

LITTON INDUSTRIES, INC.

Docket 8778. Order and Statement, June 27, 1969

Order denying complaint counsel's request for an injunction against respondent to prevent it from altering the production facilities of an acquired company.

CONCURRING STATEMENT

BY JONES, COMMISSIONER:

Counsel in support of the complaint challenging respondent Litton's acquisition of Triumph-Adler Co. petitioned the Commission to initiate injunction proceedings against Litton to prevent it from altering and expanding Triumph-Adler's preacquisition production facilities.¹

Complaint counsel have already negotiated a protective agreement with Litton designed to preserve Triumph-Adler as a sufficiently separate entity from Litton to insure the existence of a divestible business should the instant challenge to the legality of the acquisition be sustained.² Now it wishes to go beyond this agreement and enjoin Triumph-Adler's future expansion.

Complaint counsel argue that without an injunction forbidding Litton from expanding Triumph-Adler's typewriter facilities abroad, Triumph-Adler will have become so dependent on Litton as an outlet for its expanded capacity that, if the present challenge to Litton's acquisition is sustained, it would be impossible to restore Triumph-Adler to the same independent, viable competitive status which it enjoyed prior to the acquisition. Second, counsel argue that if Litton were not permitted to expand Triumph-Adler's production, it would not be able to look to Triumph-Adler to service its own needs and thus it would not be able to

¹ Counsel have not defined the contemplated terms of such an injunction. They simply referred to Litton's plans for shifting portions of Triumph-Adler's production facilities, expanding its production capacity and rearranging its R & D responsibilities. I am assuming that the request for an injunction against "altering in any way the preacquisition facilities of Triumph-Adler" would cover these enumerated contemplated changes with respect to Triumph-Adler.

² Litton submitted a proposed protective agreement with complaint counsel which it had executed on March 21, 1969. It asserts it withdrew from the proposed agreement on April 19, 1969, on its understanding that failure of complaint counsel to communicate their own acceptance to Litton in the four week interim meant rejection by complaint counsel. Complaint counsel have since confirmed execution of the agreement, and Litton now affirms that the protective agreement is in full force and effect.

close down its own typewriter production which counsel advises us it is in the process of doing.³

If Litton is reorganizing Triumph-Adler's foreign production facilities so as to threaten Triumph-Adler's future independent competitive viability,⁴ then it is possible that its actions *vis-a-vis* Triumph-Adler could be producing anticompetitive consequences which might be difficult to undo should the acquisition prove to be illegal and divestiture be ordered.

However, even if these consequences might result from its present expansion, it is not clear that an injunction against Triumph-Adler provides an acceptable or preferable remedy. Freezing Triumph-Adler's expansion now might put a brake on its current ability to compete effectively by preventing it from keeping pace with other firms in meeting changing resource needs in what appears to be a growing, expanding industry. (One source estimates that sales were up from \$352 million in 1963 to \$546 million in 1967.)⁵ Triumph-Adler has allegedly been an aggressive marketer and capable producer who has proven it knows how to capture new business in an expanding market. If so, the Commission must be careful not to impair its competitive viability now in an effort to preserve its competitive viability in the future.

Second, Triumph-Adler, operating under the pall of adjudication regarding its future, has already been forewarned not to develop such an umbilical relationship with Litton that its severance would be economically jarring. Indeed, I cannot assume that Litton would do anything so anticompetitive as to stifle Triumph-Adler's own research and development in the field of communications systems or denude Triumph-Adler of its potential in the development of the electric typewriter or to take any other actions which would destroy Triumph-Adler's competitive vigor. In any event, an injunction would add nothing in this regard to the obligation already undertaken by Litton in the protective agreement.

³ Counsel inform us that Litton recently closed down its ten-year old typewriter plant in Springfield, Missouri and counsel fear that Litton may also close its only remaining typewriter plant in Hartford, Connecticut because of the expense and labor difficulties being encountered there.

⁴ Complaint counsel state that Litton plans to absorb into its United States distribution a substantial portion of the increased capacity of Triumph-Adler's foreign plants and argue that future production activity of Triumph-Adler would be wholly dependent on Litton's United States sales organization to find an outlet for this greatly increased volume of typewriters now being planned.

⁵ *Facts for Industry*, Series M-35-C, 1948-1967, Bureau of the Census, U.S. Dept. of Commerce.

Third, it is of course quite clear that if this merger is found to be illegal the Commission can, without a previous injunction, take account of the existence of any dependency relationship between Triumph-Adler and Litton in tailoring whatever remedial order it regards as necessary to restore both potential and actual competition in this industry.

Complaint counsel also urge injunctive relief against Triumph-Adler's expansion because it hopes that such an injunction would confront Litton with the necessity of developing its own typewriter resources and facilities and perhaps even to reopen its closed plant. Complaint counsel contend that only by enjoining Triumph-Adler's planned alterations and expansion, thereby depriving Litton of the additional capacity, can there be any hope that Litton's domestic production facilities will in fact remain as a viable factor in the American market.

I have no doubt that the powers of the Commission and of the courts to preserve the competitive *status quo ante* during the challenge to a merger need not be confined solely to protecting the integrity of the acquired assets. Obviously, commingling of assets is not the only factor which could effect a permanent or irrevocable change in the competitive situation of the merged companies.

The anticompetitive consequences of a Litton withdrawal from the domestic market could be significant. If Litton abandons its Royal operations in the United States, the United States typewriter market will have lost what one source reports to be the second largest producer of typewriters in an industry where allegedly the top five as of 1967 had approximately 90 percent of the market.⁶ Litton has already informed the Commission of the difficulties of entering the typewriter field *de novo* because of the importance of patents and, of even more crucial significance, of access to know-how. Further additional barriers to *de novo* entry have been posited by students of the industry such as the need to develop essential skills in production, research and in marketing, the value of the trade acceptance of a name (such as Litton acquired when it acquired Royal), and the essentiality of a sizeable and seasoned broad national distribution, marketing, and service organization. With Litton's production abandoned, even if Triumph-Adler should be reconstituted, the existing United States market will still remain the poorer by one major producer even though an independent Triumph-Adler (assuming illegality and

⁶ J. Fred Weston and George N. Engler, *The Typewriter Industry: The Impact of a Significant Technological Innovation* (A Preliminary Draft).

divestiture) presumably would exist as the same potential competitive factor which it is alleged to be today.

It would be material to our decision if it could be clearly demonstrated whether complaint counsel is correct in his assertions as to the causal relationship between Litton's internal restructuring of its domestic typewriter business and the Triumph-Adler acquisition. At this stage, however, the evidence is at best equivocal. Certainly a strong and convincing showing of such causative relationship would have to exist before the Commission should attempt to invoke a remedy which although purportedly designed to discourage such abandonment, would involve such drastic interference with Triumph-Adler's internal business activities and growth. Moreover, the fact remains that neither an injunction nor any protective order could prevent Litton from going out of the typewriter business if it so elects.

Perhaps of great relevance to this issue—relevant enough in fact to make discussion of the merits of an injunction academic—will be the manner in which Litton carries out its own internal restructuring. Presumably, should Litton decide to leave the business, its exit could be accomplished in such a way that the competition represented by the Royal-Litton typewriter production and sales could be carried on by another party or be preserved in such a way that it is capable of being carried on by a third party if and when Triumph-Adler is divested. It is not impossible that the Commission could take some remedial steps in these areas if a divestiture order is entered in this case.

At this stage in the litigation, however, it does not appear that a sufficient showing has been made to warrant the Commission to grant the request to seek an injunction as contended for by counsel supporting the complaint.

I agree, therefore, that the petition should be denied.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION OF
COMPLAINT COUNSEL'S REQUEST FOR INJUNCTIVE RELIEF
UNDER THE ALL WRITS ACT

This matter is before the Commission on the hearing examiner's certification of complaint counsel's request that the Commission seek preliminary relief under the All Writs Act against alterations by respondent of the operations of Triumph-Adler, and respondent's answer thereto. The Commission, in light of respondent's reaffirmation of the "Protective Agreement" executed by both parties, has determined that the request should be denied. Accordingly,

It is ordered, That complaint counsel's request, certified by the hearing examiner, that the Commission seek preliminary relief under the All Writs Act be, and it hereby is, denied.

Commissioner Jones was recorded as concurring.

ADVISORY OPINION DIGESTS*

No. 314. Advertising by manufacturers in an independently published periodical.

The Federal Trade Commission was asked to express an opinion with respect to the legality of payment by manufacturers for the purchase of advertising space in a periodical published by a firm which has no connection whatever with any retail customer of such manufacturers and which will supply or otherwise make the periodical available without cost to all retailers.

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned or controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate sections 2(d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and will be supplied and otherwise made available without cost to all industry retailers; the periodical is not designed to be usable only by particular retailers, or classes or groups of retailers; every effort will be made to distribute the periodical as broadly as possible among industry retailers; and distribution will not be limited to any particular retailer, or group or class of industry retailers.

The Commission advised that if the periodical is made available, in a practicable business sense, to all competing customers of a participating manufacturer, then no objection would be raised to payments by that manufacturer for advertising space therein. Further, that appropriate measures should be taken by the publisher to advise participating manufacturers that the periodical will serve to supplement, not supplant, their usual methods of notifying retail customers regarding the availability of their

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are published in the Federal Register.

sales programs and that advertising the details of such program in the periodical will not relieve them from this statutory obligation. (File No. 693 7064, released Jan. 17, 1969.)

No. 315. Foreign origin disclosure of wearing apparel partly made in a foreign country.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of textile products processed in Puerto Rico and the Dominican Republic from fabric produced in the United States, and thereafter exported to the mainland United States.

Specifically, the Commission ruled upon the following two questions:

(1) Must a semimanufactured product with less than 50 percent of the value added in a foreign country be labeled in any way before entering the U.S. territory?

(2) If said product is then finished in Puerto Rico and shipped for distribution in the U.S. mainland, can it be labeled "Made in U.S.A.?"

In response to the first question, the Commission said that it will not be necessary to disclose the foreign country of origin where less than 50 percent of the value is added to the product insofar as the laws of the Commission are concerned.

In regard to the second question, the Commission expressed the opinion that it would be improper to label such a product as "Made in U.S.A." because this would constitute an affirmative misrepresentation that the product is made in its entirety in the United States. (File No. 693 7055, released Jan. 17, 1969.)

No. 316. Foreign origin disclosure of imported bearings.

The Commission rendered an advisory opinion in regard to the proper marking of imported bearings.

According to the facts presented in the matter, the top of the container in which the bearings will be packaged will carry the following statement: "The (word of a particular foreign country) Bearing". Also printed on the top of the container is the statement: "Made in (country of origin)". Etched on the outer race of each bearing is the inscription of the name of the foreign country of origin.

Most of the bearings are sold to domestic manufacturers who use said bearings in their manufacture of heavy earth moving equipment and farm machinery. The bearings normally represent less than 2 percent of the total cost of the finished equipment. Domestic manufacturers who use the bearings in their production

of machinery and equipment compete with one another for both domestic and foreign markets.

Specifically, the following two questions were raised:

(1) Are the bearings marked with sufficient clarity to disclose they are manufactured in a certain foreign country?

(2) Is it necessary for the manufacturers who use the imported bearings in their machinery and equipment to disclose the country of origin of the bearings?

In response to the first question, the Commission said that its examination of the markings revealed they were adequately marked to show their foreign country of origin.

With respect to the second question, the Commission said that it would not be necessary for the manufacturers who use the bearings in their machinery and equipment to disclose the foreign country of origin of the bearings. (File No. 693 7054, released Jan. 17, 1969.)

No. 317. Tuition refunded if no job offered within 90 days.

The Commission advised that it could not rule on advertising for a school which would offer a refund of all charges for tuition, registration and incidental fees to its graduates who do not receive an offer of employment within 90 days after graduation.

The offer will be subject to the following three qualifications:

1. It will not be made to students eligible for imminent draft into the armed forces.

2. The student must use the placement service of the school and must be available for interviews.

3. The student must work at placement through other sources.

Although the advertising did not so state, the offer of employment would not be considered valid by the school unless the offer is limited to the geographic area specified in the student's application form.

Because the proposed plan may be subject to such a wide variety of interpretations, and also depending upon the manner and extent of its implementation, the Commission expressed the view that it was not in a position to rule upon the legality of the plan. (File No. 693 7061, released Jan. 28, 1969.)

No. 318. Commission refusal to grant blanket approval to small dairy to be acquired by any corporation subject to Commission acquisition-prohibiting orders.

The Commission rendered an advisory opinion in response to a premerger clearance request from the owner of a small dairy who wants to sell the business to any one of three national firms in

the dairy industry, two of which are subject to Commission cease and desist orders containing provisions prohibiting further acquisitions without prior Commission approval.

The applicant was advised by the Commission that it cannot grant the blanket approval requested. The Commission pointed out that corporations covered by orders prohibiting certain acquisitions are free, of course, to apply for prior approval to acquire the applicant's business.

From the data submitted by the applicant, it appears that his business continues to operate profitably despite extremely competitive and rapidly changing conditions in the milk industry in his area. The applicant enjoys a substantial share of the markets in which he operates. No evidence was presented of any attempts to sell the business to any other independent dairy firm or to anyone now outside the dairy industry. (File No. 693 7072, released Feb. 4, 1969.)

No. 319 Sales price and lease rate for a book need not be identical.

The Commission issued an advisory opinion concerning charges by a publisher in connection with the distribution of its publications.

The publisher offers reference books to customers on lease (the publisher picks up the obsolete volumes upon the issuance of a new edition or upon the expiration of the lease) or for purchase.

The Commission advised the publisher that no law administered by the Commission requires it to charge the same amount for the lease as for the sale of a book (File No. 693 7075, released Feb. 4, 1969.)

No. 320. Disclosure of origin of imported components used in manufacture of firearms.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of certain imported components to be used in the manufacture of revolvers and automatic pistols. If such disclosure is required, a question is raised as to the proper location of that disclosure.

Specifically, the advisory opinion involved the use of components imported from both Germany and Italy, such as barrels, cylinders, and hammers. The remaining components were of domestic origin.

With respect to the question of whether a disclosure of the origin of the imported components would be required, the Commission said: "In the absence of any evidence to the contrary, the Commission believes that the question of foreign origin dis-

closure largely depends upon the importance which prospective purchasers would attach to the fact, if known, that a substantial number of the components of the finished product are of foreign origin. It is the Commission's judgment that the imported components in both factual situations, namely, the barrels, cylinders, and hammers, represent such an integral and essential part of the finished product that prospective purchasers would in all probability manifest a deep concern over their origin and manufacture. If such is the case, then the failure to reveal the origin of the imported components would play a vital, if not decisive, role in the customers' selection or purchase. Under these circumstances, the Commission is of the opinion that the failure to reveal the country of origin of the imported components in both factual situations would likely result in deception to consumers and unfair injury to competitors."

In regard to the question of whether the disclosure should be made on the product or the container, the Commission cited the well-established general rule that the disclosure should be clear and conspicuous. This means, the Commission said, that it must be placed in a location at the point of sale where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. If the merchandise is displayed in such a manner that a disclosure on the product would not be seen prior to the purchase thereof, it would be necessary to place the disclosure on the container. On the other hand, if the merchandise is displayed in a manner which would permit purchasers to observe the disclosure on the product, it would not be necessary to make a disclosure on the container. (File No. 693 7057, released Feb. 7, 1969.)

No. 321. Sale of unlabeled American made products.

The Commission issued an advisory opinion to an American manufacturer in response to his request concerning sale of one of his products, with or without labels. He asked for the opinion because a dealer in another State has recently placed a substantial order for the product, specifying that it must be shipped in unlabeled containers. The supplier believes the dealer may intend to resell the product in export trade. The manufacturer does not enjoy a monopoly.

The Commission advised the applicant that, under laws administered by the Commission,

- (1) You may legitimately refuse to sell a specific product to a customer who asks for it in an unlabeled container;
- (2) No labels are required on American made merchandise sold in export

trade; however, an American exporter should determine what foreign laws govern the operations; and

(3) Packaging and labeling of domestically sold consumer commodities are governed by the Fair Packaging and Labeling Act (Public Law 89-755) and the regulations issued thereunder. * * * The product described in correspondence, is a consumer commodity as defined in section 10(a) of the Act, therefore packaging or labeling of this product must be in accordance with the regulations. However, section 500.2(d) of the regulations which defines the term package contains several exceptions which appear to apply to the facts in your situation. In addition, your attention is invited to the exception contained in section 500.2(e) wherein the term "label" is defined. Subsection (2) excepts, from application of the regulations, written, printed, or graphic matter affixed to or appearing upon commodities sold or distributed to industrial or institutional users.

(File No. 693 7074, released Feb. 7, 1969.)

No. 322. Supplier advertising in an independently published periodical.

The Federal Trade Commission was asked to express an opinion with respect to the publication and distribution of a monthly publication designed to supply wholesale and retail outlets, without cost to them, with information concerning promotional allowance programs instituted by manufacturers selling to such outlets, and with particular reference to two specific questions:

(1) Will a manufacturer who places in the publication a clear and timely description of the terms of a promotional program offer and the conditions upon which payments will be made be regarded as having notified a customer, who in fact receives the publication, of the availability of that promotional offer?

(2) In the case of a promotional offer which extends over a 6-month period, will such manufacturer be regarded as having so notified a retailer, who in fact receives the publication each month, if the description is placed therein only once, prior to or at the beginning of the 6-month period? If not, how often must the notice be republished? At 3-month intervals? In each monthly issue?

The advisory opinion noted that payments by a manufacturer for the purchase of advertising space in a periodical published by a firm which is not owned nor controlled by, or in any way directly or indirectly affiliated with, any customer of that manufacturer, or group or class of such customers, do not violate section 2(d) or (e) of the amended Clayton Act where no discriminatory benefit is conferred by such payments on a particular customer, or class or group of customers, over competitors. The periodical will be given nationwide distribution and

will be supplied and otherwise made available without cost to all industry wholesalers and retailers. The periodical is not designed to be usable only by particular resellers, or classes or groups of resellers; every effort will be made to distribute the periodical as broadly as possible among industry resellers; and distribution will not be limited to any particular reseller, or group or class of industry resellers.

The Commission advised that if the periodical is made available, in a practical business sense, to all competing industry resellers of a participating manufacturer's products, then no objection would be raised to payments by that manufacturer for advertising space therein.

Regarding the two specific questions, the Commission advised that although a listing by a manufacturer of the details of his promotional allowance program in the publication would appear to be adequate and sufficient notification to recipients thereof that such programs are available and under what specific conditions, such listing does not, however, relieve any manufacturer-advertiser from his statutory obligation of informing those resellers who may not receive the publication regarding the availability of such program.

And further, as to the second specific question, in view of the fact that the publisher will update the master mailing list every 3 months, the Commission required that notices of extended promotional offers be republished each calendar quarter. It was pointed out, however, that the quarterly notice republication requirement was being imposed to coincide with presented facts and that notice given at less frequent intervals may be adequate in other situations. If the required notice is in fact given it is immaterial whether it is republished at any particular interval of time so long as all those entitled to promotional assistance are made aware in timely fashion of any benefits to which they may be entitled under a published program. (File No. 693 7076, released Feb. 7, 1969.)

No. 323. Disclosure of imported electronics equipment.

Rather than labeling an imported product as "made" in a certain foreign country, the Commission said it would interpose no objection to a disclosure which stated that the merchandise was a "product" of a certain foreign country.

The advisory opinion was rendered in response to a request from an importer of electronics equipment which enters the United States in a completely finished state. Included in the

equipment are radios, tape recorders, transceivers, etc. (File No. 693 7073, released Feb. 13, 1969.)

No. 324. "Free hosiery for life" offer to obtain sales representatives.

The Commission rendered an advisory opinion in regard to the propriety of advertising which offers information for "free hosiery for life" in connection with the sale of hosiery.

According to the proposed plan, one who responds to the advertisement will receive information offering the recipient a job selling hosiery, and for every certain number of hosiery which is sold the recipient will receive a free pair of hosiery.

In the advisory opinion which was rendered, the Commission said that the use of the word "free" under the above circumstances would be deceptive and therefore in violation of section 5 of the Federal Trade Commission Act, unless the initial advertisement and any subsequent promotional material contains a clear and conspicuous disclosure of all of the conditions or prerequisites to the receipt and retention of the free merchandise. (File No. 693 7049, released Feb. 27, 1969.)

No. 325. Marketing 10-year-old unused equipment as new as deceptive.

The Commission issued an advisory opinion concerning the marketing now as "new" of 10-year-old equipment which has never been used and is still in the original shipping cartons.

The Commission wrote the applicant for the advisory opinion:

According to the information you submitted, your company is not the original manufacturer of the equipment you are interested in marketing as "new." Further, it is understood you have recently obtained a license to manufacture similar equipment. Also, you state there have been no model changes since the 10-year-old equipment was produced. Having considered the matter, the Commission hereby advises you that you would risk violating section 5 of the Federal Trade Commission Act if you marketed the 10-year-old equipment as "new;" such an act would clearly be deceptive. Of course, you are free to describe the equipment accurately and disclose that it is 10 years old and has never been used.

(File No. 693 7080, released Feb. 27, 1969.)

No. 326. Country of origin marking requirements for product assembled in Puerto Rico of domestic and foreign components.

The Commission's opinion was requested as to the legality of marking as "Made in the U.S.A." a Puerto Rican produced product composed for the most part of domestic components

but containing some components originating in the United Kingdom.

In the Commission's view, the unmodified marking "Made in U.S.A.," or equivalent, would be an affirmative representation that the product in question is in its entirety of domestic origin.

Since in the situation described, the product in question is not wholly of domestic origin the Commission is of the opinion that the marking "Made in U.S.A.," or equivalent, would be improper, unless additional and accurate disclosure is made of the presence of the imported components.

The requesting party was further advised that the Commission would not object if the product in question were to be marketed with no accompanying identification of, or claim as to, country of origin. (File No. 693 7027, released Feb. 27, 1969.)

No. 327. Disclosure not required of origin of imported materiel used in shoes.

The Commission rendered an advisory opinion to a manufacturer of athletic shoes stating that it would not be necessary to disclose the country of origin of the imported upper material.

The imported upper material will represent approximately one-third of total material costs, and the remaining two-thirds will be composed of material made either in the United States or Puerto Rico. Concluding that a disclosure of the imported upper material would not be required, the Commission said:

In the absence of any affirmative misrepresentation as to origin, the Commission is of the opinion that, under the facts as presented, it will not be necessary to disclose the country of origin of the imported upper material.

(File No. 693 7082, released March 4, 1969.)

No. 328. Organization of warehouse distribution center for a jobber buying group.

The Commission issued an advisory opinion warning of probable violations of law in the proposed organization by an automotive replacement parts manufacturers' representative of a warehouse distribution center buying group of jobbers.

According to the information submitted, the applicant is now, and intends to continue to be, a sales agent for several automotive parts manufacturers. He proposes to organize and operate a warehouse distribution center for automotive parts, obtaining quantity discounts on purchases from suppliers and then reselling at a 5 percent to 7 percent markup to "member" jobbers. The quantities will be the result of pooled orders from the jobbers.

Jobbers will be "members" only in the sense that they will contribute \$1,000 each to the applicant in return for the privilege of sharing some of the quantity discounts on purchases from suppliers. The applicant and his wife will be the sole owners, operators, and employees of the warehouse distribution center. Drop shipments will be used when orders are large enough to obtain quantity discounts for the particular orders. The applicant intends to organize only one jobber in each of the smaller towns and perhaps two or more in larger towns "where they would not be competing for the same customers." The center will place orders with manufacturers, receive goods not otherwise drop-shipped and distribute them, bill jobber-customers (i.e., "members"), and slowly accumulate an inventory in its warehouse.

The Commission is of the opinion that the applicant would probably violate section 2(c) of the amended Clayton Act if he receives commissions from manufacturers whom he represents as a sales agent on purchases for his own account for resale to jobbers.

The Commission also pointed out that, while buying groups of jobbers are not illegal per se, they may function in ways to violate section 2(f) of the amended Clayton Act if they refuse membership to jobbers who compete with each other and thereafter obtain unjustified price discriminations. (File No. 693 7087, released March 4, 1969.)

No. 329. Dissemination of uniform warranty plan by trade association to members.

The Commission rendered an advisory opinion to a trade association of retailers that its proposal to circulate a uniform warranty among its membership would likely result in violation of Commission administered laws. The warranty in question, applicable within 100 miles of a dealer's store, provides:

(1) The extent of the liability of this firm to service merchandise purchased from us is limited to this policy and it is in addition to any written guarantee included from the manufacturer involved.

(2) Under conditions of normal usage, our store warrantees (sic) our (products) to be free from defects in workmanship and structural materials for a period of 1 year from the date of purchase. This guarantee does not apply to damages resulting from negligence, misuse, or accidents.

(3) We will repair or replace at our option any defective item, or part, at absolutely no charge. In determining the cause or nature of the defect, and the manner of repair; the judgement of this firm will be final.

The Commission concluded that it could not render advice with respect to that portion limiting retailer liability to the

warranty terms nor to the comment that the warranty is in addition to any manufacturer's written guarantee. This position was taken for the reason that the question of warranties is being currently examined, specifically as they relate to the automotive industry, and any Commission statement along these lines at this time would be premature.

Nor could the Commission approve the remainder of the proposed warranty for the reason that it is not a simple, generalized guideline intended to assist the membership in drafting warranties embracing their own terms but is, in fact, an actual 1 year warranty incorporating predetermined and definite terms and conditions for use without change by members. For this reason the Commission advised that should the proposed warranty be selected by all or a substantial number of Association members the likely purpose and probable result would be the adoption of anticompetitive uniform terms and conditions by the membership and would, therefore, be objectionable. (File No. 693 7065, released March 19, 1969.)

No. 330. Proposed advertising for orthopedic pillow.

The Commission was requested to render an advisory opinion with respect to proposed advertising for a pillow intended for orthopedic and therapeutic purposes, which would represent that the device was designed for use in cervical spine, low back pain cases and by cardiac patients.

The opinion advised the advertisers that while the Commission has no objection to representations that the device might afford temporary relaxation and comfort under certain conditions, any representations in advertising that the pillow is a health device particularly useful for cervical spine, low back pain and cardiac cases would appear to have the capacity and tendency to deceive. (File No. 693 7088, released March 19, 1969.)

No. 331. Disclosure of origin of imported food product.

The Commission rendered an advisory opinion to a trade association which involved the question of whether it is necessary to disclose the origin of an imported food product. Imported in its entirety, the product is later sliced and packed in containers in the United States for sale to the general public.

Ruling that the product's origin must be disclosed, the Commission said:

* * * as to this product, the country of origin may be a material fact to many consumers in deciding whether to make a purchase, and that it should therefore be disclosed to them in an appropriate manner at the point of sale.

(File No. 693 7084, released March 19, 1969.)

No. 332. Publication of advertising standards by private association.

The Commission announced its approval of advertising and selling standards proposed for publication by a private association.

The association has come to believe that certain unfair and deceptive practices are being used by a number of firms providing a particular service. It has therefore devised a "Statement," similar to a Code of Ethics, setting forth a number of practices which have heretofore been found unlawful by the Commission and which should not be engaged in by members of the industry. It proposes to invite industry members voluntarily to agree to avoid such practices as "bait" advertising, false disparagement of competitors, deceptive pricing, deceptive advertising of guarantees, and misleading use of the word "free."

The objective of the "Statement" is to maintain accuracy and truth in advertising and selling of the service involved. Among other things the "Statement" provides, "all advertising shall be accurate and clearly disclose the true nature of the offer. Advertising as a whole should not create a misleading impression, even though each statement or illustration, when considered separately, may be literally truthful. Advertisers at all times should be in a position to substantiate the accuracy of any claims made in their advertising."

The Commission advised that:

"As long as each signer of the document agrees to, and abides by, its provisions without coercion, expressed or implied, the Commission would have no objection to your proposed document as written, or its proposed use."

(File No. 693 7094, released March 19, 1969.)

No. 333. Manufacturer-wholesaler relationship; different discounts; refusals to deal; termination or further sales.

The Commission issued an advisory opinion in response to a request from a manufacturer concerning several courses of action he proposes to take in his sales relationships with wholesalers.

The manufacturer now grants all wholesalers a 40 percent discount off the list price of his products. Proposed are new contracts, providing the 40 percent discount to a Full Service Dealer or Wholesaler who performs certain specified functions, and only 25 percent to a Part Service Dealer or Wholesaler "who does not fulfill all the functions set forth" in the definition provisions for a Full Service Dealer or Wholesaler.

The Commission advised:

(1) To the extent that an additional discount is sought to be justified on the basis of functional services such as stocking and display performed by so-called Full Service Dealers or Wholesalers [function No. 4 of applicant's proposed wholesaler agreement], no advisory opinion can be provided at this time because the Commission contemplates an inquiry looking toward a rule-making proceeding involving this question as it pertains to another industry.

(2) Moreover, as to the other functional criteria for Full Service Dealers or Wholesalers set forth in applicant's proposed wholesaler agreement, the Commission will not approve any standards whereby a wholesaler's eligibility for added discounts is contingent upon the imposition of specified restrictions upon his customers by him.

(3) You also ask if you may refuse to deal with a wholesaler in one town who is reselling your products to wholesalers in another town. The Commission is of the opinion that such refusal to deal could amount to a violation of section 5 of the Federal Trade Commission Act. Therefore, the Commission cannot approve the proposal.

(4) Additionally, you ask if you may terminate further sales to a wholesaler who is establishing his own network of wholesale dealers, obligated by contract to purchase their supplies exclusively from him. This wholesaler, as does the one involved in your second request, is departing from the traditional role of the wholesaler in the beauty and barber supply business by refusing to confine his sales to beauty schools and salons and has, in effect, entered into competition with your company as a supplier of [your] products to wholesale dealers. The facts provided do not give any basis for viewing the wholesaler's exclusive dealing arrangements as violative of the antitrust laws. Without reaching the question of whether you might terminate further sales to the wholesaler if the exclusive dealing contracts were illegal, the Commission believes your proposed termination of the wholesaler would appear to be anticompetitive and thus contrary to the provisions of section 5 of the Federal Trade Commission Act. The proposal, therefore, cannot be approved.

(File No. 693 7075, released April 18, 1969.)

No. 334. Location of foreign origin disclosure.

The Commission advised an importer of candles and candle holders in regard to the proper location of the foreign country of origin disclosure thereof.

After importation, the product will be assembled in a combination blister package of eight candles and eight holders on a display card for resale to the general public. The imported holders and candles will be marked with their respective country of origin. However, this identification as to foreign origin will not be readily seen by prospective purchasers making a casual inspection of the merchandise prior to the purchase thereof.

In regard to the question of whether the disclosure should be made on the product or on the face of the display card, the Commission said:

* * * the general rule is that the disclosure must be clear and conspicuous. This means that it must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof.

(File No. 693 8095, released April 18, 1969.)

No. 335. Refusal of membership in trade association.

A national trade association asked the Commission if the association might properly refuse membership to a member's competitor at the member's insistence.

The Commission noted that, as a general rule, a trade association may deny membership for failure to meet reasonable qualifications, but may not deny membership to a potential member if to do so would unreasonably restrain interstate or foreign trade or commerce.

Since no information was submitted as to why a member publisher would want to refuse membership to a competitor or as to what the competitive effects of such a refusal would be, the Commission was unable to be more specific with respect to the question than the statement of the general rule set forth above. In the absence of such information, the Association would have to make its own determination as to the propriety of any specific denial of membership within the confines of the general rule as it applies to conditions which exist in its industry.

Thus, while the Commission could not categorically rule that denial of membership under the conditions described would be illegal, it also could not give its affirmative approval to the proposal because of the factual uncertainties involved. (File No. 693 7078, released April 18, 1969.)

No. 336. Legality of membership by brewer in beer wholesalers' trade association.

Responding to an application from a beer wholesalers' association the Commission advised the applicant that:

* * * it is not illegal per se for suppliers to belong to a wholesalers' trade association, but particular care must be exercised to avoid violation of law. In the case of an industry where distributors are in a weak bargaining position, vis-a-vis, their suppliers and where the industry on the supply side is concentrated, these circumstances may lead to vertical restraints on the distributors violative of the antitrust laws for example in the area of pricing decisions. These considerations may apply in the case of the beer industry. The necessity of preserving its members' independence in making business decisions should, of course, be taken into consideration by trade association when they formulate membership policies.

"The Commission further advised the applicant that it is not

a violation of the antitrust laws to exclude suppliers from membership in a wholesalers' organization." (File No. 693 7086, released April 18, 1969.)

No. 337. Disclosure or origin of imported hand sprayers and squeeze bottles.

The Commission issued an advisory opinion concerning the proper labeling as to the origin of imported, small, plastic, hand-operated sprayers and two-piece plastic squeeze bottles.

The applicant advised the Commission that the imported articles would be sold in quantity to manufacturers or suppliers of cleaning liquids or other industrial accounts. These purchasers would furnish the imported articles to industrial users for dispensing cleaning liquids supplied by these purchasers.

The Commission advised the applicant that on the basis of the facts as presented the country of origin of the imported sprayers or squeeze bottles should appear conspicuously on the cartons in which they are shipped to his customers. In the absence of any affirmative representation that these products are made in the United States or any other representation that might mislead the ultimate purchasers or users as to the country of origin and in the absence of any other facts indicating actual deception, the failure to mark the origin of these articles on them would not be regarded by the Commission as deceptive. Accordingly, no marking is required on these articles with reference to the country of origin. (File No. 693 7104, released April 25, 1969.)

No. 338. Disclosure of origin of imported seam ripper blades.

The Commission rendered an advisory opinion concerning the proper marking of the origin of seam ripper blades imported from Germany. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades. (File No. 693 7091, released April 25, 1969.)

No. 339. Disclosure of origin of imported fishing lures.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure at the point of sale of the foreign country of origin of its imported fishing flies.

Under the factual situation presented in the ruling, the flies will be shipped to retailers for resale packaged 1 dozen loose in a plastic box. Each box will contain from 1 to 4 flies made in a foreign country and 8 to 11 flies of domestic origin. Fishermen normally will purchase the flies singly and not by the dozen. (File No. 693 7089, released April 29, 1969.)

No. 340. Location of foreign origin label on imported engine parts.

In response to a request for an advisory opinion, the Commission advised an importer of fuel injection parts and units, which are to be used as replacement parts in engines, that it could disclose the foreign origin thereof on the container rather than on the product.

The engines are purchased by industrial and commercial users, and by individual consumers as well. Whenever possible, the imported products will be marked with the country of origin on the nameplate. Furthermore, the imported parts and units may be packaged individually or in certain specific quantities per box. Because a number of the imported replacement parts are either too small to permit country of origin identification on the product itself, or may have highly finished surfaces which would be destroyed with marking, the question was raised as to whether it would be permissible to make the disclosure only on the container. (File No. 693 7096, released April 29, 1969.)

No. 341. Disclosure of origin of imported motors.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of certain electric motors or components thereof which are imported from Poland.

According to the facts presented by the requesting party, the imported motors will be attached in the United States to domestically made gear trains. Moreover, the imported motor will represent approximately one-third of the total cost of the finished unit, i.e., the motor and the gear train.

Concluding that a disclosure would not be required under these circumstances, the Commission said:

In the absence of any affirmative representation that the imported motors are made in the United States, or any other representation that might mislead purchasers as to the country of origin, the Commission is of the opinion that, under the facts presented, the failure to mark the origin of the imported motors or components thereof will not be regarded by the Commission as deceptive.

(File No. 693 7105, released May 1, 1969.)

No. 342. Location of term "irregular" to describe shirts.

In response to a request for an advisory opinion, the Commission advised a manufacturer that irregular men's dress and sport shirts should be stamped "irregular" on the neck band, not on the shirttail.

Whenever an affirmative disclosure is required, the Commission said, it is a well-established principle that it must be made with such clarity that it will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. Because of the manner in which shirts are ordinarily folded and displayed at the point of sale, the Commission added, an "irregular" stamp on the shirttail would not normally be seen by prospective purchasers until after the sale has been consummated.

Concluding that the disclosure should be made in the neck band, the Commission said:

Although the disclosure may be placed in any location so long as it complies with the aforementioned principle, experience indicates that the best possible location in most cases would be in the neck band. This is where most prospective purchasers look at a shirt because this is where the size and fiber identification normally are placed. Under these circumstances, therefore, the Commission would not accept a disclosure made on the shirttail. It would, however, accept a legible disclosure made in the neck band as being in compliance with sec. 5 of the FTC Act.

(File No. 693 7103, released May 1, 1969.)

No. 343. Disclosure of origin of imported circular saw discs.

In response to a request for an advisory opinion, the Commission ruled that it would not be necessary to disclose the foreign origin of imported circular steel saw discs.

After importation, the manufacturer will add tungsten carbide tips to the imported discs. Domestic parts and labor represent approximately 80 percent of total production costs, with the remaining 20 percent representing the cost of the imported discs. The finished blades will be sold to cabinet shops, schools, builders, industrial concerns, and hobbyists. (File No. 693 7107, released May 2, 1969.)

No. 344. Premerger clearance not granted; grocery stores in concentrated market.

The Commission advised an applicant for an advisory opinion that it cannot grant clearance for a proposed merger of two grocery retailing corporations operating in the same metropolitan marketing area.

Applicant is the owner of three supermarkets having 1.5 percent share of the particular market. The proposed purchaser is a regional supermarket chain having 18 percent to 20 percent of the same market with a ranking of second among all the companies selling groceries in the area. The market is concentrated with the four leading companies sharing 57 percent according to one survey and 74 percent of all sales as calculated by another analyst.

The Commission advised the applicant that it believes that the proposed merger would raise substantial questions of legality under the merger laws and that it therefore cannot grant the clearance requested. (File No. 693 7100, released May 2, 1969.)

No. 345. Survey of professional compensation by employing institutions.

The Commission issued an advisory opinion with respect to a proposed survey of certain professional compensation in employing institutions.

The applicant proposed to conduct a survey of employing institutions by means of a questionnaire to ascertain the compensation being paid to specified professionals. Respondents to the questionnaire would not be identified. The results of the survey would be reported as national and regional averages and they would be published and distributed to the trade and public press. No conclusions would be drawn nor would recommendations be made.

The Commission advised the applicant that implementation of the proposed course of action in the manner described probably would not violate any of the laws administered by the Commission. (File No. 693 7113, released May 5, 1969.)

No. 346. Promoter's responsibility in tripartite promotional assistance plan.

The Commission issued an advisory opinion relative to the duty and responsibility under the laws administered by the Commission of a promoter or intermediary in a tripartite promotional assistance plan.

The Commission expressed the view that the fact that an intermediary is positioned between the supplier and the supplier's customers does not affect the applicability of the law to the plan. Such a plan must still provide all of the supplier's customers who compete with each other in reselling his products an opportunity to participate on proportionally equal terms. In this regard, the plan should contain suitable alternatives for cus-

tomers who may be unable, as a practical matter, to participate in the primary proposal.

The legality of such arrangements, in the Commission's view, is measured by whether the promoter and the suppliers using the plan have met this obligation toward the suppliers' customers or whether participating customers have actual or constructive knowledge that they disproportionately benefit under the plan.

In the light of these general principles, the Commission declined to approve the proposed promotional plan for two reasons—(1) The proposal did not appear to be a complete plan offering practical alternatives for those customers unable to participate in the primary proposal, and (2) even if it did contain alternatives usable by all competing customers, they would apparently not all be notified of the entire plan so that each may choose which alternative is suitable for his own use.

The Commission stated that if the proposed promotional assistance plan were implemented, section 2(d) or (e) of the Clayton Act, as amended, and/or section 5 of the Federal Trade Commission Act would probably be violated. (File No. 693 7077, released May 5, 1969.)

No. 347. Disclosure of origin of imported shoes.

In response to a request for an advisory opinion, the Commission ruled that it would be necessary for the requesting party to make a clear and conspicuous disclosure of the foreign country of origin of its imported shoes.

Under the factual situation present in the ruling, it was assumed that the shoes were entirely of foreign manufacture and after importation they were to be sold to the general public. (File No. 693 7108, released May 8, 1969.)

No. 348. Disclosure of origin of imported turpentine.

The Commission advised a company that a "Packaged in U.S.A." statement standing alone would not be sufficient, and that it would be necessary to make a clear and conspicuous disclosure on the package of the foreign country of origin of the imported turpentine.

Under the factual situation presented for a ruling, the company plans to import turpentine from either Portugal or the U.S.S.R. After importation, the turpentine will be repackaged here in the United States into 1 gallon, 1 quart, and 1 pint containers for resale for general consumer use. (File No. 693 7118, released May 24, 1969.)