

Complaint

IN THE MATTER OF
CARLTON FREDERICKSORDER OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 8668. Complaint, Oct. 25, 1965—Decision, Feb. 20, 1967*

Order dismissing a complaint against an author and radio lecturer on diet and nutrition which charged respondent with allegedly misrepresenting his academic background and status, the number of radio stations carrying his program, and the copyright data of his book on diets.

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 Carlton Fredericks, hereinafter referred to as respondent, has 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 Carlton Fredericks is an individual whose home address is Spring Valley, Rockland County, New York, and whose business address is 1440 Broadway, New York, New York.

PAR. 2. Respondent is now, and has been for some time last past, engaged in selling and distributing a radio program concerning nutrition, diet and health. Respondent's said program is recorded on tape by him at his home and place of business, and said tapes are then distributed by respondent or his agents to various radio stations throughout the United States. Respondent also writes, and has written and published, books and pamphlets concerned with nutrition, diet and health, which books and pamphlets are sold and distributed by respondent or his agents to purchasers thereof located in various States of the United States.

Respondent maintains, and at all times mentioned herein has maintained, a substantial trade in said radio programs, books and pamphlets in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of his business and for the purpose of inducing the sale and distribution of his radio program recordings to various radio stations throughout the United States, and of his books and pamphlets to the purchasing public, respond-

ent has made certain statements and representations with respect thereto in advertisements and promotional material, including advertising appearing in trade magazines and newspapers, and in brochures and circulars.

PAR. 4. Among and typical, but not all inclusive, of the statements and representations made and appearing in said advertisements are the following:

The scripts of the [respondent's] programs have been translated into braille by the Library of Congress * * *.

His [respondent's] Ph.D. dissertation * * * was entirely in the field of nutrition * * *.

He [respondent] taught Nutrition * * * as a member of the faculty of the School of Education of New York University * * *.

Visiting Lecturer * * * College of Pharmacy, Columbia [University].

For the public services rendered in his broadcasts, Dr. Fredericks has received an honorary Doctorate of Humanities degree * * *.

Dr. Fredericks is a Founding Fellow in the International College of Nutrition, and has been awarded the Diplomate by this college.

Dr. Fredericks' biography appears in: * * * [the] National Cyclopedica of American Biography.

These Top Stations KNOW Carlton Fredericks SELLS * * * WEIV, Ithaca, New York, WOIV, Syracuse, New York, WJIV, Albany, New York * * *.

Eat, Live and Be Merry—a New Book by Carlton Fredericks * * * Copyright 1961, by Nutrition Surveys, Inc.

PAR. 5. Through the use of said statements and representations, and of others not specifically set out herein, respondent has represented, and now represents, directly or by implication in his advertising:

1. That scripts of respondent's radio programs have been reproduced in braille by, or at the instigation of, the Library of Congress, an agency of the United States Government;

2. That respondent's doctoral dissertation or thesis was written on the subject of, or in the field of, the science of nutrition;

3. That respondent at one time held or enjoyed the rank of member of the faculty of New York University, and of Visiting Lecturer in the College of Pharmacy of Columbia University;

4. That respondent has received an honorary Doctorate of Humanities degree from an institution or academic body lawfully authorized and empowered to award the same;

5. That respondent has been awarded the degree or status of "diplomate" by an institution or academic body lawfully authorized and empowered to award the same;

6. That respondent's biography has been published in a cer-

tain encyclopedia of professional biography, *viz.*, "The National Cyclopedia of American Biography";

7. That certain radio stations, *viz.*, Station WEIV, Ithaca, New York, Station WOIV, Syracuse, New York, and Station WJIV, Albany, New York, broadcast respondent's radio program;

8. That a certain book, *viz.*, "Eat, Live and Be Merry," was a "new" book authored by respondent, and was copyrighted in the year 1961 by "Nutrition Surveys, Inc."

PAR. 6. In truth and in fact:

1. Scripts of respondent's radio programs have not been reproduced in braille by, or at the instigation of, the Library of Congress or any other agency of the United States Government;

2. Respondent's doctoral dissertation or thesis was not written on the subject of, in the field of, nor was it concerned with, the science of nutrition;

3. Respondent has at no time been a member of the faculty of New York University, nor has he held the rank of Visiting Lecturer in the College of Pharmacy of Columbia University, nor has he held a teaching relationship with any institution of learning other than Fairleigh Dickinson University, Rutherford, New Jersey;

4. Respondent has not received the honorary degree of Doctor of Humanities from an academic institution lawfully entitled or empowered to award or grant the same, but on the contrary has been "awarded" the said degree by a foreign school of theological learning which said school is not entitled or empowered by its charter to award or grant the same;

5. Respondent has not been awarded the degree or status of "diplomate" by any institution or academic body lawfully authorized or empowered to award the same;

6. Respondent's biography has not appeared in the publication entitled "The National Cyclopedia of American Biography";

7. Radio Stations WEIV (Ithaca, New York), WOIV (Syracuse, New York), and WJIV (Albany, New York) have not broadcast respondent's radio program;

8. The edition of the book referred to as "Eat, Live and Be Merry, a new book by Carlton Fredericks * * * copyright 1961 by Nutrition Surveys, Inc." was not a "new" and previously unpublished book, but on the contrary was essentially the same book which had been published under that title in 1951; said book was not copyrighted in 1961 and was never copyrighted by "Nutrition Surveys, Inc."

Therefore, the statements and representations made by re-

spondent as set forth and referred to in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. The use by respondent of the foregoing false, misleading and deceptive statements and representations in advertising has had and now has the tendency and capacity to mislead and deceive those purchasing radio programs, and the purchasing public, into the mistaken belief that such statements and representations were, and are, true, and into substantial purchases of respondent's radio programs and books and pamphlets respectively by reason thereof.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Richard Whittington Whitlock and *Mr. Edward F. Downs*, supporting the complaint.

Mr. Milton A. Bass (assisted by *Mr. Robert Ullman*), of *Bass & Friend*, New York, N.Y., for respondent.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JULY 11, 1966

The complaint herein, issued on October 25, 1965, alleges the making of deceptive statements and misrepresentations constituting violation of the Federal Trade Commission Act, presumably Section 5 in particular. An answer was interposed, followed (on order of the examiner) by an amended answer. Various motions were filed directed to the complaint and the answer, and seeking discovery, as to which the examiner made various rulings.

A nonpublic prehearing conference was held, and is reported in the stenographic transcript, consisting of 99 pages. The examiner issued a detailed prehearing conference order of directions dated January 12, 1966, followed later by certain supplementary directions.

There was considerable discovery. Each side submitted lists of proposed witnesses and exhibits, and also indicated the issue to be proved by each witness and exhibit. Copies of exhibits were exchanged. Both sides were very cooperative.

The Commission authorized hearings in both Washington, D.C., and New York, adopting a recommendation by the examiner

that this be done pursuant to a plan obviating the necessity for going to New York more than once. The hearing commenced in New York City on March 30, 1966, where it continued until April 8, and concluded with one day in Washington, D.C., on April 12. There is a hearing transcript of 969 pages.

Practically all of the witnesses were called by complaint counsel, most of them being faculty members of New York University, where respondent took his Ph.D. and also briefly taught; they testified as to the meaning, particularly at said University, of a Ph.D. thesis "in nutrition" and of "faculty member," the subjects of two alleged misrepresentations. Although complaint counsel gave notice that they were calling two faculty members of the School of Pharmacy of Columbia University on whether or not respondent was a "visiting lecturer" there, they were not called, nor was any evidence presented as to whether or not respondent was a "visiting lecturer" there.

Complaint counsel also had listed a proposed witness from Canada, stating that he had specialized knowledge on Canadian academic institutions, on the issue of the authority of a certain institution there to issue an honorary doctorate degree held or claimed to be held by respondent; however, they did not produce him, nor any other specialized witness, or any general proof of Canadian law as to the authority to issue honorary degrees.

Paragraph Two of the complaint alleges that respondent has been engaged in selling and distributing a radio program concerning nutrition, diet and health, that the program is prerecorded by him and distributed by him or his agents to various radio stations throughout the United States. It also alleges that he has written and published various books and pamphlets, also concerning nutrition, diet and health, although the proof mainly and predominately concerns one book, to wit, "Eat, Live and Be Merry." Interstate commerce is duly pleaded, and does not seem to be seriously contested as such. But respondent strenuously denies that *he* made the representations in commerce, rather than independent third parties.

Paragraph Three of the complaint alleges that in the course of his business, and for the purpose of inducing the sale of his radio program recordings to radio stations, and of his books and pamphlets to the purchasing public, respondent has made "certain statements and representations with respect thereto in advertisements and promotional material, including advertising appearing in trade magazines and newspapers, and in brochures and circulars."

Said paragraph three expressly relates to representations not only to "radio stations" in connection with his radio program, but to the "purchasing public" in connection with his writings. However, the proof is, for all practical purposes, that all but one of the representations were made to radio stations, in connection with the sale of respondent's radio program. Only one representation was made to the general public, in connection with a book, pamphlet, or other writing, to wit, the book "Eat, Live and Be Merry."

Moreover, apart from the book representation to the public, all of the proved representations to radio stations are made in a single "large advertisement" in Broadcasting Magazine, except for one of them made in a single "small advertisement" in Broadcasting Magazine; both advertisements appeared as far back as 1961. Furthermore, both of these advertisements were subscribed by CF Productions, Inc., not by respondent, and were inserted by said company.

It will also be noted that the complaint alleges representations "in advertisements and promotional material." Complaint counsel at the hearing, in order to bolster up their proof, contended that various Who's Who and similar biographical sketches of the respondent come within the meaning of "advertisements and promotional material." The examiner ruled that they are neither advertisements nor promotional material—although relevant on the issue of respondent's responsibility for the derived representations in the advertising herein, since he referred the drafter of the advertising to the biographical sketches.

In general, the hearing examiner finds in this decision that complaint counsel have completely failed in their proof as to all the alleged misrepresentations to the radio stations, and have succeeded in their proof only as to the one representation to the general public in connection with the book "Eat, Live and Be Merry." In general, the examiner has found that none of the representations to the radio stations have been proved to be false, except perhaps two which were inadvertent and not worthy of serving as the basis for the issuance of a cease and desist order.

The following is a quotation of paragraph four of the complaint, purporting to quote the specific representations relied on. The subnumbering is added by the examiner but is the same as used in five and six of the complaint:

PAR. 4. Among and typical, but not all inclusive, of the statements and representations made and appearing in said advertisements are the following:

[1] The scripts of the [respondent's] programs have been translated into braille by the Library of Congress * * *.

[2] His [respondent's] Ph.D. dissertation * * * was entirely in the field of nutrition * * *.

[3] He [respondent] taught Nutrition * * * as a member of the faculty of the School of Education of New York University * * *.

Visiting Lecturer * * * College of Pharmacy, Columbia [University].

[4] For the public services rendered in his broadcasts, Dr. Fredericks has received an honorary Doctorate of Humanities degree * * *.

[5] Dr. Fredericks is a Founding Fellow in the International College of Nutrition, and has been awarded the Diplomate by this college.

[6] Dr. Fredericks' biography appears in: * * * [the] National Encyclopedia of American Biography.

[7] These Top Stations KNOW Carlton Fredericks SELLS * * * WEIV, Ithaca, New York, WOIV, Syracuse, New York, WJIV, Albany, New York * * *.

[8] Eat, Live and Be Merry—a New Book by Carlton Fredericks * * * Copyright 1961, by Nutrition Surveys, Inc.

These representations are quoted, but in some instances more fully, in Part FOUR of this decision. There is a fuller quotation herein, particularly as to No. 2 and No. 8, both of which make liberal uses of asterisks; No. 2 also omits a preceding and a following sentence deemed by the examiner to be pertinent.

For convenience, and for further use in captions of various subparts of this decision, the alleged misrepresentations will be listed here in the following cryptic form:

1. *Brailling of radio scripts by Library of Congress.*
2. *Ph.D. thesis in "nutrition."*
3. *Faculty member, New York University.*
Visiting lecturer, School of Pharmacy, Columbia Un.
4. *Honorary Doctor of Humanities.*
5. *"Diplomate."*
6. *National Encyclopedia biographee.*
7. *On Ivy stations—WEIV, WOIV, WJIV.*
8. *New book, Copyright 1961; author thereof.*

Both sides have duly filed proposed findings and conclusions, together with legal argument, as well as supplemental submissions subsequently authorized by the examiner.—Important exhibits are reproduced herein as part of the decision.

FINDINGS OF FACT AND DISCUSSION

All findings of fact in this case are contained herein. Any proposed finding not found here is disallowed, although not necessarily on the ground of lack of proof.

Salient findings of fact are emphasized. Evidentiary facts and

discussion are not, except where unavoidably intertwined with fact.

These "Findings" are subdivided into various parts, which follow the numbering, and essential content, of each of the below paragraphs of the complaint, as follows:

- ONE. Identification of Respondent.
- TWO. His Occupation.—"Commerce."
- THREE. Chargeability as to Representations.
- FOUR. Text of Representations.
- FIVE. Meaning of Representations.
- SIX. Truth or Falsity.
- SEVEN) Substantial Effect.
- EIGHT.) Public Interest or Injury.

The following are typical abbreviations, and their meaning, used herein:

- TR 199—Transcript of testimony—page 199.
- TR 199:3—Same—page 199, line 3.
- CX 1—Complaint counsel's Exhibit 1 in evidence.
- RX 1—Respondent's Exhibit 1 in evidence.
- CPF 9—Complaint counsel's Proposed Findings, number 9.
- RPF 9—Respondent's Proposed Findings, number 9.

Any pending and undecided motions are hereby denied.

ONE

Identification of Respondent

Respondent Carlton Fredericks is an individual whose home address is 5 Patricia Drive, New City, Rockland County, New York State (TR 52:23), and whose business address is in New York City.

TWO

His Occupation.—"Commerce."

Respondent is well known as a radio lecturer on the subject of nutrition, diet, and health. He has a popular radio program on this subject, and most of the challenged representations here concern the advertising of his program addressed to radio stations. His program is ordinarily prerecorded by him in New York, and at home or in his place of business, and the tapes are then sold and distributed by him, or others for him, to various radio stations throughout the United States, the program being widely broadcast—although sometimes his program, or a lecture, may be

broadcast "live." Selling, distributing, and advertising the tapes, has been done, so far as concerns the present case, through CF Productions, Inc., of New York City.

Respondent is also the author of books and pamphlets concerned with nutrition, diet, and health, and is well known as the author of "Eat, Live and Be Merry." Said book, 1961 edition, is directly involved in this case but only in connection with one challenged representation, in two parts, to wit, the "New Book * * * Copyright 1961" representation, on the paperback book's front cover. Said book, in said 1961 edition, as well as the 1951 edition, was sold, published, and distributed by respondent, or others for him, throughout the United States, and widely distributed throughout the country. Said book, in both editions, has been published by Paxton-Slade Publishing Corporation of New York and, presumably, directly distributed by it as the publisher.

The above findings, primarily as to respondent's radio program and his book or books, are not believed by the examiner to be in dispute. They have been pieced together by resort to the complaint, the amended answer, and the Proposed Findings, including supplements, on each side. They are supported by the evidence.

Respondent maintains and at all times mentioned herein has maintained a substantial trade in commerce in his said radio program and his said book or books, and presumably the pamphlets—as "commerce" is defined in the Federal Trade Commission Act. "Commerce" is proved largely through his two "agents" named above, and his close relationship to them, which will be detailed in THREE, *infra*.

As for his radio program, the challenged representations were all inserted by CF Productions, Inc., in two advertisements, both appearing in *Broadcasting Magazine*, circulated throughout the United States. Moreover, the "tapes" were distributed throughout the United States by said CF Productions, Inc.

"Substantiality" of commerce is also proved. Both respondent's program and his writings are, as already found, each widely distributed; and, viewing both together, with their same subject matter, the showing is clear. Substantiality is further indicated by the well-known popularity of books and broadcasts on respondent's subject of nutrition, diet, and health—to the extent, perhaps, of a national fad—so that respondent's books and writings have inevitably been competitive with similar programs and writings authored by others.

The alleged representations proved in this case, both in con-

*nection with advertising respondent's radio program to radio stations and with the "new book" * * * representation advertising his book to the public, were "in commerce" within the meaning of the Federal Trade Commission Act for the purposes of jurisdiction.*

However, and in conclusion, although the requisite commerce is found by the examiner in this case, the finding is dependent on the finding in THREE hereof that respondent is chargeable with the representations made by others.

"Commerce" does not seem to be a real issue in this case, at least not as such.

Paragraph Two of the complaint alleges, in the first paragraph thereof, the movement of respondent's radio "tapes" and his writings throughout the United States:

The second paragraph of Paragraph Two alleges that respondent has maintained a substantial trade in his program and writings "in commerce."

The amended answer (Par. 2) of respondent does deny "each and every allegation" of the complaint and it affirmatively alleges that the "correct facts" are that respondent is "a renowned [radio] commentator" and a "distinguished author" on nutrition, diet, and health.—This may mean, of course, that respondent disassociates himself from any program distributor or book publisher making the representations "in commerce," and that therefore respondent claims he himself is not in commerce. However, this is more a question of the law of agency, a subject which is passed on in Part THREE, *infra*.

Moreover, respondent's formal motion to dismiss the complaint herein, filed on November 20, 1965, although it expressly denies "trade or commerce" (p. 3), does so only on the ground that the complaint "does not present a charge of public interest" (p. 3), citing and quoting (pp. 4,5) *F.T.C. v. Klesner*, 280 U.S. 19.

Respondent's Proposed Findings, in a presentation of 35 pages, does not contain a single reference to "commerce" or "substantial commerce." Furthermore, the sole reference to "jurisdiction" (Conclusions of Law, p. 4) is a naked statement that there is no showing that respondent sold or advertised the radio tapes or books. This again seems to raise the agency question, rather than the commerce question as such.

It is only in his supplemental proposed findings, answering complaint counsel, that respondent, attacking complaint counsel's proposal as to commerce, explicitly states (p. 5) that the "ques-

tion of commerce is very much in dispute and is denied and explained in respondent's answer and discussed in respondent's proposed finding, pages 2 through 4 thereof."

We have already examined respondent's answer, that is, his amended answer, as to how the question of commerce is "denied and explained." We have found that the allegation of "commerce" is not denied in the usual sense, although it is denied in the limited sense that respondent claims to be merely a radio lecturer and writer not bound up by the acts of a program distributor or book publisher coming within the commerce clause.

As for the reference to pages 2 through 4 of respondent's Proposed Findings, we now turn to them and find there simply two proposed findings with discussion to the effect that the radio program and the book or books were not sold by respondent but by C. F. Productions, Inc., and Paxton-Slade, respectively, and that respondent was just a radio performer and writer, nothing more. This again, as in the answer, contends that respondent is out of commerce only by presenting questions of the law of agency, which are treated in this decision in Part THREE.

Of course, the precise question here is whether the challenged representations (as attributable to respondent) were in commerce. Courts are not too strict in finding such requisite commerce. See, for instance, *John A. Guziak v. F.T.C.* (U.S.C.A. 8th, June 8, 1966) [8 S.&D. 188].

Finally, it may be noted here that, inasmuch as the decision herein finds no violation except as to the "new book" representation, the commerce question is moot except in respect to the "new book" representation, made to the general public. The commerce question is therefore hardly important as to the other representations directed to radio stations through the two advertisements in *Broadcasting Magazine*.

There are not too many statistics, but the following note is in order: First of all, there is no doubt that respondent's radio talks and his books are intertwined in his nation-wide coverage. At its apex, he testified, possibly as many as 300 stations carried his program, scattered over the whole country (TR 54:19-22). The 1951 edition of his book sold to the extent of possibly half a million copies (TR 497:7), throughout the country (TR 493:25-494:2). There are no figures in the record for the 1961 book, the book in question here, but this is simply the same book, with a few minor corrections, with the same publisher as the 1951 book (SIX (8), *infra*). The 1961 book sold until sometime in 1964 (TR 498:22-24).

THREE

Chargeability as to Representations

The statements and representations as quoted in the complaint are set forth in part FOUR below, although with some supplementation. All these statements and representations were made to radio stations, i.e., readers of *Broadcasting Magazine*, for the purpose of selling respondent's radio programs—except for No. 8 (New book [Copyright 1961]) made to book readers or the general public, on respondent's paperback book itself, for the purpose of selling same.¹

First, in the course and conduct of his business and for the purpose of inducing the sale and distribution of his radio program recordings to various radio stations throughout the United States, respondent has made, or is chargeable with having made, as will be shown below, certain but not all of these statements and representations, with respect thereto. These statements and representations, i.e., to radio stations, were all made, except one, in a single full-page advertisement in *Broadcasting Magazine*, dated November 20, 1961, the so-called "large advertisement."¹ The one exception, No. 7 (Ivy stations) was in an advertisement in the same magazine, dated November 6, 1961, the so-called "small advertisement"—one of the representations which respondent is held not chargeable with having made.

Both advertisements were inserted and subscribed by C. F. Productions, Inc., found here to be sufficiently respondent's agent, and held out as such by its initials referring to respondent's name with respondent's acquiescence.

The examiner holds that respondent so made, or is chargeable with having made, as distinguished from C. F. Productions, Inc., such statements and representations except that he is not chargeable with the following, for the reasons hereunder indicated:

No. 3 ("Visiting Lecturer" portion)—Not in advertisement. No evidence on falsity. [Second part of No. 3.]

No. 5 (*Diplomate*)—Not furnished by respondent. Respondent promptly "stopped" it.

No. 6 (*In National Encyclopedia*)—Complete inadvertence; merely premature. Also *de minimis*.

¹ Representations similar to No. 1 (Braille by Library of Congress) also appear on the outside back cover of respondent's books, thus reaching the general public. For various reasons, including nonfalsity, this is an unimportant qualification to the above statement. See discussion at end of this Part THREE entitled *Book Representations*—latter part, entitled *Outside Back Cover, Braille Representation* (No. 1).

No. 7 (*On Ivy Stations*)—Not furnished by respondent. Also *de minimis*. [No. 7 is in "small advertisement."]

(Complaint counsel in their submissions after the hearing moved to reopen the hearing, so that they might rely on statements similar to the "Visiting Lecturer" portion of No. 3, and call witnesses not produced at the hearing to prove falsity. This motion has been denied, as set forth herein.)

Second, in the course and conduct of his occupation as a writer and for the purpose of inducing the sale and distribution of his book "Eat, Live and Be Merry" (CX 45) to the purchasing public, respondent made, or is chargeable with having made, as distinguished from C. F. Productions, Inc., a certain statement or representations in respect thereto on the outside front cover of said paperback book, namely that it was a "new book" (No. 8, supra), which statement may be read together with the date 1961 of the copyright notice inside the book.

However, said "Copyright 1961" portion of No. 8 is not held to be a representation as such as distinguished from a copyright notice² or at least not a representation as such chargeable to respondent.

More detailed discussion and findings as to both the radio program and the book representations will now be set forth.

Large Advertisement

In General.—The large advertisement contains representations 1 through 6—except, as already stated, the second part (Visiting Lecturer) of No. 3, which is not to be found therein or in any other promotional material (and as to which there is no proof of falsity).

The question as to respondent's liability for the "large advertisement" subscribed and inserted by C. F. Productions, Inc., is not too critical in this case, inasmuch as the examiner finds that the representations have not been proved to be false or, in some instances, not chargeable to respondent for special reasons. (A similar observation also applies to the "small advertisement" containing representation No. 7 (*Ivy stations*) found to be not chargeable to respondent.)

The examiner holds that C. F. Productions, Inc., was sufficiently respondent's agent, and by reason of having his initials in its name with his acquiescence, sufficiently his *apparent agent*, to hold him responsible for all representations (subject to any special

² Except that it is held that it is a representation (although not by respondent) that it was registered in the Copyright Office.

exception) in the advertising, provided he furnished the information contained therein. In other words, respondent is liable and chargeable to the extent that the representations were based on information furnished by him to the company or made available by him through the Who's Who and other biographical volumes called to its attention by respondent, knowing, of course, the use to which they would be put (and put in commerce).

This holding of the examiner eliminates the second part (Visiting Lecturer) of No. 3, since it is not even in the advertisement, or any other promotional material. The holding more pointedly eliminates No. 5 (Diplomate), which was not made on information furnished by respondent, nor contained in the biographical volumes he called to the company's attention. The general part of the holding does not, to be sure, eliminate No. 6 (National Cyclopaedia), but the examiner, as a special exception, eliminates this representation No. 6 as *de minimis* inadvertence and merely a premature announcement of respondent's listing in the encyclopedia. (This ruling also eliminates No. 7 (Ivy stations) of the small advertisement since the Ivy station information was not supplied by respondent, and also since said No. 7 is a *de minimis* inadvertence.)

In order to understand the picture better, some background facts will now be set forth briefly, with further facts and further transcript references to follow later in this discussion.

C. F. Productions, Inc., was organized in 1959 or 1960 (TR 68:6) primarily by two gentlemen, Mr. Nathan and Mr. Curtis. Its business was to sell radio shows, and apparently to concentrate on respondent's show in particular. The two men had in mind that respondent would join in organizing the corporation (TR 92:10), since he was to be their first account (TR 92:9), if not their only basic account. That's how it came about that they used the initials C. F. in the name (TR 92), which he did nothing to stop (TR 99:23). However, instead of actually becoming part of the corporation, respondent signed a contract (CX 10) whereby the corporation syndicated his radio show and he was to obtain 80 percent of the gross, the company to retain 20 percent as "syndicator" or "sales organization" (TR 96:7—respondent's characterizations).

Curtis owned 50 percent of the stock of the company and Nathan the other 50 percent (CX 13 C-D).

The corporation used as an advertising company, to wit, Curtis Advertising Company, closely connected with it: Curtis and his wife were the sole stockholders of the advertising company, which,

also, was in the same building as C. F. Productions, Inc. Mr. Curtis or Mr. Nathan (TR 87:21) got up the "large advertisement" (and also the "small advertisement").

Respondent himself worked closely with Nathan and Curtis: "They called me on advertising copy. They called me to announce that they had assigned new stations and to ask me to cut promotion spots for new stations * * *. They called me to consult about the advisability of taking a given station * * *." (TR 100:10)—The material in the "large advertisement" was compiled on the basis of information supplied by the respondent, either directly or by referring to the biographical volumes, except the Diplomat representation, which he immediately caused to be stopped, after reading the advertisement in the magazine (TR 93:1).—(He did not supply the material (Ivy Stations) in the small advertisement.)

Eventually C. F. Productions, Inc., became inactive, and respondent's wife took over Nathan's 50 percent interest. Respondent says this was to facilitate collection by him of outstanding accounts (TR 95).

As to the advertising, it is, of course, true that it is subscribed by and was composed, as well as inserted, by C. F. Productions, Inc. Respondent contends that this negates that the company acted as respondent's agent, rather than only as an independent contractor or other legal entity, or that respondent is in any way responsible here to radio station readers for the representations contained in the advertising.

However, entirely apart from respondent's exact legal status in relation to the company, the examiner holds that it is clear that respondent must bear responsibility for the representations in the advertisement—subject to any exceptions which may be allowable.

To begin with, respondent is responsible for admittedly furnishing at least most of the information to the company—knowing the use to which the information would be put—either directly or by referring the company to Who's Who and similar volumes containing biographical sketches of himself.

The notable exception to this general responsibility is No. 5 (Diplomat). He merely told the company he had applied for the Diplomat (TR 140:9). Moreover, there is no Diplomat statement in any of the Who's Who or other biographical volumes, to which he referred the company. A further exception is No. 6 (National Encyclopedia), which, as already stated, is merely an

inadvertent and premature representation, and also *de minimis* (merely the last of six publications, five correctly listed).

It should be kept in mind that, except for explainable or inconsequential items, respondent has consistently asserted the truthfulness of these representations derived from the information furnished by him and/or the Who's Who and other biographical volumes, and also should be kept in mind that the examiner finds in respondent's favor thereon, upon the proof or lack of proof in this case.

However, the examiner holds that the fact that respondent himself supplied the information (true or false) or directly made it available, is fairly decisive, apart from exceptions, on the question of respondent's responsibility for the use made of the information so supplied or made available by respondent, knowing the use to which it would be put.

Nevertheless, in the examiner's opinion, equally decisive on the question of general responsibility, is the consideration that the company had apparent authority to bind or speak for respondent, as will now be demonstrated.

First, respondent concededly permitted the company to use the initials C. F., at least after he found out about it; which initials concededly must stand for his own name, Carlton Fredericks. Respondent himself testified: "'CF' represented my initials, undoubtedly" (TR 92:13), although he immediately but unsuccessfully tried to qualify this somewhat. The initials obviously conveyed to radio station readers, in the examiner's opinion, that respondent was intimately identified with the company (as indeed he was in at least some important ways) and they created the effect that he was sponsoring and vouching for the representations.

Second, radio station readers were entitled to regard the company as respondent's agent or distributor having a "standard relationship," with limited functions, to the respondent, as generally understood in the industry. Respondent himself affirmed at the hearing that the company's relationship to him "was a standard relationship * * * standard in the industry" (TR 125: 5-8). Moreover, the surrounding facts in this case hardly support the conclusion in effect propounded by respondent's counsel that the company was an independent contractor. It was not, particularly as concerns its functions relevant here, or was it so regarded in the radio industry.

Finally, apart from the first theory, as expounded above, based on respondent's supplying the company with the information

used in the advertisement, and apart from the second theory of "apparent authority," based upon the use of his initials permitted by him, as well as the industry-known limited power of the company, there is a further consideration.

This further consideration is that, first, on all the facts in this case, and, second, under the wording of the contract between respondent and the company, the company was indeed for all practical purposes in this case an agent or other instrumentality, subject to *strict control by respondent* in respect to important activities, expressly including the content of advertising copy and the consideration that respondent paid for advertisements.

First, the background facts, already partially presented, are of significance:

Respondent testified that the organizers of the company had "had in mind my becoming a member of the corporation (TR 92:10); that is how, he thought, they came to use his initials in the company's name. Why he did not become a "member" is not explained in the testimony, but the fact that the agreement negotiated with them gave him 80 percent of the gross suggests that he stood to gain nothing by organizational identification with the company.

Furthermore, it is curious, and perhaps significant, that respondent's wife eventually obtained and now owns the stock (elsewhere described as 50 percent) formerly held by Nathan (TR 58:13-20)—Respondent explained that the company is now inactive and that this procedure aids him to collect accounts (TR 95).

Finally, it cannot be overlooked that the company actually did begin its activities with respondent's program (TR 92:9) and that, although according to his testimony, the company was free to take on other accounts (TR 57:25), the evidence indicates, as already stated, that respondent's was at least its only one basic account, even though it had other accounts.

We now turn to the written contract itself, between the parties, to show that, entirely apart from the issue of apparent authority, the company as a matter of contract was, at least for the purposes of this case, and particularly as to advertising copy, an agent rather than an independent contractor, and a rather limited type of agent at that:

The written contract with the company expressly provides that advertising or promotional material shall be "subject to the approval of respondent" (CX 10 B, par. 4(a)(3)). This seems to show a more or less classical principal-agent relationship, at least insofar as affects the issue of responsibility for the text of adver-

tisements. The company was definitely no independent contractor in respect to the text of advertising. Respondent himself testified (TR 66:14) that the understanding was "that the copy would be submitted to me for approval, either by reading over the phone or by mail or in person" (TR 66:14). Respondent's counsel himself espouses this position (RPF 3; p. 5) and sets forth appropriate transcript references. The contract also provides that respondent should pay the cost of advertising.³

Indeed, respondent's counsel makes it a major point that the company in this instance did not submit the copy of the advertisement in advance (or discuss it by telephone in advance), which is true, and, presumably, that the respondent is not responsible to the readers of the advertisement, which is a false conclusion. The latter contention is a false conclusion because of the fundamental rule of law that a principal is responsible for the acts of his agent acting within the scope of his authority, or apparent scope of his authority.

However, it should be noted in all fairness that the real thrust of said counsel's argument in this connection is directed against the binding effect on his client of the concededly false representation No. 5 (Diplomate). Counsel stresses, of course, that respondent never supplied this information, and promptly stopped it as soon as he read the advertisement in the magazine (TR 93, 98), with the apparent result that the magazine never carried the same advertisement at all from that time on. The examiner does not, of course, hold in this decision that respondent was chargeable with this "Diplomate" representation, on reasoning which will be further stated in due course.

The contract in this same clause providing for approval by respondent of advertising or promotional material, although authorizing the company to create the same, adds the very significant phrase, "all of the costs thereof to be borne by Producer" (*Id.*; CX 10 B; par. 4(a)(3)). Respondent in his testimony did not claim that any different practice was followed as to the advertising here in question.

Apart from retaining control on advertising copy in respondent, and providing that he pay costs, the said contract itself, dated September 10, 1960, has a number of provisions and references spelling out something much less than an independent contractor relationship of the company with respondent. Complaint counsel have pointed this up in detail in their submissions.

³ CX 10 B, par. 4(a)(3), respondent's testimony confirms this was the practice in respect to Broadcasting Magazine advertising (TR 96:21-22).

The contract describes respondent as "Producer" and the company as "Distributor." It describes the company as having the "organization and staff to perform the necessary functions for the sale, auditing, trafficking and distribution with respect to the syndication" of respondent's radio program (CX 10 A, preamble). The contract states that respondent desires the company to "distribute and sell for broadcast this Show" (*Id.*).

The contract also provides that respondent, among other things, shall be "solely responsible" (CX 10 A; par. 2) for editorial content of his show and similar matters. Moreover, the contract in providing for the company's right to make contracts with radio stations uses the words "in its name and/or in the name and on behalf of Producer" (CX 10 C; par. 4(b)).

The contract provides that respondent and the company shall "jointly determine the price to the stations" for the radio program, and shall jointly determine the term or duration of each contract (*Id.*).

The contract states that "every contract with a station must require an acceptance of any advertiser to this Show by the Producer," and "shall provide that the broadcast time of the Show shall be subject to the approval of the Producer" (*Id.*).

The contract provides that the company has the right to bring actions for unauthorized broadcasts "provided, however, that the approval of Producer shall be obtained in each instance * * *" (CX 10 D; par. 5).

The contract provides that respondent agrees to indemnify and hold the company harmless for suits and claims arising out of broadcasts, including liability and slander claims (CX 10 F; par. 8).

The contract, as already stated, gives respondent 80 percent of gross proceeds, the company retaining 20 percent.

The above, in the examiner's opinion, is a fairly impressive enumeration, but respondent's counsel relies on the following clause in the contract (CX 10 H):

12. Nothing herein contained shall constitute a partnership or joint venture between the parties, nor shall Distributor be deemed an employee of Producer in the performance of any of its duties hereunder.

In the examiner's opinion, this paragraph of the contract does not negate the company's status as an agent, in a general sense, and certainly does not do so for the purposes of this case before an administrative body. The paragraph expressly interdicts the construction only of a "partnership or joint venture" between

the parties, or a construction holding the company as an "employee." Furthermore, it is the examiner's opinion that even stronger language, including words expressly interdicting a construction of a principal-agent relationship, would not be conclusive here, where all the facts, in the light of administrative law decisions, will determine the company's actual legal status for the purposes of this case.

In determining the liability of respondent for representations in the large advertisement (and the small advertisement as well), and proper exceptions to such liability or chargeability, the examiner has been guided by the following adjudicated cases:

Libbey-Owens-Ford Glass Company v. F.T.C., 352 F. 2d 415 (6th Cir. Nov. 1965);

General Motors Corporation v. F.T.C. (companion case to above; same citation);

Regina Corporation v. F.T.C., 322 F. 2d 765, 768 (3rd Cir. 1963);

Charles A. Brewer & Sons v. F.T.C., 158 F. 2d 74, 77 (6th Cir. 1946);

Goodman v. F.T.C., 244 F. 2d 584, 590, 591 (9th Cir. 1957);

Standard Distributors, Inc. v. F.T.C.,⁴ 211 F. 2d 7, 13 (2nd Cir. 1954).

(The last two are, to be sure, "salesmen" cases, but they announce broad principles obviously applicable here.)

First of all, all these cases amply demonstrate, in the examiner's opinion, that in determining whether or not an alleged principal is bound by the acts of his alleged agent, the Federal Trade Commission is not bound by any strict common law rules as to what does or does not constitute a principal and agent relationship. On the contrary, the facts of each case, and presumably of each situation, should control. The real question thus is, perhaps, whether and under what circumstances it is fair and realistic to hold a respondent responsible for representations made by another—i.e., as here, representations in advertisements as to respondent's product or work. The Commission, in the exercise of its expertise, has special qualifications to determine this.

Second, as demonstrated particularly by the fairly recent *Libbey Glass* case (6th Cir. Nov. 1965), courts are liberal and forthright in affirming Commission rulings fastening liability on respondents for representations made by others. The Libbey Glass concern was held, as held by the Commission, to be responsible

⁴ See also *In the Matter of Wilmington Chemical Corporation*, D. 8648 (F.T.C., June 17, 1966), affirming Hearing Examiner Moore.

for false "mock-up" TV advertising perpetrated by its advertising agency, through a filming company. *General Motors*, in the companion case, was held liable for its similar "mock-up" advertising (although only a single commercial) through its advertising agency—as also held by the Commission.

The advertising purported to show the superiority of Libbey safety plate glass, used in all of the windows of GM cars, over safety sheet glass used in the side and rear windows of non-GM cars.—Of course, the name of the advertising agency, or of any other third party, was not featured. Respondent here seeks to distinguish the case at bar because of this.

The examiner, however, relates the *Libbey* case to the one at bar by the use here, with respondent's acquiescence, of CF, his initials, in the syndicating company's name as appearing in the subscription to the advertising. The examiner thus strikes down the distinction, sought to be drawn by respondent's counsel, between the *Libbey Glass* case (including the *General Motors* case with its special facts) and the case at bar. To this point of the initials must be added the *more important* factor that in the case at bar respondent admittedly supplied the company with the information used in the representations except as noted herein. The examiner, as already made clear, finds the respondent responsible for the advertisements in the present case only when both elements are present, namely the use of CF in the subscription to the advertisements *and* respondent's having supplied the information; even if both elements are present, the examiner finds no responsibility in special situations, at least no responsibility warranting an order.

However, the element of furnishing the material or ideas used in the representations, which is present here but not in *Libbey Glass-General Motors*, seems to be controlling in any event.

Thus the case at bar by reason of the subscription with his initials in the advertising, suggesting respondent's sponsorship, is a somewhat stronger one for liability than *Libbey*; and by reason of respondent's having furnished the information in the advertisement it is definitely stronger.

Moreover, paying for the advertisement-representations, even only part payment, is a factor given weight in determining that there is liability. Libbey paid the advertising agency, and respondent here, under his contract and apparent practice, was responsible for paying the advertising by CF Productions, Inc.

Respondent here takes some oblique comfort in the consideration that the Commission did not hold GM liable for the TV

advertising placed through its advertising agency by Libbey, which was working together with GM—Libbey spending \$3 million for advertising and GM buying the Libbey glass. But the Commission simply did not decide this particular liability question one way or the other (Commission Opinion, D. 7643, p. 8, July 16, 1963). It explained that GM's liability was demonstrated by GM's own TV advertising entirely apart from Libbey's.

It is significant that—although the Commission found Libbey responsible for the advertising perpetrated by its advertising agency on the theory that there was a definite principal and agent relationship (D. 7643, p. 11)—the Court of Appeals reached the same result by regarding, or assuming that the agency was an “independent contractor.” The Court of Appeals opinion states (p. 418):

In our opinion LOF [Libbey Glass] may not delegate its advertising to an independent contractor and escape liability for the acts of its advertising agency and film producer in advertising LOF products.

Earlier cases clearly anticipate the thinking expounded in *Libbey Glass*.

In *Regina* (3rd Cir. 1963), for instance, the respondent manufacturer furnished the retailer advertisers with suggested list prices, which the manufacturer knew were the exception, not the rule. The retailers published these inflated prices alongside their advertised prices, *i.e.*, in newspapers published and sponsored by the retailers (much as respondent here claims as to the challenged advertising by the CF company). The opinion of the Third Circuit states (p. 768, col. 2), in respect to furnishing the information:

With respect to those instances where petitioner did not contribute to the cost of misleading advertising, it is settled that “One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.” [Citations omitted here.]

The opinion states as to sharing the cost of the advertising (p. 768, col. 1):

To the extent that petitioner contributed towards the cost of misleading advertisements, it was equally responsible with its retailers for the deceptive character of the representations that appear therein.

It will be recalled that the contract here calls on respondent to pay for advertising.

The “instrumentality of deception” theory is not, of course,

confined to furnishing information, but is based on a broad general principle. In *Brewer* (6th Cir. 1946) the Sixth Circuit held that the manufacturer was guilty of an unfair trade practice in selling punchboards to retailers which could be used to conduct lotteries or games of chance in the sale of merchandise to the public. The manufacturer defended on the ground that the retailers were "independently engaged" (p. 77) in their business and the manufacturer had no connection with sales of merchandise to the public—i.e., that the retailers were more independent than independent contractors. The opinion of the Sixth Circuit states (p. 77):

From the foregoing analysis of the Commission's findings, however, it seems that the petitioners are not as independent of those to whom they sell and ship their products in interstate commerce as they would make it appear. With deliberate intent, using channels of interstate commerce, they put into the hands of others, including manufacturers and wholesale and retail dealers, the means of using "unfair methods of competition" and "unfair or deceptive acts or practices."

In *Goodman* (9th Cir. 1957), a "salesmen" case, to be sure, the defense was that the salesmen were independent contractors, as stated in their contracts with the respondent there. The opinion of the Ninth Circuit rejected this argument in broad language based on the inapplicability of the absolute letter of common-law definitions (p. 590):

However, when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity for the enforcement of standards it has established.

In reviewing the authorities, the opinion stresses (p. 591), by a quotation, the placing "in the hands of another a means of consummating a fraud," and also stresses "apparent scope" of authority. Both these factors are present in the case at bar.

In *Standard Distributors* (2nd Cir. 1954), also a "salesmen" case, the opinion of the Second Circuit states (p. 13):

The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner.

In the case at bar, there was, apart from apparent authority, the element that resulting sales of the tapes inured to the benefit of respondent, since he had an 80 percent interest in the gross.

(Although the foregoing discussion, as already indicated, may be regarded as largely moot since the examiner finds that respondent is in any event not responsible or not subject to an order in respect to the advertising, the discussion nevertheless applies with full vigor to the "new book" representation No. 8, on the outside front cover of respondent's book, which respondent attributes to his publisher, but which the examiner regards as respondent's representation, as will be demonstrated in due course.)

The various representations in the large advertisement will now be treated, for convenience and reference purposes, in numerical order. However, they will be so treated only by way of summary—except as to the following: The second part (Visiting lecturer) of No. 3 will be discussed at length in view of complaint counsel's motion to reopen as to this representation. No. 5 (Diplomate) will be further discussed—although not at great length—in view of its being excused although substantial. No. 6 (National Encyclopedia), which is not substantial, will be touched on, but only very briefly. (No. 7, Ivy stations, of the small advertisement, will be discussed immediately thereafter, followed by a full discussion of No. 8, the "new book" representation.)

1. *Braille by Library of Congress.*
2. *Ph.D. thesis in nutrition.*
3. *Member of faculty, New York University* [First part of No. 3].

On the reasoning and discussion above, and the cases cited, respondent is held to have made, or to be chargeable with having made, the above representations (although they are held to be true in Part SIX hereof, *infra*).

3. Cont'd. *Visiting lecturer, Pharmacy, Columbia Un.* [Second part of No. 3].

This is a representation which does not appear in the large advertisement or any other promotional material; nor was any evidence adduced of falsity.

In response to the examiner's prehearing order of directions of January 12, 1966, requiring a list of exhibits and the issues to be proved by each, complaint counsel in their letter of March 8, 1966, stated (p. 2) that this representation No. 3 "also" appears in the large advertisement (*i.e.*, CX 1, as then proposed) in Broadcasting Magazine. It simply does not appear there, nor in any other promotional material.

Complaint counsel's letter states—first to be sure—that the representation "was taken from" *American Men of Science* (CX

30), *i.e.*, from respondent's biographical sketch therein. However, the examiner held at the hearing, and still holds, that this sketch, or the book itself, does not come within "advertisements or promotional material" of Par. Three of the complaint. The respondent did testify that he furnished preliminary material for biographical volumes in which his biographical sketches appeared (which might make them, if false, potential instruments of misrepresentation). However, unless the biographical material was used by others in "advertisements" or "promotional material," as specified in Par. Three of the complaint, the examiner's holding was and is that there are no advertisements or promotional material disseminating the representations.

Complaint counsel seemed well aware, at the hearing, of their deficiency in proof as to the making of the representation "Visiting lecturer," for they never produced the two witnesses designated by them (in a preceding letter dated January 28, 1966, also in response to the examiner's prehearing order) to prove that the representation was false. The witnesses designated were the Dean and a Professor of the College of Pharmacy, Columbia University, neither of whom appeared at the hearing. However, complaint counsel ignored this in the argument in their Proposed Findings (CPF 13; p. 11) by referring only to the examiner's refusal to allow respondent himself to testify on this (TR 482-484), and not noting the examiner's stated (although not exclusive) reason that there was no proof of the Visiting lecturer representation once the biographical sketch or sketches were excluded (TR 483:22). (Complaint counsel's motion to reopen "for the reception of testimony and exhibits" on this question was denied by the examiner's order of May 31, 1966, although without opinion or statement of reasons.)

Complaint counsel finally attempted (TR 493-494) at the hearing to establish the making of this representation by referring to the outside back cover of respondent's 1951 edition (CX 44) of the book "Eat, Live and Be Merry." The representation on the back of this 1951 edition merely reads that respondent "contributed his services to the faculties of [among other institutions] Columbia College of Pharmacy." There being no reference to "Visiting lecturer," the examiner had no hesitancy in excluding it (TR 495:14-25). Moreover, the book was never listed for this purpose in complaint counsel's proposed exhibits.

4. *Doctor of Humanities.*—This representation is held to have been made, or to be chargeable to respondent, on the reasoning and discussion, as well as the cases cited, above. (However, the

representation is held not proved to be false, in Part SIX of this decision.)

5. *Diplomate*.—The examiner believes that he is amply justified by the adjudicated cases in not holding the respondent responsible for making this representation. Respondent did authorize the large advertisement, as fully found herein. But he definitely did not authorize the *Diplomate* representation. The crucial fact is that he did not furnish the information about the *Diplomate* (as it appears in the advertisement) to C. F. Productions, Inc., which seems to have garbled something he did furnish. The company never supplied him with a copy of the advertisement in advance or telephoned him, as required by his contract and his understanding with it (CX 10 B, par. 4(a)(3); TR 93:3). As soon as he read the advertisement in the magazine he immediately advised the company by telephoning it, "upbraiding them" as to the statement in the advertisement about the *Diplomate* (TR 93). The representation as to the *Diplomate* was never made again in further advertising in the magazine.

Complaint counsel himself stated at the hearing: "* * * I am not inclined to press on the diplomate point" (TR 394:25).

Moreover, as elsewhere stated herein, the *Diplomate* representation does not appear in any of the biographical sketches, so that the respondent cannot be held responsible for it by having brought these sketches to the company's attention, or indirectly responsible even by the mere existence of the biographical sketches on information which might have been supplied by him.

It may be added here that, apart from the initial question of theoretical responsibility, and even assuming such responsibility, there would be no public interest in a cease and desist order against the use of this representation, or against violation in general, when the facts are that respondent did not authorize the representation as such but on his own initiative had it stopped, after a single usage, as soon as he knew about it.

6. *National Cyclopedia of American Biography*.—There is no doubt that technically respondent must be held to have made, or to be chargeable with having made, this representation. This follows from the general reasoning and the holdings of the adjudicated cases as set forth above. Respondent admittedly supplied the information that his biographical sketch was in the *Cyclopedia of American Biography*. However there are extenuating circumstances and persuasive explanations.

The representation as to there being a biographical sketch in this publication is the last, not the first, of six listings of Who's

Who and other publications containing biographical sketches of respondent. The first five do each contain respondent's biographical sketch. The precise representation as to all of these, as contained in the large advertisement, is as follows:

Dr. Fredericks' biography appears in:
The Biographical Directory of American Men of Science
Leaders of American Science
Who's Who in American Education
Who's Who in the East
Who's Who in Commerce & Industry
National Cyclopedia of American Biography

It can thus be seen that the incorrectness of this one representation (Cyclopdcia of American Biography) is, in the context of the other correct representations, a relatively unimportant matter. Moreover, as a matter of proof, there is no evidence whatever of a special uniqueness or importance of a sketch in the National Cyclopedia, as compared with a sketch in any of the other five publications.

Furthermore, the proof is that respondent's biographical sketch was definitely slated to appear in the National Cyclopedia, having already appeared in galley proof, and that it did not appear only through inadvertence. Moreover, it is slated to appear in the edition currently being issued. Complaint counsel in their Proposed Findings (CPF 16; p. 17) themselves propose that "the evidence does not establish that such representation was deliberate or wilfull [sic]." Moreover, complaint counsel submit no argument whatever as to why respondent should be held for this representation, considering all the circumstances. The facts in respect to how this representation came to be made are contained in an oral stipulation of counsel (TR 769-772).

On June 1, 1961, the National Cyclopedia wrote respondent stating that it wished to publish his biographical sketch. On June 6 respondent advised it that he would be honored and would be glad to discuss his biographical data with it. On June 14 he was interviewed by an associate editor of the publication for this purpose. Later he was advised that, although there was no charge, there would be a charge for the cost of a cut if he desired that his photograph be printed with the sketch. On August 7 he sent a check to cover this cost. On November 16, 1962, the publication sent him a copy of his biographical data for his approval (TR 771:1). On December 21, 1962, according to his records, he returned it with corrections and notations. According to the publication's records it sent him a galley proof (TR 771:8), and

according to his records he returned the galley proof with corrections. However, the publication has no record of the return of the galley proof by respondent. The stipulation, agreed to as the "facts" (TR 772:10-19), states explicitly (TR 771:12) as follows:

The records of the National Cyclopedia therefore indicate that his biography did not appear in the issue at that time because, whether it was an oversight or some error, they did not receive the galley at that point, but that Mr. Fredericks' biography is appearing in the current issue which is being issued by the National Cyclopedia of American Biography.

Accordingly, since the biographical sketch definitely was slated to appear in the prior edition and is apparently being presented in the current edition, it would seem that the representation in question was simply premature, and that, in any event, it was and is *de minimis* for proving misrepresentation. It is the examiner's opinion, therefore, that there would be no public interest in issuing an order thereon, or using it to support any other provision of a cease and desist order.

Small Advertisement

7. *On Ivy Stations—WEIV, WOIV, and WJIV.*—In line with the general discussion and cases cited above in this part of THREE, the examiner holds that respondent did not make, or is not chargeable with having made, the above representation, contained in the small advertisement (CX 9), even though the advertisement, like the large advertisement but on a smaller scale, is subscribed with the name CF Productions, Inc., containing respondent's initials with his acquiescence. The reason for this holding is that it is clear that respondent did not supply the company with the information that his talks were being broadcast by these Ivy stations, and, moreover, that the information was peculiarly within the company's knowledge as the immediate negotiator with the radio stations. Actually, the list might change from week to week.

Apart from this, the examiner regards the representation, or misrepresentation, as *de minimis* in nature.

Complaint counsel merely argues (CPF 17; p. 18), that although "the evidence does not indicate that respondent was personally responsible for the inclusion of these stations * * * the representation was made by his agent or representative." The examiner does not, of course, regard himself as strictly bound one way or the other, under the cases, by the common law rules of

agency. The particular facts must govern as to each situation.

A glance at the small advertisement (CX 9) shows that the above three stations are part of the listing of 52 stations. The advertisement may be constructed as listing these 52 stations as carrying respondent's program, although all that the advertisement actually states is: "These Top Stations KNOW Carlton Fredericks SELLS." Moreover, respondent's program has been covered on about 300 stations. Naturally, there inevitably must be a turnover as to stations carrying the program, or so contemplating, so that it is easy to see how a mistake could be made, even by CF Productions, Inc., which was in direct contact with the radio stations. (See TR 54:19; 82:13; 98:23; 99:1; 115:17.)

The mistake in listing these three Ivy stations may well be held to be inconsequential. Complaint counsel argue to the contrary because the listing represents that respondent's program is broadcast in a specific local area. However, this is a representation not to the general public but to radio station people who, if affected by such a local claim, would probably not be deceived and certainly could easily check the matter.

In addition, it will be noted that the printed list contains such outstanding top stations as WOR, of New York City, so that the inclusion of the three challenged stations may for this reason alone be deemed inconsequential. The three stations, as elsewhere stated herein, are in upstate New York. However, although a ruling that the representation is *de minimis* is amply justified, the examiner prefers to rule squarely that respondent is not responsible for the representation in question and that this is demonstrated by the fact that he did not furnish the information as to the three radio stations to the company, as he did with most of the biographical material in the "large advertisement." Moreover, the information as to carrying stations was information peculiarly within the company's knowledge since the company made the actual contacts with the stations (TR 54, 82, 98).

It would be difficult and strained, therefore, to hold that respondent made, or is chargeable with having made, this representation as to the three radio stations. Since the respondent has already been held not chargeable for making the substantial Diplomat representation, he certainly is not chargeable for making this unsubstantial representation.

Book Representations

8. "New Book." Also "Copyright 1961, by Nutrition Surveys, Inc."—As already indicated herein, the examiner holds respondent

chargeable with having made the "new book" representation on the outside front cover of his paperback book "Eat, Live and Be Merry" (CX 45). In contrast, the examiner holds that respondent is not chargeable with the "Copyright 1961" statement or representation inside the book, although the date itself may, in the examiner's opinion, possibly be read together with the "new book" representation.

Respondent's counsel strongly attacks any finding holding respondent liable for the "new book" representation (or, of course, for the "Copyright 1961" representation). Respondent's counsel points out, as is altogether correct, that complaint counsel have not adduced detailed factual material to support a holding that respondent is liable for the "new book" representation, certainly not of the specific kind which might ordinarily be expected.

The examiner finds, however, after careful consideration, that respondent at the very least must have known about the "new book" representation, if only after the book was turned off the press to begin its active circulation. He certainly must have looked at the outside front cover of his own author's copy and read:

a new book by
Carlton Fredericks

The quotation is, as nearly as possible here, exactly as it appears on the outside front cover. Indeed respondent's real defense here is hardly that he did not know this, but that he is not responsible, and that it was a new book.

Respondent, of course, did not stop or halt this representation, nor take any steps to correct it. Thus the use of his name immediately under said representation "new book" without being stopped or corrected by him, and its continuation, makes it indeed, in the examiner's opinion, respondent's own representation for all practical purposes. This is so even if the representation is true, and it is certainly so if it is false (as found herein under Part SIX, *infra*).

Thus, as the examiner views it, it was simply a continuing representation over respondent's own name, which he could have stopped or corrected. Certainly he cannot stand by and disclaim responsibility on the ground that his publisher or anybody else allegedly made the representation and that he himself had nothing to do with it. He himself indicated that the book was sold until, apparently, sometime in 1964, *i.e.*, two years prior to the hearing (TR 498; 22-24).

Since the "new book" statement is over his own name

it is, of course, more explicitly tied to him thereby than the advertising in Broadcasting Magazine is tied to him by his initials in the name of CF Productions, Inc.

Moreover, personal responsibility is emphasized, and vouched for, by the repetition of his name on the outside back cover, together with a large photograph of himself, plus a biographical sketch.

The reasonable presumptions seem to support respondent's responsibility for the "new book" representation or the continuation thereof. This would seem to be so in almost any case of such a book put out by a publisher. However, it is more so in this case because the book in question seems to be respondent's magnum opus. It not only had a 1951 edition, widely circulated in the United States, as he testified, but it came out ten years later in a 1961 edition, put out by the same publisher. It is listed by name in respondent's Who's Who and other biographical sketches. He is hardly in any position to deny the obvious, namely, that he knew it was represented as a "new book," nor does he deny this.

Respondent's counsel contends that there is nothing in the record connecting the publisher, Paxton-Slade Publishing Company, Inc., of New York, with the respondent in respect to the "new book" representation. It is true that we do not know the actual contractual relationship with the publisher. However, this does not relieve the respondent from responsibility, since, even if the representation was made by the publisher alone, it was made over the prominently printed name of respondent, and respondent did nothing to correct this, but on the contrary espoused and still espouses the "new book" claim. Thus it is proper to find that he made the representation or is chargeable with having made it. This is the issue, entirely separate from the falsity of the representation (as found in SIX, *infra*).

The representation is also a substantial one, namely, that a ten-year-old book is new. To be sure the examiner has held respondent not chargeable with making the Diplomat (No. 5) representation in Broadcasting Magazine, even though substantial, as well as false. But the respondent "stopped" that representation as soon as he knew about its one use—nor for that matter had he, or has he, ever espoused it.

Finally, as to the Diplomat representation, the examiner held, *supra*, that even if respondent is chargeable with having made it, no cease and desist order should issue thereon. As to the "new book" representation, the examiner does not so hold, *i.e.*, that despite respondent's chargeability with having made it, no cease

and desist order should issue thereon. The main question in issuing an order is likelihood of resumption of the misrepresentation. Whereas respondent "stopped" the Diplomat representation, he did nothing to stop the "new book" representation. Whereas he always has recognized the Diplomat representation as false, he or his counsel even right now is taking the position that the "new book" representation is true. Thus, without an order he could continue to sell the book (CX 45) or one like it as new. Respondent at the hearing, without any leading, called the book "a new edition, a revised edition"—not a new book.

The examiner finds that respondent was perfectly willing to have his book (CX 45) advertised on its cover as a "new book" with the extra profit it can be assumed this would bring him, knowing that it was only, at the most, a new or revised edition. This fell far short of the utmost good faith he showed in connection with the Diplomat representation in the magazine.

This willingness of the respondent to go along with a "new book" representation even though he himself seems to think of it as "a new edition, a revised edition"—although referred to immediately above on the question of the issuance of an order—does seem to have a bearing, however indirect, on the question of his chargeability with having made the "new book" representation.

The very fact that respondent did make some corrections or changes—however few or slight—in getting out the 1961 edition here in question, also, in the examiner's opinion, ties in respondent factually with the one publisher of both editions, as does the very fact that he kept the same publisher. And his puny corrections were the instrument of the deception.

Perhaps it is also noteworthy that the outside front cover of the 1961 edition is precisely the same—including the "new book" representation, table of contents, and even color scheme—as the cover of the 1951 edition. This shows that all the respondent had to know was that the same cover was to be used (by the same publisher) and he then would automatically also have known that the "new book" representation was to be used ten years after the 1951 edition. There is something incomplete and utterly inconclusive about respondent's cryptic answers "No" to his counsel's questions as to whether he knew who wrote the cover and whether it was submitted to him for approval (TR 951:15, 17).

Respondent argues that since the 1961 edition has the same cover, with the same "new book" wording as the 1951 edition, it is not a representation, or representation of newness, at all, but merely a representation that it is the same old book. This is a

tenuous argument. The 1961 cover not only represents that the book is new, but it represents, since it reads as of the time it is seen, that the book is or was new in 1961 or the year of publication.

Respondent also makes the point that there is no evidence that the book or its cover was displayed publicly for sales purposes (see TR 529-530). The examiner is not impressed. First, it can be assumed, in the absence of clear contrary evidence, that a substantial number of people bought the book only after reading the cover. Second, it is obvious that if a book is bought containing promotional material on its cover, the representations on the cover continue there for both the buyer and others to read, and may well tend to induce sales on the basis of alleged newness of the book.

Respondent also contends, at least by strong implication, that the "new book" representation on the outside front cover is not within the meaning of "advertisements and promotional material," as used in Par. Three of the complaint. The examiner rejects this contention. The outside front cover of the paperback book is an excellent vehicle for advertising and promotional material, and serves that purpose here very well, perhaps even better than a separate piece of advertising, in view of the subtlety with which the "new book" representation is projected in the intimate closeness to the text proper.

Nor can it be plausibly contended that the outside front cover containing the "new book" representation is really the title page of the book and therefore, at least arguably, not to be regarded as promotional material at all. The fact is that the very first sheet after the cover is the title page with no claim at all that it is a new book.

It is true that the representation as quoted in the complaint, "A New Book by Carlton Fredericks * * * Copyright 1961, by Nutrition Surveys, Inc.," perhaps suggests, by the use of asterisks, that this is a representation or advertisement separate and apart from the book. However, the complaint certainly is broad enough to include the promotional statement on the outside front cover, as here.

Although it is not necessary so to find, it is also no doubt true, and is found, that respondent at least knew of the "Copyright 1961" statement inside the book, *i.e.*, at least after the book was published. The complete copyright statement is "Copyright 1961, by Nutrition Surveys, Inc." It is significant that respondent was one of the three men who incorporated this company (TR 492:

12, 900:17), and at one time he was an officer (TR 901:22). It is also noteworthy that above the copyright notice, occupying the larger part of the page, is a statement entitled "Author's Note," subscribed by Carlton Fredericks. It may be assumed that respondent, as an author, would read this note in the book subscribed by himself, and easily pass down to the copyright notice.

Moreover, even if respondent should not be charged with knowledge of the 1961 date in the copyright notice, it must perforce be found, since he knew that the book was published in 1961, that it was represented as a "new book" in 1961—whether by the publisher, himself, or both—and, of course, in the years following, during which respondent presumably took his royalties or profits although doing nothing to correct the representation over his own name.

However, the examiner does not find that the "Copyright 1961, by Nutrition Surveys, Inc." wording or statement, nor any part thereof, is a representation chargeable as such to the respondent. It is thus unnecessary to discuss respondent's legal argument that "Copyright 1961" can in no event be regarded as a representation of copyright, as distinguished from the legal claim of copyright, *i.e.*, even if not registered in the Copyright Office.

The examiner is of the opinion that the legal discussion herein with case citations, set forth in connection with the advertising in Broadcasting Magazine, is applicable here even though the facts differ from those of the magazine advertising.

In determining whether respondent is chargeable with making the representation made on the cover of the book by his publisher, or any third party, the general principal governing is that the courts and the Commission are not bound by or "concerned with the refinements of common-law definitions," *i.e.*, "when interpreting a statute the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it." See *Goodman*,⁵ *supra*, p. 590.

The question, therefore, is not what is the exact legal status of respondent's publisher in relation to respondent, but rather whether there is a relationship of such a nature and under such circumstances as to warrant possible sanctions by the Commission to "control and outroot some evil practices" (if so found) contrived in or through this relationship.

Certainly it is an evil practice if an author permits, and is able to permit, his publisher to make or continue representations on the outside front cover of his book right over the author's name,

⁵ *Goodman v. F.T.C.*, 244 F. 2d 584 (9th Cir. 1957).

and if the author is still able to disown responsibility for the representation, *i.e.*, even if the representation is false.

Thus it is appropriate that *Goodman* notes (p. 591) the factor, quoted from another case, of placing "in the hands of another a means of consummating a fraud," and also notes the factor of "apparent scope" of authority. These two elements of, first, instrumentality of perpetrating a fraud,⁶ and, second, apparent scope of authority,⁷ are frequently mentioned in the relevant court cases.

If an author is allowed to have his book published by a publisher and to permit, even by standing by while the book is distributed, any such representation as in the case at bar, the author has indeed, by action and non-action, placed in the hands of the publisher the means of consummating a fraud, if the representation is false. This is the case at bar. Respondent's very "corrections" were the instrument of deception here.

Moreover, a publisher of a book is acting within "apparent scope" of authority if the publisher makes the representation, over the author's name, that a book is a new book by that author, *i.e.*, even though it may be an old book. This, too, is the case at bar.

Even if respondent were not entitled to royalties or other remuneration from the publisher, and if the publisher alone stood to gain from the "new book" representation over respondent's name, respondent, it seems to the examiner, would still be in the position—by standing by and doing nothing about the representation while the book is being distributed and sold—of being chargeable for the act of the publisher within "apparent scope of authority," of so representing over respondent's name although only for the publisher's own enrichment. No author should have the right to permit a publisher to do such a thing, even for his own enrichment, once commerce jurisdiction can be established. On the face of it (if the representation is false), it is an unfair trade practice tending to mulct the public. And it is the Commission's function to find what type of practice is an unfair trade practice.

It is true that respondent here did not, so far as the proof shows, furnish the publisher with the information that the book was a "new book," nor suggest it. All that we know is that the wording on the front cover, including "new book," is exactly the same as in the 1951 edition. Thus the situation is different from the advertising in *Broadcasting Magazine*, the material for which, or most of it, was supplied by respondent. But, important

⁶ See, as only two examples, quotations from *Regina* and *Brewer*, *supra*.

⁷ See quotation from *Standard Distributors*, *supra*.

as it is, the element of furnishing material or ideas is not indispensable in finding responsibility in this type of case. For instance, there was no furnishing of material or ideas in *Goodman*. Nor was there in *Libbey Glass*,⁸ *supra*.

The publisher in this case is sufficiently like the advertising agency in *Libbey Glass*, for the purposes of finding the respondent here chargeable. In *Libbey* it was an advertising agency with the authority, obviously, to advertise. Here, it was a publisher with "apparent authority" to advertise. The court in *Libbey* declined to exonerate Libbey even if the advertising agency were regarded as an "independent contractor," nor did the court even discuss Libbey's exact legal status as an agent, independent contractor, or as occupying any other status. The court simply states, as quoted earlier in this decision, that Libbey, *i.e.*, even as an independent contractor, could not escape liability by delegating its advertising. In the case at bar the respondent should not be able to escape liability by delegating advertising to his publisher or by permitting the publisher to advertise over respondent's name and standing by while the publisher continues to do so.

Of course, the respondent himself has gained by this "new book" representation. Respondent has undoubtedly gained not only money but publicity and status as well. Courts naturally look askance at respondents who disavow the representations or misrepresentations of others working with them. One court frankly stated in a case that it will not permit such a respondent to "reap the fruits from their acts and doings."⁹ Other pertinent cases may not use the same language, but the same type of thinking is revealed, whatever the words and stated reasoning.

It may also be noted here, although perhaps by way of repetition, that the "new book" representation is more explicitly chargeable to respondent than the radio program advertising, since it carries the subscription of respondent's full name, Carlton Fredericks, rather than merely his initials CF, as part of the name of the company which placed the advertising.

*Outside Back Cover. "Braille" representation (No. 1).*¹⁰—As already found in this part THREE, complaint counsel have proved that respondent made, or is chargeable with having made, the "braille" representation (No. 1) to radio stations, *i.e.*, in the "large advertisement," stating that respondent's radio scripts

⁸ *Libbey-Owens-Ford Glass Company v. F.T.C.*, 352 F. 2d 415 (6th Cir. Nov. 1965).

⁹ *International Art Co. v. F.T.C.*, 109 F. 2d 393, 396 (7th Cir. 1940).

¹⁰ This matter has already been referred to, without details, in the footnote at the beginning of this Part THREE.

were brailled by the Library of Congress (although the representation is held not proved to be false in part SIX, *infra.*).

Complaint counsel also point out, although largely as an afterthought, that representations, similar but by no means identical with the representation as quoted in the complaint, are made to the general reading public, on the outside back covers of respondent's books, *i.e.*, in the 1951 edition (CX 44), the 1961 edition (CX 45), and even in an alleged 1964 edition (CX 68) or enlarged version, issued under a different title by a California publisher.

Inasmuch as the question of respondent's responsibility or chargeability is moot (in view of the examiner's finding of no proof of falsity) and in view of the relative unimportance of this additional contention, no finding will be made here as to whether or not respondent is chargeable with having made the representation, addressed to the general book public, on the outside back covers of the books as described above. The examiner does note, however, the following:

The statement on the outside back covers of both the 1951 and 1961 editions is merely that respondent's radio scripts have been "transcribed into Braille by the Library of Congress *and the American Red Cross*" (emphasis supplied), which is hardly the representation alleged in the complaint.—Furthermore, so far as the examiner recollects, no notice was ever given that the 1951 and 1961 editions would be offered for this purpose; they were certainly not listed in complaint counsel's list of exhibits in their letter of March 8, 1966.

As to the 1964 alleged "edition" (CX 68), although it does contain on the outside back cover a statement sufficiently like the quotation in the complaint, the fact is that there is no extrinsic proof whatever, even as to prior dealings with the publisher, to connect respondent with this California publisher. Actually the statement's grammatical error, "a portion of his radio scripts *were* translated into Braille by the Library of Congress" (emphasis supplied), does not help to connect respondent—an English major, a Phi Beta Kappa and a Ph.D.—Moreover, the book was not listed at all on complaint counsel's list of exhibits and notice of intention to rely thereon was not given until shortly before the hearing itself.

FOUR

Text of Representations

The statements and representations appearing in certain ad-

vertisements or promotional materials—as well as the one representation in the book itself—which are quoted in the complaint, although in certain instances only in part, are set forth in full in the following listing, 1 through 8.

The listing contains some statements and representations found (under THREE, *supra*) not to be chargeable as having been made by respondent. Notations as to such prior finding are made accordingly after each quotation.

The reason all statements and representations are stated and quoted, even though respondent may have been found not responsible in THREE hereof, is for completeness of presentation in this decision.

The said representations are as follows:

Large Advertisement

1. The scripts of the programs have been translated into braille by the Library of Congress * * *. [As quoted in the complaint.]

2. Dr. Fredericks' Ph.D. was taken in the area of Public Health Education. His Ph.D. dissertation which was entirely in the field of nutrition, constituted a study of the response of his audience to his broadcasts. It may, therefore, be said that this is a broadcaster who knows his audience, their characteristics, income and education, better than any other in the Industry. [Complaint quotes only from second sentence of the above, and eliminates the main part of this sentence by the use of asterisks.]

3. He [respondent] taught Nutrition * * * as a member of the faculty of the School of Education of New York University * * *. [This is as quoted in the complaint.]

Visiting Lecturer * * * College of Pharmacy, Columbia [University]. [Quoted as in complaint, but there is failure of proof as to this representation.]

4. For the public services rendered in his broadcasts, Dr. Fredericks has received an honorary Doctorate of Humanities degree * * *. [This is as quoted in the complaint.]

5. Dr. Fredericks is a Founding Fellow in the International College of Nutrition, and has been awarded the Diplomate by this college. [As quoted in complaint. This representation as to "Diplomate" not chargeable to respondent; see THREE.]

6. Dr. Fredericks' biography appears in:

The Biographical Directory of Men of Science

Leaders of American Science

Who's Who in American Education

Who's Who in the East

Who's Who in Commerce & Industry

National Cyclopedia of American Biography. [Challenged representation as to National Cyclopedia held not chargeable to respondent; see THREE.]

Small Advertisement

7. These Top Stations KNOW Carlton Fredericks SELLS, i.e., 52 radio

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stations listed by radio station designation, city and State, starting with WOR, New York, New York, and including the following: WEIV—Ithaca, N.Y.; WOIV—Syracuse, N.Y.; and WJIV—Albany, N.Y. [Representation set forth more fully than in complaint. Found not chargeable to respondent; see THREE.]

Book

8. EAT,
LIVE, and
BE MERRY
a new book by
Carlton Fredericks
America's Foremost Nutritionist
[Outside front cover of paperback book]

COPYRIGHT 1961,
BY NUTRITION SURVEYS INC.

[Contained on reverse side of book's title page, at bottom thereof, upper portion being an "Author's Note," subscribed by Carlton Fredericks]

FIVE

Meaning of Representations

The representations set forth in FOUR have the meanings, directly or indirectly, set forth below. The examiner's construction of meaning is in some instances more qualified and limited, or otherwise different, than the construction set forth in the complaint (Par. Five).

Large Advertisement

1. *Brailling by Library of Congress. Meaning.*—That scripts of respondent's radio programs have been reproduced in braille by, or at the instigation of, the Library of Congress, an agency of the United States Government—or under the sponsorship of the Library of Congress. [This is as alleged in the complaint except as to the added wording, after the dash (adding the alternatives, "sponsorship"), an addition which is not too important.]

2. *Ph.D. Thesis in Nutrition. Meaning.*—That respondent's doctoral dissertation or thesis was written in the field of nutrition (or on this subject or concerned therewith (Compl. Six (2))). [This modifies somewhat the meaning as stated in the complaint.]

It may be noted at once that although the declaration is made in the representation that the thesis is in nutrition, it is affirmatively stated in the very same sentence that the subject matter of the thesis is a study of the response of respondent's audience to his

broadcasts, *i.e.*, on nutrition (an unchallenged description of the subject).

3. *Faculty Member, N.Y.U. Meaning.*—That respondent at one time was a member of the faculty of New York University. [Much the same as alleged in the complaint.]

3. *Cont'd. Visiting Lecturer, Columbia. Meaning.*—That respondent was a visiting lecturer in the College of Pharmacy of Columbia University. [Much the same as in complaint. However, there is a complete failure of proof as to this representation.]

4. *Doctorate of Humanities. Meaning.*—That respondent has received an honorary Doctorate of Humanities degree from an institution or academic body lawfully authorized and empowered to award the same—this meaning being subject, however, to a qualification such as “as far as he knew or should have known,” unimportant for deciding this case. [This is as alleged in the complaint, except for the qualification after the dash.]

The qualification above referred to would require the addition of some such clause as “at least so far as respondent knew or should have known” and/or language recognizing the implications here of a presumption of regularity. The qualification is of no practical importance in this case inasmuch as complaint counsel have failed to prove the ingredient of lack of authority of the institution in question. Such proof would be necessary in any event. Lack of authority is clearly pleaded by the complaint (Par. Six (4)).

5. *“Diplomate” Degree. Meaning.*—That respondent has been awarded the degree or status of “Diplomate” by International College of Nutrition. [Some change from complaint. The making of this representation not chargeable to respondent; also excusable; see THREE, *supra*.]

6. *National Cyclopedia Biography. Meaning.*—That respondent's biography has been published in a certain encyclopedia of professional biography, *i.e.*, “The National Cyclopedia of American Biography.” [As alleged in complaint. The making of this representation not chargeable to respondent; also *de minimis*; see THREE.]

Small Advertisement

7. *On Ivy Stations. Meaning.*—That certain radio stations, *viz.*, Station WEIV, Ithaca, New York, and Station WOIV, Syracuse, New York, as well as Station WJIV, Albany, New York, broadcast respondent's radio program—or, possibly, were about to

broadcast respondent's radio program. [As in complaint except portion after dash. The making of this representation not chargeable to respondent; also *de minimis*; see THREE.]

Book Representation

8. Representation "a new book by Carlton Fredericks." *Meaning.*—That a certain book, viz., "Eat, Live and Be Merry" (CX 45) was a "new" book authored by respondent. [This follows the wording of complaint. Respondent is found chargeable in THREE (8) with having made this representation on the book's outside front cover.]

That this is the meaning of the representation cannot seriously be disputed. The argument of respondent's counsel that this is not the meaning because the same "new book" statement is made (in the same place and context) in the 1951 edition is, as already indicated, without any merit.

It is also found that the "new book" representation means that the book was new as of 1961. (This is because of the "copyright" date of 1961 inside the book and because the book was issued in 1961.) [This varies from the allegations of the complaint charging respondent with full responsibility for the "Copyright 1961" statement inside the book.]

Once it is found that the representation is that the book is a "new" book, it is difficult to see how respondent can dispute this further finding of its being new in 1961. Respondent has not disputed the 1961 date.

8. Cont'd. "Copyright 1961, by Nutrition Surveys, Inc. *Meaning.*—Although, under THREE (8) *supra*, this wording is not a representation chargeable as such to respondent, its meaning, contrary to respondent's counsel, is that the copyright was registered in the Copyright Office, Washington, D.C.

It may be stated immediately here that respondent concedes that the copyright was not registered. His counsel contends that, as a matter of law, copyright is obtained by the very insertion of the notice in the book, and that registration is merely to invoke various statutory rights and protections. It is not necessary to rule on this.

The important consideration, although the matter is moot in view of respondent's non-chargeability, is that to the average reader, and certainly to a substantial segment of readers, a copyright notice means that the copyright was duly registered.

Furthermore, although the question involved is moot in view of respondent's non-chargeability with having made the representa-

tion as such, it is hereby found that the naked "Copyright 1961" notice, in view of the rarity of not applying for registration, and in view of all the surrounding facts in this case, is a representation to the average reader that the book is a 1961 book, i.e., presumably a new book as of that year.

Finally, even though "Copyright 1961" is not chargeable to respondent as having been made by him as a representation, the date "1961" may be used, together with the 1961 issuance of the book, to fix the year when it was represented as a "new book." This the examiner has already done in finding, in his discussion of the "new book" representation, that it was represented to be new as of 1961.

SIX

Truth or Falsity

The actual facts found by the examiner as to the subject matter of the representations are stated below. These facts are stated and found in respect to all alleged misrepresentations, that is, even those not found by the examiner to be chargeable to respondent as representations made by him.

Large Advertisement

1. *Brailling by Library of Congress.*—*The scripts of respondent's radio program were reproduced in braille by, or at the instigation of the Library of Congress, an agency of the United States Government—and certainly under its sponsorship.—The representation is therefore true, and it is so found.*

The Library itself so regarded the reproduction of the scripts of respondent's radio program, so that a cease and desist order on the basis of this representation would in any event be unjustified and inequitable.

There is no dispute whatever, and no doubt whatever, as to two basic factors. First, the scripts of respondent's radio program were translated into braille. Second, this was done under the regular brailling program of the Library of Congress, which itself solicited the authorization to braille the book containing the scripts. Furthermore, one brailled copy (in four volumes) was kept in the Library of Congress itself, and another brailled copy deposited in the New York Public Library (TR 884-885).

The book in which respondent's radio scripts were contained and compiled, prior to brailling, is entitled "Living Should be Fun," which is also the title of respondent's radio program (TR

949-950). This is the book which was brailled after the authorization solicited by the Library of Congress was received by it.

Complaint counsel contend that the scripts were not brailled "by" the Library of Congress as expressly represented in the advertisement, or at its "instigation," as alternatively construed in the complaint, or even under its "sponsorship," as further construed by the examiner. Complaint counsel contend on the contrary that the scripts were brailled entirely apart from any such auspices of the Library of Congress. They strongly rely on the undisputed fact that the actual brailleing was done by voluntary braillists, *i.e.*, of the American Red Cross, who volunteered their brailleing services to the Library of Congress.—The examiner regards this as a most picayune point, particularly in respect to a representation addressed not to the public at large, but to readers of *Broadcasting Magazine*, to wit, "radio stations."

The true nature of the connection of the Library of Congress with the brailleing, as held out to the outside world, is contained in the Library's letter of July 26, 1946 (CX 64), twenty years ago, in respect to this very brailleing. The letter is signed by its Director, Division of Books for the Adult Blind. It requests the copyright holder of respondent's book to permit the brailleing (which permission was thereafter granted).

As just indicated, the letter is from the Division of Books for the Adult Blind, of the Library. In its body, it actually refers to the "program in the Braille Transcript Section of this Division." The letter also states that the brailleing is done by "specially trained volunteer braillists," thus implying Library of Congress supervision or control, at least in some degree, of the volunteer braillists.

In exact words, the letter reads in part as follows:

Under our program in the Braille Transcribing Section of this Division, it is planned to have single copies of the book:

Living Should Be Fun
by Carlton Fredericks

hand-transcribed for the use of blind readers.

* * * * *

All of this work is done by specially trained volunteer braillists. * * *

* * * * *

Sincerely yours,
XENAPHON P. SMITH, *Director*,
Division of Books for the Adult Blind.

The volunteers, incidentally, are actually trained by this very Division of the Library of Congress. Mr. Gallozzi, the present Assistant Chief of the Division, testified (TR 874:18):

Well, the Division encourages and helps volunteers, individual volunteers and groups of volunteers, to learn, master and transcribe braille, and this we refer to as our Braille Transcribing Program. * * * We train them and * * * ask them to do particular books for us * * *.

It will be noted that Mr. Gallozzi referred to our "Braille Transcribing Program."

Moreover, the brailled version of respondent's book contains on the face of each of the four volumes of the set a description expressly noting the Library sponsorship. The description first lists the title, the author's name, and the name of the "American Red Cross" brailist. The description ends up, at the bottom, with the following wording (RX 16):

Under The Sponsorship of
The Library of Congress
Washington, D.C.
1949.

This sponsorship statement as just quoted, added to the Library's own letter quoted and described above, would seem to be conclusive on the question of the correctness and truthfulness of the alleged misrepresentation, to wit, No. 1, as to brailleing by the Library of Congress.

Complaint counsel, however, are resourceful and take another tack. They attempt to impugn the idea of Library of Congress sponsorship on the ground that the Library does not initiate the request that a book be brailled. They cite the testimony of Mr. Gallozzi that the Library relies, at least largely, on outside requests that books be brailled, rather than its own initiative. This, in the examiner's opinion, is a doubtful tack insofar as concerns the question as to whether the Library of Congress does or does not sponsor the brailleing.

However this may be, the fact is that Mr. Gallozzi testified that perhaps 2,000 or so requests come to the Library in a one-year period, of which only 300-500 are accepted by the Library under its program (TR 878:8,14). This, in the examiner's opinion, implies selectivity of some kind or other, which, if anything, supports the conclusion of Library of Congress sponsorship of the brailleing, and extends the scope of the sponsorship beyond the necessities of this case.

Incidentally, Mr. Gallozzi, although the sole witness called by complaint counsel on the brailleing issue, was not even an employee of the Library at the time here in question (TR 865:13). Accordingly, his attempt to contradict or explain the Library's own apparent position stated in its letter of 1946, as well as the

sponsorship statement on respondent's brailled volumes, is not entitled to too much consideration. He admittedly (TR 891:6) had no knowledge of just how respondent's book containing the radio scripts came to be brailled, whether, for one thing, at the request of an outside person or a Library staff member. His testimony, trying to explain the Library's 1946 letter, and the sponsorship statement placed on respondent's brailled volumes, as well as his testimony attempted to construe such wording as brailled "by" (TR 854 ff.), disclose to the examiner a witness rather willing, if only unconsciously, to be led by, and to please the attorneys who called him.

Complaint counsel discuss this alleged misrepresentation No. 1 only very briefly in their submissions (CPF 18; p. 18).

They state therein that Mr. Gallozzi testified that the Library has no record [so far as he knows] that the respondent's radio scripts were brailled "by" the Library (TR 854-889). They refer, also, to his testimony, when he was asked whether the Library was the "initiating factor" in the braillying, and he answered that there was no such evidence (TR 858). The record actually quotes him as answering, in pertinent part: "I have not found any such evidence. I have examined the records that were available" (TR 858:6). Complaint counsel also dwell on a Library policy, as testified to by Mr. Gallozzi (TR 856), to have "very popular" books brailled by paid contractors, and the less popular books by volunteer brailers. Mr. Gallozzi testified that in the case of a "very popular book" or "one of wide interest" (TR 879:10), or supported by "many requests" for braillying (TR 891-892), the book is brailled by nonvolunteers. The Library accomplished this by contracting with outside firms and paying the contract price. He testified that this is done when the braillying is "in large quantities" (TR 860), or a "great many copies" are required (TR 879:10). He further testified that this procedure must be approved by staff experts, following certain standards (TR 892). He was testifying, of course, only as to present procedure, and could not testify as to what the exact situation was with respondent's scripts in connection with their braillying.

However, the examiner finds that for the purposes of this case, and in respect to the question of Library sponsorship, there is little distinction whether the books are brailled by unpaid volunteers trained by the Library, incidentally at its expense, or by paid contractors braillying a book in quantity. The braillying—in the terms or meaning of the alleged misrepresentation—is by or at the instigation of the Library of Congress, and certainly under

its sponsorship, whether the braille is done by volunteers or by paid contractors.

Complaint counsel also contend in their submissions that respondent has "persistently" (CPF 18) misrepresented that the braille of his scripts was by the Library of Congress. To support this contention, they point out that representations similar to No. 1, *i.e.*, in the large advertisement, appear on the outside back cover of respondent's book, "Eat, Live and Be Merry," in its 1951 edition (CX 44), its 1961 edition (CX 45), as well as an alleged 1965 enlarged version (CX 68) under a different title.

This contention by complaint counsel is something of an afterthought. However, it is obvious that the examiner, having already found as true the representation as originally relied on by complaint counsel, can hardly find that similar representations are false. This is particularly true of the representations as they appear on the outside back cover of the 1951 and 1961 editions of the book, which refer to the American Red Cross, as well as to the Library of Congress, as having done the braille. This conclusion follows even though the representations, since they are contained in or on books, are addressed to the general public, rather than to radio stations. In the examiner's opinion, the meaning of the claimed braille is much the same to the general public as to radio stations. Certainly, the examiner can in no event find that the maker of the representations has "persistently" made a false representation as to braille by the Library, even if the contention is made by complaint counsel only to obtain a broad order, assuming one should issue at all in respect to a braille representation.

The above findings and discussion dispose of the *book* representations as to braille entirely apart from the question as to whether respondent is chargeable with having made them, as contrasted with the publisher or publishers of the books, for instance. See *THREE, supra*.

2. *Ph.D. in Nutrition.*—Respondent's doctoral dissertation or thesis was written in the field of nutrition, as represented (although only parenthetically). It constituted a study of the response of his audience to his nutrition broadcasts, as expressly stated in the main part (omitted in the complaint) of the sentence challenged as being the representation. Furthermore, it was not represented that his Ph.D. degree (as distinguished from the thesis) was in nutrition, but that it was "in the area of Public Health Education" (a correct statement contained in the prior sentence).—The challenged representation is true, particularly

since addressed to radio stations, as contrasted with the general public, and since definitely "pitched" to radio stations and their business interests.

It definitely has not been proved that the thesis "was not written on the subject of, in the field of, nor was it concerned with" (Compl. Par. Six) nutrition or the science of nutrition. On the contrary, the thesis *was* so written, particularly if it is considered within the context of a study of the response of respondent's audience to his broadcasts, constituting the main part of the representation, as aforesaid.

It is the examiner's opinion, as expressed at the hearing, that the matter of the Ph.D. thesis has been blown up far out of proportion, even to the extent of distortion, by the cryptic way in which the representation is quoted in the complaint—actually the tail wagging the dog, even without the dog—to wit:

His [respondent's] Ph.D. dissertation * * * was entirely in the field of nutrition * * *.

The full statement or representation, as found herein (FOUR (2), *supra*) is as follows:

Dr. Fredericks' Ph.D. was taken in the area of Public Health Education. His Ph.D. dissertation which was entirely in the field of nutrition, constituted a study of the response of his audience to his broadcasts. It may, therefore, be said that this is a broadcaster who knows his audience—their characteristics, income and education, better than any other in the Industry.

The complaint version, by using asterisks in the one sentence quoted therein, gives the impression that the representation (that the thesis is in the field of nutrition) is a main affirmative representation, instead of being merely parenthetical or of an adjective nature. Moreover, the complaint version, by omitting the first of the three sentences, tends to give the impression, or lends itself to the implication, of which complaint counsel take full advantage, that the representation is also that respondent's Ph.D. was taken in the field of nutrition; whereas actually, of course, the first sentence expressly states that the degree was taken in the area of Public Health Education. Finally, by omitting the third sentence, the complaint version eludes construing the representation in the language of its radio station readers and for their specific commercial purposes.

In the full version the second sentence reads as follows:

His Ph.D. dissertation which was entirely in the field of nutrition, constituted a study of the response of his audience to his broadcasts. (Emphasis ours.)

We have emphasized in the above quotation the main declarative statement in the sentence, to wit, that the dissertation "constituted a study of the response of his audience to his broadcasts," entirely omitted from the complaint version but represented by asterisks. The complaint version limited itself to "His Ph.D. dissertation * * * was entirely in the field of nutrition * * *," thus even replacing "which" by the asterisks.

The primary part of the representation, as above emphasized, and contained in the unabridged second sentence of the representation, is a full and complete disclosure of the true facts, in the examiner's opinion. Actually the thesis is entitled "A Study of the Responses of a Group of Adult Female Listeners to a Series of Educational Radio Programs." It is undisputed that the thesis is the study indicated by the title, and that the radio programs concern nutrition or diet.

The parenthetical part is, of course, that portion of the sentence referring to "field of nutrition," as contained in the complaint version. However, in passing on whether or not this portion is misrepresentation, the examiner is not dwelling unduly on the consideration that it is parenthetical or adjective in nature. The same general result follows if it were not parenthetical but a full primary and affirmative statement. It is the examiner's opinion that any possible objectionable ambiguity therein in respect to the thesis and its being in nutrition is eliminated by the affirmative disclosure in the sentence as to just what the thesis constitutes, namely, a study of the responses of the radio audience to respondent's broadcasts. This result is reached on a familiar principle in Federal Trade Commission law, particularly as applied by the Commission in framing orders permitting certain representations provided there is specific affirmative disclosure.

Actually, however, it is the examiner's opinion that there is no ambiguity or misrepresentation if the "nutrition" representation is read in context, and that, on the contrary, there is golden clarity if read in respect to its radio station readers and in the light of the third sentence, pointing up this factor. *Rhodes Pharmacal Co. v. F.T.C.*, 208 F. 2d 382, 387 (7th Cir. 1953), *aff'd* 348 U.S. 940, with its holding as to dual meanings, is therefore hardly applicable to the present case. *F.T.C. v. Sterling Drug Co.* (Bayer Aspirin), 317 F. 2d 669, 675, 676 (2nd Cir. 1963), is the case which is applicable, as contended by respondent.

Bearing all this in mind, as well as the fact that the complaint gives the impression that this and the other representation (in the advertisement) were made to the general public, the examiner

is inclined to believe that the Commission would not have authorized the inclusion of this Ph.D. representation in the complaint had it been fully apprised of the facts even as then available.

The examiner has emphasized this aspect of the full three-sentence version of the Ph.D. representation, instead of a one-sentence version with asterisks, and the aspect of the representation's being made only to radio stations, because they both support the examiner's resolute conclusion that the determination of the truth and falsity of this representation as to the Ph.D. thesis requires no "expert" witnesses, although complaint counsel called a number of witnesses more or less falling in this category.

With or without these "expert" witnesses the examiner unequivocally finds that respondent's thesis on the responses of his audience to his radio broadcasts was and is in the field of nutrition, particularly insofar as concerns the radio stations to whom the advertisement containing the representation is addressed.

The representation, for the purpose of this proceeding, must be construed in relation to these radio stations, or their executives, managers, and owners, and particularly in relation to the purpose for making the representation, namely, to sell respondent's radio scripts on nutrition to them, by showing, among other things, that the programs were worth buying for commercial reasons, particularly radio advertising.

The Commission, and the examiner, can judge the meaning simply by reading the representation without the aid of witnesses. The law on this is so clear that no case citation is necessary.

At the risk of some repetition, the full representation, as contained in the advertisement, will be reviewed again.

Respondent is represented as having written a Ph.D. thesis constituting a study of the responses of his audience to his broadcasts. This particular portion of the full representation is not contested, as already pointed out. This is the primary representation, giving the respondent substantial dollar value in the estimation of radio stations, *i.e.*, as being not merely a theoretical lecturer, but one who has scientifically studied his audience, so that he knows just what impact his radio talks make, particularly in terms of diet and commercial food products.

Parenthetically the representation in the advertisement also nails down the point that respondent's broadcasts upon which his thesis was founded, were on or about nutrition or diet.—This "nutrition" slant increases respondent's dollar value to radio sta-

tions in that executives can well say to themselves that respondent must be a man who can bring in advertisers and sponsors specifically in the nutrition field, particularly by reason of his specialized knowledge of his audience.

Moreover, incidentally, the thesis has a substantial amount of material which is specifically on nutrition in its strictly scientific sense, as distinguished from audience responses in the communications sense (CX 36; see, for instance, pp. 113-119; also extensive bibliography.)

We return to the first sentence of the representation; "Dr. Fredericks' Ph.D. was taken in the area of Public Health Education." This points up, at the very beginning, respondent's capacity as an educator and a lecturer, or for that matter a radio speaker, on the subject of nutrition, rather than as a nutritionist-scientist. In conjunction with the second sentence as to the nature and title of his thesis, the first sentence makes it almost impossible to regard the advertisement as representing that the thesis is on the science of nutrition per se, since it actually represents anything but that.

The testimony of the so-called "expert" witnesses called by complaint counsel for the purpose of proving that the thesis was not in the field of nutrition, was received by the examiner with great sufferance. The testimony, apart from opinion, could hardly do more than expose the operating facts of the meaning of the field of nutrition among professors on the university campus or among medical specialists.

Actually the testimony, as given, weakens the complaint counsel's case, inasmuch as it shows a duality of meaning on the part of one or more professors and as among all professors. If a less "scientific" meaning of "nutrition" is at least tolerable among professors, it tends to corroborate the hearing examiner's independent opinion of its meaning, particularly in an advertisement addressed to radio stations.

Although the examiner adheres to his belief that no testimony is necessary on the issue of whether respondent's Ph.D. thesis was in the field of or related to nutrition, he will now describe salient portions of the testimony of some of respondent's witnesses.

Professor Flick of New York University gave a broad, not narrow, definition of "nutrition," defining it as "a study of the physiological, economic, psychological and sociological aspects of food as it pertains to the nourishment of an individual" (TR 590:3).¹¹ She stated that "the meaning of nutrition actually

¹¹ TR 590:3 means transcript of testimony, page 590, line 3.

emerges in a situation where you are applying it or you're using it" (TR 590:10). It has a different meaning for the "expert" than for the "layman" (TR 591:13-14). Asked the question, "You did speak about 'field of nutrition' as being a very wide thing?" she answered, "Yes, it is" (TR 596:10-12). Asked the question, "It might include the communicating of dietary principles or accepted dietary principles, is that correct?" she answered "Yes" (TR 596:24, 597:1). She did add that the person communicating these principles would be assumed to be "qualified" (TR 597:5), but she agreed that a health educator would be so qualified if a nutritionist¹² were "available" to him (TR 601:6-12). In respect to Peace Corps workers in undeveloped countries (TR 604) she was asked the question, "Then they are working in the field of nutrition?" and her answer was "Yes" (TR 605:11-13).

Dr. Van Italie, described by complaint counsel as a "distinguished nutritionist," started out in his testimony with a very scientific definition of nutrition. But he readily and quickly admitted that "nutrition is a very broad area" (TR 780:11). As to Professor Flick's definition which we quoted above, he stated: "Well, in the broader sense that could be a definition" (TR 781:4). He added: "I think in a very broad sense nutrition enters into every phase of life, agriculture, economics, psychology * * *" (TR 781:7).

However, so far as Dr. Van Italie was concerned in his specialized interest, nutrition relates to the "clinical aspects" of human nutrition (TR 781:11-12). In particularizing on this meaning of "nutrition" limited to say "physiology and biochemistry" (TR 787:2) he referred to requirements imposed on graduate students studying under him (TR 786-787). It was only in this context that he testified (TR 788:2), as to respondent's thesis: "Well, from my standpoint, in the context of my own department, I would feel this would then be in the field of Public Health Education." Complaint counsel's reference to this quotation should be read in full context.

Even Professor Siepmann of New York University testified that a study which involves an analysis of the vitamin and mineral content of diets involves the field of nutrition (TR 839:14). Respondent's thesis and study did this very thing, using a control group and an experimental group for the purpose of study and analysis (CX 36 A, p. 2, TR 958).

¹² The complaint does not attack respondent's own claim to being a "nutritionist" prominently set forth in the large advertisement.

Accordingly, the examiner can do nothing but hold that misrepresentation No. 2, as to nutrition and the Ph.D. thesis, is not proved, to wit, that it is not proved, as alleged in Par. Six of the complaint that it

was not written on the subject of, in the field of, nor was it concerned with the field of nutrition.

It is a certainty that the thesis at the very least was "concerned" with the field of nutrition. And in any event there is certainly no deception of radio stations, or the readers generally of Broadcasting Magazine, as distinguished from the general public.

3. *Member of Faculty, New York University.*—Respondent was, despite complaint counsel's contention, at one time a member of the faculty of New York University. It is undisputed that he taught and was a "Lecturer on Education" (CX 62 A), in a course entitled "Applied Nutrition for Health Supervisors." The examiner holds that this sufficiently qualified him as a "member of the faculty" in the word's first dictionary meaning in this connection, as well as in common parlance, including advertising addressed to radio station readers. Inapplicable here is the second dictionary meaning in this connection, and the New York University By-law definition (CX 61), defining faculty as necessarily including participation in the government of a university.¹³ Despite its By-laws, the general Bulletin of New York University for the pertinent year (RX 5 E; TR 672:7) concededly listed respondent as a member of the faculty of New York University. Despite the By-laws, also, the annual Catalogues of the University list instructors and lecturers as members of the faculty (TR 705), even though they have no right to vote or to participate in University government.

According to the Charter and By-laws (CX 61, par. 86, p. 36) the faculty of a school in the university consists of:

the President, Chancellor * * * the dean of the school, professors, associate professors, and assistant professors, all of whom shall be voting members.

It is also provided that:

Professors emeriti, adjunct and clinical professors, and instructors are entitled to attend faculty meetings but shall not have the right of vote * * *.

However, as found above and as is undisputed, respondent's name is listed in the pertinent Bulletin of the University (RX

¹³ "First dictionary meaning" and "second," as used here, do not necessarily mean one meaning preferred over the other.

5 E) as a member of the faculty and the annual Catalogs regularly list instructors and lecturers as members of the faculty.

Through inadvertence the catalogs (CX 58 A through 58 K) were apparently not marked in evidence, although complaint counsel refer to them as "in evidence" (TR 702:3), and the examiner has had the impression that they were in evidence. Complaint counsel also refer to the latest Catalog, obviously as something of an example, as listing instructors as faculty members (TR 702:4, 19-21), *i.e.*, for the purpose of having their witness testify that this was incorrect procedure. This same witness agreed that the documents followed this type of listing (TR 705:1-5), as does the law school Catalog (RX 10).

In the examiner's opinion the Bulletin and Catalog usage on the part of the University constitutes at least a *de facto* definition which should definitely rank as the first and truly realistic meaning of "member of the faculty," as against the hierarchic meaning in the By-laws. The fact that respondent lectured for only one semester (in 1949-1950) does not affect this faculty status.

This is so, in the examiner's opinion, however a limited period of teaching may affect "*Tenure*," even if the teacher is a professor and a participant in University government.¹⁴ Certainly, in the examiner's opinion, in view of the showing in this case and the circumstances disclosed, respondent, even without resort to the right of reasonable "puffing" in advertising, was justified in claiming to the radio broadcasting industry that he was at one time a member of the faculty of New York University.

Further support for the finding herein, and refutation of complaint counsel's proposed finding or findings thereon, is as follows:

The fact that respondent lectured for only one semester has no particular bearing on the question whether he was a faculty member. Complaint counsel did not in any way make such a contention at the hearing, so far as the examiner can recall. Moreover, their witnesses did not draw a distinction based on whether the teaching was for one semester rather than for a longer period of time.

Dictionary definitions are as follows:

Webster's New Collegiate Dictionary states (RX 7 B), by way of definition of the word "faculty":

6. A branch of learning or instruction in a university. 7. The body of persons to whom are entrusted the government and instruction as of a university or college.

¹⁴ Faculty Handbook, RX 9, p. 22.

Webster's Unabridged Dictionary states (RX 6):

6. [from L. *facultas*, transl. of Aristotle's *dynamis*, branch of learning.] any of the departments of learning in a university; as, the *faculty* of law, the science *faculty*.

7. all the teachers of a school, college, or university.

Black's Law Dictionary states (RX 8):

The corps of professors, instructors, tutors, and lecturers. To be distinguished from the board of trustees, who constitute the corporation.

Of somewhat crucial significance in reaching for a general definition for the purposes of construction of the alleged misrepresentation is the fact that the rigid terminology of New York University's By-laws is apparently not followed at all at Harvard University, for instance. Harvard definitely and unequivocally includes lecturers and instructors as members of the "faculty," although they are referred to as "junior faculty" as contrasted with "senior faculty." These significant facts were extracted by respondent on cross-examination (TR 722; also 721).

Complaint counsel can obtain little comfort from the consideration that the word "faculty" may have alternative meanings resulting in ambiguity which itself may often be found to be misrepresentation. The *Rhodes* case, 208 F. 2d 382, 387 (7th Cir. 1953); *aff'd* 348 U.S. 940, already cited in this decision, had a fact situation not applicable here. Far more applicable is the *Sterling Drug* (Bayer Aspirin) case, 317 F. 2d 669 (2nd Cir. 1963), also already cited herein, where the court stated, at page 675, the following:

Surely the fact that the word "supported" might have alternative dictionary definitions of "endorsed" or "approved" is not alone sufficient to show reason to believe that the ordinary reader will probably construe the word in this manner. Most words *do* have alternative dictionary definitions; if that in itself were a sufficient legal criterion, few advertisements would survive. [Emphasis by court.]

It may also be noted here that complaint counsel assert, correctly, that this representation or its equivalent, as to being a member of the faculty, was also made in biographical sketches of respondent in Who's Who and other biographical volumes. This adds nothing to complaint counsel's case. First, the examiner held at the hearing, and still holds, that these biographical sketches do not constitute "advertisements" or "promotional material" within the meaning of Par. Three of the complaint. Second, even if they did, the biographical sketches constitute a true representation to the public at large; the examiner holds that

the meaning of this particular representation in the biographical sketches is about the same as the meaning conveyed to radio stations by the representation in the "large advertisement."

3. *Cont'd. Visiting Lecturer, Columbia.*—*There is no proof whatever of the alleged falsity of the representation that at one time respondent was a visiting lecturer in the College of Pharmacy of Columbia University. Complaint counsel simply failed to call the two witnesses named by them to prove this in their letter of January 28, 1966, pursuant to the examiner's prehearing order of directions. The witnesses specified were the Dean of the College of Pharmacy and one of its professors. Complaint counsel admit this failure (CPF 13, p. 11), and at the most attempt to explain it, which does not constitute proof. Actually, the failure to call them seems to have been due to their failure to prove the representations themselves through the two sources specified, for such proof, in their supplemental letter of March 8, 1966, namely, the "large advertisement" and a biographical volume held by the examiner not to constitute advertising or promotional material.*

Whatever the explanation for not producing the two witnesses, the fact remains that there is no proof in this case as to the truth or falsity of the representation as to respondent's being a visiting lecturer in the College of Pharmacy of Columbia University. As elsewhere noted herein, complaint counsel seem to imply (CPF 13, p. 11) that their failure to produce the witnesses was due to the examiner's refusing to consider as relevant the biographical volume offered by them. However, it may well be that this is merely to bolster up their motion to reopen made after the hearing, a motion which has been denied.

Complaint counsel take umbrage at the examiner's ruling at the hearing that he would not permit them to question the respondent himself as to the truthfulness of the representation as to being a visiting lecturer. However, the examiner based this ruling on his other ruling that the biographical volume or volumes are not advertising or promotional material within the meaning of the complaint (TR 483:14-23), thus leaving complaint counsel without any proof of the representation. Moreover, it does seem somewhat inappropriate to call the respondent on this question, after failing to call the very two witnesses, from Columbia University, listed by them on the issue.

4. *Doctorate of Humanities.*—*Construing the representation as complaint counsel construe it, and have consistently construed it, namely, that respondent definitely represented that the doctorate*

degree came from an institution lawfully authorized and empowered to award the same, they have completely failed to prove that Philathea College was not authorized and empowered to do so. The fact that its charter does not expressly include this power is insufficient proof; the charter does not even expressly include the power to grant ordinary degrees. No matter on what additional grounds complaint counsel may be relying, the failure to prove this lack of authority is fatal. It is undisputed that respondent did receive an honorary Doctorate of Humanities degree, that is, an appropriate certificate duly attested and signed (RX 37), i.e., from Philathea College—referred to in the complaint itself as a “school of theological learning” (Compl. Par. Six (4))—located in London, Canada. Incidentally, the complaint does not challenge that part of the representation stating that respondent received the degree “[f]or the public services rendered in his broadcasts.”—Accordingly, complaint counsel have failed to prove the falsity of this representation.

That the record as it stands contains no evidence showing lack of authority to confer the degree is apparently uncontested by complaint counsel. Actually they moved, after the hearing, to reopen on this issue, and the motion has been denied. The only witness they called was one of the officials of Philathea College, a very old gentleman whom they happened to find in New York, and who did not help support their contentions. They never produced the witness originally scheduled to testify in connection with the authority to issue the degree, a person from Canada stated by them to have specialized knowledge of degree-conferring institutions in Canada. They produced only the charter of the college, which states nothing one way or the other about degrees, honorary or otherwise, although containing language conferring general power.

Particularly in view of complaint counsel's motion to reopen, therefore, it may be pertinent to show that complaint counsel have consistently regarded authority to issue the degree as the issue in the case, and certainly a necessary issue.

The complaint itself alleges that the respondent represented that the honorary degree was from an institution “lawfully authorized or empowered to award the same” (Compl. Par. Five (4)). In its charging paragraph, the complaint states that the degree is not from an institution “lawfully entitled or empowered to award or grant the same,” but from “a foreign school of theological learning which said school is not entitled or empowered by its charter to award or grant the same” (Compl. Par. Six (4)).

Thus both in construing the meaning of the representation in the advertisement, and in asking for relief, the complaint proposes, as the issue, the power to grant an honorary degree, and apparently proposes nothing more and nothing less.

The construing paragraph (Compl. Par Five (4)), to be sure, also reads into the representation that the claimed degree came from "an institution or academic body." But complaint counsel can hardly contend that Philathea College does not come within this description. Philathea College certainly is an "institution" as complaint counsel themselves frequently refer to it. Moreover, the charging paragraph of the complaint itself refers to it as a "school of theological learning," as above quoted. Finally, complaint counsel themselves introduced in evidence catalogs of the institution (CX 41, 42) which certainly on their face and by their contents establish this, as was corroborated by the sole, however ineffectual, witness produced by them.

Moreover, it is true, to be sure, that the charging paragraph (Six (4)) denies that respondent "received" the degree from "an academic institution." However, it continues by expressly and affirmatively stating that the institution is a "*foreign school of theological learning* which said school is *not entitled or empowered* by its charter to award or grant the same." (Emphasis supplied.) Thus, again, the full weight of the complaint is on the issue of authority to confer the degree.

Even at the prehearing conference complaint counsel expressly disclaimed that they were trying to prove that Philathea College was a "diploma mill," as they put it (PREH. TR 56:23). The term "diploma mill," of course, generally refers to a college having the authority to issue degrees, but misusing it. Thus complaint counsel were saying that they were trying to prove that Philathea College had no authority to issue the degree, unlike a "diploma mill" which has the authority but abuses it. Said counsel did state that Philathea was "gravely suspect as an educational institution." But they regarded this as a matter of whether it was an accredited institution, to be established or disproved through an apparent accrediting agency named by them (PREH. TR 56-57); and counsel indicated that they would take a deposition in Canada thereon from Dr. Sheffield of the accrediting agency (PREH. TR 58:4). Actually no deposition was ever taken of Dr. Sheffield, or anyone else; nor was any motion made for one. Moreover, Dr. Sheffield was not produced at the hearing, although he was listed as a witness having the title Director of Research, Association of Universities and Colleges of Canada, in

complaint counsel's letter of January 28, 1966, furnished pursuant to the prehearing order of directions. In this letter it was stated (p. 3):

It is hoped that Dr. Sheffield (or his delegate) will be available in this country to testify as to the nature and status of the institution known as Philathea College, London, Ontario, Canada, in support of the allegations of Paragraph Six, sub-section 4 of the complaint. In the event that neither Dr. Sheffield nor his delegate is available to come to the United States for this purpose, the Hearing Examiner will be requested to authorize the taking of Dr. Sheffield's deposition in Ottawa, at a time convenient to counsel for the respondent.

As pointed out above, Par. Six (4) of the complaint—referred to in the letter by complaint counsel—is predicated solely on the issue of power to confer the honorary degree.

Complaint counsel finally proposed and produced an entirely different witness, and dispensed with Dr. Sheffield or any delegate. This witness was Dr. Harry Cohen, Chancellor of the theological institution in question. He is the witness above referred to who contributed very little, and nothing of help, to complaint counsel. (See also complaint counsel's motion of March 7, 1966, to substitute Dr. Cohen in place of Dr. Sheffield.)

Most surprising of all is that complaint counsel, although offering in evidence the charter of Philathea College on the issue of authority or lack of authority to confer the honorary degree, never came in with any proof whatever of foreign law, to wit, the law of Canada as to the construction of this charter, issued on its face to "Philathea College" or on the law generally of Canada on powers of academic institutions to issue honorary degrees.

Moreover, the pertinent proposed finding (CPF 14, p. 12) is limited to the issue of authority to confer the degree, the very issue completely unsupported by proof. It reads, in full, as follows:

The institution which awarded the respondent an "Honorary Doctor of Humanities" degree, *viz.*, Philathea College, of London, Ontario, Canada, is not authorized or empowered by its charter to award degrees of this type, and, accordingly, it is misleading and deceptive for respondent to represent that he has received a *bona fide* Honorary Doctor of Humanities degree.

It will be noted that the reference to a "*bona fide*" degree is not stated as the proposed misrepresentation as such, but merely as a consequence of the proposed misrepresentation, to wit, that Philathea College "is not authorized or empowered by its charter to award degrees of this type." So far as the examiner can recollect, this is the first time that the word "*bona fide*" or an

equivalent, such as "good faith," was used or mentioned in this proceeding in any connection whatever.

The examiner will now discuss in detail, and in the same sequence followed by complaint counsel, the arguments set forth by them in support of their Proposed Finding on this point (CPF 14, pp. 13-17). Complaint counsel's opening quotation from the prehearing transcript as to "diploma mill" has already been discussed and needs no further discussion.

Complaint counsel then point out that the Philathea College catalog for 1958-59 (CX 41) contains a statement (p. 4) as follows:

Besides earned degrees, as previously outlined, provision has also been made in the charter for the granting of * * * the degree of Doctor of Humanities (D.Hum.) upon persons in secular life who have distinguished themselves in the field of human relationships.

Complaint counsel then point out that catalogs for subsequent years do not contain this statement. Nor does the charter (CX 43) expressly provide for honorary (or earned) degrees.

However, it is clear, in the examiner's opinion, that the omission of the quoted statement in subsequent catalogs does not necessarily mean that Philathea College withdrew any prior claim to the world that it has the authority to confer an honorary degree. The omission may mean any of a number of things. It may even mean that the school, in its judgment, thought that honorary degrees should not be publicized routinely in the catalogs. The fact is that the document given to respondent and certifying to the degree is duly attested by the officers of Philathea College, including Dr. Cohen, Chancellor, complaint counsel's only witness.

Complaint counsel also contend that the testimony of respondent is "curious" as to how he came about to receive the honorary degree. On the face of it this does not seem to be particularly pertinent to the *issue of the power to confer the degree*. However, the facts or considerations noted by complaint counsel will be examined.

First, complaint counsel point to respondent's testimony that prior to receiving the degree "somebody" called him to advise him that the college had decided to award the degree to him, which is not an altogether unusual event. Second, complaint counsel state that the degree was awarded to respondent at a luncheon (respondent's testimony states it was preceded by a "ceremony" (TR 455:11)) at the Lotus Club in New York, attended by "perhaps a dozen or fifteen" persons (TR 448:14).

This seems to add somewhat to the reality of the honorary degree rather than subtract from it.

Third, they point out that respondent testified that he had looked up the school, found out that it was growing and building buildings (TR 447:1), and also ascertained that Mrs. Eleanor Roosevelt and Harry Truman had received similar degrees (TR 454:23). This hardly impairs the good faith of respondent, assuming that this is an issue in the case.—In addition, complaint counsel state that respondent, apart from receiving the certificate itself, did not receive a scroll or citation, although the testimony (by respondent) is that it is possible that he did but he did not remember (TR 455:19). The examiner does not consider this scroll matter very weighty, particularly in the absence of evidence as to Canadian practice in this respect.

Complaint counsel also make the point that respondent admittedly made a contribution to the school's scholarship fund at or about the time he received the degree—explaining, however, that he made similar contributions to other colleges and universities (TR 470:8 ff.).—The examiner is unable to draw any clear inference from this.¹⁵

Furthermore, none of the foregoing points or considerations urged by complaint counsel, it must be repeated, seem to have much to do with the real issue, the power and authority of the school to award an honorary degree.

Complaint counsel go on to cite alleged errors of the examiner in refusing to permit certain questions of their one witness on this aspect of the case, to wit, Dr. Harry Cohen, Chancellor of the school. Incidentally, he is a person of distinguished professional background, with the degrees of M.D., Ph.D., and Litt.D. (CX 42, p. 2; TR 744).

The examiner made his ruling on complaint counsel's statement at the prehearing that they were not claiming that the school was a "diploma mill" (TR 756:14), and also on the allegations of the complaint (TR 756:16; 758:7-8). Accordingly, on objections of respondent's counsel, the examiner refused to allow a question of Dr. Cohen as to how many full-time teachers the school had in 1961 (TR 758:22). The examiner similarly refused to permit an answer to the question as to what sort of physical plant or buildings the school had in 1961 (TR 761:8). The examiner also refused to allow an answer to the question, "Dr. Cohen, what is the reputation in Canada of Philathea

¹⁵ As already pointed out, the complaint raises no issue whatever about respondent's receiving the degree for "public services rendered in his broadcasts."

College?" (TR 765:25).—Incidentally, complaint counsel are mistaken in stating that Dr. Cohen testified that he knew that subsequent catalogs of the school had omitted its statement of the authority to grant honorary degrees; he testified: "I wouldn't know that" (TR 751:3).

Complaint counsel also try to make a big point about the examiner's refusal to keep the record open until April 15, or later, pending the availability or return from Europe of a newly proposed witness, to wit, one John M. Keesing. The real and controlling fact in connection with this newly proposed witness is that the complaint counsel at the hearing, before actually calling Dr. Cohen, stated that he would rather call Mr. Keesing instead, and as a substitute for him. Respondent's counsel agreed, and the examiner permitted this. However, complaint counsel were unable to produce Mr. Keesing, and thereupon moved that in addition to being allowed to call Dr. Cohen, they also have the right to call or "depose" Mr. Keesing, if they could not get sufficient information from Dr. Cohen (TR 516:1). In greater detail, the facts are as follows:

Complaint counsel stated at the hearing that his proposed witness, Dr. Cohen, appeared to be very elderly, in bad health and very agitated (TR 467:1), and that he would like to "skip" (TR 467:3) him and call Mr. Keesing instead. Complaint counsel did not state what Mr. Keesing would testify to but did say that Mr. Keesing was a guest lecturer in international jurisprudence at Philathea College (TR 465:20). Counsel also stated: "I do gather that Mr. Keesing is a teacher at this school or lecturer. Certainly, he must know something about it" (TR 465-6). Respondent testified that he met Mr. Keesing at the time of the award of the diploma and may have received a call from him prior thereto (TR 461:11, 20).

Respondent's counsel said that it was very "strange" that complaint counsel were looking around for witnesses at this late hour, but that he would not object to the "substitution," *i.e.*, in place of Dr. Cohen (TR 467:9, 17). The examiner issued a subpoena for Mr. Keesing accordingly, on complaint counsel's representation that he thought he was connected, or might have some connection, with a New York law firm, although the school catalog apparently lists him as Q.C., Queen's Counsel. Complaint counsel later informed the examiner (TR 515) that a colleague had tried to serve Mr. Keesing at a New York law office, but had been informed by Mr. Keesing's brother that Mr. Keesing was in Europe and would not return until April 15 (TR 515:9).

At the same time, complaint counsel advised the examiner that he would call Dr. Cohen (as he eventually did) but that in the event he could not get any information from him he would move to keep the record open to "depose" Mr. Keesing, *i.e.*, as an additional witness (TR 516:1-4). This time respondent's counsel objected strenuously. Complaint counsel then made a formal motion (TR 517:17), and the examiner denied the motion (TR 519:4).

Complaint counsel also offered in evidence an article in MacLean's Magazine (Canada), dated or stamped April 6, 1964, which is critical of degrees in a number of colleges, including Philathea College. The examiner rejected the article (TR 767:20; CX 63, Rejected). The article is the rankest kind of hearsay. Moreover, apart from its statement, however inconclusive, that the charter (act of incorporation) of Philathea College does not authorize it to offer honorary degrees, the article is deemed irrelevant by the examiner on the issue in this case. Finally, the article is not listed in complaint counsel's list of exhibits as directed by the examiner's prehearing conference order of directions.

In the discussion in their Proposed Findings (CPF 14, p. 15) complaint counsel describes the magazine as the "Saturday Evening Post" of Canada, of which there is no evidence in the record and as to which none was offered. Moreover, although the exhibit was curtly rejected (TR 766:11; 768:3) by the examiner, complaint counsel have seen fit to quote "[w]hat this article had to say about Philathea College," consisting of three short paragraphs.

This includes, to be sure, the statement that the institution "is a bible-training school of the First Church of Christ (Disciples)," which now has an addition built "on to" it for additional working space for the school. It also contains the statement that Eleanor Roosevelt and John P. Robarts, premier of Ontario, have been the recipients of honorary degrees from it (however questionable).

However, complaint counsel no doubt rely upon the statement in these paragraphs that the students of the institution are not required to comply with the admission requirements of recognized universities which, for all the record shows, may, even if true, be appropriate for a bible-training school, or permitted a bible-training school, of college status, in Canada.

Complaint counsel no doubt also rely upon the statement in

the article that the institution has no right by its act of incorporation to grant honorary degrees, as already referred to above, and upon comments in the article on the number of honorary degrees conferred.

Complaint counsel state that the article was for the "sole purpose" of alerting the examiner to the facts about the College and the desirability of keeping the record open, apparently for the purpose of further examination of Mr. Keesing. Actually, the only purpose stated in the record is that it had been intended to use it to interrogate Dr. Cohen if he had been allowed to answer as to what the College's reputation is (TR 766:7), plus, perhaps, the observation that the pleadings raise "the question as to whether this is a proper school and that there is information in this article" (TR 767:4). The discussion in the Proposed Findings (p. 16) states, among other things, that the "legitimacy of its status as an actual and *bona fide* educational institution cannot be determined on this record." However, as already noted by the examiner, the Proposed Finding itself does not propose anything about good faith except as a conclusion from the alleged lack of authority to award honorary degrees.

Finally, in a footnote, complaint counsel point out that, although respondent's list of proposed witnesses proposed one Mayer Lerner, Q.C., London, Canada, as a witness, to testify with respect to the powers and rights of Philathea College to confer honorary degrees, he never did appear. In view of the absence of any evidence submitted by complaint counsel on the authority to confer the honorary degrees, and in view of their failure to produce Dr. Sheffield, or one of his delegates, from the Canadian accrediting agency, as noticed in their own list of proposed witnesses, this criticism of respondent for not producing a witness in defense seems to be touched with a grain of unconscious humor.

The examiner has gone into considerable detail as to this alleged misrepresentation as to the honorary degree, not because it is unclear that the issue should be squarely resolved in favor of the respondent, but because of complaint counsel's motion that the record be reopened for further testimony, which motion, as already indicated, has been denied.

5. *The "Diplomate."*—*The representation in the advertisement that respondent holds a Diplomate "degree" is untrue, but the controlling consideration is that this representation is not chargeable to respondent. As shown under THREE, supra, re-*

spondent never even supplied the information for the representation (nor did it appear in the Who's Who or other biographical volumes), and he took immediate steps actually stopping it as soon as he knew about it. Complaint counsel, as already noted, stated on the record: "I am not inclined to press on the diplomate point." (TR 394:25) In support of their Proposed Finding as to falsity of this representation (CPF 15; p. 17) they do not utter a single word of argument or say anything except the three words, "This is conceded." The examiner, therefore, believes that they are not seriously pressing their Proposed Finding as to the Diplomate. This is so even though they perfunctorily include it and every other pleaded representation in their proposed order. —Accordingly, the examiner finds that the Diplomate representation is false, although not chargeable to respondent as having been made by him and in no event warranting an order (see THREE, *supra*).

6. *National Encyclopedia Biography*.—*This representation is untrue, although, as fully developed under THREE, supra, it is de minimis.* Complaint counsel in their Proposed Finding (CPF 16; p. 17) merely propose that "although" the representation is "untrue" it was not "deliberate or wilfull" (sic). There is no argument thereunder, merely the words "Stipulation of Counsel, Transcript, pp. 769-772." As fully expounded in THREE, the misrepresentation is *de minimis* in any event.

Small Advertisement

7. *On Ivy Stations*.—*This representation that respondent's program was carried on the three Ivy stations—WEIV, WOIV, and WJIV, all in upstate New York—is false, although, as held in THREE supra, it is not chargeable as having been made by respondent.*

Moreover, the misrepresentation is of a trivial and *de minimis* nature considering the large number of stations listed in the advertisement, and considering the total of all stations carrying the program, including such leading stations as WOR, and bearing in mind the apparently minor stature of the three stations involved (despite complaint counsel's point of local coverage). This, too, is developed in Part THREE, *supra*.

Book

We shall now discuss the book itself and the two alleged misrepresentations, each of which will be discussed separately. The

"new book" representation is definitely found to be false.—The "Copyright 1961" statement is found, in view of the customary registration, which was not applied for and obtained, to be a limited misrepresentation, *i.e.*, that registration had been applied for and obtained. However, under THREE, it is not chargeable to respondent.

In finding falsity in this Part SIX (8), the examiner will elaborate on the meaning of the representations or statements as found in FIVE, *supra*.

8. "New Book" (Outside Front Cover).—*The paperback book in question (CX 45), containing on its outside front cover the words "new book" (and identified as to date by the "Copyright 1961" on an inside page), definitely is not a "new book," as clearly represented, advertised and promoted, on said cover. As a matter of fact, it is essentially and almost identically the same book in its text and entire set-up, as published under the same title in 1951 (CX 44), with the very same outside front cover, including the same representation "a new book by Carlton Fredericks."*

Respondent's Proposed Findings do not argue to the contrary except to present the futile argument that since the 1961 book has the same outside front cover and the same "new book" representation as the 1951 book, there is no intent to misrepresent by the 1961 book, ergo no misrepresentation.

Apart from the general irrelevancy of intent in proving misrepresentation under section 5 of the Federal Trade Commission Act, the plain situation here is that the reader of the 1961 book will judge it by the "new book" representation he sees on the outside front cover. Such a reader may well not even know that there has been a 1951 issue (CX 44), and that the latter represented that the book was "new" ten years before the 1961 book.

The actual changes, such as they are, were stipulated by counsel on both sides (TR 894-897). They are approximately a dozen in number, and can hardly be regarded in any sense as substantial enough to make the 1961 edition, here in question, a new book, or anything other than a revised book, and revised only in a few details. For example, in two instances in the 1961 edition the words "folic acid" were deleted, and in apparently a majority of instances recommended dosages were altered, such as a change from "rutin, 60 milligrams" to "rutin, 50 milligrams."

The exact changes were as follows (TR 895-897):

1951 Book	Page no.	1961 Book
"folic acid"	23, 48	deleted.
100 milligrams (para-amino- benzoic acid)	28	60 milligrams (same).
60 milligrams, Rutin	57	50 milligrams, Rutin.
50 milligrams (para-amino- benzoic acid)	57	30 milligrams (same).
6 milligrams (re: Riboflavin)....	74	5 milligrams (re: same).
Dosages "5 to 30"	75	Same: "5 to 25".
Minimum of 5 milligrams.....		Minimum of 2 milligrams.
Minimum of "30 to 100 milli- grams" (re Niacin)	76	Minimum of "35 to 100 mil- ligrams" (re same).
milligrams (mgs)	57, 82	International units, milli- grams.
2 sentences on folic acid	77	said 2 sentences are deleted.
Rutin: "60 milligrams"	79	Rutkin: "50 milligrams."
"as stated"	81	words "as stated" deleted. See TR 897:3-7 Vitamin D, etc.).
certain spelling	87, 90	spelling changed.
Pyrodoxyn	87, 90	Pyridoxin.

The list of these changes indicates very clearly that at the very most the 1961 book is merely a "revised" edition of the 1951 book and might very well have been represented as such, instead of as a new book.

8. Cont'd. "Copyright 1961, by Nutrition Surveys, Inc."—Concededly, there was no registration of this copyright. Since it has already been found under FIVE (8), *supra*, that the meaning to the average reader is that the claimed copyright has been registered in the Copyright Office, there is embodied in this claimed "copyright notice" a false representation that the claimed copyright has been duly registered. Moreover, in view of the few and very minor changes it is doubtful that the book was copyrightable at all (CX 67 B, from Copyright Office), thus involving further probable misrepresentation.—However, as found in THREE, *supra*, respondent is not chargeable with having made the above-quoted representation as such.

Furthermore, it is hereby found that the "Copyright 1961 * * *" statement is definitely a representation that the book is of 1961, i.e., a new book as of the year 1961.—However, as further found under THREE, *supra*, respondent is not chargeable with having made this "1961" representation as such.

Nevertheless, further reference is made to THREE, *supra*, including THREE (8) thereof, in connection with the finding therein that the "new book" representation can be read together with the date "1961" in the copyright notice, and in connection with the issuance of the book in 1961, so that respondent is responsible

for having made the false representation that the book was a new book as of 1961.

SEVEN (AND EIGHT)

Substantial Effect and Public Interest or Injury

8. The examiner finds that the use and utilization by respondent of the "new book" representation—which was and is a false, misleading and deceptive statement by way of advertisement or promotional material—has had and now has the tendency and capacity to mislead the purchasing public into the mistaken belief that said representation and statement was, and is, true, and into substantial purchases of said book by reason thereof.

The examiner also finds, or concludes, that the aforesaid act and practice of respondent in using and utilizing said "new book" representation, was and is to the prejudice and injury of the public, and constituted, and now constitutes, an unfair and deceptive act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

There is little doubt that in the present posture of this case, and on the facts as proved, a cease and desist order should issue.

It is true that the sale of the book in question, or the particular 1961 edition, ended, according to respondent, considerably prior to the filing of the present complaint. However, there is nothing to prevent him from publishing the same book right now, with the same "new book" representation, with or without minor changes.

It may be that respondent does not intend to do this, and is willing to enter into a firm agreement not to do so and not to make any further "new book" representation as here found to be false. But the examiner does not regard this matter as before him or even presented to him by respondent. It is a matter for the Commission to pass on on proper application by respondent to avail himself of informal enforcement or related procedure.

The examiner deliberately refrains from making any findings, one way or another, on substantial effect and public interest or injury, in respect to any of the alleged representations or misrepresentations herein, apart from the "new book" misrepresentation.

In part, of course, this is because none of the others have been proved within and under the allegations of the complaint.

However, the more important reason is that the bulk of the alleged misrepresentations, *i.e.*, those addressed to the radio stations through advertising in Broadcasting Magazine, seem to be relatively minor and of no great significance—at least each one

by itself—except for the “Diplomate,” which is clearly excusable in view of respondent’s voluntary and prompt action putting a stop to it.

The respondent, concededly a Phi Beta Kappa, a Ph.D., and a well known radio lecturer on diet and nutrition, and whose biographical sketches appear in a number of Who’s Who and other biographical volumes, has been subjected here to a veritable avalanche of charges, each and all of them relatively petty to his main claim and outstanding representation that he is “America’s Leading Nutritionist,” a claim which is not attacked at all.

Par. Seven of the complaint uses the word “substantial.” Par. Eight speaks of “injury to the public.” The preamble to the complaint contains, of course, the Commission’s preliminary finding of “public interest.”

Where is the proof of substantial injury to the public or of public interest in connection with the advertising to radio stations as to each of the pertinent alleged misrepresentations? Where is this proof even by implication, unless all of them, or most of them, had been fully proved?

One outstanding fact is that both advertisements in Broadcasting Magazine appeared only once, and as long ago as 1961. The large advertisement was immediately stopped when the respondent first noted the “Diplomate” representation and loudly complained about it. The “small advertisement,” erroneously listing the three Ivy stations, among many others, could hardly have any substantial effect in any overall sense.

Moreover, there is the outstanding fact that both these advertisements, containing seven out of the entire eight representations, were addressed to presumably hard-boiled radio station executives, not to members of the general public, including the gullible and the weak of understanding, who on high court authority make this general public the special ward of the Commission.

There may be even doubt as to whether the Commission would have found sufficient “public interest” to issue the complaint herein in respect to the radio stations, had it known that it was based on a single advertisement in each instance, appearing as far back as 1961, addressed only to the radio industry, and actually subscribed not by respondent but by CF Productions, Inc.

Let us look at the large advertisement, which accounts for all but one of the alleged misrepresentations to the radio stations.

The advertisement is captioned in bold type “*Station Managers Should Know,*” thus making it clear that it is not the public

at large that is being addressed. Then follows the capitalized caption THE FACTS ABOUT AMERICA'S LEADING NUTRITIONIST, a characterization of respondent (in the last three words) not attacked in any way in the complaint nor during the entire proceeding. Similarly, there has been an omission to attack in the complaint or in the proceeding the statements in the advertisement, such as respondent's associate professorship in Fairleigh Dickinson University, the actuality of his biographical sketches being contained in five Who's Who, or in similar publications.

Moreover, the "pitch" of the advertisement is obviously to the profit-making proclivity and not to any function of radio stations to obtain the best-qualified nutritionist to address the public. For instance, the advertisement concludes and closes with the statement:

For more facts on how your station can benefit from this award-winning show and obtain national business * * * write, phone, or wire * * *.

A further example is the advertisement's frank description of respondent's Ph.D. thesis as "a study of the response of his audience to his broadcasts," in the field of nutrition—and the follow-up statement: "It may, therefore, be said that this is a broadcaster who knows his audience, their characteristics, income and education, better than any other in the Industry." Thus, the advertisement seems to be playing up respondent as an attraction in acquiring national food advertising, and only secondarily for his attainments.

However, as to respondent's attainments in the sense of strict biographical data, it is interesting to note that the complaint does not attack the following data in the advertisements, quite a few of which eclipse the items which are attacked:

Founding Fellow in the International College of Nutrition [which erroneously is stated to have awarded the Diplomate].

Member, American Academy of Nutrition, American Academy of Dental Medicine.

Taught Nutrition, extension division, Brooklyn College and City College of New York.

Associate professor in Public Health Education, Fairleigh Dickinson University.

Taught Nutrition for Dentists in two of the New York Societies.

Consultant in Nutrition to many physicians and dentists.

His broadcasts completely documented; extensive bibliography utilized, A.M.A., etc.

Has scientific staff, comprising a diplomate physician.

Awarded Grand Cross, Eloy Alfaro International Foundation

CONCLUSIONS

1. There has been a failure of proof as to all alleged representations except as to the "new book" misrepresentation (but not excepting the "Copyright 1961" alleged misrepresentation as such).

No showing has been made for the reopening of the proceedings, as moved by complaint counsel. The motion was heretofore denied by a separate order of the examiner dated May 31, 1966.

2. The statement and representation, a "new book," appearing on the outside front cover of the book, "Eat, Live and Be Merry," by Carlton Fredericks, was and is misleading in material respects, and constituted and now constitutes false, misleading, and deceptive statements and representations in advertising within the intent and meaning of the Federal Trade Commission Act.

3. The use and utilization by the respondent of the foregoing false, misleading, and deceptive statement and representation in advertising—to wit, "new book"—had and now has the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statement and representation was, and is, true, and thereby into the purchase of respondent's book so represented to be "new," by reason thereof.

4. The aforestated act and practice of the respondent, as herein alleged, was and is to the prejudice and injury of the public and of respondent's competitors, and it constituted, and now constitutes, an unfair and deceptive act and practice and an unfair method of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

5. The Federal Trade Commission has jurisdiction of this proceeding, the subject matter thereof, and the parties therein.

ORDER

It is ordered, That the complaint herein be dismissed as to each and every alleged misrepresentation except the "new book" alleged misrepresentation, as contained on the outside front cover of a paperback book entitled "Eat, Live and Be Merry," by Carlton Fredericks. (Said book is marked on an inside page thereof "Copyright 1961, By Nutrition Surveys, Inc.," which is not found to be a misrepresentation as such by respondent.)

It is ordered, That the motion of complaint counsel to reopen

the record be noted here as denied, having heretofore been denied by order of the examiner dated May 31, 1966—such denied motion being for the reception of testimony and exhibits as to the “Visiting lecturer” alleged misrepresentation, and the reception of testimony (by formal hearing or deposition) from one John M. Keesing as to the “Doctor of Humanities” alleged misrepresentation, more specifically, as to the status of Philathea College.

It is ordered, That respondent Carlton Fredericks, individually and doing business under his own name, or trading and doing business under any other name, his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any book or similar publication in commerce, as “commerce” is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

That any book or similar publication is a “new” book or publication when, in fact, the said book or similar publication has previously appeared in essentially the same form or content.

ORDER DISMISSING COMPLAINT

This matter is before the Commission on the cross-appeals of counsel supporting the complaint and of respondent, and has been heard by the Commission on briefs and argument in support thereof and in opposition thereto.

The Commission has considered the transcript and the briefs and arguments of the parties and has concluded that the decision and order of the hearing examiner should be set aside and that the complaint should be dismissed in its entirety. This action is being taken because of deficiencies in this record. The Commission emphasizes that respondent's business activities will be kept under surveillance, and should it appear that the public interest so demands, the Commission will not hesitate to take whatever future action is warranted.

Accordingly, *It is ordered*, That the initial decision and order of the hearing examiner be, and they hereby are, set aside.

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

IN THE MATTER OF
WASSERMAN & LAVINE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING
ACTS

Docket C-1175. Complaint, Feb. 20, 1967—Decision, Feb. 20, 1967

Consent order requiring a New York City manufacturing furrier to cease misbranding, falsely invoicing, and deceptively advertising its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Wasserman & Lavine, Inc., a corporation, and David Wasserman and Paul Lavine, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Wasserman & Lavine, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents David Wasserman and Paul Lavine are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 345 Seventh Avenue, New York, New York.

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