been changed or that the texts have been abridged. Whatever the merits of the changes, the procedure followed in making them is objectionable. Significant alterations have been made in these orders in reliance on the self-serving statements of respondents on industry conditions and these statements have not been confirmed in the course of public hearings. The only other data available at the Commission bearing on industry conditions pertinent to these modifications, of which I am aware, was secured on the basis of rather informal contacts from a representative of the industry being regulated.

Even if the changes effectuated in these orders were desirable, the procedural precedent afforded by the Majority's action cannot but further erode the Commission's adjudicatory processes. Presumably, when the Commission issues a cease and desist order it believes that the provisions in that order are necessary to prevent recurrence of the unlawful practices documented by the record. This Agency's cease and desist orders are based on formal public proceedings. Such orders should not, therefore, be modified on the basis of respondents'

\*Consolidated opinion in two cases: *The New American Library of World Literature, Inc., et al.*, Docket No. 5811 and *A. A. Wyn, Inc., et al.*, Docket No. 6792, p. 19 herein.

contentions on industry conditions, unless those assertions are corroborated by evidence adduced in an equally public hearing. Otherwise, there is a very real danger that the Commission's perspective in taking these actions is narrowed to that of those being regulated. Our responsibilities, of course, go further than the mere convenience of the respondents under order. It is the function of this agency to protect the consumer from false and misleading and unfair practices on the part of those subject to such orders. I regret that the Commission, in its desire to achieve what it believes to be the just result in two cases, has, in effect, set a precedent, placing in jeopardy the integrity of many other cease and desist orders.

Furthermore, it seems to me that, since the Commission has a number of publishers under similar orders,<sup>1</sup> the issues raised by these modifications have industry-wide implications. The Commission, therefore, should have handled the issues raised by these petitions for review on an industry-wide basis, rather than with an *ad hoc* piecemeal approach. Had the Commission initiated a trade regulation rule proceeding with respect to the compliance problems raised by orders requiring disclosure of substitutions of titles and abridgements, then a public record could have been made as to the actual conditions in the publishing industry bearing on these issues and whether in fact changes in these orders are really necessary. The precedent of our handling of disclosure requirements relating to re-refined oil in a trade regulation rule proceeding is applicable here.<sup>2</sup> This certainly would be the more orderly procedure. As it is, the action of the Majority may well breed confusion in one area, in which at least hitherto our course has been reasonably clear. Further, the rule-making proceeding would have permitted us to consult all interested parties, namely, consumers, librarians, and book retailers, and not merely those being regulated here, the publishers.

As to the modifications themselves, there is insufficient information at hand to discern the significance of these changes in all their ramifications. Certain of the problems arising out of these changes are, however, readily apparent.

The provisions in both orders requiring disclosure of substitutions of titles have been modified to exclude:

\* \* \* any book originally published outside of the United States of America in a language other than English \* \* \*

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<sup>1</sup> It is my understanding that at least 9 orders of this nature are outstanding.

<sup>2</sup> See *Double Eagle Lubricants, Inc.*, Docket No. 8589 (1964) [66 F.T.C. 1039].

I assume that the Commission intended to exclude reprints of books originally published in a foreign language on the ground that only a minority of the people would be likely to purchase a book either overseas or here in a foreign language and then repurchase the same book in an American edition because of a covert change in title. Has the Commission here in effect decided that a minority does not deserve protection from deception? Be that as it may, I for one am not in possession of sufficient facts to support the determination that those consumers conversant with a foreign language should in effect be penalized for that talent.

The order in *New American Library* has been modified so that in the case of "hardcover" books the respondents are required to disclose the substitution of a title or abridgement of the text in these reprints:

\* \* \* upon the front flap of the jacket or dust cover and upon the title page of hardcover book \* \* \*.

In the case of paperbacks, however, this disclosure is unequivocally required on both the front cover and the title page. The modification is puzzling for a number of reasons. For example, if the respondents were to publish a "hardcover" book without a jacket or dust cover, then apparently no disclosure would be required on the front cover of the reprint. The Commission does not enlighten us with its reasons for drawing this distinction between "hardcover" books and paperbacks. Further, since the order requires the disclosure on the jacket of a book or on its dust cover, I see no reason why the requirement should not be enforced with respect to the front cover of a "hardcover" book not endowed with either a jacket or a dust cover. Logically there seems no reason for this distinction. At least the Commission has not articulated any reason. The modification raises other questions. Is the purchaser of the presumably more expensive "hardcover" edition in less need of protection than the purchaser of the presumably cheaper paperback reprint? If so, why?

In addition, it is conceivable that the order as modified may for other reasons be a source of perplexity to businessmen and the Commission's staff alike. It is certainly conceivable that books cheaply bound with a stiff cardboard binding in fact have a close affinity to the paperback books from which they are now apparently distinguished by the modification in the order. If that is the case, there seems no valid reason for distinguishing between "hardcover" books of this nature and paperbacks. On the other hand, the order also lends itself to the contrary construction that a book with a stiff

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cardboard cover or binding is in fact a paperback as opposed to a "hardcover" edition with a cloth binding. The Commission's order nowhere contains a definition of "hardcover" books in the light of which its provisions could be construed. To summarize, the order in certain important respects is ambiguous and gives rise to the suspicion that the Commission may not have thought the problem through when it embarked on the course of modifying these orders. This, of course, is understandable, since we are without a record from which findings of fact could be made to give us some insight into the implications of these changes.

In short, these orders have been modified on the basis of inadequate data; the Commission has failed to articulate its reasons for making the changes, and, further, the changes are in some respects ambiguous. For the foregoing reasons I dissent.

#### ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission having issued on January 13, 1955 [51 F.T.C. 583], its decision and order to cease and desist in this matter; and

Respondents having petitioned the Commission for clarification or modification of the aforesaid order of January 13, 1955:

*It is ordered*, That this proceeding be, and it hereby is, reopened.

*It is further ordered*, That the Commission's order to cease and desist issued in this matter on January 13, 1955, be, and hereby is, modified by substituting for paragraphs numbered one and two of said order the following:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgment," "condensed," or "condensation," or any other words or phrases stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of paperback books and upon the front flap of the jacket or dust cover and upon the title page of hard cover books, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book, except any book originally published outside of the United States of America in a language other than English, unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front

cover and upon the title page of a paperback book and upon the front flap of the jacket or dust cover and upon the title page of hard cover books, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser: *Provided, however,* That any book, although originally published in a foreign language, if it has been previously published in an English language edition,