

and negotiations of representatives of respondent authorized to negotiate with potential purchasers or their representatives, relating to the sale of such assets, and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy, or indications of interest in the acquisition of the whole or a part of the assets in question.

IN THE MATTER OF
STUPELL ORIGINALS, INC., TRADING AS
STUPELL ENTERPRISES, ETC.

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

Docket 8603. Complaint, Nov. 1, 1963—Decision, Feb. 18, 1965

Order requiring a New York City toy distributor, to cease falsely representing in its display material and on packages containing its toy "Puncherino" that the goggles in the packages have yellow glass or other protective material when no such protective material is present, and failing to make an affirmative disclosure that goggles may fail to protect users' eyes from injury.

COMPLAINT

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 Stupell Originals, Inc., a corporation, trading as Stupell Enterprises and Carole Stupell Exclusives, and Carole Stupell and Harry Mervis, 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 Stupell Originals, Inc., 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 1749 First Avenue, New York 28, New York. Said corporation trades under the names Stupell Enterprises and Carole Stupell Exclusives, at the same address.

Respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of said corporate respondent, including the acts and practices herein-

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after set forth. Their addresses are the same as that of said corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of a variety of items of merchandise, including a toy product designated as "Puncherino," to wholesale distributors, jobbers and retailers, for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said toy product, 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 maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The toy product aforesaid is a device consisting of a plastic ball which, when inflated, measures approximately seven inches in diameter, to which is attached a rubber string or band. The other end of said string or band is attached to the center portion of a pair of plastic goggles to be worn over the eyes of the user. The ball is punched rhythmically away from the face and retracts towards the face of the user. For protection of the user's eyes, the goggles contain vertical plastic bars approximately 1/16th of an inch in width and spaced approximately 5/16th of an inch apart. The goggles contain no glass or other material.

PAR. 5. In the course and conduct of respondents' business as aforesaid, and for the purpose of inducing the purchase of said toy product, respondents have made, or have caused to be made, certain statements, depictions and representations concerning the operation and safety of use of said toy product. The package in which the product is sold contains a depiction of a boy and girl, each wearing the goggles and striking the ball with their hands, and the following wording:

NEW!
PUNCHERINO
FUN! HEALTHY!

Advertising circulars distributed to retailers contain the same depiction and wording.

PAR. 6. By and through the use of the aforesaid statements and depictions, and others similar thereto but not specifically set out herein, respondents have represented to prospective purchasers, and have placed in the hands of retailers and others the means and

instrumentalities for representing, directly or by implication, that said toy product is hazard-free and is safe for use by the purchaser, including children.

PAR. 7. In truth and in fact said toy product is not hazard-free nor is it safe for use by the purchaser, including children, due to the possibility of injury to the user's eyes or face resulting from the rubber band breaking and piercing the spaces between the plastic bars on the goggles.

Therefore, the statements, depictions and representations, as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive. In addition, the container in which said product is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on said container.

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 merchandise of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William S. Hill supporting the complaint.

Mr. Milton H. Mandel of *Mandel & Permutt*, New York, N. Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JULY 23, 1964

The complaint in this proceeding issued by the Commission on November 1, 1963, charges the respondents named in the caption

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hereof with false, misleading, and deceptive representations in violation of Section 5 of the Federal Trade Commission Act.

The respondents answered and denied the violations alleged. Hearings have been held and counsel for the parties have filed proposed findings of fact, conclusions of law and order. These have been considered. The matter is now before the hearing examiner for the issuance of an initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Stupell Originals, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1749 First Avenue, New York, New York. Said corporation trades under the names of Stupell Enterprises and Carole Stupell Exclusives, at the same address.

2. The individual respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of the corporate respondent. Their addresses are the same as that of the corporate respondent.

3. During the years 1961 and 1962, the respondents named in Paragraphs 1 and 2 hereof were engaged in the offering for sale, sale, and distribution of a toy product designated as "Puncherino" to wholesale distributors, jobbers and retailers, for resale to the public. Total sales of said product during the years 1961 and 1962 amounted to approximately 378,240 units, having a total wholesale value of approximately 71,900. As of July 9, 1963, the respondents had on hand approximately 141,398 units of said toy product and an additional 190,944 units were stored in a bonded warehouse subject to withdrawal by respondents.

4. In the course and conduct of their business, respondents have caused said toy product, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States, and during the years 1961 and 1962, maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The toy product "Puncherino" which is the subject of this proceeding consists of a plastic ball which, when inflated, measures

approximately 7 inches in diameter, to which is attached a rubber string; the other end of the string is attached to the center portion of a device shaped like goggles. The goggles are intended to be worn over the upper part of the face, covering the eyes and surrounding area of the face. The goggles received in evidence at the hearing (CX 11) appear to be of a rubberized plastic material, molded in one piece. The goggles do not contain any glass or transparent plastic material over the portion which covers the eyes, as do the usual eye-glasses or goggles. Instead, in each side or portion of the goggles which covers each eye are four vertical bars, approximately 1/16th of an inch in width and placed approximately 5/16th of an inch apart. These vertical bars are of the same material as the rest of the goggles and appear to have been molded or formed with the rest of the goggles in one original manufacturing operation. The goggles are held in place on the face by an adjustable elastic band attached to each end of the goggles and extended around the back of the head.

6. When sold by respondents to wholesale distributors, jobbers and retailers, and when resold to the public, the toy "Puncherino," which includes the deflated plastic ball, rubber string, and goggles, is contained in a transparent plastic package or container (CX 11). The deflated plastic ball is folded over the goggles, and while the toy remains in the package, the goggles are not visible from the outside of the package. Attached to the top of the package is a folded sheet of heavy paper, or cardboard, approximately 4 x 7 inches in size. On the front side of the paper is a depiction of a boy and girl, each wearing goggles and striking the ball with their hands, and the following wording:

NEW!
PUNCHERINO
FUN! HEALTHY!

On the other side of the sheet of paper are instructions for inflating the ball.

7. The appeal of the toy "Puncherino" is principally to children. After the components have been removed from the container, the plastic ball inflated as directed, and the goggles placed on the face of the user, secured by the elastic band, the ball is intended to be struck or punched by either one or both fists, successively, in a repetitive sequence. The resiliency of the rubber string is intended to permit the ball, when struck, to travel away from the goggles and then retract toward the goggles, and the ball struck again and so on, successively, similar to striking a punching bag.

8. The first charge in the complaint is that, through the depiction on the package as above described, and through advertising circulars distributed to retailers containing the same depiction and wording, respondents have represented to prospective purchasers, and have placed in the hands of retailers and others, the means and instrumentalities for representing, directly or by implication, that said toy product is hazard-free and safe for use by the purchasers, including children; whereas, the toy "Puncherino" is not hazard-free, due to the possibility of injury to the user's eyes resulting from the rubber string breaking and retracting into the spaces between the four vertical bars on the goggles.

9. The second charge in the complaint alleges that the container in which the toy is sold is misleading and deceptive in that it fails to reveal material facts with respect to the risk of injury resulting from the use of the toy as directed on the container. In other words, it is the contention of complaint counsel that the toy is latently dangerous and, by reason of the provisions of the Federal Trade Commission Act, the respondents owe a duty to the purchaser to warn him of possible injury to the eyes from use of the toy by a marking or writing on the package that the goggles might not protect the eyes of the user in case of breakage of the rubber string.

10. The facts are not in dispute. The respondents do not deny the possibility of injury to the eye of the user of the toy "Puncherino" in case of breakage of the rubber string. However, the respondents do deny that they have represented, through the wording or the depiction on the package, or in advertising circulars, either directly, or by implication, that the toy "Puncherino" is hazard-free and safe for use by purchasers, including children. Respondents readily admit that a rubber string will eventually break and in such event could retract and the loose end of the rubber string penetrate one of the open spaces between the vertical bars of the goggles, possibly striking and injuring the eye. Respondents say that a casual look at the goggles and rubber string attached thereto (CX 11), the depiction of the boy and girl, each wearing goggles, attached to the package, and the depictions of the boy and girl wearing goggles as shown on the advertising circulars (CX 2 and CX4) relied on by complaint counsel, negate any suggestion that the goggles afford protection to the eyes in case of the breaking or snapping of the rubber string attached to the ball. Respondents say that the possibility of the rubber string entering the open spaces between the four vertical bars in the event of break is made obvious to the prospective pur-

chaser by the picture of the goggles displayed on the folded sheet of paper attached to the package containing the toy and also the pictures shown on the advertising circulars (CX 2 and CX4). Respondents say that the pictures of the goggles reproduced on these exhibits plainly show that the space between the vertical bars on the goggles is many times the size of the rubber string, thus making obvious the possibility of the rubber string entering one of the open spaces between the vertical bars of the goggles in case the rubber string should break, striking the eye and causing possible injury to the eye.

11. In support of the allegations of the complaint, Commission counsel offered several exhibits, including the toy "Puncherino" (CX 11), in the plastic container as sold to the public, with the 4 x 7 inch sheet of heavy paper attached to the top of the container bearing the depiction of the boy and girl, each wearing goggles, striking the ball with their hands, and the marking,

NEW!
PUNCHERINO
FUN! HEALTHY!

contained thereon, and copies of two advertising circulars, CX 2 and CX 4. Complaint counsel also offered the testimony of four witnesses, the individual respondent Carole Stupell; Mr. David N. Aberman, an attorney and counsel for Toy Manufacturers of the U.S.A., Inc.; Mr. Mufit Ogut, an electrical engineer employed by Good House-keeping Institute; and Miss Dorothy Elizabeth Rencken, Assistant Director of the Consumer Service Bureau of *Parents' Magazine*.

12. Miss Stupell identified various exhibits which were offered and received in evidence, including CX 11, the toy "Puncherino". The substance of her testimony was, and it is found, that: Miss Stupell purchased her initial stock of "Puncherino" in Italy in 1960, and the latest purchase was in June, 1961; for the past two or three years, up to the date of the hearing on March 24, 1964, sales of the toy have accumulated less than \$3,000. Most of the sales of the toy "Puncherino" were made during the years 1961 and 1962, which, as previously found, amounted to approximately 378,240 units. Thus, all of respondents' stock of the toy "Puncherino" were purchased more than two years prior to the date of the hearing on March 24, 1964. Miss Stupell also testified that the so-called goggles are not goggles in the real sense of the word, but are only intended as a support for the rubber string to which the plastic ball is attached; are not intended to afford protection to the user, and have more

sales appeal than would a plain band around the head. She stated that "a child likes a mask no matter what kind of a mask it is" (Tr. 13).

13. The next witness offered by counsel supporting the complaint was Mr. David N. Aberman, attorney and counsel for Toy Manufacturers of the U.S.A., Inc., a trade association composed of approximately 400 American toy manufacturers. Mr. Aberman was offered as a toy safety expert. Counsel for respondents did not admit the qualifications of the witness as a toy safety expert, and, upon questioning, Mr. Aberman voluntarily stated that he did not consider himself to be a technical expert on the safety of toys. The witness was then excused.

14. The next witness offered by complaint counsel was Mr. Mufit Ogut, an electrical engineer employed by Good Housekeeping Institute. Mr. Ogut testified that the Institute has laboratories which investigate and test products, including toys, to be advertised. The testing includes the safety of the product to be advertised. Mr. Ogut examined the toy "Puncherino" as contained in the plastic container (CX 11) and gave it as his opinion that, "when the ball is inflated and hit hard, there is a possibility that the rubber band might snap and retract back and go through the vertical bars and possibly hurt the eye" (Tr. 50-51). On cross-examination, Mr. Ogut further testified that, aside from any expert knowledge from his training and experience as an electrical engineer, it was perfectly obvious from looking at the toy "Puncherino" that, if the rubber string attached to the ball should break or snap, the end of the rubber string could penetrate between the vertical plastic bars of the goggles very easily; expert knowledge was not necessary to recognize this was so. Mr. Ogut further testified that the vertical bars of the goggles would not afford any protection to the eye of the user in the event the rubber string should break and retract toward the face of the user.

15. The last witness offered by complaint counsel was Miss Dorothy Elizabeth Rencken, Assistant Director of the Consumer Service Bureau of *Parents' Magazine*, New York, New York. Miss Rencken testified that she holds an AB Degree in Home Economics from Douglas College, New Brunswick, New Jersey; and a Masters Degree in Home Economics from Teachers College, Columbia University, New York, New York. Miss Rencken was asked to examine CX 11, the "Puncherino" toy involved in this proceeding, and give an opinion as to whether the toy in operation, as shown on the package, would or would not be dangerous. The answer of Miss Rencken was:

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A. The product, as I have examined it and as I can see it pictured on the package I think, in my opinion, presents a potential hazard to any child that might be using it.

Q. Would you please state the basis for your conclusion?

A. On the frame of the eye piece, which covers the child's eye, there is a small piece of elastic here, which even under normal usage could conceivably enter a portion of the glasses here. (Tr. 63-64)

Miss Rencken further testified that, from looking at the toy (CX 11), it was plainly evident that the rubber band was much smaller than the spaces between the vertical bars on the goggles, and she was convinced that the rubber string could penetrate through the open spaces between the vertical bars of the goggles, and that there was no deception therein. Miss Rencken further testified that, by looking at CX 4, the picture of a child wearing the goggles and punching the plastic ball (CX 11), it was evident "that the apertures between the upright bars are much wider than the rubber band depicted on that picture" (Tr. 73).

16. In order to obviate the necessity of hearings in Baltimore, Maryland; Detroit, Michigan; and Eagle Pass, Texas, counsel supporting the complaint and counsel for respondents entered into a stipulation concerning the testimony of certain witnesses residing in those cities. The general effect of this testimony would be that one adult and two children received injuries to their eyes while using the toy "Puncherino" in the prescribed manner, when the rubber string broke and retracted between the vertical bars of the goggles striking an eye of the user. Said stipulation further provides that each of said witnesses would testify that no representation was made as to the safety of the toy product "Puncherino" at the time of its purchase. Accordingly, it is found that the witnesses named in said stipulation would have testified as stated therein, if they had appeared at the hearings.

17. After careful examination and consideration of the evidence, this hearing examiner is of the opinion that the allegations of the complaint have been established. This determination is based largely upon the depiction of the goggles worn by the boy and girl which are depicted on the paper attached to the top of the package containing the toy "Puncherino" (CX 11). This depiction of the goggles, unlike the depictions of the goggles contained on the advertising circulars CX 2 and CX 4, appear to afford protection to the eyes of the user. The vertical bars on the goggles depicted on CX 11 appear to be sufficiently close together so as to afford protection to the eyes of the user in case of breakage of the rubber string. This

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depiction is on the front of the package in which the toy is sold to the public. This depiction of the goggles is what the purchaser sees at the time of purchase of the toy "Puncherino." He does not see the goggles themselves. The goggles are not visible from the outside of the package. Although the vertical bars on the goggles are approximately 1/16th of an inch in width and are placed approximately 5/16th of an inch apart, this circumstance is not discernible from the depiction of the goggles shown on the package containing the toy (CX 11). The plastic package containing the toy "Puncherino" is sealed while on display for sale to the public, and the purchaser is not aware of the relative size of the rubber string and the open spaces between the vertical bars of the goggles until after purchasing the toy and removing the goggles from the container. After removal from the container, however, a casual glance at the goggles themselves (CX 11) will immediately indicate to the viewer that the goggles will not protect the eyes of the user in the event the rubber string should break and retract into one of the open spaces between the vertical bars on the goggles (CX 11). On the other hand, the depictions of the goggles shown on the advertising circulars CX 2 and CX 4 are much larger than on CX 11. On the advertising circulars CX 2 and CX 4, the relative size of the rubber string as compared to the size of the open spaces between the vertical bars of the goggles make evident the possibility that the end of the rubber string might penetrate one of the spaces between the vertical bars of the goggles and strike the eye of the user in case the rubber string should break. This impression created by the depictions on CX 2 and CX 4 is substantiated by the testimony of two expert witnesses offered by complaint counsel, Mr. Ogut and Miss Rencken. Their testimony is discussed in Paragraphs 13 and 14 hereof, and will not be repeated.

18. By and through the depiction of the goggles on the plastic package containing the toy as displayed for sale to the public, respondents thereby represented to prospective purchasers and placed in the hands of retailers and others the means for representing, directly or by implication, that said toy "Puncherino" can be used as illustrated without danger or risk of injury to the eyes of the user. The evidence shows, and it is found, that the toy "Puncherino" cannot be used as illustrated without danger or risk of injury to the eyes of the user due to the possibility of the rubber string breaking and penetrating one of the open spaces between the vertical bars on the goggles. Also, the plastic package in which the toy is contained, displayed and sold is misleading and deceptive for the reason

that it fails to reveal material facts with respect to the possibility or risk of physical injury which may result from use of the toy as illustrated on the package or container.

CONCLUSIONS

1. The use by the respondents of the false, misleading and deceptive depictions on the package as found herein has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said depictions are true and into the purchase of substantial quantities of said toys by reason of said erroneous and mistaken belief.

2. The aforesaid acts and practices of respondents as found herein are to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

3. In view of the fact that the depiction of the goggles shown on the package containing the toy "Puncherino," as it is displayed for sale, falsely represents that the goggles afford protection to the eyes of the user in the event the rubber string attached to the ball should break, respondents should be required to clearly indicate on the package in which the toy is sold that the goggles may not protect the eyes of the user from possible physical injury.

4. With respect to respondents' contention that they are not selling the toy at the present time and that current sales are not substantial, the evidence shows that respondents' stock of the toy on hand is substantial, that their sales of the toy in 1961 and 1962 were substantial, and that respondents may resume sales of the toy at any time in the future. Under such circumstances, respondents have not shown good reason why an order to cease and desist from the practices complained about should not be entered to protect the public interest.

ORDER

It is ordered, That respondents Stupell Originals, Inc., a corporation, trading as Stupell Enterprises, Carole Stupell Exclusives, or under any other name, and its officers, and Carole Stupell and Harry Mervis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a toy product designated "Puncherino," or any other product of similar construction or having substantially

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similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that such toy product can be used without danger or risk of injury to the eyes of the user.

(2) Failing to clearly and conspicuously disclose on the package or container in which the toy product is sold that the goggles may fail to protect the eyes of the user from injury.

(3) Furnishing or placing in the hands of jobbers, retailers or dealers in said toy product the means and instrumentalities by and through which they may deceive or mislead the public in the manner or as to the things hereinabove prohibited.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

Respondents are charged with falsely representing that their toy product is safe for use by purchasers and with failing to reveal material facts with respect to the risk of injury resulting from the use of said product, in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner held in his initial decision that the allegations were sustained and ordered respondents to cease and desist from the unlawful practices. Respondents have appealed from this decision.

The toy product, designated "Puncherino," consists of a plastic ball which, when inflated, measures approximately 7 inches in diameter, to which is attached a rubber string. The other end of the string is attached to the center of a pair of goggles made of a rubberized plastic material. The goggles do not contain any glass or transparent plastic material in the eyepieces. Instead, in each section which covers the eye, there are four vertical bars, with spaces between them, which are of the same material as the rest of the goggles. As depicted on the package in which the toy is sold, the ball is to be punched or slapped away from the goggles and retracts toward the goggles, in the same manner as a punching bag.

The complaint charges that the toy is not safe due to the possibility of injury to the user's eyes or face resulting from the rubber string breaking and piercing the spaces between the plastic bars on the goggles.

When sold to the public, the toy is packaged in a transparent plastic container with a heavy sheet of paper attached thereto which,

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in addition to setting forth instructions for use and for inflating the ball, also depicts a boy and a girl each wearing the goggles and striking the ball with their hands, accompanied by the following wording:

NEW PUNCHERINO FUN HEALTHY

Respondents do not deny the possibility of injury to the eye of the user should the rubber string break. Moreover, there is stipulated testimony of injury to the eyes of two children, ages 6 and 7, as a result of the rubber string breaking and retracting through the space between the vertical bars. There is similar stipulated testimony of an adult who was demonstrating the toy to his 6-year-old daughter. In addition, complaint counsel introduced the testimony of two witnesses, both of whom are engaged in the testing of toys, one for Good Housekeeping Institute and the other for Parents' Magazine. Both of these witnesses testified that there is a possibility of injury to the eye through the use of this toy.

The examiner found that, as packaged, the deflated plastic ball is folded over the goggles; and while the toy remains in the package, the goggles are not visible from the outside of the package. In their appeal respondents contend that the hearing examiner erred in so finding. In this regard there is no dispute that the toy which was introduced in evidence at the hearing had been removed from the bag for testing prior thereto. Thus, respondents contend that since the examiner did not have the toy as originally packaged before him, there is no basis in the record for his finding. They state that, in fact, the goggles are clearly visible in the original package and that since the examiner's order is based on an erroneous finding, the order must fall.

At the oral argument on this matter, on December 16, 1964, respondents' counsel offered to introduce as an exhibit the Puncherino toy allegedly packaged in the manner in which it is sold to the public, *i.e.*, with the goggles placed on top of the folded ball where they can be seen by the purchaser. The Commission accepted the toy (Exhibit A) with the express understanding from respondents' counsel that it could be used for the purposes of deciding this case.

We turn first to a consideration of the charge that respondents have falsely represented that the toy is hazard-free and is safe for use by the purchaser, including children. The examiner ruled that the picture on the paper attached to the package is deceptive whereas display posters (CX 2 and CX 4) are not. His conclusion is based on the finding that the vertical bars on the goggles pictured on the

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package appear to be sufficiently close together so as to afford protection to the eyes whereas on the posters the relative size of the rubber string as compared to the size of the open spaces between the vertical bars make evident the possibility that the end of the rubber string may penetrate one of the spaces. We have considered both of these pictorial representations and we are of the opinion that they have a capacity to deceive notwithstanding the space pictured between the bars. Specifically, we refer to the fact that the goggles are pictured on the package and on the poster (CX 2) as containing yellow glass or some other transparent protective material in the eyepieces in addition to the bars. A prospective purchaser cannot determine what this toy is or how it works unless he examines these pictures. Even though the goggles themselves are visible in the package, it is reasonable to assume that protective coverings for the eyepieces, as pictured, are provided. Since the deflated plastic ball is folded in the bag, there is no means by which the customer can tell that the represented shielding has not been enclosed.

The examiner's failure to consider this aspect of the picturizations is obviously in error. We find that by picturing their goggles as having a covering in the eyepieces in addition to the bars, respondents have represented that the toy is safe. Since there is no dispute as to the danger which may result from the breaking of the rubber string, our order will prohibit such representations.

We turn next to a consideration of the charge that respondents' failure to reveal the risk of injury resulting from the use of the toy is deceptive. As previously mentioned, the examiner's ruling that this charge has been sustained is based on his finding that the goggles are not visible in the package when sold to the public. However, respondents contend that since in the exhibit introduced at the oral argument, the prospective purchaser can see that the space between the bars on the goggles is wider than the thickness of the rubber string, the risk of injury is obvious and patent and that therefore no disclosure should be required.

Respondents' argument must be rejected for several reasons. First, while the risk of injury to the eye from the rubber string breaking may be obvious to the person who pauses to consider such possibility, we seriously doubt that the ordinary purchaser would dwell on this eventuality.¹ This is particularly true in the case of children to whom

¹ "The Commission may employ its expertise and envision an advertisement as it would be seen by the public generally 'which includes the ignorant, the unthinking and credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.'" *Nirco Industries, Inc. v. Federal Trade Commission*, 278 F. 2d 337, 342 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

the toy is offered. The price of \$1 or less at which this toy is sold is well within the reach of this class of customer. Moreover, the possibility of the rubber string breaking is certainly not obvious. A very minute examination of the package discloses a small knot in the rubber string at the end which is attached to the plastic ball. Not only is the simple method of attachment not clearly visible, it cannot be ascertained without attempting to unfold the ball in the bag that there is no other means by which the string is secured. Additionally, we think it well within the realm of possibility that in view of modern manufacturing techniques, even a person who pauses to consider may well believe that in a toy which retracts toward the eyes of the user, the retracting element is more than a mere rubber string but is made of some material which will not so readily break.

This toy is designed and intended to be used in such a manner that the rubber string and the ball retract toward the face and eyes of the user. We hold that respondents' failure to disclose that the goggles will not protect the users' eyes is an unfair and deceptive practice.

In reaching this conclusion, the Commission is not laying down a new rule, which would require all sellers to warn the public that their products might break and to list all of the conceivable hazards which might result to the users if their products break, without regard to whether or not the risk of breakage and the consequences therefrom are discernible. The Federal Trade Commission Act imposes no requirement of disclosing the risks of breakage where those risks are obvious or apparent, for in such a case non-disclosure is not deceptive. We merely apply to the facts here the well-established rule that where breakage is likely to occur in the normal use of the product, and the hazards of such breakage are not apparent or obvious, at least to many consumers, non-disclosure of such risk is deceptive and therefore unlawful. The danger that the rubber string attached to the ball in the "Puncherino" toy will break and, in breaking, injure the user's eye may be obvious to a member of this Commission who has carefully examined the toy and heard extensive arguments and discussion on the question, but we do not think it is obvious to a young child who goes into a toy store and buys "Puncherino" with his dollar.

Most consumers expect and assume, in the absence of some indication to the contrary, that a product marketed to the general public is safe for the use for which it is sold. This assumption and expectation is, we think, especially widespread in the case of products in-

tended for the use of children. Few would imagine that any manufacturer would place on the market a dangerous toy without warning the purchaser of the danger. Thus, at least where the danger is not an obvious one immediately apparent even to the casual purchaser or user, it is an unfair and deceptive trade practice to market such a product without clear disclosure of the danger. "Puncherino" is a dangerous toy, and while the danger is obvious once one's attention is directed to it, we think there are very few purchasers, especially children, who would realize the danger before or at the time of purchase. Whether or not the Commission has the power to ban the sale in interstate commerce of unsafe products as such, it plainly has the power and the duty to prevent the sellers of such products from failing to disclose that they are unsafe, thereby unfairly and deceptively exploiting the consumer's normal expectation that a product placed on the market with no restriction whatever as to its sale is reasonably safe for its intended use.

Finally, respondents contend that there is insufficient evidence to support the examiner's finding that they have maintained a substantial course of trade in this toy product in commerce. Thus, they argue that the record fails to establish that there is sufficient public interest in this proceeding as required by Section 5(b) of the Federal Trade Commission Act.

This argument is without substance. The examiner found, and it is not disputed, that in 1961 and 1962, respondents sold about 378,240 units of this toy product. As of July 9, 1963, respondents had on hand approximately 141,398 units and an additional 190,944 units were stored in a bonded warehouse. Invoices in the record show sales of over 7,800 units of this toy in a few months in 1961 and 1962 from respondents' place of business in New York to customers located in New Jersey, Massachusetts, Pennsylvania and Wisconsin. These invoices are a sufficient indication of interstate sales to warrant a finding that such sales were substantial. Moreover, the extent of the public interest is not controlled entirely by the sales in commerce. In a proceeding such as this, which involves the failure to disclose risk of injury to the eyes through use of the product involved, there can be no doubt as to the interest of the public even though sales in commerce may be relatively small.

On the basis of the foregoing, respondents' appeal is denied. The initial decision is set aside and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

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Opinion

Commissioner Jones concurred in part and dissented in part, and has filed a separate opinion.

CONCURRING IN PART AND DISSENTING IN PART

By JONES, *Commissioner*:

I concur in the Commission's conclusion that a cease and desist order should issue against respondent by reason of the fact that respondent falsely represented in its display material and on the package containing respondent's toy that the goggles contained in the packaged toy have yellow glass or other protective material when in fact no such protective material is present.

I do not agree with the Commission's conclusion that respondent has further misrepresented its product because of its failure to make an affirmative statement on its package and display material that the goggles may fail to protect the user's eyes from injury caused by the possibility of the rubber string breaking and penetrating one of the open spaces between the vertical bars on the goggles.

Respondent has made no affirmative representation that its toy is either safe or nonbreakable or hazard-free in the event it does break. Thus it is respondent's *silence*, not its affirmative statements, about its products which is found by the Commission to be misleading. Deceptions by silence have heretofore been limited by the Commission and the courts to a narrow and definable range of situations. Thus sellers have been required to disclose the true properties of their products where the appearance of those products, absent disclosure, would mislead the public (e.g., simulated wood products which are in fact paper,¹ fabrics which look like wool but are in fact rayon,² or oil products which are not crude oil but in fact used oil³). Similarly, silence respecting the foreign origin of a product has been deemed misleading where the public will assume domestic origin absent disclosure.⁴ In the category of hazardous products—a situation most closely analogous to the Commission's decision here—sellers have been required to disclose the nature of any hazard attaching to the normal use of the product where such hazard is latent, *i.e.*, not apparent to or discernible by the purchaser. Thus the presence of toxic materials in a photographic film brush or in plastic

¹ *Haskelite Mfg. Corp. v. F.T.C.*, 127 F. 2d 765 (7th Cir. 1942).

² *Academy Knitted Fabrics Corp.*, 49 F.T.C. 697 (1952); *Seymour Dress & Blouse Co.*, 49 F.T.C. 1278 (1953).

³ *Mohawk Refining Corp. v. F.T.C.*, 263 F. 2d 818 (3d Cir. 1959), *cert. denied*, 361 U.S. 814 (1959).

⁴ *Segal v. F.T.C.*, 142 F. 2d 255 (2d Cir. 1944); *Manco Watch Strap Co., Inc., et al.*, 60 F.T.C. 495 (1962).

metal menders which can cause injury to the user in the course of his normal use of the product has been required to be disclosed.⁵ Similarly, sellers of plastic toy playhouses or of flammable rayon products were required to disclose the hazards of asphyxiation or fire which inhered in these products and which, absent disclosure, could not be known or detected by the purchaser.⁶

In the instant case, however, respondent's toy does not by its appearance convey any deceptive or false impression to the prospective customer about its safeness or nonbreakable properties. In fact every feature of the toy to which the Commission refers, *i.e.* the fact that the ball is affixed to the goggles by a rubber string and the fact that the rubber string is thin and might break, is clearly visible to the customer. Moreover, respondent not only placed a picture of the toy being used on its package but it sold its toy in a transparent envelope so that every customer was able to see the actual toy itself as well as the picture of how it was used.

The Commission, therefore, in reaching its conclusion respecting respondent's deception here, in my view is laying down a new rule despite its disclaimer of any such intention. Since I can conceive of no way by which respondent could have disclosed more vividly the exact properties of its toy which the Commission now claims are concealed and not detectable, I cannot agree that its decision here is merely following the established principle that where risks exist and are not discernible, nondisclosure of them is deceptive.

Accordingly, I am forced to conclude that if the Commission's instant interpretation of what constitutes deception in the sale of toys is followed by it in future cases, all sellers of children's toys will have to place an affirmative warning on their toys that the toys might break and that such sellers will, in addition, have to disclose all the conceivable hazards which might result to the users if their products break. This is manifestly an impossible burden to place on sellers. Nor is such a burden necessary to impose on sellers in order to protect consumers. Where, as here, the risks inhering in the use of respondent's toy are apparent from even the most casual inspection, the Commission should stay its hand. It is obvious that the Commission can never protect *all* consumers from their own inattention. Moreover, it is doubtful that these consumers who will not "pause to consider" the eventuality of the risks, even though apparent, will be likely to pause any more attentively to consider

⁵ *Nuclear Products Co.*, 49 F.T.C. 229 (1952); *The Martin-Senour Co.*, F.T.C. Docket C-209, August 31, 1962.

⁶ *Novel Mfg. Corp.*, 60 F.T.C. 1748 (1962); *Fisher & De Ritis*, 49 F.T.C. 77 (1952).

such risks by reason of any additional statement concerning such risks which the Commission might require to be placed on the packaged toy. Yet these are the very consumers whose inattentiveness the Commission relies upon as the reason for requiring an affirmative disclosure.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on November 1, 1963, charging them with engaging in unfair and deceptive acts and practices and unfair methods of competition in the sale of a toy product. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of the allegations of the complaint were received into the record. Respondents did not introduce any testimony or other evidence in defense of the charges. In an initial decision filed on July 23, 1964, the hearing examiner found that the charges had been sustained by the evidence and issued his order to cease and desist.

The Commission having considered respondents' appeal from the initial decision and the entire record in this proceeding, and having ruled on said appeal, and having determined that the initial decision should be vacated and set aside, the Commission further finds this proceeding is in the public interest and now makes its findings as to the facts, conclusions and order, which together with the accompanying opinion, shall be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Stupell Originals, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1749 First Avenue, New York, New York. Said corporation trades under the names of Stupell Enterprises and Carole Stupell Exclusives, at the same address.

Individual respondents Carole Stupell and Harry Mervis are officers of said corporate respondent. They direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

2. Respondents have been engaged in the offering for sale, sale and distribution of a toy product designated "Puncherino" to wholesale distributors, jobbers and retailers, for resale to the public. Total

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sales of said product during the years 1961 and 1962 amounted to approximately 378,240 units, having a total wholesale value of approximately \$71,900. As of July 9, 1963, respondents had on hand approximately 141,398 units of said toy product and an additional 190,944 units were stored in a bonded warehouse subject to withdrawal by respondents.

3. In the course and conduct of their business, respondents have caused said toy product, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States. Invoices in the record establish that during the years 1961 and 1962, respondents maintained a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. The toy product "Puncherino" consists of a plastic ball which when inflated measures approximately 7 inches in diameter, to which is attached a rubber string. The other end of the string is attached to the center of a device shaped like goggles. The goggles are made of a rubberized plastic material and are intended to be worn over the upper part of the face, covering the eyes. The goggles do not contain any glass or transparent material in that portion which covers the eyes. Instead, in each section which covers the eyes there are four vertical bars, with spaces between them. The vertical bars are of the same material as the rest of the goggles, are about 1/16th of an inch in width, and are placed about 5/16ths of an inch apart.

5. When sold by respondents to wholesale distributors jobbers and retailers, and when resold to the public, the toy which includes the deflated plastic ball, the rubber string and goggles, is contained in a transparent plastic bag. Attached to the top of the package is a folded sheet of heavy paper approximately 4 x 7 inches in size. On the front of the paper is a depiction of a boy and a girl, each wearing the goggles and using the toy, and the following wording:

NEW PUNCHERINO FUN HEALTHY

6. The appeal of the toy "Puncherino" is principally to children. After the components have been removed from the container, the plastic ball inflated as directed, and the goggles placed on the face of the user, the ball is intended to be struck or punched rhythmically away from the face. The resiliency of the rubber string is intended to permit the ball, when struck, to travel away from the goggles and then retract toward the goggles.

7. The complaint charges that, by the use of certain statements and depictions, respondents have represented that said toy product is hazard-free and safe for use by the purchaser, including children. The complaint further charges that the container in which the toy is sold is misleading in that it fails to reveal material facts with respect to the risk of injury resulting from the use of said product as directed on the container.

8. Respondents do not deny the possibility of injury to the eyes of the user in case of breakage of the rubber string. Stipulated testimony establishes that two children, ages 6 and 7, sustained injury to their eyes as a result of the rubber string breaking and retracting through the space between the vertical bars of the goggles. There is similar stipulated testimony of an adult who was demonstrating the toy to his 6-year-old daughter. The testimony of two witnesses who are engaged in testing toys for private concerns further establishes the likelihood of injury to the eyes through the use of this toy.

9. On the paper attached to the package (CX 11 and Exhibit A) and on a display poster (CX 2), the goggles are pictured as containing yellow glass or other transparent protective material covering the eyes of the user. Additionally, on the goggles pictured on the package, the space between the vertical bars appears to be sufficiently narrow so as to prevent entry of the rubber string. By and through the use of these depictions, respondents have represented that the goggles afford protection to the eyes of the user in case of breakage of the rubber string. Such representations are false, misleading and deceptive.

10. In the package introduced by respondents' counsel, the goggles are visible. However, the possibility of the rubber string breaking is not readily apparent nor is such possibility likely to be considered by the prospective purchaser. Neither the manner in which the string is attached to the ball nor the fact that the string is made of rubber rather than some more durable material can be readily ascertained. Moreover, the prospective purchaser is unable to determine that no protective shielding for the eyepieces has been provided in the package.

This toy is offered to children and retails at one dollar or less. It is intended to be used in such a manner that the rubber string retracts toward the eyes of the user. In view of the intended use of the toy and the representations made, respondents' failure to disclose on the package that the goggles may fail to protect the user's eyes is misleading and deceptive.

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11. By and through the use of the foregoing practices, respondents have placed in the hands of retailers and others the means and instrumentalities for misleading and deceiving the public into believing that said toy product is safe for use by the purchaser.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Stupell Originals, Inc., a corporation, trading as Stupell Enterprises, Carole Stupell Exclusives, or under any other name, and its officers, and Carole Stupell and Harry Mervis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of a toy product designated "Puncherino," or any other product of similar construction or having substantially similar properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that such toy product can be used without danger or risk of injury to the eyes of the user.

(2) Failing to clearly and conspicuously disclose on the package or container in which the toy product is sold that the use of such toy product involves a danger or risk of injury to the eyes of the user if the rubber string should break.

(3) Furnishing or placing in the hands of jobbers, retailers or dealers in said toy product the means and instrumentalities by and through which they may deceive or mislead the public in the manner or as to the things hereinabove prohibited.

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

Commissioner Jones concurring in part and dissenting in part.

Complaint

IN THE MATTER OF

TELEVISION SERVICE ASSOCIATION OF
DELAWARE VALLEY ET AL.

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

Docket 8623. Complaint, May 13, 1964—Decision, Feb. 19, 1965

Order requiring a trade association of television and radio repairmen and its members, of Philadelphia, Pa., engaged in the repair service of television sets, radios, and other electronic devices, to cease entering into and carrying out any planned course of action to coerce, intimidate, or boycott wholesalers or distributors of electronic equipment or component parts who also sell such products at retail, to refrain from interfering with the practices in which such wholesalers conduct their business, and to cease using a policy to "black list" wholesalers or distributors who sell such products at retail and to "white list" wholesalers or distributors who refuse to sell such products at retail.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Sec. 41, et seq.), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties hereinafter referred to as respondents have violated the provisions of Section 5 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Television Service Association of Delaware Valley, a corporation, sometimes hereinafter referred to as TSA of Delaware Valley, is a non-profit trade association, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with offices and its principal place of business at 4710 Old York Road, Philadelphia, Pennsylvania. Respondent TSA of Delaware Valley was organized and is maintained ostensibly to promote the welfare and mutual interest of the radio-television and electronic industry. The membership of said respondent constitutes a class so numerous and changing as to make it impracticable to name individually each and every member as a respondent herein. Accordingly, the following members of respondent TSA of Delaware Valley are herein named as respondents in their individual capacities, as members of respondent TSA of Delaware Valley, as past or present officers, directors or in other official capacities of said corpo-