

THE PAPERCRAFT CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket 8779. Complaint, Apr. 10, 1969¹—Decision, June 30, 1971²

Order requiring a major manufacturer and distributor of gift wrapping paper and ribbons with headquarters in Pittsburgh, Pa., to divest itself of all assets and properties of CPS Industries, Inc., a Chicago, Ill., gift wrapping firm, and for ten (10) years not to acquire any distributor of gift wrapping without prior approval of the Federal Trade Commission, and not to sell to a customer of CPS Industries for a period of three (3) years unless it has sold to such customer prior to December 27, 1967.

COMPLAINT

The Federal Trade Commission having reason to believe that The Papercraft Corporation, a corporation, has acquired the stock, busi-

¹ Reported as amended by Hearing Examiner's order of September 9, 1969, by amending the introductory portion of Paragraph 16.

² Modified by Commission's order of September 9, 1971, by modifying Paragraph IX of the order, 79 F.T.C. 420.

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Complaint

ness and assets of CPS Industries, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. Sec. 18); and, therefore, pursuant to Section 11 of said Act, issues this complaint stating its charges as follows:

I

Definitions

1. For the purpose of this complaint, the following definition shall apply:

"Gift wrapping paper and ribbons" includes all paper and ribbons ordinarily used for the purpose of wrapping gifts.

II

Respondent

2. The Papercraft Corporation, herein referred to as "Papercraft," is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with principal offices located at Papercraft Park, Pittsburgh, Pennsylvania.

3. Papercraft owns two manufacturing subsidiaries: LePage's Inc., which manufactures pressure sensitive tapes and adhesives; and American Universal Plastics, Inc., which manufactures vinyl tablecloths, placemats, and doilies. A third subsidiary, Papercraft Properties, Inc., owns the real estate housing the parent corporation. All three subsidiaries are Pennsylvania corporations.

4. Prior to the aforesaid acquisition, Papercraft was the second largest manufacturer of gift wrapping paper and ribbons. Based on total industry sales of \$100,000,000 in 1967, its percentage share of the market based on approximately \$16.3 million in sales was 16.3%. Papercraft's total sales of all products in 1966 was \$24.1 million.

5. At all times relevant herein, Papercraft has sold and shipped its products, and specifically gift wrapping paper and ribbons, in interstate commerce throughout the United States and was and is engaged in interstate commerce within the meaning of the Clayton Act.

III

CPS Industries, Inc.

6. On December 27, 1967, Papercraft acquired all of the issued and outstanding capital stock and debentures of CPS Industries,

Inc., a Delaware corporation with a main office located at 2300 Logan Boulevard, Chicago, Illinois. At the time of the acquisition, CPS Industries, Inc., had two subsidiaries: CPS Industries (Tenn.) Inc. (a Tennessee corporation), Franklin, Tennessee, Rapid Ribbon, Inc. (a Delaware corporation) (same address as parent).

7. In 1967, CPS Industries, Inc., was the Nation's largest manufacturer of gift wrappings and ribbons. Its 1967 sales of these products of \$17,006,112 approximated 17.0% of the total domestic market for such products. The firm's 1966 sales of all products were \$20.9 million.

8. At all times relevant herein, CPS has sold and shipped its products, and specifically gift wrapping paper and ribbons, in interstate commerce throughout the United States and was and is engaged in interstate commerce within the meaning of the Clayton Act.

IV

Nature of Trade and Commerce

9. Total production of gift wrappings and ribbons throughout the United States approximates \$90 million to \$100 million a year. These products are sold to department stores, drugstores, grocery chains, toy stores, gift stores and other outlets.

10. Based upon the figures noted in Paragraph 4 and 7 herein, Papercraft, as a result of its acquisition of CPS, has increased its share of the gift wrappings and ribbon market from approximately 16.3% to 33.3%. The acquisition has also resulted in an increase, from 50% to 60%, in the share of the subject market controlled by the four largest firms.

11. There have been no new entrants into the gift wrappings and ribbon industry since 1962. At least thirteen firms, including one of the largest, withdrew from competition during this period; five others were acquired by larger firms.

12. Within the industry, Papercraft concentrated primarily upon sales to grocery, drug and discount chains. The company produced gift wrapping and ribbons that were functionally identical to that of CPS, but were priced somewhat lower in some cases.

13. CPS competed on every price level within the industry. Several of its brand name products were in direct price competition with those of Papercraft. CPS' main sales thrust was directed to the quality department store and gift shop outlets.

14. Both Papercraft and CPS competed for substantial sales to

chain retail outlets, both in the sales of brand names and private label products. Typical of such customers were S.S. Kresge Co., Sears Roebuck & Co., and Arlan's Department Stores whose total purchases from Papercraft and CPS were \$3 million in 1967.

v

The Acquisition

15. On December 27, 1967, pursuant to an agreement dated December 6, 1967, Papercraft acquired all of the stock and debentures of CPS, a privately held corporation, directly from the holders thereof solely in exchange for 285,300 shares of stock of Papercraft valued for purposes of the transaction at \$20 a share, or a total consideration of \$5,706,000.

vi

Violation

16. The effect of the acquisition by Papercraft of CPS has been, or may be, substantially to lessen competition or tend to create a monopoly, in the United States, in the production and sale of gift wrapping paper and ribbons in violation of Section 7 of the Clayton Act in the following ways, among others:

(a) actual competition between the two firms in the production and sale of gift wrappings and ribbons in general, and to chain department, discount and drugstores, has been or may be eliminated;

(b) potential competition by Papercraft in the production and sale of gift wrapping and paper to quality department stores and gift shops has been or may be eliminated;

(c) concentration of production and sales capacity within the gift wrapping paper and ribbon industry has been substantially increased;

(d) the increased dominance of Papercraft within the industry tends unduly to heighten barriers to the entry of new substantial competitors and render the survival of existing competition tenuous.

The acquisition of CPS by respondent, as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

Mr. Joseph J. O'Malley, Mr. William A. Zolbert, and Mr. Larry D. Sharp, supporting the complaint.

McKean & Whitehead, by Mr. David J. McKean, and Cohn & Marks, by Mr. Richard M. Schmidt, Jr., for respondent.

Initial Decision

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INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

JULY 27, 1970

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STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on April 10, 1969, charging it with having violated Section 7 of the Clayton Act, as amended, by reason of its acquisition of the stock, business and assets of CPS Industries, Inc., a manufacturer of gift wrappings and ribbons. After being served with said complaint, respondent appeared by counsel and filed its answer to the complaint denying, in substance, that the acquisition was illegal, and alleging as affirmative defenses that the two companies were not in substantial competition and that CPS was a failing company.

Thereafter, a series of prehearing conferences were held between July 14, 1969, and October 2, 1969, before Leon R. Gross, to whom this proceeding was initially assigned as hearing examiner. Follow-

ing the death of Examiner Gross, the undersigned was assigned to act as hearing examiner herein on December 8, 1969. A further pre-hearing conference was held before the undersigned examiner on January 13, 1970.

During the prehearing phase of this proceeding, various applications, requests and motions were made by the parties, for purposes of discovery, including a motion to produce by respondent, an application for access by counsel supporting the complaint, a request for admissions by counsel supporting the complaint, and a motion for the issuance of "Special Reports" pursuant to Section 6(b) of the Federal Trade Commission Act by respondent. Most of said applications and motions were ruled upon by Examiner Gross during the pendency of this proceeding before him. Respondent's request for leave to file an interlocutory appeal from said examiner's order ruling on its motion to produce was denied by order of the Commission issued September 30, 1969. Respondent's motion for the issuance of Special Reports pursuant to Section 6(b) (which was certified to the Commission by the former examiner) was denied by order of the Commission issued August 27, 1969. Following the latter action, respondent instituted a suit in the United States District Court for the Western District of Pennsylvania to compel the Commission to conduct a survey under Section 6(b). Said suit was dismissed on January 14, 1970. On February 23, 1970, and March 6, 1970, after the commencement of hearings herein, respondent made application to the undersigned examiner for the issuance of approximately 550 subpoenas duces tecum designed to produce information of the type earlier sought to be obtained through the Section 6(b) survey requested of the Commission. Said applications were denied by order of the examiner dated March 20, 1970. Respondent contends that it was denied due process because of the failure to grant its requests for such information. This contention is hereinafter considered in the context of whether the data sought is relevant in this proceeding.

Hearings for the reception of evidence commenced herein on January 20, 1970, before the undersigned hearing examiner. Complaint counsel's case-in-chief was completed on February 9, 1970, except for the cross-examination of one witness which was delayed until February 16, 1970, at the request of respondent. The presentation of evidence on behalf of respondent commenced on February 10, 1970, and was completed on March 20, 1970. On the latter date rebuttal evidence was also offered by complaint counsel and received. The record was closed on March 20, 1970, subject to the possible filing of a

motion by respondent during the following week, to reopen the record for the purpose of offering certain surrebuttal evidence. A motion to reopen was filed by respondent on April 20, 1970, and was granted by the examiner on April 27, 1970, to the extent of permitting certain affidavits, as to which there was no objection by complaint counsel, to be received in evidence. A supplemental motion by respondent to reopen the record for the purpose of receiving certain additional affidavits was denied by order of the examiner dated April 30, 1970. It may be noted, however, that none of the findings hereinafter made by the examiner are based on the testimony of the witness in response to which the aforesaid affidavits were offered.

During the course of the hearings held herein, certain exhibit consisting of sales figures and other business data of third parties purporting to be in competition with respondent were received in evidence and, on request of said third parties, and with the concurrence of complaint counsel, were accorded *in camera* status for a period of five years. Under the examiner's ruling pertaining to such *in camera* documents, access thereto was limited to counsel for the parties to the proceeding, subject to the right of counsel for respondent to request leave of the examiner to disclose to their client any document or portion thereof which they could not understand or interpret without its assistance. (See, for example, Tr. 712.) Counsel for respondent state in their proposed findings that they renew their objection to the examiner's ruling purporting to deny them the right to show or discuss with the respondent any *in camera* documents. It may be noted, however, that at no time during the course of the proceeding did counsel for respondent seek to avail themselves of the right to request leave of the examiner to disclose such documents to their client, or attempt to establish in any way their inability to use or understand such documents without disclosure of the contents thereof to their client.

At the close of all the evidence, the parties were granted leave until May 5, 1970, to file proposed findings of fact, conclusions of law and an order. On application of respondent, the time for filing proposed findings was extended until May 13, 1970. Proposed findings were received from counsel supporting the complaint and counsel for respondent on May 13, 1970. Although an opportunity to file replies to the findings of opposing counsel was granted on application of counsel supporting the complaint, counsel for the parties elected not to file any reply findings.

After having carefully reviewed the evidence in this proceeding

and the proposed findings and conclusions submitted by the parties,¹ and based on the entire record, including his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT²

I. Identity and Business of Respondent and Acquired Company

A. *The Respondent*

1. Respondent, Papercraft Corporation (sometimes referred to herein as "Papercraft"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office located at Papercraft Park, Pittsburgh, Pennsylvania 15238 (Adm., Ans., par. 2).

2. Papercraft has two manufacturing subsidiaries: LePage's, Inc., which manufactures pressure sensitive tapes and adhesives; and American Universal Plastics, Inc., which manufactures vinyl tableclothes, placemats, and doilies. A third subsidiary, Papercraft Properties, Inc., owns the real estate housing the parent corporation. All three subsidiaries are wholly owned by Papercraft and are Pennsylvania corporations (Adm., Ans., par. 3; CX 7, pp. 3-4).

3. Papercraft was founded in 1945 as a manufacturer of gift wrap products (Tr. 1152). In 1967 it manufactured and sold gift wrap products, Christmas icicles and Christmas greeting cards, with gift wrap products constituting the bulk of its business. Its total net sales of all products in 1967 were \$17,935,000, of which \$15,700,000 consisted of gift wrap products. The total net sales of Papercraft and its two operating subsidiaries in 1967 were \$27,022,000, and their net income after taxes was \$2,215,000 (RX 19; CX 13, p. 10).

4. Papercraft sells its gift wrap products under the brand names "Kaycrest" and "Rhapsody," and under various private labels (Tr. 1188-89, 1169; CX 21-C). Such products are distributed for resale to various retail and wholesale outlets, either directly or through so-called manufacturers' representatives (Tr. 1165-70, 1214; RX

¹ Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to proposed findings are made with the following abbreviations: "CPF" (for complaint counsel's proposed findings); and "RPF" (for respondent's proposed findings).

² References are herein made to certain portions of the record in support of particular findings. Such references are to the principal portions of the record relied upon by the examiner, but are not intended as an exhaustive compendium of the portions of the record reviewed and relied upon by him. The following abbreviations are used in referring to the record: "Tr." (for transcript of testimony); "CX" (for complaint counsel's exhibits); and "RX" (for respondent's exhibits).

22-A). Papercraft's gift wrap products are manufactured or converted at its plant in Pittsburgh, Pennsylvania, and are distributed to its customers through warehouses located throughout the United States (Tr. 1258-59). At all times material herein, Papercraft has sold and shipped its gift wrap products, in interstate commerce, throughout the United States (Adm., Ans., par. 5).

B. The Acquired Company

5. Until its acquisition on December 27, 1967, CPS Industries, Inc. (sometimes referred to herein as "CPS"), was a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 2300 Logan Boulevard, Chicago, Illinois. CPS had two subsidiaries, CPS Industries (Tenn.) Inc., a Tennessee corporation, which was located in Franklin, Tennessee, and Rapid Ribbon, Inc., a Delaware corporation, which was located at the same address as the parent corporation (Adm., Ans., par. 6).

6. CPS was founded in 1916 under the name of Chicago Printed String, Incorporated. During the early 1920's, it began the manufacture and sale of gift wrap ribbon, and during the early 1930's it began to manufacture and distribute gift wrap paper in addition to ribbon (Tr. 1355). CPS operated three manufacturing plants in Chicago until 1964, when it moved the major part of its manufacturing facilities to a new plant in Franklin, Tennessee. However, it still retained one plant in Schiller Park, Illinois. Its subsidiary CPS Industries (Tenn.) Inc., manufactured and converted gift wrap products for sale by the parent corporation. Its other subsidiary, Rapid Ribbon, Inc., manufacture stretch-ties for sale by the parent corporation (CX 10-A, F, G, CX 13, p. 2; Tr. 1307, 1313, 1411).

7. In 1967, just prior to its acquisition, the products manufactured by CPS and its subsidiaries consisted of gift wrap products and industrial tapes. Its total sales of all products in 1967 were \$19,250,000, of which \$17,300,000 consisted of gift wrap products. The balance, constituting approximately 10% of its total sales, consisted of glass yarn used to wind electrical generator armatures and tapes employed as tear tape openers in corrugated boxes (RX 18; Tr. 1303-06). CPS and its subsidiaries had total assets of \$14,220,000, as of October 28, 1967, (CX 25, p. 4679-44).

8. CPS sold its gift wrap products under the brand names "CPS," "Tie-Tie," "Crinkle-Tie," "Galaxy," "Pride," and "Rippl-Tie," and under various private labels. Such products were distributed by CPS through its salesmen, for resale by various retail and wholesale out-

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lets, for use by retail establishments in wrapping gifts for customers, and for use by manufacturers of certain consumer products for prewrapping their products (CX 20 C-D, CX 21 D-E, CX 47 A-B; Tr. 595, 600, 617, 1303, 1323, 1330, 1341-42). At all times material herein CPS sold and shipped its gift wrap products, in interstate commerce, throughout the United States (Adm., Ans., par. 8).

C. *The Acquisition*

9. Negotiations between Papercraft and CPS looking toward the former's acquisition of the stock and assets of the latter commenced on or about November 4, 1967, and continued until December 6, 1967, when an agreement was entered into for Papercraft to acquire CPS (CX 10, 12, 25 and 78). Pursuant to said agreement, Papercraft, on December 27, 1967, acquired all of the stock and debentures of CPS directly from the holders thereof, in exchange for 285,300 shares of Papercraft stock valued, for purposes of the transaction, at \$20 a share or a total consideration of \$5,706,000 (Adm., Ans., par. 15).

II. Nature of the Trade and Commerce

A. *The Line of Commerce*

10. There is sharp disagreement between the parties as to what is the appropriate line of commerce, in terms of which to measure and determine the probable competitive impact of the instant acquisition. As defined in the complaint, it consists of all paper used for the purpose of wrapping gifts, and ribbons ordinarily used for the purpose of tying gift packages. However, during the course of the proceeding complaint counsel conceded that the line of commerce should be expanded somewhat to include decorative foil laminated to paper, pre-made bows as well as the basic ribbon, and several items used as accessories to the basic gift wrap package, such as tags, seals and decorative tie-ons (CPF at 59). It is respondent's position that the overall product market is even broader than that proposed by complaint counsel, and should include various other materials allegedly used in wrapping gifts, such as tissue paper, non-laminated foil, kraft paper, cellophane and plastic film, and various other materials used in addition to ribbon for tying gift packages, such as decorative yarn and pressure sensitive cellophane tape. Respondent also contends that the line of commerce should include various other products that are interchangeable with gift wrap paper and foil, such as gift boxes, gift bags, and industrial pre-wrap (RPF at 60-62).

11. The principal products manufactured by gift wrap manufacturers consist of the basic gift wrap paper, either paper alone or paper laminated with aluminum foil, and the materials used in tying the gift package. The latter consists mainly of ribbon made from textile material or polypropylene plastic, and may include pre-fabricated bows which dispense with the necessity for the customer to make his own bow from the ribbon. Supplementing ribbon as a tying material, some manufacturers produce or sell small quantities of decorative yarn, tinsel cord or pre-fabricated tyings known as snap-ties. Some manufacturers also produce or sell certain ancillary products used in connection with the gift wrapping of packages, such as enclosure cards, and tags and seals which are affixed to the package, decorated plastic tape for closing the package, and tie-ons and other objects for decorating the package. While many gift wrap manufacturers, particularly the larger ones, produce both wrapping material and tying material, there are some who produce only one of the two basic products used in gift wrapping, *i.e.*, either gift wrap or gift tyings. For the most part, the accessory items are converted by the gift wrap manufacturer from basic material purchased from other manufacturers. Thus, cards and tags are purchased in bulk from printing firms and are cut to size by the gift wrap manufacturer (CX 14, p. 10, CX 31-C, G, CX 36-B, CX 44-A, CX 48-B, CX 56-C, D, CX 59-B, O, CX 60-A, CX 61-C, D, CX 62-D, CX 63-A, CX 64, CX 65-B, CX 67-B, K, L, CX 68-C, CX 70-D, CX 71-A, B, CX 72-A, CX 73-A, CX 74-A, CX 75-D, E, CX 79; Tr. 337, 343, 461-5, 561, 562, 706, 729, 820, 946, 964, 1021, 1079, 1083, 1086, 1198-9, 1303, 1398).

12. The only products carried in the line of gift wrap manufacturers as to which there is any substantial dispute between the parties, concerning their inclusion or exclusion from the relevant line of commerce, are tissue paper and kraft paper. Neither of these products is customarily manufactured by gift wrap manufacturers, but is purchased in bulk from paper companies and cut to size for distribution to the gift wrap manufacturers' customers. Many years ago tissue paper was widely used in the wrapping of gifts, but it has been largely replaced by decorative gift wrap paper or paper laminated with foil. Its use in gift wrapping is largely restricted to that of an inner wrap within a box used to enclose a gift. However, a very minor amount of colored or madras tissue is still used as an outer wrap in lieu of gift wrap paper (Tr. 432-4, 652, 660, 692, 1021, 1081, 1192, 1748; CX 31-D). Complaint counsel apparently concede that colored tissue used as an outer wrap may be considered

as part of the gift wrap product line (CPF at 8-9). Respondent apparently contends that all tissue, irrespective of whether it is used inside or outside of a package and without regard to whether it is distributed by gift wrap manufacturers, should be considered part of the relevant line of commerce (RPF at 61).

13. The record does not disclose whether there is any basic difference between the tissue which is sold by gift wrap manufacturers to be used in connection with the gift wrapping of products, either as an inside or an outside wrap, and that produced and sold by tissue mills or manufacturers generally. However, it does appear that there are a few companies which specialize in producing tissue which is used in the gift wrap market. The principal one is Crystal Tissue Company, which sells over half of its tissue to gift wrap manufacturers, including a number of the major manufacturers whose sales figures are in evidence. Crystal does not manufacture any other gift wrap products. The only gift wrap manufacturer which produces its own tissue is Ben-Mont Papers, whose sales of tissue constitute about 12% of its total sales of gift wrap paper (Tr. 433-5, 652-3, 660-1, 1081-2, 1192; CX 95-A, CX 60-D).

14. In the opinion of the examiner, the only tissue which may conceivably be considered part of the gift wrap product line is that distributed by gift wrap manufacturers or produced by manufacturers specializing in the production of tissue for the gift wrap trade. While the position of complaint counsel that the only type of tissue which should be considered to be part of the gift wrap product line is that customarily used as an outer wrap has considerable merit, it is of little practical significance, for purposes of the disposition of the issues in this proceeding, whether plain tissue used as an inner wrap (and sometimes as an outer wrap) is considered part of the relevant line of commerce. Since the bulk of the tissue used in connection with the gift wrapping of products is distributed through gift wrap manufacturers, and both the universe figure of gift wrap sales and the sales figures of the individual companies include sales of both types of tissue, the exclusion of any portion of the tissue sales from the universe figure would also require the exclusion of such sales from the figures of the individual companies, thus leaving the market-share percentages of the individual companies substantially the same irrespective of whether tissue sales, or any segment thereof, are included or excluded.

15. Like tissue, kraft paper is purchased in bulk quantities from paper manufacturers and converted to smaller size by gift wrap manufacturers. It is not used to gift wrap a package, but as an over-

wrap for the mailing of gift packages. For the most part, the kraft paper sold by gift wrap manufacturers is plain brown paper similar to that used in bags and other packaging material. However, some gift wrap manufacturers distribute kraft paper containing designs printed thereon, particularly that sold at Christmas which contains traditional Christmas motifs. Even where the kraft paper contains a design it is not customarily used in lieu of gift wrap paper, but as an overwrap for mailing purposes (Tr. 337-8, 512-3, 622, 774, 947, 1023, 1080, 1116, 1774, 1903, 1935, 2095; RX 4).

16. It is apparently respondent's position that all kraft paper, irrespective of whether it is distributed by gift wrap manufacturers for use in overwrapping gift packages or by paper manufacturers for general use in packaging, should be considered part of the gift wrap product line. Kraft is not generally used as gift wrap and is not, in the opinion of the examiner, part of the gift wrap product line. To the extent that it is converted and sold by gift wrap manufacturers as part of their gift wrap product line, it may be argued that it is part of the gift wrap line of commerce. However, as a practical matter, it makes no difference, for purposes of the resolution of the issues in this proceeding, whether this category of kraft paper is or is not deemed to be a part of the relevant line of commerce since the universe figure of gift wrap sales in the record and the sales figures of the individual companies generally include sales of kraft paper. If these figures were removed from the universe figure on the ground that kraft is not part of the overall market, they would have to be removed from the sales figures of the individual companies, and the relative market position of the various companies would remain substantially the same. Moreover, since the sales of kraft paper by gift wrap manufacturers and their customers constitute only 1% or less of their total sales, the inclusion or exclusion of such sales would not significantly affect market share percentages (Tr. 652, 880, 1116, 1750, 1806, 1927).

1. *Interchangeable Products*

17. As noted above, respondent contends that the product market should include not only products distributed by gift wrap manufacturers, but certain products which are allegedly interchangeable with, or substitutable for, the basic gift wrap products. The principal items involved in this contention are gift boxes and bags, and industrial "pre-wrap" (RPF at 63-9). Gift boxes are generally manufactured by box manufacturers, and not by gift wrap manufacturers (Tr. 338, 1080, 1193, 1436). One type consists of boxes similar to

plain boxes which are used in wrapping gifts, but are more attractive in color and contain the name of the store imprinted thereon. In some instances store customers insist that such boxes be overwrapped with gift wrap paper. Another type of so-called gift box consists of an ordinary box laminated with gift wrap paper or foil. In the latter situation, the retail stores generally purchase the gift wrap paper separately from a gift wrap manufacturer, and have it shipped to the box manufacturer from which the boxes have been purchased, for lamination to the box. This is done as a labor-saving device to obviate the need for personnel in the retail establishment to wrap the gift package (RX 205-222; Tr. 622-3, 1898-1900, 1907, 2039). While there are some retail stores which carry such gift boxes for resale purposes, there are many which do not. A number of stores which previously carried gift boxes have discontinued stocking them because of the amount of space which they require in comparison with the stocking of plain boxes in knockdown form, and gift wrap paper. To the extent that retail establishments do carry gift boxes, they generally constitute an insignificant portion of the line of gift wrap products carried (Tr. 368, 624, 985, 1080, 1751, 1825, 1952, 2007, 2040, 2088-9). Although several gift wrap manufacturers have considered adding gift boxes to their line, they abandoned the idea as impractical because of the differences in marketing (from regular gift wrap), the high investment and inventory required, and the lack of sufficient demand for the product (Tr. 1081, 1435).

18. The record is not clear as to the type of gift bags that respondent contends are part of the market, except that they are "pre-formed decorative bags into which a gift is inserted" (RPF at 61). Such bags are manufactured by bag manufacturers, and not by gift wrap manufacturers. Respondent, which is one of the largest gift wrap manufacturers, declined an offer to distribute such bags for a prominent bag manufacturer for the reason that "it was not within the scope of our marketing activities" (Tr. 1195; RX 134). The record fails to establish any substantial use of gift bags in lieu of conventional gift wrap material (Tr. 881-2, 984-5, 1023, 1741). For the reasons hereafter discussed, neither gift bags nor gift boxes are part of the gift wrap line of commerce, for purposes of this proceeding.

19. Industrial pre-wrap is used principally by manufacturers of liquor, cosmetics, candy, and hosiery in pre-wrapping their products during certain holiday seasons, particularly Christmas. It consists of materials such as basic aluminum foil, boxes, ribbons and bows, and

accessory items, which are used to wrap the products in automatic wrapping machines. Some of the tying material, such as ribbons and bows, is supplied by gift wrap manufacturers, but most of the basic wrapping material is supplied by other types of manufacturers such as aluminum companies and box manufacturers (Tr. 467-8, 472, 1023-4, 1340-52). To the extent that pre-wrap consists of ribbon and other materials customarily manufactured by gift wrap manufacturers, it may appropriately be considered part of the gift wrap product line. To this extent the sales figures of the principal manufacturers referred to as producing such products are already in the record (CX 53-A, CX 56-B, C, CX 61-C, E, CX 79; RX 21). Such figures disclose that industrial pre-wrap constitutes a relatively minor portion of the sales of gift wrap manufacturers who sell to this class of customer, so that the inclusion or exclusion of such sales would not materially affect the market share percentages of the principal manufacturers.³ To the extent pre-wrap includes other materials such as basic aluminum foil and boxes supplied by manufacturers of the type which do not normally produce gift wrap, it is not, in the opinion of the examiner, part of the gift wrap product line.

2. Submarkets

20. In addition to its contention that the overall gift wrap product market is substantially broader than that proposed by complaint counsel, respondent also contends that the gift wrap line of commerce is divisible into three submarkets, *viz.*, (a) "quality-serviced" gift wrap, (b) "promotional" gift wrap, primarily Christmas gift wrap, and (c) "bulk" or "in-store" gift wrap (RPF at 19-20). Such submarkets are based on alleged differences in the quality, prices and methods of distribution of the three types of gift wrap. Respondent's proposed division of the gift wrap market into three different submarkets coincides with the differences in the areas of specialization between respondent and the company it acquired, CPS. The acceptance of such submarkets as the relevant lines of commerce would tend to minimize somewhat the competitive impact of the instant acquisition. Complaint counsel oppose respondent's effort at division of the gift wrap market into various submarkets, contending that the basic gift wrap products are all part of a single line of commerce (CPF at 25).

21. Historically, the original channel of distribution for gift wrap

³ CPS's sales of industrial pre-wrap in 1967 were approximately \$500,000, out of total gift wrap sales of \$17,377,000 (Tr. 1343; RX 21).

was the department store. Gift wrap paper was sold by the manufacturer in large rolls and the ribbon was sold in reels. The department stores used the paper and ribbon in providing a gift wrap service for their customers. Originally the service was provided without charge, but as papers became more expensive and elaborate the customer was given the option of selecting the free gift wrap or of paying for the more expensive types of gift wrap. In due time, gift wrap manufacturers began to supply the paper and ribbon in individual packages for resale by the store to its customers, who would do their own gift wrapping. Eventually, the outlets distributing gift wrap for resale to the consumer included variety stores, drug stores, and card or gift shops. In most instances, the gift wrap resale packages contained pre-marked retail prices affixed by the manufacturer. They were frequently displayed in racks which were furnished by the gift wrap manufacturer, who serviced the racks by keeping the merchandise properly displayed and stocked in accordance with a pre-planned program. The merchandise was either sold to the store directly by the manufacturer, or through wholesalers known as rack jobbers. Where sales were made by the rack jobber rather than the manufacturer, the jobber supplied and serviced the racks. The gift wrap sold consisted of two broad categories, *viz.*, "everyday" wrap and "Christmas" wrap. The former was a designation applied to gift wrap sold for a miscellany of occasions other than Christmas, *e.g.*, weddings, birthdays, confirmations, graduation, Valentine's Day, etc. Christmas wrap generally constituted the greater proportion of gift wrap sold. This distinction between everyday wrap and Christmas wrap has continued in the gift wrap industry (Tr. 338, 599, 654, 884, 996, 1028, 1040, 1084, 1088, 1090, 1355, 1735, 1756, 1796, 1944).

22. During the 1950's when the discount stores and supermarkets came into prominence, gift wrap manufacturers began to sell their gift wrap to such establishments. Papercraft was a pioneer in the distribution of "promotional" gift wrap through discount stores, supermarkets, and other mass merchandising outlets. The great bulk of the gift wrap sold through such establishments consists of Christmas wrap. Unlike so-called "quality" gift wrap which is generally sold in individual packages and rolls, "promotional" gift wrap, particularly Christmas gift wrap, is sold in multiple packages, the larger of which are designated as "Jumbo" rolls. In many instances it is not pre-priced, and a number of the manufacturers do not provide the racks and service which are customarily supplied to the traditional outlets. The gift wrap sold through the discount stores, supermar-

kets, and other mass merchandising outlets is referred to in the industry as "promotional" wrap, since it is not pre-priced and is sometimes used as a vehicle for getting customers into the store. In the case of some manufacturers, the promotional gift wrap paper is of a lighter weight, and contains less elaborate designs, than the regular so-called quality gift wrap, and it sells at a somewhat lower price (Tr. 339, 412, 415, 419, 600, 868, 995, 1030, 1088, 1153, 1156, 1162, 1180, 1323, 1327, 1474, 1550, 1932, 2000, 2116).

23. While the record does establish that there are some differences between so-called "quality" and "promotional" gift wrap, in terms of quality of paper, price, distributional methods used, and types of establishments handling them, they are not, in the opinion of the examiner, of such magnitude as to require the two types to be considered separate lines of commerce for purposes of determining the competitive impact of the instant acquisition. Although, as noted above, the paper used by some manufacturers of promotional gift wrap is somewhat lighter in weight than that generally used in so-called quality gift wrap, there are other manufacturers who use the same weight of paper for both types of gift wrap. Moreover, weight is not necessarily determinative of the quality of the paper. While the designs on some types of promotional gift wrap may be less elaborate than those of quality gift wrap, gift wrap manufacturers often use the same designs on both, except that the promotional gift wrap may consist of designs used on quality gift wrap during a prior season. Moreover, in recent years the differences in quality have narrowed considerably, as manufacturers have sought to upgrade the quality image of their promotional gift wrap and have introduced the more expensive types of gift wrap paper, such as flocked and foil-laminated paper. From the point of view of retail establishments, the differences in quality are minimal. Such differences in quality as do exist involve gift wrap papers only, since there are no quality differences between gift tyings sold in the two lines (Tr. 342, 621, 629, 654-5, 663, 729, 771, 902, 910, 995, 1087-9, 1224-5, 1475, 2023; CX 31-G, CX 106-8, 111-4, 124-7, 129-139, 146-9, 152-4; RX 129-131, 149-151, 166-7, 172-3). The historically lower prices of promotional gift wrap, as compared with quality wrap, have been narrowed in recent years with the upgrading of the former, and there is now considerable overlap in price between the lines. Such differences as do exist are sometimes minimized by selling different sized packages of each at comparable prices (Tr. 621, 1088, 1105, 1248, 1292; CX 47-C, 45, 76-F, 100-G, 141, 143).

24. While there are some manufacturers who specialize in the pro-

duction and distribution of promotional gift wrap, there are a number who produce and distribute both types of gift wrap. The choice is primarily that of the manufacturer. There is nothing inherent in the nature of the two types of gift wrap to prevent a manufacturer from switching from one to the other. The same basic type of machinery is used in the manufacture of both types. While some manufacturers of promotional gift wrap do not provide display racks and service to the retailer, there are some manufacturers who provide it on both types. Moreover, even where a manufacturer of promotional gift wrap does not provide service directly, he may provide it indirectly through a rack jobber, in those instances in which the store makes its purchases through a wholesaler. Furthermore, the lack of service involves principally Christmas gift wrap. Because of the brief, concentrated season and the tremendous quantities involved, even suppliers of so-called quality gift wrap provide only limited service or no service during this period. Even where service or fixtures are available, there are a number of substantial retailers who do not avail themselves of it (Tr. 868, 918, 997, 1027, 1030, 1087-8, 1090-1, 1167, 1233, 1738, 1798, 1834, 1964, 2020, 2102; CX 20-D, E). Despite the concentration of manufacturers of promotional gift wrap on discount stores, supermarkets and other mass outlets, in their distributional pattern, there are a number of manufacturers of so-called quality gift wrap who compete for the business of such establishments, particularly during the large-volume Christmas season. Conversely, a number of the department stores, which are the traditional outlets for quality gift wrap, have added promotional gift wrap to their line (Tr. 375, 403, 515, 600, 614, 654, 680, 906, 914, 1245, 1468, 1800, 1923, 1999, 2002, 2033, 2084, 2094, 2119; CX 142-3, 146-7).

25. Bulk or in-store gift wrap is sold primarily to department stores and independent specialty stores, which provide a wrapping service for customers. In the larger department stores the in-store wrap is purchased by a different buyer than purchases gift wrap for resale, and the price structure between the two types is somewhat different because of the quantities involved in the individual bulk wrap rolls. However, generally the same salesmen represent the manufacturer in selling both in-store wrap and resale gift wrap. Although the bulk of the in-store wrap was originally supplied to the retail customer without charge, at the present time approximately 40% of such wrap is sold to the customer when his package is wrapped. Despite differences in the quantities in which they are sold to the retail stores, there is no substantial difference in the quality of

the gift wrap paper used, between bulk gift wrap and resale gift wrap. While there are a few gift wrap manufacturers who specialize in selling only in-store gift wrap, and some who do not sell bulk gift wrap, most gift wrap manufacturers supply both bulk gift wrap and gift wrap for resale (Tr. 595, 598, 692, 958, 1091-2, 1320, 1440, 1755, 1768). In the opinion of the examiner, the differences between bulk and resale gift wrap, in terms of the quantity sold, prices charged, and distributional methods used are not such as to require that the two types be considered separate lines of commerce, for purposes of determining the competitive impact of the instant acquisition.

B. Structure of the Industry

1. Identity of Companies

26. The record does not disclose the precise number of manufacturers of gift wrap and gift tyings. However it is clear that the number thereof does not exceed 50 to 60, and that most of these are comparatively small in size (Tr. 344-5, 368, 393, 655, 664, 666, 670-1, 718-20, 860-1, 956-7, 961, 1030-1, 1099-1100, 1161, 1185; CX 21-G, 47, 76-A, 81).⁴ For most of the companies in the industry, the manufacture and distribution of gift wrap products is their principal business, while for some it is a subsidiary business. One group of companies in the latter category is the so-called greeting card manufacturers, whose primary business is the manufacture and distribution of greeting cards and whose sales of gift wrap products constitute only about 10-15% of their total sales. The gift wrap sales of the larger greeting card companies range from approximately \$12 to \$14 million, while those of the smaller manufacturers range from approximately \$2 to \$5 million (CX 44, 48-51, 63, 64, 75). There are also several other manufacturers, in addition to the greeting card manufacturers, whose gift wrap business is ancillary to some other type of business. However, for most of the companies in the industry the manufacture and sale of gift wrap products constitutes their principal business. A number of the companies manufacture both gift wrappings and gift tying materials, while some manufacture only one of those principal products of the industry. Most of the major companies are members of the industry trade association, the Gift Wrappings and Tying Association (CX 46; Tr. 376, 717, 1083).

⁴One gift wrap manufacturer regarded as a "major" company any company whose volume of gift wrap sales was \$500,000 or over, while another characterized as the "principal" companies in the industry those with annual sales of between \$2-\$4 million (Tr. 504, 661).

27. The largest of the greeting card companies manufacturing and distributing gift wrap products are Hallmark Cards, Inc., and American Greetings Corporation. Each of these manufactures and distributes both gift wrap materials and gift tying products. The greater part of the gift wrap manufactured by these companies is distributed through department stores, gift and card shops, and other traditional outlets. However, both distribute a substantial portion of their gift wrap to discount stores and supermarkets. Most of the gift wrap is sold in resale packages, but a small quantity consists of bulk or in-store wrap. The resale gift wrap is generally displayed by the customer in fixtures supplied by the manufacturer. While the manufacturer services such display rack, the servicing thereof is merely an incident to the servicing of their greeting card line. The bulk of the gift wrap sold by both companies is distributed under the company's trade name, *i.e.*, Hallmark and American Greetings, and is pre-priced by the manufacturer. However, each of these companies also manufactures one or more lower-priced lines, which are distributed through discount stores, supermarkets and other non-traditional outlets. Hallmark's lower-priced line is sold under the name "Ambassador." American Greetings distributes two lower-priced lines, under the names "Laurel" and "Forget-Me-Not." An even lower-priced promotional line, known as "Sapphire," was discontinued by American Greetings because it was not profitable. The gift wrap paper used in the higher and lower-priced lines of these manufacturers is substantially alike, but the designs on the lower-priced lines are somewhat less elaborate or extensive. While the lower-priced lines are also pre-priced, the retailers do not feel obliged to maintain them (CX 44, 47, 48; Tr. 654-5, 656, 658, 994-5, 1087-8, 1834, 2104, 2116).

28. The other greeting card manufacturers which manufacture and distribute gift wrap products are Norcross, Inc., Rust Craft Greeting Cards, Inc., and Gibson Greeting Cards, Inc., with the latter having a division or subsidiary known as Buzza-Cardoza. All three companies distribute both gift wrap paper and tying products. With the exception of Gibson, their gift wrap products are distributed for resale and not for in-store use. While Norcross distributes its gift wrap products entirely through the so-called quality retail outlets, Rust Craft and Gibson's subsidiary Buzza-Cardoza sell to discount chains and supermarkets, as well as traditional outlets (CX 63-B, 72-B, 75-D, 47; Tr. 884, 898, 731).

29. Among the largest of the non-greeting card gift wrap manufacturers is Cleo Wrap Corporation, although it too has indirect

connections with a greeting card company through its ownership by CIT Financial Corporation, which also owns Gibson Greeting Cards, Inc., and the latter's Buzza-Cardoza Division. Cleo is primarily a producer of so-called promotional gift wrap paper and foil, which it distributes through a variety of outlets other than department stores and card shops. It also distributes a minor amount of ribbon and bows and other gift wrap accessories (CX 75-E, 47; Tr. 706, 718, 732, 806, 987, 1030, 2033).

30. The acquired company herein, CPS Industries, Inc., was the largest single gift wrap manufacturer in 1967, not counting the combined companies constituting the CIT complex. If the CIT-affiliated companies (Cleo, Gibson and Buzza-Cardoza) are considered as one entity, then their combined sales would exceed CPS's by approximately \$2 million. CPS, which was initially a manufacturer of gift tying ribbons, was a substantial producer of both gift wrap paper and foil, and gift tying products. Its gift wrap products were sold principally under the brand names "Tie-Tie," "Crinkle-Tie," "Rippl-Tie," "Galaxy," and "Pride." Sales of bulk gift wrap for in-store use constituted approximately 40% of CPS's gift wrap sales. The predominant portion of its resale merchandise consisted of so-called quality gift wrap sold under the brand names "Tie-Tie" and "Crinkle-Tie" to department stores, card shops, variety stores and drug stores. However, it also distributed promotional gift wrap under the "Galaxy" and "Pride" labels and under private labels, primarily to discounters and supermarkets, but also to some department, drug, and variety stores. The bulk of its promotional gift wrap consisted of Christmas wrap. Promotional gift wrap constituted 16% of CPS's total gift wrap sales and 28% of its resale gift wrap (RX 21; CX 75, CX 10-B, C, D, CX 20-C, D, CX 21-B, D, E, CX 47; Tr. 595, 597-603, 607-9, 611-6, 625-6, 628, 887-9, 1326-8, 1330, 1442-4, 1999-2000, 2057-8).

31. The respondent herein, Papercraft Corporation, was the second largest manufacturer of gift wrap products in 1967, its gift wrap sales being approximately \$1.6 million less than those of CPS. Substantially all of its gift wrap products were promotional gift wrap and 95% of its sales involved Christmas gift wrap. Its products are sold under two brand names, "Kaycrest" and "Rhapsody," which are identical in quality, and under various private label brands. Its principal customers for gift wrap are discount department stores, supermarkets, discount drug stores, variety chains, and mass merchandisers such as Sears Roebuck. It does not sell any merchandise to conventional department stores or to card shops, and it

does not sell bulk gift wrap for in-store use (CX 20-B, D, E, CX 21-C, D, CX 47; RX 19; Tr. 1163-4, 1188-9, 1230, 409-410).

32. Following CPS, Papercraft, Cleo, and the two largest greeting card companies (all with sales in excess of \$10 million annually), there were seven companies with gift wrap sales of between \$4.5 million and \$6.9 million in 1967. These were Artistic Manufacturing Company, Minnesota Mining and Manufacturing Company (3-M), Wrap-Tures Gift Wrap, Inc., d/b/a Ben-Mont Papers, Susan Crane Packaging, Dennison Manufacturing Company, Archer Products, Inc., and Gibson Greeting Cards, Inc., (whose operations have been described above). Artistic is a division of Sun Chemical Company, and produces only gift tyings, which are sold to a variety of retail outlets other than department stores and card shops. It produces a small amount of store-use tyings and makes some tying products for other members of the industry (CX 53; Tr. 706-7, 713-5, 730). Among the broad spectrum of products manufactured by the 3-M Company are gift tying products, which it distributes primarily to discount retailers, but also to some variety stores and drug chains. It also distributes an in-store line of bulk gift wrap products, including a small quantity of paper and foil purchased from other manufacturers and converted by it (CX 56, CX 47; Tr. 945-6, 2050). Ben-Mont manufactures and distributes primarily gift wrap paper, but it also distributes a small amount of tying products which it purchases from other manufacturers. Its product line includes tissue, it being the only gift wrap manufacturer to produce its own tissue. Its products are distributed to a variety of retail outlets, other than department stores and gift shops (CX 47, 60-A, D; Tr. 510, 806, 989, 1030). Susan Crane, a division of The Cole National Corporation, is a producer and distributor of both gift wrap paper and ribbon, which it distributes primarily for in-store use. It discontinued the distribution of resale gift wrap at the end of 1967, except to a few private label customers. Some of its gift wrap is sold to manufacturers of consumer products for use as pre-wrap (CX 61). Dennison is a manufacturer of both gift wrap paper and tying products, which it distributes to wholesalers and to a variety of retail outlets for resale and for in-store use (CX 65-B, 67, 47-B; Tr. 1024, 1030). Archer Products, which is a division of Reynolds Tobacco Company, manufactures and distributes only wrapping products. Most of its distribution is to retail outlets other than department stores and card shops. However, it also manufactures wrapping products for in-store use and for resale to other members of the gift wrap industry (CX 79, 47-A; Tr. 814, 820, 867-8).

33. Following the above-mentioned companies is a group of about 10 companies with gift wrap sales ranging from approximately \$1-3 million. These include two of the previously-mentioned greeting card companies, Rust Craft and Norcross and, in addition, Hy-Sil Manufacturing Co., George S. Carrington Company, Tuttle Press Company, St. Clair Mfg. Corp., Berwick Textile Products Co., Inc., Wm. E. Wright Company, Technical Tape, Inc., and Delaware Ribbon Manufacturers, Inc. Hy-Sil is one of the oldest manufacturers of gift wrap in the United States and produces both gift wrap paper and tying products, which it distributes to all types of retail outlets both for resale and for in-store use (CX 36; Tr. 338, 341, 403, 510). Carrington manufactures both gift wrap paper and ribbon, which it distributes to wholesalers and to retail outlets other than department stores and card shops (CX 59; RX 14). St. Clair also manufactures both gift wrap paper and ribbon, but its products are sold primarily in bulk for in-store use, although it also distributes a small amount for resale (CX 68-9). Tuttle Press and Technical Tape manufacture only gift wrap paper, and their products are distributed to a variety of retail outlets, for resale, with Tuttle also distributing some in-store gift wrap (CX 47, 62, 73). Berwick, Wright and Delaware Ribbon manufacture and sell only tying products. Berwick's and Wright's sales are made largely to variety stores for resale, although both also sell some in-store ribbon. Delaware Ribbon's products are sold largely for in-store use (CX 47, 70, 71, 92; Tr. 961).

34. The record also contains statistical evidence or testimony concerning the operations of a number of other smaller manufacturers or converters of gift wrap products, including Brown Company, the Champion Division of U.S. Plywood, East House and Steven Lawrence (CX 52, 74; Tr. 393, 1749-50). However, it is clear that these are all relatively small and insignificant manufacturers or converters, insofar as their gift wrap line of products is concerned, with sales of not more than \$500,000 for any company. The record is also clear that the companies specifically described above constitute the heart of the gift wrap industry, and account for the bulk of its sales.

2. Market Shares and Concentration

35. Complaint counsel's statistical case, insofar as it purports to establish the market shares of the companies involved and the degree of concentration in the industry, is based primarily on (a) sales data obtained by subpoena *duces tecum* from 20-odd companies, each

with sales of over \$1 million, and (b) published data of the Bureau of Census reflecting the value of shipments of gift wrap paper and the data obtained by subpoena *duces tecum* from the principal companies do not include all the companies in the industry and the Census figures do not include certain accessory products, complaint counsel have made certain adjustments in the above figures, based on the expert testimony of industry witnesses (CPF at 34-45). Thus, the data obtained by subpoena *duces tecum* from the principal companies in the industry disclose sales of gift wrap products of approximately \$132 million in 1967 (CX 36, 44, 48, 50, 52, 53, 56, 59, 60-75, 79; RX 21). Based on the testimony of several industry witnesses that the principal companies accounted for somewhere between 80 to 92% of total industry sales, complaint counsel suggest an adjustment of 13% in the total sales figure of the principal companies, resulting in a total universe figure of \$152 million (CPF at 43). The Bureau of Census figures disclose shipments of gift wrap paper and tying products totaling \$146 million in 1967 (CX 83-86). Because such figures admittedly do not include sales of cards, tags and seals, complaint counsel make an adjustment of 17% to account for the missing products, resulting in a total adjusted Census figure of \$176 million (CPF at 41). Utilizing these two groups of statistics, and the testimony of various industry experts who estimated industry sales as being between \$136 million and \$177 million, complaint counsel suggest a total figure of \$162 million as a reasonable industry universe estimate, arrived at by averaging the adjusted sales and Census statistics, and the average of the expert witnesses (CPF at 45).

36. Respondent contends that the statistical evidence offered by complaint counsel is not sufficiently complete to afford an adequate basis for a determination of market shares and concentration in the gift wrap industry. Specifically, respondent contends that there are many more companies than the 20-odd companies whose sales data were offered in evidence by complaint counsel, and that the Bureau of Census figures do not include data for certain gift wrap products and are incomplete for other categories of such products (RPF at 78-80, 88-91).

37. Based on the testimony of industry witnesses (both manufacturers and retailers) called by both complaint counsel and respondent, and other evidence concerning the constituency of the industry, the examiner is satisfied that the companies whose sales figures were offered in evidence by complaint counsel constitute the heart of the gift wrap industry and that the statistical evidence offered with re-

spect to such companies is unquestionably adequate to permit an informed assessment concerning the statistical structure of the industry, to the extent such an assessment is required in order to make a proper determination of the probable competitive impact of the instant acquisition. The examiner is satisfied that such statistical evidence includes substantially all manufacturers of basic gift wrap (paper-foil and/or tying products) with sales of \$1 million or over, and that the combined sales volume of the manufacturers from whom data were not obtained would, in all probability, not account for more than 10-12%, and probably less, of total industry sales of gift wrap) Tr. 344-6, 393, 655-6, 664, 718-720, 806, 860-1, 956-7, 961, 975, 987-8, 1025-6, 1083, 1092, 1161, 1185, 1197, 1235-6, 1758, 1796, 1956, 2015, 2021, 2033, 2050; CX 21-G, CX 76, CX 81, CX 36-C, CX 71-C, CX 73-C).

38. The statistical evidence in the form of sales data of gift wrap manufacturers offered by complaint counsel establishes total sales of approximately \$133 million for 25 companies.⁵ The estimates of industry witnesses on which complaint counsel rely, as to the percentage of the total market accounted for by the principal companies, were actually based on the sales of a lesser number of companies than the 25 companies whose figures were offered in evidence by complaint counsel.⁶ Adjusting the figures of record by 12% (which in the opinion of the examiner would be an overly generous adjustment) yields an industry total of just under \$150 million in sales. This figure comports with the estimates of various industry representatives, whose estimates of total sales in the industry ranged from \$136 million to \$177 million (Tr. 348, 670, 695, 725-7, 738, 1044; CX 31-C).⁷ More importantly, it accords with the statistical evidence obtained from the Bureau of the Census, indicating total sales of basic gift wrap and tying products of \$146 million in 1967.

39. As noted above, respondent contends that the Bureau of Cen-

⁵ The above figures reflect sales of all companies included in complaint counsel's computations, including those of several subsidiaries of some of the major companies, and several companies with sales under \$1 million whose figures are in evidence. In addition, the examiner has included the sales of Delaware Ribbon, on the assumption that the figures in evidence (CX 92) involve only sales of gift wrap ribbon.

⁶ One witness, who estimated that the major companies accounted for 80-85% of industry sales, named about 15 companies as being the principal companies in the industry (Tr. 344-6, 516-7). The same witness regarded as a major company, any company with sales over \$500,000 (Tr. 501). Another member of the industry estimated that the 10 principal companies accounted for approximately 76% of the industry's sales (Tr. 670). Another estimate was that out of 37 companies manufacturing Christmas gift wrap, 7 companies (all of whose figures are in evidence, except for one company whose sales were estimated at about \$1 million) accounted for 80% of the market (CX 76-A).

⁷ Some of the estimates of industry witnesses require downward adjustment to give effect to an increase in industry sales since 1967.

sus figures are incomplete. Basically, it contends that such figures do not include tags and seals, gift wrap tissue, imported gift wrap, and gift boxes, and that the Census reporting forms are such that gift wrap manufacturers may have improperly classified their gift wrap products (RPF at 88-91). The examiner is satisfied that the Census reports offered in evidence by complaint counsel are substantially complete and accurate, and that they include substantially all gift wrap products produced in the United States, with the exception of tags and seals and a small amount of tissue. Since tags and seals are basically produced in the printing industry, being merely converted by gift wrap manufacturers, they are reported on Census forms applicable to the printing industry, which do not break them out from the broad category of printed tags (Tr. 1141, 1199, 1587). However, the testimony of industry witnesses indicates that tags and seals, plus certain other accessory items such as decorative tie-ons, are approximately 5% of total sales (Tr. 983, 1082, 1298, 1925, 1949, 2003, 2007, 2038, 2049, 2106). Adjusting the Census figure by 5% would yield a total of approximately \$153 million. With respect to gift wrap tissue, the record indicates that gift wrap manufacturers normally report tissue along with other gift wrap paper under Census product code 26492 (CX 91-A). The only companies which do not do so are the few which are exclusively in the tissue business and are not basic producers of gift wrap products. As previously noted, the principal producer of tissue for gift wrap is Crystal Tissue, whose sales of tissue other than those made to gift wrap manufacturers are less than \$1 million (CX 95-A). As far as other types of misclassification by gift wrap manufacturers are concerned, the examiner is satisfied that the likelihood of misclassification is not significantly greater in this industry than in other industries (2147-8, 2150-2, 2194-7).⁸ With respect to the matter of imported gift wrap, there is no reason to believe that the volume thereof is of such magnitude as to significantly affect the market share percentages disclosed by the statistical evidence in the record.

40. Respondent argues that it was deprived of the opportunity of establishing the inadequacy of the data relied upon by complaint counsel because of the examiner's refusal to issue subpoenas *duces tecum* to 551 companies, including 230 companies, which respondent believed to be manufacturers of basic gift wrap products and 321

⁸ The reports of several of the leading manufacturers which are in evidence, including those of respondent and CPS, indicate that their gift wrap products were classified in accordance with the Census categories on which the Census reports offered by complaint counsel are based (CX 90-94, CX 22-B, CX 23-B).

box companies which it believed were sellers of gift-wrapping boxes. Respondent contends that the examiner's denial of its application for subpoenas *duces tecum* addressed to such companies constituted a denial of due process (RPF at 99-102). The examiner's refusal to issue subpoenas *duces tecum* to the 321 box manufacturers was based on his conclusion that gift-wrapping boxes are not part of the gift wrap line of commerce. His refusal to issue 230 subpoenas to companies alleged to be sellers of gift wrap was based on the grounds that, (1) the evidence before him already established who the principal gift wrap manufacturers were, (2) it was highly questionable whether many of the companies whose names were included in respondent's list were manufacturers of gift wrap, and (3) to the extent some of them were producers of gift wrap, their volume was not of sufficient magnitude as to have any significant impact on the statistical evidence in the record.

41. Respondent notes, in its proposed findings, that there are approximately 90 manufacturers actually referred to in the record as gift wrap manufacturers, which are not accounted for in the statistical evidence offered by complaint counsel (RPF at 80-83). For the most part, such companies are not basic gift wrap manufacturers. They are either producers of certain basic materials used by gift wrap manufacturers or by other types of manufacturers for use as industrial pre-wrap, or they are printers of gift wrap for other gift wrap manufacturers (whose gift wrap sales are largely reported), or they are relatively small producers of ancillary products such as tags and seals or bows, or they are converters of gift wrap products manufactured by others. To the extent some of them are gift wrap manufacturers, they are relatively minor factors who were unknown to most of their competitors, and their volume of sales is more than taken into account by the upward adjustment in the figures of the reporting companies proposed by complaint counsel. In the opinion of the examiner, a determination of market shares and the extent of concentration in a proceeding of this type does not require a drag-net, detailed statistical compilation of the type envisioned by respondent's applications for 551 subpoenas *duces tecum*, and the undue protraction of the proceeding which would be entailed thereby.

42. Based on the largely uncontradicted testimony and other evidence identifying the principal gift wrap manufacturers, and the statistical evidence relating to such companies, it is possible to obtain a meaningful statistical picture of the structure of the industry without going through the involved process, engaged in by complaint counsel, of averaging various estimated and adjusted universe

figures. Using the total sales of the principal companies in the industry, amounting to approximately \$133 million, which accounts for substantially all companies with sales of over \$1 million and a few companies with sales under that figure, CPS and Papercraft are disclosed to have been the number one and number two companies in the industry in 1967, with market shares of 13.7% and 11.8%, respectively. This accords, substantially with their rank according to the testimony of several industry witnesses (Tr. 370-1, 680-1, 1029, 1033; CX 76-A). The five largest companies, each with sales in excess of \$10 million (including Hallmark, American Greetings and Cleo, in addition to Papercraft and CPS) accounted for 54.6% of the sales of the principal companies in the industry. On the basis of the nine companies with sales in excess of \$5 million (including 3-M, Gibson-Buzza Cardoza, Dennison and Artistic, in addition to those named above) such companies accounted for 73.8% of the sales of the principal companies.

43. While, in the opinion of the examiner, the universe figure proposed by complaint counsel (\$162 million) overstates total industry sales in 1967 by approximately \$12 million, such figure may be utilized as providing a meaningful basis for estimating market share percentages and the structure of the market.⁹ The market picture revealed on such basis is likewise one on which the acquired and acquiring companies accounted for substantial shares of the market, and in which they and their three closest competitors accounted for almost half of the industry's sales. On this basis, CPS's share of the gift wrap market in 1967 was 10.7%, Papercraft's was 9.7%, that of the top five companies was 44.8%, and that of the top nine companies was 61%. Even using the maximum universe figure suggested by the evidence, that of \$177 million (which one of respondent's officials used as an approximation of the industry's total sales),¹⁰ the

⁹ As previously noted, such figure comports with Census data and the estimates of industry witnesses. One industry witness estimated total industry sales at between \$125 million and \$150 million (Tr. 347-8; CX 36-D), while another estimated it at \$160-170 million as of 1969, with an annual rate of increase of 10-12% (Tr. 670, 695). Another witness estimated total sales of resale gift wrap (excluding in-store bulk sales) at \$120 million (Tr. 1044). Still another, whose company specialized in store-use gift wrap paper (but not ribbon), estimated total sales in that segment of the market to be \$17 million (Tr. 577, 581). The record indicates that sales of paper predominate over ribbon by a ratio of 3 or 4½ to 1 (Tr. 728, 1198). An industry witness whose company specializes in Christmas gift wrap, estimated that market at \$100-110 million (CX 76-A). Census data indicate that Christmas paper is 62% of gift wrap paper shipments and that Christmas ribbon is 71% of gift wrap ribbon shipments (CX 83, p. 3; CX 85, p. 3).

¹⁰ The above figure appeared in an article in a trade publication, which was approved by respondent's president (CX 31-32). Respondent suggests, in its proposed findings, that the figure has no validity since it was taken by the writer of the article from an earlier article by another writer in another magazine (RPF at 87). However, it is clear that, irrespective of where or when the figure originated, it was adopted by respondent's president as a meaningful current estimate of industry sales, when he approved the article in 1968, even making appropriate changes therein.

market picture would not be significantly changed. On this basis, CPS's and Papercraft's market shares in 1967 were 9.8% and 8.9%, respectively, that of the top five companies was 41.0%, and that of the top nine companies was 55.4%.

3. *Changing Structure of the Industry*

44. The last 10 to 15 years have witnessed a considerable shakeout in the gift wrap industry. A number of companies have left the industry completely, a number have been absorbed by other companies and a number have curtailed their product lines. The number of major companies in the industry has declined substantially. Some of the formerly leading companies have suffered a substantial decline in their market standing. While a few new companies have entered the industry, only one has become a substantial factor (Archer), and it has undoubtedly been assisted by the fact that it has the financial support of its parent company, Reynolds Tobacco Company (Tr. 344, 368-70, 393-4, 541, 661-2, 714-5, 753, 759-60, 814-6, 1235-6, 1286-9, 2057; CX 76-B, C).

45. Among the leading companies whose fortunes have changed (mainly for the worse) in recent years are: Dennison Manufacturing Company, which dropped its Christmas line of gift wrap (a much larger volume line than everyday wrap); the 3-M Company, which has ceased the manufacture of gift wrap paper and has confined itself largely to tying products; St. Clair Manufacturing Company, which has ceased the manufacture of gift wrap for resale, although it continues to manufacture and sell gift wrap for in-store use; and Artistic Manufacturing Company, which sold out its paper line to Cleo, but has continued in tying products. A formerly active company, Orchard Paper Company, was acquired by Boise-Cascade Paper Company and later resold to St. Clair. Ben-Mont, which was formerly one of the top companies in the industry, has experienced financial difficulties and a declining market position. Susan Crane was acquired by Cole National Corporation in 1966, and has discontinued the manufacture of resale gift wrap except to a few private label customers, although it has continued in bulk in-store gift wrap. Cleo, which became a part of the CIT complex of companies, has become more aggressive and has supplanted Ben-Mont as one of the industry's leaders. Included in the group of companies acquired by CIT have also been Gibson and Buzza-Cardoza (Tr. 344, 368-70, 394, 661, 715, 719, 1235-6; CX 61, 76). In early 1968, following the acquisition of CPS by respondent, Technical Tape decided to discontinue its gift wrap operation and sold its manufacturing equipment to George S. Carrington Company (CX 73-B).

46. Respondent suggests that the gift wrap industry is a fragmented one, with no dominant companies and vigorous competition throughout (RPF at 92). While the industry is characterized by a number of relatively small companies, a handful of large companies have the lion's share of the business, as the statistical evidence above discussed discloses. They are the leaders in pricing and advertising, and are the principal suppliers of the large variety chains, drug chains, mass merchandisers, department stores and supermarkets. In the field of quality gift wrap, particularly everyday wrap, CPS was a leading, if not the leading, company. In the field of promotional gift wrap, particularly Christmas gift wrap, Papercraft was far and away the leading company (Tr. 901, 909, 922, 987, 1029, 1033, 1735, 1796, 1812, 1815, 1834, 1836, 1917, 1920, 1944, 1999, 2015, 2032, 2052, 2084, 2102, 2104; CX 76). While several of the companies have been acquired by larger, well-financed companies doing business in other areas, only Cleo and Archer seem to have been able to combine their newly acquired financial assistance with their own expertise to maintain or improve their position in the gift wrap market (CX 76-A, B, C). Although, as respondent notes, total gift wrap sales have been increasing at an annual rate of 10 to 12%, the sales and profits of most of the smaller companies have not kept pace with the industry's growth. Some have experienced declining sales and some, like Hy-Sil Manufacturing Company, have been able to maintain a viable position only by acquiring smaller competitors (CX 36-C, CX 52, CX 53-A, CX 56-C, D, CX 60-A, CX 71-A, B, CX 72-B, CX 73-B; Tr. 370).

III. Competitive Impact

A. *Elimination of Competition*

47. Respondent's contention that competition will not be affected by the instant acquisition is based largely on the alleged lack of substantial competition between the two companies because of the fact that CPS was largely a manufacturer of so-called quality gift wrap, which it distributed for in-store use and resale, whereas Papercraft was primarily in the promotional gift wrap field and did not sell any gift wrap for in-store use. However, despite differences in the areas of specialization of the two companies, the record establishes that substantial competition existed between them and that, in addition, Papercraft was a potential competitor of CPS and was one of the companies which was in the best position to enter the so-called quality gift wrap field at any time it chose to do so.

48. It is conceded by respondent that Papercraft and CPS were in

direct competition in 1967, insofar as Papercraft's principal gift wrap lines and CPS's Galaxy and Pride lines are concerned (RPF at 21, n. 3; Tr. 1243). While respondent has sought to minimize the extent of such competition, the fact is that sales of the Galaxy-Pride lines amounted to \$2,887,763 in 1967, and constituted 16% of CPS's gift wrap sales (RX 18). This can hardly be considered as an insubstantial volume, in terms of the order of magnitude of sales in the gift wrap industry. CPS's sales of Galaxy-Pride substantially equalled or exceeded the total gift wrap sales of a number of manufacturers which were referred to by their competitors as being among the important companies in the industry, including Hy-Sil, Carrington, Tuttle Press, Rust Craft, Berwick, Technical Tape, Buzza-Cardoza, Wright and Norcross.

49. While Papercraft did not sell to traditional department stores, which accounted for 29% of CPS's sales, it did sell gift wrap to a number of the same types of establishments as did CPS. Seventy-two percent of Papercraft's sales and 35% of CPS's sales were made to the same types of establishments (RX 22-A). Among the important types of customers of each were drug store chains, variety chains, and mass merchandisers such as Sears Roebuck and Montgomery Ward, which accounted for 29% of Papercraft's sales and 23% of CPS's sales. In a number of instances, they sold to, or competed for, the gift wrap business of the identical customers, including Newberry, McCrory, Kresge, Sears, Montgomery Ward, and Arlans' Department Stores. Sales to three of these customers (Kresge, Sears and Arlans') accounted for 11.9% of Papercraft's total gift wrap sales in 1967 and 12.7% of CPS's sales in that year (CX 21-C, D, E; RX 21; Tr. 901, 907, 2015, 2033, 2084).

50. Respondent suggests that to the extent it and CPS were selling to the same type of establishment, it was largely a matter of CPS selling its Tie-Tie or other quality line (consisting primarily of everyday merchandise), and Papercraft selling its promotional lines (primarily for Christmas). However, it is by no means clear from the record that this was the case. CPS not only offered its Galaxy line to variety stores and mass merchandisers, but also submitted bids for Christmas private label merchandise, in accordance with the individual customer's specifications, as did Papercraft (Tr. 887-89, 892, 899, 907, 2015, 2017, 2019, 2052, 2084-5, 2119; CX 21-D, E). Despite differences in terminology, the top lines of so-called promotional gift wrap manufacturers are comparable to those of the quality gift wrap manufacturers (Tr. 901-4). Some retailers purchase

from both groups of manufacturers and offer the merchandise for resale to their customers in the same advertisements.¹¹ The reality of the competition which existed between the two companies is attested to by the fact that following Papercraft's acquisition of CPS, one or the other of the two companies ceased bidding for the business of customers which both had previously sold to or solicited (Tr. 632-3, 907, 1827-8, 1842, 2094-5).

51. Aside from the actual competition which existed between the two companies, it is clear that there also existed a potential for substantial and increasing competition between them. Department stores, which were traditionally the stronghold for so-called quality gift wrap, have begun to carry promotional gift wrap in recent years in order to entice customers from the discounters. At the same time, some of the discount-type department stores and variety stores have been upgrading their gift wrap lines. As previously noted, the qualitative differences between the two lines have narrowed considerably. Before its acquisition CPS was already selling its promotional line to some of the department stores which carried its Tie-Tie line (Tr. 611-6, 1042, 1245, 1801). This would have been a natural area for Papercraft to expand into. Some of its competitors in the promotional gift wrap field were also selling to traditional outlets (Tr. 403, 1030). With the upgrading of its line, Papercraft was in a position to expand into the regular gift wrap departments of the department stores, or to sell them promotional gift wrap. Several manufacturers of gift wrap agreed that there was basically nothing to prevent a manufacturer of promotional gift wrap from selling to department stores and gift shops if it chose to do so, and that of all the manufacturers of promotional gift wrap, Papercraft and Cleo were the two best able to do so (Tr. 868, 1041). While some manufacturers of promotional gift wrap do not provide service to their customers, this does not present an insurmountable obstacle to manufacturers of promotional gift wrap in the event they decide to solicit department stores. Most of the promotional gift wrap is sold during the Christmas season and even manufacturers of quality gift wrap which normally provide service for their everyday gift wrap, provide little or no service during the Christmas season due to the tremendous quantities involved and the brief period of time available for service (Tr. 997-8, 1090-1, 1963-4, 2020).

¹¹ CPS's Tie-Tie line was advertised for resale by Montgomery Ward along with gift wrap of Cleo and Archer, both promotional gift wrap manufacturers (Tr. 887-94, 899; CX 54 at 244-5). Papercraft also submitted a bid for Montgomery Ward's business, but was not successful in 1967 (Tr. 907-9).

B. Competitive Advantage

52. The record is clear that the merging of the two largest gift wrap manufacturers will, in all probability, result in conferring on them certain advantages not available to their smaller competitors with more limited lines to offer. A number of the manufacturer witnesses, including the CPS representative, and some of the customers purchasing gift wrap, attested to the advantage in getting business that a manufacturer offering a broad line of products to customers has (Tr. 345-6, 715-6, 735, 761, 897, 1426). While most of the testimony involved the ability to offer a customer both a gift wrap line and a tying product line, a similar advantage exists in favor of a manufacturer who can offer both quality and promotional gift wrap lines.¹² The fact that a number of the manufacturers of quality gift wrap have seen fit to enter the promotional gift wrap end of the business in recent years is indicative of such advantage. Papercraft itself looked to the acquisition of CPS as a vehicle for improving its competitive position. Aside from the advantage of being able to offer customers a broader line, with attendant flexibility in price quotations, the merger offered other advantages through economies in manufacturing and distribution costs (CX 21-H, 12, 14 at 3, CX 10-I, CX 39; Tr. 624, 693-4, 737, 1423).

53. Respondent seeks to minimize the competitive impact of the acquisition by citing the testimony of some customer-witnesses regarding the lack of competition between quality and promotional gift wrap, and the lack of effect of the merger on them (RPF at 22-24, 92). The opinions of retailers concerning the existence of competition between manufacturers and as to the effect of an acquisition on them are no more binding on the examiner, who is charged with the ultimate responsibility of determining the competitive impact of an acquisition, than are the opinions of witnesses to an accident binding on the judge or jury in determining the issue of negligence. A determination of the existence of competition and of competitive impact must be made from the basic operative facts and not from the conclusions of witnesses. It may be noted, however, that a number of the manufacturers themselves attested to the existence of competition between quality and promotional gift wrap and saw the acquisition as having adverse implications for them, by strengthening their largest competitor and enabling it to achieve cer-

¹² As one manufacturer testified (Tr. 347), "When we sell an account, usually the buyer likes to buy the whole line of gift wrapping, all the way from the low end paper to the luxury type paper, and the ribbons and bows that go along with it."

tain economies through the merger (Tr. 692-3, 737-8, 860, 1033, 1038). It may also be noted that of the 8 retailers whose testimony is cited by respondents indicating that the merger had no effect on retailers (RPF at 92), the testimony of 3 establishes that they were representatives of traditional department stores of the type that had never been solicited by Papercraft (Tr. 1799, 1903, 1947). As to the remaining 5, with respect to which the evidence does disclose that the merged companies were previously in competition, the amount of weight which should be given to the negative opinions cited by respondent, as to the effect of the merger on them, may be judged from the fact that the testimony of 4 of them, reveals that after the acquisition of CPS by Papercraft one or the other of the 2 companies ceased soliciting their business (Tr. 907, 987, 1842, 2095). Such basic facts are entitled to considerably more weight on the issue of competitive impact than are the generalized conclusions of these witnesses.

C. The Failing Company Defense

54. Respondent has pleaded the "failing company" defense, as barring the possibility of competitive injury. It contends that the financial structure of CPS was such during the several years prior to its acquisition that it may be considered to have been a failing company at the time it was acquired and that, therefore, the acquisition is not within the ban of Section 7 (RPF at 97). The record fails to sustain respondent's defense since, whatever financial difficulties CPS may have had, they were hardly of such a nature as to justify any finding that it was a "failing company" within the meaning of the failing company doctrine.

55. In the four fiscal years ending June 30, from 1961 to 1964, CPS operated at a profit in each year except 1964, when it showed a loss of \$216,616 (RX 202-A). However, this was due largely to "non-recurring problems" resulting from the move of its manufacturing operations to Franklin, Tennessee, in January 1964 (CX 10-A). In 1965 CPS changed its fiscal year from one beginning July 1 to one beginning January 1. For the 18-month period ending December 31, 1965, it showed a profit of \$593,359 (RX 202-A). The apparent improvement in its financial picture was due, in part, to the fact that this period included sales for two Christmas seasons (1964-1965), which are the most profitable periods of the year. For the fiscal year ending December 31, 1966, it continued to operate at a profit, albeit a relatively small one, *viz.*, \$154,638 (RX 202-A). For the 10-month period ending October 28, 1967 (just prior to the ac-

quisition by Papercraft), it showed a profit of \$162,451, which did not cover sales for what are normally the most profitable two months of the year (CX 25 at 4679-95). However, in March 1968, following the acquisition, a review of CPS's operations by the accountants, resulted in a write-off of \$774,000, due partly to an alleged inventory shrinkage and partly to obsolescence of inventory (Tr. 1889). As a result, the revised financial statement of CPS's operations showed a loss of \$344,111 for the fiscal year ending December 31, 1967 (CX 26-G).

56. Respondent's contention that CPS was a failing company is based on the loss disclosed for its last calendar year of independent operation, its allegedly flat profit picture, and the testimony of an official of the bank which had been carrying its credit that the bank would not have renewed CPS's loan in 1968 on the basis of the figures disclosed in the revised financial statement (Tr. 1861). Despite CPS's ostensible loss for the last year of operation, its financial condition was hardly one which can be described as a "failing" one, within the meaning of the failing company doctrine. While CPS's profit record was somewhat flat and uninspiring, its financial profile cannot be said to be that of a company "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" (*International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291). Part of its financial problems stemmed from its move to Tennessee and the condition was reversed in less than a year, following completion of the move (CX 14 at 3). Despite the bank official's prognostication concerning what recommendation he would have made to the bank with respect to the renewal of CPS's credit, the examiner notes that the bank continued to renew CPS's credit each year, including 1964 when the loss was almost as high as that revealed in the revised financial statement for 1967. Even assuming that CPS might have had some difficulty in obtaining a renewal of its loan, and even granting that it was having some financial difficulty, its condition in no way resembled that of a failing company.

CONCLUSIONS

I. Engagement in Commerce

1. Respondent admits and the record establishes that at all times relevant herein, it and CPS Industries, Inc., sold and shipped their products, and specifically gift wrapping paper and ribbons, in interstate commerce throughout the United States (Ans., par. 5 and 8). It is accordingly concluded and found that at all times relevant in

this proceeding respondent and CPS were each a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

II. The Relevant Market

A. *The Product Market*

2. As previously noted, complaint counsel contend, essentially, that the relevant product market consists of (a) gift wrapping paper (including foil laminated to paper, and tissue used as an outer gift wrap), (b) ribbons, bows and other gift tyings and (c) certain accessories to the wrapping of gift packages, such as tags, seals and decorative tie-ons (CPF at 59). Respondent has presented alternative proposals with respect to the appropriate product market. On the one hand it argues for the existence of three separate submarkets as being the appropriate product markets, *viz.*, (a) "Quality-Serviced" gift wrap such as is usually sold through department stores and card shops, (b) "promotional" gift wrap, consisting primarily of Christmas gift wrap, and (c) "bulk" gift wrap sold for "in-store" use and to manufacturers of consumer products for "pre-wrapping" their merchandise (RPF at 19-21). However, respondent recognizes that since a gift need be wrapped only once, all gift wrap, irrespective of quality or type, competes for the consumer's dollar (RPF at 56). Accordingly, it suggests as an alternative product market, one that is "drawn along the outer boundaries of the product market, those determined by reasonable interchangeability" (RPF at 60). On this basis, respondent proposes that there should be included in the gift wrap market not only the gift wrapping materials proposed by complaint counsel but other materials that can be used for wrapping gifts, such as tissue paper of all types, Kraft paper, cellophane, plastic film, and unsupported aluminum foil. In addition to wrapping materials, respondent proposes that the product market should include gift boxes and bags in which a gift may be placed without further wrapping. In addition to the gift tyings which complaint counsel propose, respondent suggests that plain, pressure-sensitive tape (such as Scotch Tape) should be included (RPF at 61-2).

3. Respondent's theories with respect to the appropriate product market stem essentially from the Supreme Court's decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), in which the Court laid down the principle that the "outer boundaries of a product market are determined by reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." However, the Court also noted that "within this broad

market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Respondent seeks to justify its division of the gift wrap market into the three submarkets initially proposed by it, on the basis of the criteria referred to in *Brown Shoe* as being the "practical indicia" of a submarket, *viz.*, "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors."

4. A resolution of the question of what is the appropriate product market—whether it consists of the basic products of an industry, whether it is appropriate to divide the products of the industry into submarkets, or whether it is appropriate to combine the products of more than one industry—is not a mere academic exercise in economic semantics. "[T]he purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects [on competition] of a given acquisition." *United States v. Continental Can Co.*, 378 U.S. 441, 457. Since the law is violated if the effect may be adverse in "any" line of commerce, it is not necessary to make a determination as to all of the possible lines of commerce which will be affected by an acquisition. If the effect may be adverse in "a product line which [is] sufficiently inclusive to be meaningful in terms of trade realities" that is sufficient for purposes of Section 7. *Crown Zellerbach Corp. v. Federal Trade Commission*, 296 F.2d 800, 811 (9th Cir., 1961), *cert. denied*, 370 U.S. 937; cited with approval *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963).

5. Any determination of what is the appropriate product market must start with the product or products of the acquired and acquiring companies. As the Court stated in *Brown Shoe*, "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists" (370 U.S. at 326). Where the basic products of the acquired and acquiring companies compete, any meaningful grouping of these products may be considered the appropriate product market, even though it does not include all of the products that either of them, or some of their competitors, may produce. *Crown Zellerbach Corp. v. Federal Trade Commission*, *supra*; *United States v. Philadelphia National Bank*, *supra*. It is not necessary in such a case to determine whether there are smaller groupings of products, or submarkets, which will be affected by the acquisition. Thus, despite the pronouncement in *Brown Shoe* cited by respondent, that "well-defined submarkets may

exist" within a broader product market, the Court upheld as the relevant lines of commerce, the basic products which the acquired and acquiring companies produced or sold, and concluded that "a further division of product lines based on 'price/quality' differences would be 'unrealistic.'" As the Court stated in its most recent pronouncement on the subject, "submarkets are not a basis for the disregard of a broader line of commerce that has economic significance" *United States v. Phillipsburg National Bank & Trust Co.*, June 29, 1970, ATRR June 30, 1970, D-3.

6. On the other hand, where the acquired and acquiring companies are in essentially the same line of business and the products produced by them constitute a meaningful grouping of products, in terms of trade realities, it is unnecessary to consider the effect of the acquisition in terms of a still broader grouping of products which would include those of other industries, even though the latter may, to some extent, compete with the products of the acquired and acquiring companies. *United States v. Philadelphia National Bank*, *supra*. In the latter case, the acquired and acquiring companies were both commercial banks, and commercial banking was held to be the appropriate line of commerce, even though other types of institutions such as savings banks and small loan companies competed with them in some phases of their business. In the *Phillipsburg National Bank* case, *supra*, there was also involved a merger between two commercial banks. The Court held to be erroneous the conclusion of the lower court that the product market consisted not only of the products and services of commercial banks, but those of other financial institutions which competed with them. The Court stated that while such a market definition might be relevant "in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution" it was not relevant in a merger between two commercial banks.

7. The cases in which the Court has upheld lines of commerce which cross basic industry lines have been those involving mergers between companies in different industries. *United States v. Aluminum Co. of America*, 377 U.S. 271; *United States v. Continental Can Co.*, 378 U.S. 441. In the *Continental Can* case, where a producer of metal containers acquired a producer of glass containers, it was considered appropriate to combine both groups of containers into a single market for purposes of determining the competitive impact of the acquisition. It may be noted, however, that the Court refused to accept the defendant's argument that if glass and metal containers were combined as a line of commerce, then containers

made from other materials, such as plastic, paper and foil (which the acquired company did not produce), should also be included. The Court held that while there might be an even broader market consisting of containers made from all of these materials, this did not "necessarily negative" a narrower market or submarket of containers made of metal or glass, which were the principal products of the two companies (*Id.* at 458).

8. In the instant case the acquired and acquiring companies were essentially producing the same group of products, gift wrap products. Both used essentially the same machinery in producing them and both were part of a recognized and recognizable industry, the gift wrap industry. Such differences as existed in their products, on the basis of price, quality, or the service provided, are not of such a nature as to require a further fragmentation of the basic industry line of commerce into submarkets. This is not to say that in an appropriate case, such as one involving a merger between two companies producing only gift tying products, or between two companies producing only promotional-type gift wrap, it might not be appropriate to consider the impact of the acquisition in terms of narrower submarkets. However, where, as here, both companies are producing substantially the full spectrum of gift wrap products, and where the acquisition's impact is likely to be felt throughout the industry, and not in a narrow segment thereof, it is more appropriate to consider the impact in terms of the basic grouping of products of the industry.

9. On the other hand, there is no reason to extend the product line beyond that of the gift wrap industry, to include the products of box manufacturers, bag manufacturers, tissue manufacturers generally or those of other types of paper manufacturers. While such a combination might be appropriate in a Section 2 Sherman Act case involving a monopolization charge (*United States v. Du Pont & Co.*, 351 U.S. 377; *cf. United States v. Du Pont & Co.*, 353 U.S. 586), or in a Section 7 Clayton Act case involving a merger between a gift wrap manufacturer and a manufacturer of gift boxes, bags or tissue (see dicta from *Phillipsburg National Bank* case cited *supra*), it is not appropriate in a case involving a merger between two gift wrap manufacturers. The differences in the production and distributional methods, and in the uses, of these other groups of products are such as to require that they be considered separate lines of commerce from the gift wrap product market, or at the very least several submarkets.

10. Based on the evidence heretofore discussed, it is concluded and

found that the appropriate product market, or line of commerce, for purposes of this proceeding, consists of (a) gift wrap paper (including foil laminated to paper, and tissue used as an outer wrap), (b) gift tying materials, including ribbons, bows, snap ties and other tying products normally sold by gift wrap manufacturers (not including undecorated plastic tape), and (c) accessory items used in the wrapping of gifts, such as are normally sold by gift wrap manufacturers, including tags, seals, cards and tie-ons. It is further concluded that kraft paper, general purpose tissue paper, wrapping materials made from plastic film, cellophane and unsupported foil,¹³ and gift bags and boxes, are not part of the appropriate line of commerce.

B. The Geographic Market

11. Complaint counsel contend, respondent admits, the record establishes, and the examiner concludes and finds, that the United States as a whole constitutes a geographic market for the sale of gift wrap, and is an appropriate section of the country, within the meaning of Section 7 of the Clayton Act, as amended (Response to Request for Admissions, September 26, 1969; Tr. 198-9).

III. Competitive Impact

12. Respondent contends that the record fails to sustain the charge of an adverse impact resulting from the present acquisition for the reasons that, (a) the statistical evidence offered by complaint counsel to establish market shares and concentration is inadequate since it does not contain a breakdown by submarkets, does not include sales data for all gift wrap manufacturers and does not include data for box manufacturers producing gift boxes, (b) the market was so fragmented and vigorously competitive that the acquisition can have no competitive impact, (c) Papercraft and CPS were not in substantial competition, and (d) CPS was a failing company. As is apparent from the findings heretofore made, there is no merit to any of these contentions.

13. Since as has been found above, the appropriate product market consists of the basic gift wrap products of the gift wrap industry, there is no deficiency in the record by reason of the alleged lack of statistical evidence for the various submarkets proposed by re-

¹³ Although considerable evidence was offered by respondent concerning the alleged use of kraft paper and tissue as gift wrap, no substantial evidence was offered to establish that plastic film, cellophane, or unsupported aluminum are normally used as gift wrap materials by consumers, or are produced in substantial quantities by gift wrap manufacturers.

spondent, or for the inter-industry market of gift wrap products and gift boxes and bags, which respondent alternatively proposes. As has been heretofore found, the record contains adequate statistical evidence, based on the sales figures of the principal manufacturers in the industry (which are corroborated by Census data and the testimony of industry witnesses), to permit an informed judgment concerning the structure of the gift wrap product market. There is no need in a Section 7 case for the "type of precision in detail" contemplated by the exhaustive subpoena request made by respondent, addressed to hundreds of alleged industry members, where the "broad picture" is adequately presented "through study of a fair sample" of the industry. *Brown Shoe Co. v. United States*, 370 U.S. at 341-2 and notes 68-9.

14. The statistical evidence discloses that at the time of the acquisition the acquired and acquiring companies were the first and second ranking companies in the gift wrap industry, with a combined market share of from approximately 20% to 25% of the market, depending on which of the alternative bases of comparison heretofore discussed is chosen. Their combined market share gave them almost $2\frac{1}{2}$ times the market share of their closest competitor. The statistical evidence also discloses that there were only about 23 companies in the industry which had sales of over \$1 million in 1967. Of these, only 5 had sales in excess of \$10 million, and only 9 had sales in excess of \$5 million. The top 5 companies (including Papercraft and CPS) accounted for approximately 45% of the total sales of the gift wrap industry in 1967, while the top 9 companies accounted for approximately 60%. The statistical evidence establishes that while there may have been a fairly large number of companies in the industry, a substantial part of the industry's business was concentrated in the hands of a relatively few companies.

15. While it may be, as respondent contends, that the industry as a whole has been growing, in terms of overall sales, the record establishes that many of the companies have not participated in the industry's growth. The number of major companies has declined substantially, and there have been few entries of any consequence. A number of the remaining companies have had to curtail their product lines, and some have been acquired by larger companies outside the industry. The sales and profits of a number of the smaller companies have been static or have declined.

16. The evidence establishes that in 1967 Papercraft was one of the largest companies in the industry, and was a growing and aggressive company, particularly in the promotional gift wrap end of

the business. Despite its lesser progress in terms of growth and profitability, CPS remained one of the industry's leaders in 1967, particularly in the area of so-called quality gift wrap marketed through the traditional establishments. It was in no sense a failing company. It had expanded in recent years into the establishments carrying so-called promotional gift wrap, in substantial competition with Papercraft. While Papercraft was not distributing gift wrap to the traditional outlets carrying quality gift wrap, it had the clear capability to do so, and was one of the most likely companies to enter this area of the gift wrap market. The combination of the two companies removed from the market one of Papercraft's substantial competitors in promotional gift wrap and, further, removed the additional competition which Papercraft was capable of providing CPS in the area of quality gift wrap. Given the statistical evidence and testimony concerning the structure of the market, the ranking and substantial market shares of the acquired and acquiring companies, the substantial degree of concentration in the gift wrap industry, the declining number of competitors, and the trend toward acquisition and merger therein, there can be no doubt that the effect of Papercraft's acquisition of CPS may be substantially to lessen competition, or to tend to create a monopoly in the production and sale of gift wrap products in the United States, and it is so concluded and found.

FINAL CONCLUSIONS OF LAW

1. Respondent The Papercraft Corporation and CPS Industries, Inc., were at all times material herein corporations engaged in commerce, as "commerce" is defined in the Clayton Act.

2. The acquisition by respondent, The Papercraft Corporation, of the stock or assets of CPS Industries, Inc., constitutes a violation of Section 7 of the Clayton Act.

THE REMEDY

1. Respondent suggests that if substantial competition is found to have existed between Papercraft and CPS by reason of the latter's production and sale of its "Galaxy" and "Pride" lines, any order of divestiture which may issue should be limited to CPS's "Galaxy" and "Pride" business (RPF at 104, n. 13). In the opinion of the examiner, no such limitation in the order of divestiture is appropriate since competition between the two companies has not been found to be limited merely to the two lines in question and, moreover, it has been found that Papercraft was a potential competitor of CPS's in

the sale of so-called quality gift wrap to traditional gift wrap outlets. Effective competition can be restored only by reestablishing CPS as a full-line company in the production and sale of gift wrap products, as it was prior to its acquisition. The public interest would not be served by reestablishing merely an emasculated version of the company which Papercraft acquired.

2. Complaint counsel's proposed order contains several provisions which the examiner finds not to be justified. One would permit divestiture only to a new corporation. Presumably this provision was included because divestiture to any existing corporation in the industry would be as anti-competitive as the original acquisition. However, there is no reason to believe that this would be true of a divestiture made to an existing corporation not presently in the industry. Moreover, the provision requiring Commission approval would tend to minimize the possibility of an anticompetitive divestiture being made to an existing corporation. The examiner can find no justification for arbitrarily limiting divestiture to a new corporation. The examiner can likewise find no justification for the provision proposed by complaint counsel to require respondent to guarantee the credit borrowings of the new corporation for a period of five years, up to certain limits. In addition, their proposal for a complete prohibition on further acquisitions in the gift wrap industry appears to be unjustified. A 10-year limitation on such acquisitions would be adequate.

ORDER

I

It is ordered, That respondent, The Papercraft Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within six (6) months from the date of service upon it of this order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by The Papercraft Corporation as a result of its acquisition of CPS Industries, Inc., together with all additions and improvements thereto, of whatever description, made since the acquisition.

II

It is further ordered, That none of the assets, properties, rights or privileges described in Paragraph I of this order shall by such di-

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vestiture be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of The Papercraft Corporation, or to anyone who is not approved in advance by the Federal Trade Commission.

III

If respondent divests the assets, properties, rights and privileges, described in Paragraph I of this order, to a new corporation or corporations, the stock of each of which is wholly owned by The Papercraft Corporation, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of The Papercraft Corporation, in proportion to their holdings of The Papercraft Corporation stock, then Paragraph II of this order shall be inapplicable, and the following Paragraphs IV and V shall take force and effect in its stead.

IV

No person who is an officer, director, or executive employee of The Papercraft Corporation, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of The Papercraft Corporation, shall be an officer, director or executive employee of any new corporation or corporations described in Paragraph III, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in Paragraph III.

V

Any person who must sell or dispose of a stock interest in The Papercraft Corporation or the new corporation or corporations, described in Paragraph III, in order to comply with Paragraph IV of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of The Papercraft Corporation.

VI

It is further ordered, That no method, plan or agreement of divestiture to comply with this order shall be adopted or implemented by respondent save upon such terms and conditions as shall first be approved by the Federal Trade Commission.

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VII

It is further ordered, That pending divestiture, respondent shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the company to be divested which may impair its present capacity or market value, unless such capacity or value is restored prior to divestiture.

VIII

It is further ordered, That for a period of ten (10) years from the date of service of this order upon it respondent shall not acquire, directly or indirectly, through subsidiaries, joint ventures or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets of any concern engaged in the manufacture, production, sale or distribution of any decorative gift wrap product, nor shall respondent enter into any arrangement with any such concern by which respondent obtains the market share, in whole or in part, of such concern.

IX

It is further ordered, That for a period of three (3) years from the date of divestiture The Papercraft Corporation is prohibited from selling any decorative gift wrap products to any customer account which at any time has been sold any decorative gift wrap products by CPS Industries, Inc., unless such customer account was sold such decorative gift wrap products by The Papercraft Corporation prior to December 27, 1967.

X

As used in this order, the acquisition of assets includes any arrangement by The Papercraft Corporation with any other party, pursuant to which such other party discontinues manufacturing any of the products described in Paragraph VIII of this order under a brand name or label owned by such other party and thereafter distributes any of said products under any of Papercraft's brand names or labels.

XI

As used in this order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

OPINION OF THE COMMISSION

JUNE 30, 1971

By MACINTYRE, *Commissioner*:

This matter is before the Commission on appeal from an initial decision of a hearing examiner in which it was found that respondent Papercraft Corporation, a manufacturer of gift-wrap products, had acquired a competing manufacturer of such products, CPS Industries, Inc., in violation of Section 7 of the amended Clayton Act, 15 U.S.C. 18. The examiner issued an order requiring divestiture of the acquired firm and prohibiting any further acquisitions by the respondent for a period of ten (10) years.

Summary of Evidence

As detailed in our Findings of Fact, the evidence indicates that total gift-wrap sales in the United States were approximately \$150 million in 1967, the year of the acquisition, and that the acquired and acquiring firms were the 1st and 2nd largest manufacturers in the industry, with gift-wrap sales of \$17.3 million and \$15.7 million, and market shares of approximately 11.5% and 10.5%, respectively. The new Papercraft-CPS combination thus controls some 22% of the industry, or more than double the share of its next largest competitor (9.1%), and the share of the market held by the four (4) largest firms in the industry has been increased from 39.3% to an estimated 47%. The eight (8) largest manufacturers of gift-wrap products in the United States in 1967 and their respective sales volumes and estimated market shares are summarized in the table below.¹

Firm	1967 sales	Market share
	Millions of dollars	Percent
CPS.....	\$17.3	11.5
Papercraft.....	15.7	10.5
Hallmark.....	14.4	9.1
American Greetings.....	12.3	8.2
4-Firm total.....		39.3
Cleo.....	11.5	7.7
Minnesota Mining.....	7.0	4.6
Dennison.....	6.2	4.1
Susan Crane.....	5.7	3.8
8-Firm total.....		59.5

¹ Finding 75.

The evidence further establishes that the number of firms in the gift-wrap industry has been declining sharply in recent years;² that entry barriers are already high around the industry and have been raised even higher by the merger of these two firms, the 1st and 2nd largest in the industry;³ that Papercraft was already the strongest and most aggressive firm in the industry prior to the acquisition and has been made even stronger as a result of it;⁴ that the trade believes the industry will ultimately be reduced to no more than four significant firms;⁵ and that, given the significant cost and other advantages accruing to the larger-volume manufacturers, there is a substantial probability that the advantages of the Papercraft-CPS combination will ultimately prove decisive in character and that it will emerge as the dominant firm in a tight-knit oligopolistic industry of precisely the kind the merger provision of the Clayton Act was designed to prevent.⁶

Respondent's Arguments on Appeal

Respondent's principal arguments on this appeal are (1) that the relevant product market includes a number of products and a number of producers not included in the \$150 million universe figure or in the market share figures found here, *i.e.*, that the former should be doubled or more, and the latter should thus be reduced by half or more; (2) that respondent was denied due process of law by the examiner's denial of its request for subpoenas *duces tecum* to some 550 alleged manufacturers of gift-wrap; (3) that the acquired and acquiring firms were not competitors in the gift-wrap industry but were, instead, producers of products that are sold in non-competing gift-wrap "submarkets"; (4) that the acquired firm, CPS, was a "failing" company; and (5) that respondent was denied due process of law by the examiner's order placing the sales figures of the third-party manufacturers *in camera* and thus denying the corporate respondent itself (as contrasted with its counsel) access to the evidence used against it.

I. Relevant Product Market

The term "gift-wrap" refers to a number of items used in the preparation of an object for presentation to another person as a gift,

² Findings, 67, 76.

³ Findings, 68, 76.

⁴ Findings 67, 68, 73, and 76.

⁵ Finding 76.

⁶ *Id.*

i.e., to enhance the object's beauty.⁷ In the early decades of the century, plain white tissue paper (plus colored string for tying) were the only products used as gift-wrap and the acquired firm, CPS Industries, Inc. (formerly Chicago Printed String), the largest and one of the oldest firms in the industry (founded in 1916), was a pioneer in the field. Most gift-buying was done in department stores and that particular type of outlet accordingly became, along with the traditional greeting card shop, the principal outlet for gift-wrap products. Later, of course, the spectrum of gift-wrap items widened considerably, today's retail gift-wrap department featuring a wide variety of elaborately designed, colored, and embossed papers, plus a wide assortment of such accessory items as ribbons, bows, tie-ons, seals, and the like.⁸

In addition, however, there have been particularly significant changes in the channels of distribution through which gift-wrap products move from the manufacturer to the consumer. The consumer can purchase gift-wrap paper and accessories not only in the traditional department stores and greeting card shops but in "discount-type" department stores (*e.g.*, Gem's, Korvette's, and the like), variety stores (Kresge, etc.), drug stores, supermarkets, and so forth. In addition, the consumer has the choice of (1) buying the gift-wrap items for home use, *i.e.*, for wrap-it-yourself consumption (what the trade refers to as the "resale" sector of the market); (2) having the retailer that sells the gift supply the gift-wrap materials and do the wrapping (the "in-store" sector); and (3) buying a gift that is wrapped by the manufacturer before the item is introduced into the wholesale and retail channels of trade, *e.g.*, such Christmas-wrapped items as liquor, cosmetics and cigarettes (the "pre-wrapped" sector).⁹

Perhaps the most important product distinction in this industry is that between "everyday" gift-wrap, on the one hand, and "Christmas" gift-wrap, on the other. These two product categories refer to the gift-giving *occasion* involved. "Christmas" gift-wrap, the papers, ribbons, and the like used to wrap gifts given during the several weeks preceding that holiday, accounts for well over half of all gift-wrap sold in the United States. "Everyday" gift-wrap, a category used to describe all non-Christmas gift-wrapping products (*e.g.*, for weddings, showers, birthdays, anniversaries, Mother's Day, and the like), accounts for the rest. Consumers generally tend to buy

⁷ Finding 59.

⁸ *Id.*

⁹ See Findings 60, 61.

these two broad categories of gift-wrap products in a somewhat different manner. The purchase of "everyday" gift-wrap tends to center on the giving of a single gift to a specific person on a particular occasion (*e.g.*, the birthday or wedding of a close friend or relative), and thus tends to be bought in a fairly selective fashion, including a concern for such things as "quality" and "fashion" in design, color, and the like.¹⁰ "Christmas" gift-wrap, on the other hand, is bought by the consumer in relatively large quantities, to take care of the shopper's entire Christmas gift-wrapping needs. Here the consumer's concern for "quality" and "fashion" is tempered by an interest in quantity, price, and the appropriateness of the colors and designs to the season, the result being that most "Christmas" gift-wrap is "traditional" in design (Santas, reindeer, etc.) and color (reds, greens, etc.) and is sold in multi-roll (*e.g.*, "Jumbo") packages at "promotional" (discount) prices.¹¹

One of the most significant developments in the gift-wrap industry was the appearance, in the early 1950's, of the so-called "discount" stores and other mass-merchandise retail outlets, particularly the supermarket and drug chains. The department stores and greeting card shops, the traditional outlets for gift-wrap, had merchandised these items in their own distinctive way, the most significant of these merchandising characteristics being a rigidly-maintained resale price structure: department stores and greeting card shops always sell gift-wrap products at exactly 200% of what they pay for them.¹² In addition, the product, at least the so-called "everyday" gift-wrap, is generally packaged in small units (*e.g.*, in single rolls or in small packages containing one or a few flat sheets), displayed in distinctive "fixtures" or cabinets, ordered frequently and in small quantities (*e.g.*, a \$100 order every two weeks), physically reordered and stocked by the manufacturer's salesmen, and sold as a "quality" product,¹³ one that is "fashionable" in color, design, and the like. The "discounters" and other mass-merchandise retailers, on the other hand, sell gift-wrap that appeals to the broadest possible category of

¹⁰ Finding 69. "Everyday the sales are mostly flat folds and single rolls of paper." Tr. 419. "The principal ['everyday'] item is a 25-cent package of flat wrap, two sheets 20 by 30, in a transparent 10-by-10 bag; and, then, the individual rolls that retail at 39 cents, or 59 cents, and on a few occasions more." Tr. 1024-1025. "Basically, everyday gift wrapping is paper which has a specific design or color for a specific occasion, such as a wedding, shower, birthday, so forth." Tr. 996-997.

¹¹ Finding 69. "Christmas it is mostly jumbo rolls and multiple rolls of paper." Tr. 419. See also tr. 1038, 1445, 2023-2024, 2033-2035.

¹² Finding 69; tr. 920-921. Thus an item that cost the retailer \$1 would retail for \$2.

¹³ Finding 71.

customers, order it infrequently in very large quantities, sell it at "discount" prices, and display it in the most casual manner (frequently in the original shipping cartons).¹⁴

Respondent Papercraft, founded in 1945, abandoned its sales through the traditional paper wholesaler in 1953 and, in effect, went "discount," *i.e.*, it began selling its gift-wrap directly to the discount retailers, particularly the discount-type department stores, variety stores, supermarkets, and drug chains, concentrating on low prices and so-called "boiler-plate" designs and colors. A pioneer in this effort to sell gift-wrap through the mass-merchandise outlets, it was eminently successful and was soon being emulated by other gift-wrap manufacturers. The discounters and chain stores found "Christmas" gift-wrap a profitable item ("everyday" gift-wrap in not a particularly fast-moving product) and, through their lower price structure, took the bulk of that market away from the "traditional" gift-wrap outlets, the department stores and greeting card shops.¹⁵ CPS, the acquired firm here, as the leading supplier of "everyday" gift-wrap to those "quality" retail outlets, found itself in a declining sector of the industry. Responding to this competitive erosion of its business, it introduced two "promotional" brands of gift-wrap in the early 1960's, "Galaxy" and "Pride," these ultimately accounting for some 15% of its total sales volume. Its response to this competitive pressure from Papercraft and the other manufacturers of "promotional" gift-wrap was not sufficient to protect its profit picture, however, and it sold out to Papercraft in December 1967.

Respondent contends, as noted, that it and the acquired firm, CPS, operate in separate, non-competing "submarkets" and hence that the acquisition could not have lessened competition within the meaning of Section 7 of the amended Clayton Act. In its view, gift-wrap is sold in three such economically distinct submarkets, (1) the so-called "quality-serviced" market (the product sold in department stores and greeting card shops); (2) the "promotional" gift-wrap market (that sold in discount stores and the like); and (3) the bulk or "in-store" market (that used by the retailers in wrapping gifts for their consumer-customers). The argument here is that there are some physical differences in the gift-wrap products sold in these three categories; that different marketing techniques and channels are involved; and that separate and distinct price structures are maintained in those three areas. Thus CPS, which sells 55.5% of its \$17.4 million worth

¹⁴ Finding 62.

¹⁵ Finding 70.

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of gift-wrap in the "everyday" sector¹⁶ (versus 5% for Papercraft), uses heavier paper (45 lbs. versus 21 lbs. in some uses),¹⁷ more expensive ink,¹⁸ and more "fashionable" designs and colors.¹⁹ Secondly, CPS' "quality" gift-wrap is sold in "prestige" department stores and greeting card shops, while Papercraft's moves through discounters and other mass-merchandisers. And, finally, the former invariably maintain, as noted, higher, rigid resale prices (100% markup on all gift-wrap products), while the latter charge whatever the local "discount" competition dictates, with markups frequently in the range of 50% or less.

The difficulty with this argument for placing Papercraft and CPS in non-competing submarkets is that (1) the alleged physical differences are minor in nature and (2) there is in fact a significant inter-relationship between sales in the three submarkets respondent would have us recognize. The "quality" outlets (the department stores and card shops), faced with increasing volume losses to the newly-emerged mass-merchandisers in the 1950's, began handling, in addition to their "quality" Christmas gift-wrap, the "promotional" variety as well. And the discounters, anxious to extend still further their capture of the Christmas gift-wrap market, began carrying increasingly higher "quality" gift-wrap products,²⁰ with the result that both categories are now frequently sold side-by-side in both kinds of retail outlets.²¹ Secondly, however, and more importantly, the massive increase in the mass-merchandisers share of the dominant "Christmas" market (from zero in the early 1950's to over half in 1967), makes it inescapably clear that these discount retailers are in "competition" with the "quality" outlets for the consumer's total gift-wrap dollar, *i.e.*, that there is a high "cross-elasticity" of demand between the two categories of retail outlets and products. The presence or absence of cross-elasticity, where the evidence is clear on the point, is "determinative" of product-market issues. *In Re Golden Grain Macaroni Co.*, Dkt. 8737 (January 18, 1971), pp. 9-10 [p. 63, 161 herein].²²

¹⁶ RX 21 (in camera).

¹⁷ Tr. 1557-1559.

¹⁸ Tr. 1634.

¹⁹ RX 24-32.

²⁰ Finding 69; tr. 614-616.

²¹ Finding 70; CX 146, 147; tr. 1244-1251.

²² The test of cross-elasticity is whether price changes on one product result in volume changes for the other, not, as respondent argues, whether the two products maintain identical prices. Sellers of the one product can always elect to ignore a competing product's lower prices and choose, instead, to let those lower prices compete away its volume. Cross-elasticity is absent only if price changes on one of the two products results in *neither* a price nor a volume change for the other.

Not all of the output of the acquired firm, CPS, competes in this direct manner, however, with the output of the acquiring firm, Papercraft. While there is, as noted, direct competition in the sale of gift-wrap between the two major classes of retail outlets involved here, department stores and discount houses, the record suggests that perhaps only a minor portion, if any, of the "everyday" category of gift-wrap paper can be used by consumers as a substitute for "Christmas" wrap and vice versa, *i.e.*, that there is little or no cross-elasticity of demand between Christmas gift-wrap and, for example, the kind used to wrap wedding gifts (everyday). Thus, while the different emphasis in terms of retail outlets selected does not, as respondent contends, demonstrate a lack of competition between Papercraft's everyday wrap and CPS' everyday wrap, and between Papercraft's Christmas wrap and CPS' Christmas wrap, there is presumably little or no immediate competition between, for example, Papercraft's *Christmas* gift-wrap and CPS' *everyday* gift-wrap. As indicated in the table below (RX 21, *in camera*), 95.5% of Papercraft's total sales are of the Christmas variety and thus are directly competitive with the Christmas portion of CPS' sales, 44.5%. Similarly, 55.5% of CPS' sales are in the everyday category and thus encounter direct and immediate competition from only the 4.5% of Papercraft's sales that are made in this everyday class.

Total Sales of Papercraft and CPS, by Sales Category (RX 21)

Sales category	Papercraft		CPS	
	Dollars	Percent	Dollars	Percent
Christmas.....	14,998,046	95.5	7,701,762	44.5
Everyday.....	706,714	4.5	9,605,568	55.5
Total.....	15,704,760	100.0	17,377,330	100.0

The injury to competition from the merger in question is thus direct and immediate in these "overlapping" product areas. There is equally significant injury to *potential* competition, however, in the merger of these two firms in the remaining or non-overlapping product areas. Both the everyday and Christmas categories of gift-wrap paper are produced with the same manufacturing facilities, using basically the same materials, technology, and production processes, and hence the manufacturer of the one can and does shift readily to the production of the other in response to price and profit opportunities, *i.e.*, entry barriers at the manufacturing level are relatively low to the broad-line volume producer of either Christmas or

everyday wrap contemplating entry into the other gift wrap area. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, n. 42. There are, as discussed in our findings, substantial barriers at the distribution level, at least for the new entrant and the narrow-line, small-volume producer. (Findings 67 and 68.) These are hardly insuperable, however, for already-established gift-wrap producers of Papercraft's and CPS' production and marketing capacity and potential.

In short, there is a relatively high degree of potential competition between the major producers of Christmas and everyday gift-wrap, one that would be expected to result in actual cross-entry if prices (and thus profit opportunities) increased substantially on the other product line. Preservation of this potential competition, with its obviously restraining effect on consumer prices in both lines, is no less important than preservation of existing competition. In re *Kennecott Copper Corp.*, Docket 8765 (May 5, 1971), Opinion of the Commission, p. 15 [p. 744, 924-925 herein].

II. Size of Gift-Wrap Market—Request for 550 Subpoenas Duces Tecum

Respondent's argument that the examiner's \$150 million universe figure understates the true size of the gift-wrap market by improperly excluding other producers and products is related to its contention that it was denied due process by the examiner's refusal to issue some 550 subpoenas *duces tecum* to as many alleged additional gift-wrap manufacturers.²³ Had these subpoenas been issued, respondent maintains, it would have been discovered that total gift-wrap sales in the United States in 1967 were not \$150 million but probably twice as much or more, and hence that the proportionate shares of it and the firm it acquired, CPS, would have been reduced by half or more. A finding of a law violation on the basis of incomplete and erroneous market information, when complete and accurate information could have been had by issuance of the requested subpoenas, amounts, respondent argues, to a denial of due process.

²³ During the earlier stages of this proceeding, respondent filed a request for the issuance of an order requiring these several hundred other alleged gift-wrap manufacturers to file special reports under Section 6(b) of the Federal Trade Commission Act setting forth their gift-wrap sales and related information. This was denied by the Commission on September 30, 1969, and respondent subsequently filed suit in the United States District Court for the Western District of Pennsylvania for an order directing the Commission to conduct the survey in question. This suit was dismissed on January 14, 1970, on the ground that the Court had no jurisdiction to compel such an action until the administrative process had been completed. *Papercraft Corporation v. Federal Trade Commission*, 307 F. Supp. 1401 (W.D. Pa. 1970).

Counsel supporting the complaint, as part of its case in chief, submitted the sales figures of the 21 "major" manufacturers of gift-wrap products in the United States (subpoenaed from those companies).²⁴ Then, on direct examination, officials of several of those companies were requested to (1) name the major firms their respective companies compete with, (2) estimate how much of the total gift-wrap market those named "majors" account for, (3) estimate the total dollar volume of gift-wrap sales in the United States in 1967, and (4) explain the bases for their estimates. The substance of this manufacturer-testimony in the case is that the 21 major firms in question account for 80% or more of the total gift-wrap market, that the total United States market in 1967 was in the general range of \$150 million, and that they had developed these estimates from informal market surveys based on direct observation and experience in the market.²⁵ Salesmen report the brands of gift-wrap they see on the retailers' shelves and the relative quantities of each brand found in each of the major (chain) outlets. On the basis of the manufacturer's own experience in those chains where its gift-wrap products are sold exclusively, it knows the total quantity of gift-wrap that a retail outlet of a given size, location, and character should be able to sell. In brief, each of the major manufacturers, knowing the identity, gift-wrap potential, and major gift-wrap suppliers of all important retail outlets in the country, believes itself able to estimate total gift-wrap sales and the relative shares of its competitors within some reasonable range of accuracy.²⁶

The issuance of orders requiring special written reports, or of subpoenas *duces tecum*, to 550 companies should obviously be undertaken only if there is no other reasonable way to develop the necessary industry data. In industries such as the one involved here, where there is a central "core" of major firms surrounded by a score or more of relatively unimportant local or regional producers, really precise market data can be prohibitively expensive and burdensome to obtain. As the Supreme Court said in *Brown Shoe Co. v. United States*, 370 U.S. 294, 343 (n. 69), "although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision of detail is less important than the accuracy of the broad picture presented." See also *Luria Bros. v. Federal Trade Commission*, 389 F.2d 847, 858 (CA-3, 1968), *cert.*

²⁴ Finding 66.

²⁵ Finding 65. The 21 major manufacturers subpoenaed by Commission attorneys had total sales of \$134 million in 1967. Finding 66.

²⁶ Finding 65.

denied, 393 U.S. 829 (1968). We think it quite unlikely that this group of experienced executives in the gift-wrap industry was substantially inaccurate in its identification of the major competitors it faces in the marketplace and its overall assessment of the general order of their aggregate share of the market in question.²⁷

We agree, however, that the examiner defined the relevant product market too narrowly in two other respects. First, we think such accessory (and/or complementary) products as gift bags, gift boxes, tissue (both used as stuffing and the colored variety used as outer wrap), and kraft (brown) paper used as additional outer wrap for mailing purposes, to the extent that they are in fact used as an accessory in the wrapping or giving of a gift, should be included as part of the overall gift-wrap market.²⁸ They are insignificant in quantity, however (paper, ribbons, and bows constitute 80% or more of the total gift-wrap market), and the bulk of their sales are accounted for by the major gift-wrap manufacturers and hence are included in the figures in the record.²⁹ Secondly, we agree that gift-wrap products, whether produced by acknowledged gift-wrap manufacturers or by firms primarily engaged in other industries, should be included in the relevant product market. Again, however, our finding that all but a relatively insignificant portion of gift-wrap sold in the United States is produced by the 20 major firms precludes a finding that any other such firms, whether members of the gift-wrap "industry" or not, manufacture a sufficient volume of such products to significantly affect the total market involved or the relative market shares of Papercraft and CPS.³⁰

III. "Failing Company" Defense

Respondent's contention that the acquired firm, CPS, was a "failing company" is based on the fact that, in three (3) of the more recent years of its 50-year history, the latter firm sustained operating losses.³¹ In 1964 and 1965, CPS lost \$217,000 and \$135,000, respectively, these losses being associated with the movement of its major plant from Illinois to Franklin, Tennessee, and thus nonrecurring in

²⁷ The published figures of the Census Bureau in this area were also received in evidence and are generally consistent with the testimony of the industry witnesses. CX 83-86; tr. 1134-1148. While subject to margins of error associated with inconsistent product reporting by individual companies, there is no evidence that these errors are more prevalent in gift-wrap products than in other product categories. Tr. 2160.

²⁸ Finding 74.

²⁹ *Id.*

³⁰ *Id.*

³¹ RX 203; RX 10A; tr. 1653-1667; 1879-1894.

character.³² Similarly, its 1967 losses (\$344,000) were presented as an "inventory shrinkage," an accounting writedown reflecting a judgment made after the acquisition that some \$300,000 worth of its gift-wrap inventory was "obsolete."³³ The remainder of CPS' 50 years in the industry have been profitable. Its sales, as noted, were over \$19 million in 1967 (the largest in the industry) and its total assets are over \$14 million.

It seems fairly clear, however, that CPS did in fact have a management problem during the mid and late 1960's. There were apparently a number of significant inefficiencies in its production and marketing methods³⁴ and, perhaps equally important, there was an inadequate response to the competitive inroads of Papercraft and the other suppliers of the "discounters" and other mass-merchandisers that emerged in the 1950's and eventually became the dominant factors in the larger Christmas ("promotional") sector of the gift-wrap industry.³⁵ This management difficulty, in turn, led to general unprofitability and problems in securing financing at the accustomed low-cost rate.³⁶

The leading case on the "failing company" defense, *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), establishes three (3) criteria for a successful showing on this point: (1) The resources of the company must be so depleted, and the prospect of rehabilitation so remote, that the firm in question faces the "grave probability of a business failure"; (2) the prospects for reorganization through bankruptcy or similar proceeding must be dim or non-existent; and (3) all efforts to find a purchaser other than the acquiring firm must have been exhausted, 394 U.S. at 137-138. In addition, the injury to competition flowing from the failing-com-

³² *Id.*

³³ *Id.*

³⁴ RX 10, a 11-page memorandum prepared by the president of Papercraft, Mr. Joseph M. Katz, on the eve of the acquisition, summarizes the strengths, weaknesses, and future prospects of CPS in the gift-wrap industry. His judgment on the relative inefficiency of CPS' management is supported by the testimony of other manufacturers in the industry. See also tr. 737.

³⁵ Finding 76.

³⁶ The gift-wrap industry, being seasonal in character, depends heavily on borrowing for the financing of inventory build-up during the off-season period (spring and summer). With the onset of "tight money" in 1966, plus a declining confidence in the ability of CPS' management to "do the job," officials of the bank it had been borrowing from for 50 years (First National Bank of Chicago) had resolved in 1967 not to handle the firm's loan (approximately \$5 million, on sales of \$19 million) for the following year. Tr. 1854-1876. Assuming CPS' inability to get financing from another bank, this would mean borrowing from a finance company and paying, instead of the 6.5% it had been accustomed to paying, the going finance company rate of 15% or more. Tr. 1862-1865.

pany merger, if any, must be more than outweighed by other factors relevant to the public interest.³⁷ None of those tests are met here. New management, which is basically what Papercraft brought to CPS, was the company's basic need, as a 11-page memorandum prepared by the president of Papercraft, Joseph M. Katz, on the eve of the acquisition, makes clear. "The basis for our determination [to acquire CPS] will be our considered opinion that CPS Industries, operating as a subsidiary or division of Papercraft, can earn a minimum of 10% on its sales before taxes. Based on my own feelings at this writing, I think we can do better than this during the second year of ownership."³⁸ A 10% return on CPS' sales of over \$19 million would mean, of course, pre-tax earnings of \$1.9 million per year, a figure that hardly suggests a company beyond hope of rehabilitation.

IV. In Camera Ruling

There was no error in the examiner's protective order placing the sales figures of the various third-party manufacturers *in camera* for a limited period of time, subject to viewing by respondent's counsel and, on a showing of necessity, to viewing by officers of the corporate respondent. See *United States v. Lever Brothers Co.*, 193 F. Supp. 254, 258 (S.D.N.Y. 1961); *United States v. American Optical Co.*, 39 F.R.D. 580, (N.D. Cal. 1966); and *Federal Trade Commission v. United States Pipe and Foundry Co.*, 304 F. Supp. 1254 (D.C.C. 1969). Respondent's counsel, taking the position that the corporate officers of Papercraft had an absolute right to view the detailed sales figures of its competitors, declined to attempt a showing of need therefor and claimed, instead, a violation of due process. The case law is otherwise.

³⁷ In the first Supreme Court decision on the "failing-company" doctrine, *International Shoe v. Federal Trade Commission*, 280 U.S. 291 (1930), the Court grounded its acceptance of the defense on the fact that the acquisition of the failing company involved in that case did "not substantially lessen competition or restrain commerce within the intent of the Clayton Act." 280 U.S. at 302-303. As the Court had said earlier in that opinion: "Obviously, such acquisition will not produce the forbidden result if there be no pre-existing substantial competition to be affected. . . ." 280 U.S. at 297, 298. Cf. *In the Matter of United States Steel Corporation*, Dkt. 8655 (December 2, 1968) [74 F.T.C. 1270], remanded, 426 F. 2d 592 (CA-6, 1970). "We believe the court [in *International Shoe*] did no more than balance the probable injury to competition against injury to stockholders and other third persons and, in the circumstances of that case, decided that the prevention of the latter was of greater importance. [Ftn. omitted.] We agree . . . [that] in any case involving the acquisition of a failing company we must determine whether the acquisition may result in a substantial lessening of competition and, if so, the acquisition must be declared illegal in the absence of probable harm to innocent individuals so serious and substantial that the public interest requires that the acquisition nonetheless be permitted." Opinion of the Commission, pp. 17-18 [74 F.T.C. 1287-1288].

³⁸ CX 10J-K.

V. Injury to Competition

The acquisition involved in this proceeding is so far outside the pale of permissible combinations that, even if we accepted respondent's efforts to expand the universe figure to double or more the figure we believe to be reasonably correct and to place the two firms in question in separate "submarkets" of the overall gift-wrap field, we would still be constrained to enter an order restoring this acquired firm to its former status as a separate full-line gift-wrap producer. No matter how the product markets (or submarkets) might be defined, the facts still would remain, as noted, that the 1st and 2nd largest gift-wrap manufacturers have been combined into one; that the combination thus created is more than twice the size of the next-largest competitor; that those two firms were the most likely entrants into all aspects of gift-wrap production;³⁹ that the number of significant firms in the industry has been decreasing; that the trade expects this trend to continue, with only four significant firms ultimately remaining in the industry; and that there is no prospect for any new firms to enter the industry in the future. The case law simply does not sanction acquisitions of this kind. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968).

An appropriate order will be entered.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint in this matter on April 10, 1969, charging that respondent Papercraft Corporation, a manufacturer of gift-wrap products, had violated Section 7 of the amended Clayton Act, 15 U.S.C. 18, in acquiring another manufacturer of gift-wrapping products, CPS Industries, Inc. A series of prehearing conferences were held between July 14, 1969, and January 13, 1970. Testimony and other evidence in support of and in opposition to the allegations of the complaint were received in evidentiary hearings held between January 20, 1970, and March 20, 1970.

³⁹ Given new and more aggressive management, the acquired firm, CPS, would undoubtedly be constrained to move still further into the growing "Christmas" sector of the market (45% of its sales are already in that area, as are 95% of Papercraft's).

In an initial decision of July 27, 1970, the examiner concluded that the charges were supported by the evidence and entered an order that would require divestiture of the acquired firm and other supplementary relief.

The Commission, having considered the appeal filed by respondent and the entire record, and having determined that the examiner's findings of fact, conclusions, and order, as modified and supplemented herein, should be adopted as the findings, conclusions, and order of the Commission, now makes its findings as to the facts, its conclusions drawn therefrom, and its order.

FINDINGS AS TO THE FACTS

The Acquiring and Acquired Firms

1. through 56. The Commission finds the facts to be, except as expressly modified herein, as set forth in findings 1 through 56 (pages 1359 through 1386) of the hearing examiner's initial decision of July 27, 1970, and adopts those findings as its own.

57. The acquiring firm, Papercraft Corporation, of Pittsburgh, Pennsylvania, had total sales of \$17,935,000 in 1967, of which \$15,700,000 were sales of gift-wrap products. Together with its two subsidiaries, it had sales of \$27 million and net profits of \$2,215,000. The acquired firm, CPS Industries, Inc., a Delaware corporation with its main offices in Chicago, Illinois, had total sales of \$19,250,000 in 1967, of which \$17,300,000 were sales of gift-wrap products. Its total assets as of October 28, 1967, were \$14,220,000. The acquisition was consummated on December 27, 1967, Papercraft acquiring all of the stock and debentures of CPS in exchange for 285,300 shares of its own (Papercraft) stock valued, for purposes of the transaction, at \$20 a share (\$5,706,000).

58. The acquiring firm, Papercraft, produces its gift-wrap products at its plant in Pittsburgh, Pennsylvania, and sells them to various retail and wholesale outlets, either directly or through manufacturers' representatives, under the brand names of "Kay crest," "Rhapsody," and various private labels. Founded in 1945, Papercraft pioneered in the sale of gift-wrap products to discount houses, supermarkets, drug stores and other relatively low-price mass ("promotional") outlets. The acquired firm, CPS Industries, Inc. (initially Chicago Printed String), founded in 1916, began producing gift-wrap ribbons in the early 1920's and gift-wrap paper in the early 1930's. It produces its gift-wrap products in its two plants, one in Franklin, Tennessee, the other in Schiller Park, Illinois, and dis-

tributes them through its salesmen to various wholesale and retail outlets under the brand names "CPS," "Tie-Tie," "Crinkle-Tie" "Galaxy," "Pride," and "Rippl-Tie." CPS, a pioneer in the gift-wrap industry itself, has sold the bulk of its gift-wrap products through the more traditional retail outlets, particularly the more traditional-type department stores and greeting card shops, at least until the advent of the so-called "discount" stores and other mass merchandise outlets in recent years.

The Gift-Wrapping Industry

59. Gift-wrapping products are those items of paper, ribbons, and accessories that are used for the enhancement of the appearance of a product intended to be given as a gift. "My definition for gift wrap would be any plain, printed or embossed paper, film, foil that might be used as a loose over-wrap for an article to enhance its beauty. They are usually associated with ribbons, ties, seals, wraps, bands, and tie-ons."¹ Sales are divided into two major categories, "Christmas" and "everyday," these terms referring to the gift-giving occasion involved.² More than half of all sales of gift-wrap products are made at Christmas (in a period of several weeks preceding that holiday), the bulk of the remainder during such occasions as Mother's Day, Father's Day, Valentine's Day, weddings, "showers," birthdays, graduations, and the like.³ In terms of distribution channels, gift-wrap products (initially consisting of white tissue and string) were historically sold almost exclusively in department stores and greeting card shops. Later, however, and particularly with the advent of "discounting" in the post-war period, the discount department stores, supermarkets, and drug stores began to account for an increasing share of total gift-wrap sales.⁴

60. In addition to these variations in the character of the outlets in which consumers purchase gift-wrap products, there are also variations in the form in which they are received by the consumer. One of the three principal categories here is referred to in the trade as "in-store" sales. In the traditional transaction in which the consumer bought a gift at a department store and had it gift-wrapped by the store's own employees (either "free" or for a small extra charge), the sale of the gift-wrap accompanied the sale of the gift, *i.e.*, the gift and the gift-wrap were sold by the same store, either in combina-

¹ Tr. 561, 981, 337.

² Tr. 418-19.

³ *Id.*

⁴ Tr. 1035-36.

tion or separately. Here the store purchases the wrapping products from the manufacturer in "bulk" form (paper in "ream" rolls, ribbons in large rolls, bows in large boxes, etc.) and performs the entire wrapping operation for the consumer. A second category of sales recognized by the trade is the industrial "pre-wrap" classification, one involving not sales directly to the consumer but to manufacturers of other goods who gift-wrap certain of their products prior to introducing them into wholesale and retail channels of trade, particularly manufacturers of liquor (distillers), cosmetics, and cigarettes, and particularly at Christmastime. The third and currently the most significant form in which the consumer receives gift-wrap products involves what the trade refers to as the "resale" category, wrapping paper and accessories sold to a retailer in quantities and packaged in such a way as to facilitate their "resale" to the wrap-it-yourself consumer.⁵

61. There are also a number of product variations that are associated with certain of these variations in the channel of distribution through which gift-products move to the consumer and in the exact form in which they are received by the consumer. In the case of the "in-store" gift-wrap purchased in bulk by the retail stores and the industrial "pre-wrap" purchased by, as noted, manufacturers of such other products as liquor, cosmetics, and cigarettes, the initial user of the gift-wrapping product is a business organization, not a consumer, and the sale is thus one between two business organizations, in bulk quantities, and on a product geared expressly to the needs of the purchasing business organization, thus producing minor differences in design, materials, and terms of sales from those prevailing in the other categories of sale.⁶

62. Similarly, within the major "resale" category itself, the one involving the straightforward movement of gift-wrapping products through the retailer into the hands of the wrap-it-yourself consumer, there are some minor variations in these dimensions of design, materials (paper "weight" or thickness, type of ink, and the like), and terms of sale (including price) associated with the tastes, incomes, and the like of the consumers that patronize the different categories of retail outlets. In general, those department stores that attempt to project a "prestige" or "quality" image, and the greeting-card shops, have historically sold a gift-wrap product that was slightly higher in price, more "fashionable" or "exclusive" in design, sometimes of

⁵ Tr. 338-342; 345; 564; 603; 659-660; 879; 918-928; 958-960; 1153-1174; and 1355.

⁶ Tr. 959-960; 1193; 1410.

heavier (more expensive) paper, and with more or better quality (more expensive) ink, than that sold by, for example, the "discount-type" department stores and the supermarket and drug chains that emphasize price rather than prestige in their selling efforts. Thus the "prestige" department store, in its efforts to cater to the most discriminating tastes and highest consumer income levels, has sold gift-wrap products with "high-style" designs and colors ("shocking pink," avocado, etc.), that were invariably "pre-priced" (with the manufacturer's suggested retail price to the consumer), and invariably took a markup of 100% *i.e.*, double what the store paid for the merchandise. The "mass" outlets, on the other hand, have traditionally sold gift-wrap products with the broadest possible appeal (*e.g.*, the "traditional" Christmas colors and designs) and have done so on a "promotional" basis, *i.e.*, on the basis of competitive prices.⁷

Retailing of Gift-Wrap

63. The S. S. Kresge Company, operator of approximately 900 retail stores in the United States, including both variety stores and discount department stores ("K Marts" and "Jupiters"), believes itself to be the largest retailer of gift-wrap products in the country, with total gift-wrap sales in 1969 of "over \$17,000,000."⁸ Approximately 82% of its total gift-wrap sales are accounted for by the basic gift-wrap products, namely, papers, ribbons, and bows.⁹ Its purchases of the various other accessory items were: tissue, \$1.1 million; seals and tags, \$800,000; gift boxes, \$500,000; tie-ons, \$400,000; and kraft paper, approximately \$225,000.¹⁰ The latter item, kraft paper (the common brown paper used in, for example, grocery store bags), was used for mailing purposes¹¹ rather than as a decoration. Approximately 55% of the tissue paper was of the "Madras"¹² or colored type that is commonly used for wrapping gifts.

64. Other retailers report similar patterns in their purchases and sales of gift-wrap products. An official of the DeKoven Drug Co., Winnetka, Illinois, a chain of 6 drug stores and 30 lease-department discount stores in 8 States, testified that, of its total gift-wrap purchases of nearly \$400,000 annually, the accessory items accounted for the following percentages of those total gift-wrap sales: gift tape

⁷ Tr. 1158-1170.

⁸ Tr. 2007, 2023.

⁹ Tr. 2008-2010.

¹⁰ Tr. 2003-2008.

¹¹ Tr. 2010.

¹² Tr. 2029.

(cellophane), 3% to 4%; gift boxes, 2.5%; tissue 1% to 2%; kraft paper, 1% or less; tie-ons, $\frac{3}{4}$ of 1%; tinsel, $\frac{1}{2}$ of 1%; and decorated twine, $\frac{1}{4}$ of 1%.¹³ An official of McCrory, McClellan, and Green Stores, York, Pennsylvania, a variety-store chain with 608 retail stores in the United States and annual gift-wrap purchases of more than \$1 million, described the gift-wrap industry as one consisting primarily of paper, tissue, ribbon, bows, yarn, tags, and seals. Of this firm's total gift wrap sales, tissue (mostly white, with a small amount of decorated) accounted for 5%; tie-ons, 2% to 3%; yarn, $\frac{1}{10}$ th of 1%; elasticized ties, $\frac{1}{10}$ th of 1%; cellophane, $\frac{1}{10}$ th of 1%; and gift bags, $\frac{1}{10}$ th of 1%.¹⁴ His stores attempted to sell pre-wrapped gift boxes and they "just did not sell."¹⁵ A representative of Turnstile Family Centers, Inc., operator of 15 department stores in the Boston and Chicago areas and over 180 drug stores throughout the country, testified that, among the gift-wrap items, bows and ribbons account for from 10% to 12% of its total gift-wrap sales; cellophane (*e.g.*, "Scotch") tape, 5%; tissue, 1% to 2%; and kraft paper, less than 1%.¹⁶

Size of Gift-Wrap Market

65. Total sales of all gift-wrap products in the United States in 1967, the year of the acquisition at issue here, were approximately \$150 million. An official of Hy-Sil Manufacturing Co., one of the major gift-wrap producers, testified on this point as follows:

Q. . . . [A]s a result of your experience, have you arrived at any estimate or opinion as to the size of the gift wrap market in the United States?

A. Are you talking about wholesale or retail?

Q. Well, either figure, sir.

A. Okay. At the wholesale figure, I'd estimate it to be about \$150,000,000.

Q. And what does that include?

A. The type of products?

Q. Yes, sir.

A. That would include all gift wrapping paper, including printed, plain, coated papers and printed and embossed foils. That would include card tags and seals, resale ribbons, bows, tinsel cords, and package decorations.¹⁷

An official of American Greeting Corp., another major manufacturer of gift-wrap, testified as follows:

Hearing Examiner Lewis: What is your estimate as to the overall total of sales made in the industry?

¹³ Tr. 1823-1826.

¹⁴ Tr. 982-984.

¹⁵ Tr. 986.

¹⁶ Tr. 1927-1940.

¹⁷ Tr. 347-348.

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The Witness: About 160 to \$170 million.¹⁸

An official of Archer Products, Inc., a wholly owned subsidiary of R. J. Reynolds Tobacco Co., another major factor in the gift-wrap industry:

Hearing Examiner Lewis: Would you have any statements as to the market today, the size of it?

The Witness: In my opinion, it is about 160 [million dollars], something like that.¹⁹

A former official of Dennison Manufacturing Co., a major manufacturer of gift-wrap:

Hearing Examiner Lewis: You are saying that the size of the market was about \$120 million at the manufacturer's level?

The Witness: At the manufacturer's.²⁰ ["Resale" gift-wrap only, i.e., exclusive of "instore," "pre-wrap," etc.].

Mr. Joseph Katz, the president of Papercraft Corporation, the acquiring firm in this matter, gave his express, written approval to a published statement that: "The size of the gift wrapping market is about \$177 million a year. * * *"²¹

While figures of this kind can never be entirely precise in industries with, as here, a numerically large fringe of relatively unimportant regional firms, at least in the absence of an inordinately expensive and time-consuming study, their general reliability is amply supported by the record. The industry members that provided these estimates are officials of the major firms with long experience in the sale of gift-wrap products. They have availed themselves of numerous techniques of studying the industry and the positions of their own respective firms in it, including studies based on trade journals, financial source books, census data, trade sources, and the like.²² A particularly comprehensive technique for example, and one that is used extensively by the firms in the industry to estimate and compare their own and their competitors' sales volumes and market shares, is the direct observation (through sales personnel) of the specific brands of gift-wrap on the shelves of the retail outlets that carry the product. Based on its own sales to retail accounts that sell its own gift-wrap products exclusively, the manufacturer knows the amount of gift-wrap that each retail store of a given size and charac-

¹⁸ Tr. 670.

¹⁹ Tr. 831.

²⁰ Tr. 1044.

²¹ CX 31A-C.

²² CX 41; CX 76; CX 81; Tr. 478-479; 502-503; 522-557; 581; 668-672; 720-728; 912-917; 974-976; 1133-1145.

ter is generally able to sell. Its salesmen, in their rounds soliciting the major retailers (particularly the chain or multi-store retail organizations), observe which of its competitors' products are in fact on the shelves of each of those major chain outlets. Then using its own experience with chains having stores of similar size and character the manufacturer totals up the aggregate amount of gift-wrap products sold by each of its competitors, adds them together, and computes its own and its competitors' shares of that total. "I know, basically, the major manufacturers in the industry, I know the products that they sell, I know basically who they sell to."²³ "I know most of the large accounts that these [competing] companies are selling. I have a fairly good idea of what a store can use in everyday and Christmas giftwrapping."²⁴ "[I]t is an estimate based on what we think we do in like accounts and get an estimate of the number of like accounts that our competition may have, and it is a figure that we fix from year to year for each of our [competing] manufacturers. * * *"²⁵ "We have a list on every customer in the business. We see what we sell them and estimate what we think * * * other competitors would sell these same accounts, based on conversations with the buyers, and if people, customers who do not buy from us, we would say, well he has 500 stores and we have a customer that has a 1000 stores and, therefore, his approximate purchases would be just half that amount."²⁶ While these estimates naturally carry a margin of error, particularly on the shares of individual firms,²⁷ they are generally consistent with actual sales figures of the major firms²⁸ and with the industry totals reported by the Census Bureau.²⁹

Market Shares of the Major Manufacturers

66. Approximately 20 firms account for an estimated 80% of total gift-wrap sales in the United States.³⁰ These major firms reported their total 1967 gift-wrap sales as follows:

²³ Tr. 946.

²⁴ Tr. 478.

²⁵ Tr. 668-669.

²⁶ Tr. 720-723; 829-839.

²⁷ Tr. 482-484.

²⁸ See Finding 66, below.

²⁹ CX 83-86; tr. 1133-1148.

³⁰ See, e.g., tr. 517, 670.

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Firm	1967 sales	Source ³¹ (In camera)
OPS	\$17,300,000	RX 18
Papercraft	15,700,000	RX 19
Fallmark	14,375,000	CX 48B
American Greetings	12,300,201	CX 44A
Cleo	11,546,830	CX 75E
Minnesota Mining & Manufacturing	6,965,141	CX 56CD
Dennison	6,221,000	CX 65B
Susan Crane	5,715,128	CX 61K
Artistic	5,578,218	CX 53A
St. Clair	5,109,000	CX 68D
Gibson Greeting Cards	5,017,562	CX 75D
Darrington	4,934,764	CX 60A
Ben-Mont	4,543,582	CX 60D
Archer	4,498,000	CX 79
Berwick Textile	3,176,270	CX 70B
Vorcross	2,931,901	CX 72B
Wm. E. Wright Co.	2,903,982	CX 71B
Rust Craft	1,735,994	CX 64C
Cuttle Press	1,605,023	CX 62C
Technical Tape	1,600,000	CX 73B
Champion Papers	531,294	CX 74B
Total	134,288,890	

³¹ The hearing examiner received the exhibits detailing the sales volumes of all third-party firms, and particularly their sales in particular product categories and to particular buyer-accounts, *in camera* subject to whatever disclosure the Commission might deem necessary in order to perform its adjudicative functions. In view of the fact that these figures are already four (4) years old, and that they are not broken down here by product category (e.g., paper, ribbons, etc.), no third-party interests are likely to be harmed by their disclosure at this point in the interests of sound adjudication.

Entry Barriers in the Gift-Wrap Industry

67. The number of economically-significant firms engaged in the manufacture of gift-wrap products has been declining in recent years. A number of firms have been merged out of existence, several others have reduced the scope of their gift-wrap production, and some have withdrawn from the production of gift-wrap products altogether.³² Only one new gift-wrap producer of any significance, Archer (a wholly-owned subsidiary of R. J. Reynolds Tobacco), has entered the field in the past decade.³³ The trade believes that "the market will eventually firm up with only four companies."³⁴

68. There are significant entry barriers facing would-be manufacturers of gift-wrap products, particularly the cost disadvantages, *vis-à-vis* established leaders in the field, associated with the marketing of new and narrower lines of merchandise. The major buyers of gift-wrap products, particularly such large retail chains as Kresge, Montgomery Ward's, and Newberry, prefer to buy their full complement of gift-wrapping needs from a single supplier, including

³² Tr. 368-370; 393-394; 542; 662.

³³ Tr. 518-519; 2057.

³⁴ Tr. 832.

paper, ribbons, tags, seals, and the like.³⁵ Thus a former product manager of the Brown Co., Kalamazoo, Michigan (a subsidiary of the Gulf & Western complex), testified that his firm had been unsuccessful in its efforts to sell to the large chain accounts because of its narrow line of gift-wrap products—paper only, with no ribbons, tags, seals, and the like—and its resulting inability to get enough sales volume to reduce its costs to competitive levels. Demands by the larger buyers for especially low prices on three or four items, for example, pose no serious difficulties for the manufacturer selling a broad line of perhaps 13 or 14 items: the low-profit items are compensated for by the remaining higher-profit items that are also sold to that buyer. The manufacturer that sells only those few items, however, is at a disadvantage in that regard.³⁶ Moreover, each individual item in the line of gift-wrap products must be produced and sold in a relatively large volume if costs of production and distribution on each are to be kept at a competitive level.³⁷ An official of CPS, the acquired firm involved in this matter, testified, for example, that his company's sales to the chains had never been profitable because "we were never ever able to achieve any volume and, therefore, we had all of the same costs to start up a line, designing, packaging, equipment and manufacturing, and we never created enough volume to make the line profitable."³⁸

Product Market—Cross-Elasticity of Demand

69. While there are, as noted, minor differences in the gift-wrap products sold in the different types of retail outlets, and thus in the products produced by the manufacturers that have historically specialized to a greater or lesser degree in distributing their gift-wrap items through those different kinds of outlets, the similarities exceed the differences and there is a clear competitive relationship between those groups of outlets for the consumer's gift-wrap dollar. Thus notwithstanding the minor differences in designs, colors, paper and ink qualities, and the like that sometimes appear in the gift-wrap products sold in the so-called "quality" department stores and card shops, on the one hand, and those sold in the more "promotional" (lower-priced) discount-type department stores and other mass merchandise outlets, on the other, the latter group of retailers have

³⁵ Tr. 346-347; 987.

³⁶ Tr. 763-764.

³⁷ Tr. 763-781.

³⁸ Tr. 1329.

steadily eroded the share of the gift-wrap market held by the former.

Prior to the advent of the "discounters"³⁹ in the early 1950's, the "old-line" department stores and card shops had enjoyed a virtual monopoly in the retailing of gift-wrap products. Thus CPS, the acquired firm here and the largest manufacturer of gift-wrap in the country, had initially maintained a firm company policy against selling to the expanding discounters.⁴⁰ In time, however, CPS was forced by the competition of other gift-wrap manufacturers particularly the firm that ultimately acquired it, Papercraft—not only to develop two "promotional"⁴¹ brands of gift-wrap of its own ("Galaxy" and "Pride") but to sell its highest-quality brand ("Tie-Tie") to the mass outlets.⁴² The latter, on the other hand, having successfully competed away much of the department stores' gift-wrap business on the basis of price competition, began to "upgrade" their own operations, *i.e.*, to compete on the basis of "quality" and service,⁴³ including the inauguration of in-store wrapping services, attractive carpeting, and other department-store "luxury" features.⁴⁴ Over time, the differences between the discount and department stores have, for all practical purposes, been largely eliminated.⁴⁵ Both "quality" and "promotional" gift-wrap are now sold in stores of widely varying character and their competition is direct. "[W]ell, for example, take a shopping plaza where you have a supermarket, a variety chain, a discount store and various other retail operations. One will respond very quickly and very actively to an operation structure of his neighbors two or three or five doors away and there is a constant juggling during the season to maintain leadership."⁴⁶ There is similarly direct competition between "in-store" and "resale" gift-wrap.⁴⁷

Christmas gift-wrap, as noted, now greatly outsells the other category, "everyday" gift-wrap. And the overwhelming majority of the former is, today, "promotional" or competitive in character. Thus the big variety chain mentioned above, McCrory, McClellan, and Green of York, Pennsylvania, with 608 stores, and total gift-wrap sales of \$1.25 million annually, sells approximately \$1 million at

³⁹ Tr. 1165-1166.

⁴⁰ Tr. 600-615, 1355.

⁴¹ Tr. 1323-1324; 1330.

⁴² Tr. 600-616.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Tr. 614-616.

⁴⁶ Tr. 1179; 616.

⁴⁷ Tr. 349, 660, 958.

Christmas, the remaining $\$1\frac{1}{4}$ million being its year-round volume of "everyday" gift-wrap sales.⁴⁸ Other retailers report a similar disproportion between their Christmas and their "everyday" sales, and a shift to the lower-priced "promotional" gift-wrap in the bulk of their Christmas sales. An official of Turnstile Family Centers, for example, a retail chain with 15 department stores in the Chicago and Boston areas and over 180 drug stores throughout the country, testified that, of its total gift-wrap purchases of \$250,000 per year, \$150,000 to \$175,000 was "promotional" gift-wrap bought from Papercraft, the \$75,000 remainder being almost entirely "everyday" bought from such "quality" manufacturers as American Greetings, Rustcraft, and Buzza-Cardoza. (Its "quality" Christmas sales amount to "no more than a couple of hundred dollars.")⁴⁹

Competition Between Acquiring and Acquired Firms

70. The acquiring firm here, Papercraft, is engaged primarily in the sale of gift-wrap products of the "promotional" variety sold at Christmas in, for the most part, the mass-merchandise outlets, including discount-type department stores, drug stores, variety chains, and supermarkets, these categories of retail outlets having accounted for approximately 75% of its total sales in 1967.⁵⁰ The acquired firm, CPS, on the other hand, sold approximately 30% of its gift-wrap products through those particular outlets in that year, the largest single outlet for its products being the traditional non-discount department store (29% of its total gift-wrap sales in 1967).⁵¹ Narrowed more sharply to the sale of its "promotional" brands ("Galaxy" and "Pride") in the so-called "mass-merchandise" outlets, approximately 15% of the acquired firm's total sales shared a direct competitive "overlap" with the acquiring firm, Papercraft. (As a Papercraft official testified at one point, "... Galaxy [CPS] has been a competitor of Papercraft for a number of years.")⁵²

This measures only the extent of CPS' efforts to enter the lower-priced (promotional) market, however, not the extent of Papercraft's and other promotional manufacturers' encroachment on the so-called non-promotional market for gift-wrap products. In view of the capture of virtually the entire Christmas portion of the gift-wrap market from the "quality" (non-promotional) products, by the

⁴⁸ Tr. 991-998; CX 82 (in camera).

⁴⁹ Tr. 1925-1926; 1821-1822, 1849.

⁵⁰ RX 22-A (in camera).

⁵¹ Id.

⁵² Tr. 1243; 1323.

promotional gift-wrap merchandise, it would be unrealistic to find that the two are not in competition across that whole dominant sector of the market. The single most reliable indicator that two products are in the same market is a shift in sales volume away from one of them in response to price movements of the other one. The power of the discounters' pricing efforts to take the department stores' sales volume leaves no room for a finding that the two are not in the same relevant product market. The minor differences in designs, paper weight, ink quality, and point-of-sale service pointed to by Papercraft indicate, in these circumstances, no more than marginal product variations to reflect relatively insignificant differences in purchasing patterns. They are sold in the same retail outlets, frequently side-by-side and even industry experts have difficulty distinguishing the two.⁵³

Potential Competition Between Acquiring and Acquired Firms

71. There are, as noted, significant barriers impeding entry into the gift-wrap industry, particularly the problem of securing sufficient volume on each of several items to permit relatively efficient, low-cost production and hence prices as low as those of established firms.⁵⁴ These barriers are particularly formidable in the case of the "everyday" sector of the market. Whereas Christmas gift-wrap, being almost entirely "promotional" in character and thus bought largely on the basis of price by the mass-merchandisers, *e.g.*, the multi-store (chain) organizations with hundreds (and even thousands) of stores each, and all during a single short period of time, "everyday" gift-wrap is sold piece-meal throughout the year in small-lot orders to many thousands of individual retail organizations, particularly department stores. Thus Papercraft, which sold Christmas gift-wrap almost exclusively prior to its acquisition of CPS, had approximately 2,400 customers in 1967 (sales of \$15.7 million), its average invoice size (shipment) being just over \$1,300 and its total sales force consisting of only 19 manufacturers' representatives.⁵⁵ CPS, on the other hand, which had its \$17.4 million gift-wrap sales divided almost equally between Christmas and "everyday" (44.5% and 55.5%, respectively),⁵⁶ had 16,000 accounts in 1967, a sales force of 72 salesmen (plus five divisional salesmen), and an average invoice (shipment) size of \$172.⁵⁷

⁵³ CX 146, 147; Tr. 1244-1251; 905, 910-912; 1225; 1323-1325; 2241-2249.

⁵⁴ See Finding 68, *supra*.

⁵⁵ Tr. 1176-1177.

⁵⁶ RX 21 (in camera).

⁵⁷ Tr. 1282-1284.

The major sellers of "everyday" gift-wrap, particularly the department stores and greeting card shops, require considerable servicing from the manufacturers, including stocking, display arrangement, and the like, and thus are called upon by the manufacturers' salesmen every two weeks or so.⁵⁸ Moreover, "brand" or "prestige" factors are important here,⁵⁹ thus putting the would-be entrant at a still greater disadvantage vis-a-vis the older, established firms. The result is that entry into this "everyday" sector of the market is more difficult and more costly than entry into the Christmas gift-wrap category. Archer, the only significant new entrant in the past several years, entered the Christmas (promotional) sector only. "[W]e have gone in more for the mass volume merchandisers as a way for us to get into the business faster."⁶⁰ The retail outlets, not being tied to their suppliers for servicing and the like on Christmas gift-wrap, are able to readily shift their patronage from one manufacturer to another on their purchases of that category of merchandise. On the "everyday" gift-wrap, a change of suppliers would be difficult. "It would take quite a while. I don't know, I never contemplate doing it once I got something going. But I imagine it would take a year, two years, to phase in and phase out."⁶¹

72. Papercraft, with 4.5% of its total gift-wrap sales being "everyday" in 1967,⁶² was one of the most likely entrants into that sector of the gift-wrap market on a substantial scale. It was the second largest manufacturer in the industry (second only to CPS, the firm it acquired) and one of its financially strongest (\$2.3 million after-tax income in 1967), most aggressive, and fastest growing firms.⁶³

Q. Mr. Mumma, of the other companies, that you have mentioned previously which are in the gift-wrap field in 1967, which two companies were best able and qualified to enter the department store field . . . ?

* * * * *

The Witness: Well, I will say the two people best equipped to move into this field would be Papercraft and Cleo from the standpoint of their technical skills and their design capabilities and their marketing personnel.⁶⁴

Given this plain capacity for entering the "everyday" field, together with its pattern of growth in broadening its distribution into

⁵⁸ Tr. 1919, 2032-2035.

⁵⁹ Tr. 1796-1799.

⁶⁰ Tr. 868.

⁶¹ Tr. 2035.

⁶² RX 21 (in camera).

⁶³ Tr. 737; 1038; 1041-42; CX 3, p. 10.

⁶⁴ Tr. 1041.

1352.

additional types of retail outlets,⁶⁵ there was a substantial probability that, had it not been for the acquisition in question, Papercraft would have entered this area of gift-wrap distribution on its own.

73. For firms already in the "everyday" gift-wrap business, entry into the "Christmas" sector is difficult but not impossible. Thus "Hy-Sil originally sold only fine department stores and the better gift shops. Our salesmen did not know anything about promotional or discount store selling. When we got into this market, we had to show the salesmen how this type of sale had to be made."⁶⁶

CPS, the largest manufacturer of gift-wrap products in the United States at the time of its acquisition in 1967, was already a substantial factor in the Christmas gift-wrap field, its Christmas sales in that year constituting, as noted, \$7.7 million or approximately 44.5% of its total gift-wrap sales in that year.⁶⁷ Hence it was one of Papercraft's major competitors in that sector of the gift-wrap market. In view of the further fact that it is this sector, not "everyday" gift-wrap, that is growing most rapidly, under more aggressive management CPS would undoubtedly have become a still more important factor in the Christmas field where Papercraft had been and continues to be the leading firm.⁶⁸

Related Items of Gift-Wrap

74. Gift-wrapping includes, in addition to the paper, tying materials, and accessory items accepted by the hearing examiner in this matter,⁶⁹ such other related items as tissue (both inner-and outer-wrap), kraft paper, cellophane (*e.g.*, "Scotch") tape, gift-bags, and gift-boxes, whether manufactured by recognized gift-wrap manufacturers or others, where these items are in fact used in the wrapping of a gift or, in the case of kraft paper, in making it suitable for mailing.⁷⁰ In view of the fact that the basic papers, ribbons, and bows account for an estimated 80% or more of total gift-wrap sales,⁷¹ together with the fact that the bulk of those accessory items are sold by the major gift-wrap manufacturers themselves and hence are included in the sales figures of those firms in the instant record,⁷² the inclusion of those additional items can have no significant

⁶⁵ Tr. 1042.

⁶⁶ Tr. 470.

⁶⁷ RX 21 (in camera).

⁶⁸ Tr. 737; CX 10D-K.

⁶⁹ Initial Decision (July 27, 1970), pp. 1390-91.

⁷⁰ Tr. 367; 422; 455; 466; 692; 881-882; 939; 982-986; 1001-1003; 1021-1023; 1193; 1759-1762; 1807; 1818-1821; 1897-1988; 1950-1960; 2006-2030; 2055-2057.

⁷¹ Tr. 1753; 1965; 2008-2010; and Finding 63, *supra*.

⁷² Finding 66, *supra*.

effect on the general order of concentration prevailing in this industry.

Competitive Injury

75. Based on total gift-wrap sales in the United States of approximately \$150 million in 1967,⁷³ the eight (8) largest manufacturers of the product in that year were as follows:

Firm	1967 sales	Market share
	<i>Millions of dollars</i>	<i>Percent</i>
CPS	17.3	11.5
Papercraft	15.7	10.5
Hallmark	14.4	9.1
American Greetings	12.3	8.2
4-Firm total		39.3
Cleo	11.5	7.7
Minnesota Mining	7.0	4.6
Dennison	6.2	4.1
Susan Crane	5.7	3.8
8-Firm total		59.5

As a result of the merger, Papercraft's share has moved up from 10.5% to 22%. The share held by the four largest producers of gift-wrap has moved up from 39.3% to 47%.

76. At the time of this acquisition in 1967, Papercraft was already, as found above, the strongest and most aggressive of the country's gift-wrap producers, in an industry with substantial entry barriers and a declining number of firms.⁷⁴ With its market share now increased to over 20%, more than double the size of its nearest competitor; with the marketing advantages associated with that dominant size, particularly the cost economies and merchandising advantages associated with the volume and breadth of product line that it now controls;⁷⁵ and with the already difficult position of most of the other major producers in the industry,⁷⁶ the number of firms in the industry will very likely continue to decline in the future. "[I]t [the merger] has removed one competitor and made the industry that much tougher . . . [T]hey are both stronger because of the merger . . . [W]e are finding more sales resistance to sell our merchandise." ⁷⁷ Thus, "the buyers think that the [gift-wrap] market will eventually firm up with only four companies." ⁷⁸ In time, the

⁷³ Findings 65 and 66, *supra*.

⁷⁴ See Findings 67, 68, and 73, *supra*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

⁷⁷ Tr. 693, 736-737.

⁷⁸ Tr. 832.

1352

wide disparity between the size and cost advantages of the Papercraft-CPS combination and the other firms will undoubtedly make it the price leader in the industry and raise a substantial probability of the industry becoming a tight-knit, administered-price oligopoly of the kind that the courts have said Section 7 of the amended Clayton Act is particularly addressed to.

CONCLUSIONS

1 through 16. Except as modified and supplemented herein, the Commission accepts and adopts the conclusions of the hearing examiner in this matter (pages 1386 through 1393, initial decision of July 27, 1970).

17. Papercraft Corporation and CPS Industries, Inc., were at the time of this acquisition corporations engaged in commerce, as "commerce" is defined in Section 7 of the amended Clayton Act, 15 U.S.C. 18.

18. The relevant market in which to assess the competitive effects of Papercraft's acquisition of CPS is the manufacture and sale of gift-wrap and accessory products in the United States, as found herein. There is a significant interrelationship (cross-elasticity of demand) between the sale of gift-wrap products in the various forms and outlets and hence there are no significant sectors of the industry that can be designated as separate "lines of commerce" within the meaning of Section 7 of the amended Clayton Act.

19. Total sales of gift-wrap and accessory products in the United States in 1967, the year of the acquisition in question, were approximately \$150 million. While there is always a margin of error in estimates of this kind, the number of industry experts that testified on this point, their long experience in the industry, and their detailed testimony as to their estimating procedures precludes a finding that those estimates are unreliable, at least as to the general order of magnitude of the industry's total sales volume. "[I]n cases of this type precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe Co. v. United States*, 370 U.S. 294, 343, n. 69 (1962).

20. The acquiring firm, Papercraft Corporation, had total gift-wrap sales of approximately \$15.7 million in 1967 and the acquired firm, CPS Industries, had total gift-wrap sales of approximately \$17.3 million in that year. The merger thus combined the 1st and 2nd largest gift-wrap producers in the country: CPS, with approximately 11.5% of total industry sales, and Papercraft, with approximately 10.5%, for a combined Papercraft-CPS market share of ap-

proximately 22%, or more than double the share of the next largest producer of gift-wrap (9.1%). The share held by the four (4) largest firms in the industry increased from approximately 39.3% prior to the merger to approximately 47% as a result of the merger.

21. Direct competition has been eliminated between the acquiring and acquired firms in the whole of the Christmas sector of the gift-wrap market and in a part of the remaining ("everyday") gift-wrap sector. In addition, potential competition has been eliminated between Papercraft and CPS in all phases of the gift-wrap market.

22. There are significant entry barriers impeding the entry of firms into the gift-wrap industry, particularly the cost and marketing disadvantages, vis-a-vis the larger established firms, of introducing and selling a more limited line of gift-wrap products on a lesser volume-scale than that of the leading firms in the industry, particularly Papercraft-CPS. The number of significant firms in the industry has been declining sharply over the past decade and it is probable that, given the significant advantages accruing particularly to the Papercraft-CPS combination, that the industry will eventually have no more than four (4) significant firms and that this Papercraft-CPS combination will become the dominant firm or price leader in a tight-knit oligopolistic industry characterized by non-competitive prices and other such poor performance characteristics associated with such industries.

23. The acquired firm, CPS Industries, Inc., was not a "failing company" within the meaning of that term as interpreted by the courts in the relevant case law.

24. Papercraft Corporation's acquisition of CPS Industries, Inc., may have the effect of substantially lessening competition and tending to create a monopoly in the manufacture and sale of gift-wrap products in the United States and is unlawful under Section 7 of the amended Clayton Act, 15 U.S.C. 18.

25. The examiner's protective orders placing the sales figures of third-party manufacturers and others *in camera* and limiting access to them to respondent's counsel, except for good cause shown for their release to respondent's corporate officials, were in accord with established precedent and did not violate respondent's rights to due process of law.

26. The Commission's interlocutory denial of respondent's application for the issuance of special report orders to several hundred thirty-party firms allegedly engaged in gift-wrap production and sales, and the examiner's denial of respondent's application for subpoenas

duces tecum to those third-party firms, was necessary and reasonable and did not violate respondent's due process rights.

27. The examiner's denial of respondent's motion to require production of material received by the Commission from third-party complainants and not made a part of the record was in accord with the Commission's Rules of Practice (Rule 2.2(d)) and does not constitute a denial of due process.

ORDER

This matter having been heard by the Commission on the exceptions of respondent Papercraft Corporation to the hearing examiner's initial decision finding respondent's acquisition of CPS Industries, Inc., in violation of Section 7 of the amended Clayton Act, 15 U.S.C. 18, and directing divestiture and supplemental relief; and

The Commission having determined that the market data established on this record is sufficiently complete and reliable in character that there was no necessity for the issuance of questionnaires or subpoenas to the more than 500 alleged gift-wrap manufacturers named by Papercraft and that there was no denial of due process in the denial of respondent Papercraft's request for such issuance; and

The Commission having determined that there was no denial of due process by reason of the examiner's protective order placing the sales figures of various third-party manufacturers *in camera*; and

The Commission having determined that there was no denial of due process in the examiner's denial of respondent's motion to require production of material submitted to the Commission by third-party complainants and not made a part of the record; and

The Commission having determined that the examiner's findings of fact and conclusions of law, as modified and supplemented herein, should be adopted as the findings and conclusions of the Commission, and that the examiner's order should be adopted as the order of the Commission:

It is ordered, That respondent Papercraft Corporation's exceptions to the hearing examiner's initial decision be, and they hereby are, denied;

It is further ordered, That the examiner's findings of fact and conclusions of law, as modified and supplemented herein, be, and they hereby are, adopted as the findings and conclusions of the Commission, and that the examiner's order be, and it hereby is, adopted as the order of the Commission.

Complaint

78 F.T.C.

IN THE MATTER OF

EASTERN DETECTIVE ACADEMY, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8793. Complaint, July 22, 1969—Decision, June 30, 1971*

Order requiring a Washington, D.C., school offering courses of instruction as private and public detectives and investigators to cease misrepresenting that there is a great demand for its graduates, that many of its graduates have obtained employment at desirable wages, misrepresenting the placement service of the school, that the school has a shooting range, that students will receive training in the use of handguns, and placing with any debt collection agency any contract which has been deceptively procured. The order also requires that respondents' contract contain a notice that it may be cancelled by a student within seven days, and also forbids respondents to deceptively induce a prospective student to sign an installment contract.

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 Eastern Detective Academy, Inc., a corporation, and Earl M. Leven, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Eastern Detective Academy, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 724 14th Street, NW., in Washington, D.C.

Respondent Earl M. Leven is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the operation of a school, offering a course of instruction to those seeking employment as private or public detectives, investigators or agents.

PAR. 3. In the course and conduct of their aforesaid business, and