THE SEEBURG CORPORATION

Docket 8682. Order, Mar. 27, 1967

Order making available to respondent a list of accepted bottle vending machines issued by Coco-Cola, dated March 1, 1965.

ORDER DIRECTING PRODUCTION AND RULING ON REQUEST FOR PLENARY CONSIDERATION OF CERTIFICATION

This matter is before the Commission upon the hearing examiner's certification of complaint counsel's refusal to make certain documents available to respondent, filed February 3, 1967, except as that certification has been withdrawn by a subsequent submittal filed by the examiner February 10, 1967. The certification, as amended by the withdrawal, brings to the Commission the solitary issue of whether or not complaint counsel should produce for respondent a document identified as a list of accepted bottle vending machines issued by Coca-Cola, dated March 1, 1965. The hearing examiner has recommended that this document be made available.

The examiner also, without recommendation, has attached to his submission of February 10, 1967, respondent's request for plenary consideration by the Commission of the certification by the hearing examiner concerning Commission policies as to confidential files. This same request was also filed with the Commission February 6, 1967. Complaint counsel, on February 13, 1967, filed a statement with respect to the hearing examiner's February 3, 1967, certification dealing with both respondent's motion for the production of documents and respondent's request for plenary consideration by the Commission.

The Commission originally considered respondent's demand for production of documents in the Commission's confidential files on the examiner's certification of October 3, 1966, recommending denial thereof for failure to make the showing required by § 1.134 of the Commission's Rules of Practice. The request included documents relating to activities of bottlers, soft drink syrup manufacturers and vending machine manufacturers. The Commission, in an order issued October 25, 1966 [70 F.T.C. 1809], denied respondent's request. Respondent appealed this order, and its action for declaratory judgment and relief in the nature of mandamus was dismissed by the court. *The Seeburg Corporation* v. *The Federal Trade Commission* (U.S.D.C. E.D. Tenn. 1966). Later, on December 15, 1966, respondent filed a renewed motion for the production of documents, which was certified to the Commission

on December 19, 1966. The Commission denied such motion by an order issued February 8, 1967 [p. 1633 herein].

In the meantime, the examiner made detailed findings and rulings concerning the production of documents in the possession of complaint counsel. These findings and rulings are attached to the examiner's certification and are identified as Appendixes A and B. Therein the examiner systematically considers each of the documents or categories of documents requested and states his ruling as to whether or not such should be produced. There apparently is no issue before the Commission as to the documents which the examiner ruled need not be furnished.[1] The question of production is now one of narrow scope. The examiner states in his submission of February 10, 1967, partially withdrawing his prior certification, that complaint counsel have made available all the documentation in question except for two lists by Coca-Cola, one of which is reported to be now in the possession of respondent's counsel. The other is the aforementioned Coca-Cola list of accepted bottle vending machines, dated March 1, 1965.

With reference to the latter document, the hearing examiner states in Appendix A attached to his certification of February 3, 1967, that there is no longer anything secret or confidential about it "since public record evidence has already been received without objection relating to such acceptances." He found that the document might serve some purpose insofar as respondent's defense is concerned and he therefore directed production under *in camera* procedures. While it is not clear that respondent has made the requisite showing of "good cause" for the production of the document in question, nevertheless, in the circumstances, we will direct that it be made available.

We see no need at this time to further consider the issues raised by respondent in its request for plenary consideration. We believe that these issues have been largely rendered moot by the later access to records provided by complaint counsel in response to the hearing examiner's rulings. Accordingly,

It is ordered, That complaint counsel make available to the respondent, for its information and use, under such conditions as the examiner may provide, the list of accepted bottle vending machines issued by Coca-Cola dated March 1, 1965.

It is further ordered, That respondent's request for plenary consideration be, and it hereby is, denied.

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[1] Respondent's request for plenary consideration of Commission policies as to confidential documents does not seem to raise objections to the rulings of the hearing examiner to date, which rulings, in effect, have granted in part and denied in part its requests for production.

ISRAEL RETTINGER ET AL. DOING BUSINESS AS RETTINGER RAINCOAT MFG. CO.

Docket 6534. Order and Opinions, Apr. 7, 1967

Order denying respondent's motion to reopen proceeding and modify the order.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

What is involved here is essentially a private controversy between The Goodyear Tire & Rubber Company of Akron, Ohio, a billion-dollar corporation, and a small company that has been using "Goodyear" on its raincoats since 1911. In 1888, in *Goodyear India Rubber Co.* v. *Goodyear Rubber Co.*, 128 U.S. 598, the Supreme Court held that "Goodyear" is a generic name in the public domain. Subsequent to that decision, many companies (including most of the rainwear industry) have been using the term "Goodyear." Goodyear of Akron is now embroiled in private litigation with respondent and others, claiming infringement of private trademark rights. I do not think it is in the public interest for this Commission to intervene in such essentially private controversies. The point was made more than forty years ago by Gerard Henderson in his classic study, "The Federal Trade Commission" (1924):

> The argument is sometimes made that there is a legitimate place for the Federal Trade Commission in cases of this sort, as the protector of the weak against the strong. A large corporation, it is said, can hire eminent lawyers and experts, and prolong the litigation until the strength and resources of the small competitor, whose private brand the corporation is trying to appropriate, have been exhausted. The difficulty with this argument is that, in the cases in which complaints have been issued, the object has as often as not been to protect a large, nationally known company against a small but unscrupulous competitor. Among the companies for whose protection such complaints have been issued are the * * * Goodyear Tire & Rubber Company, * * *. These companies would hardly admit that they were applying, *in forma pauperis*, to have the Government assume the expense of their private litigations.
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> Where the deceptive brand or name, or the misleading advertisement, is designed to lead customers to confuse respondent's product with the product of a specific competitor, there is a remedy in the courts of law and equity which is more prompt and more efficacious than the cumbersome procedure of the Commission. * * * In such cases it would seem that the person injured should be made to pursue his remedy in a private litigation, and that public funds should not be expended by a governmental agency to relieve him of that burden. (Pp. 174–75, 228.)