

Initial Decision

92 F.T.C.

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS*Docket 9094. Complaint,¹ Jan. 17, 1977 — Final Order, July 25, 1978*

This order, among other things, requires a Syracuse, N.Y. importer of numismatic items and its corporate officers to cease importing, manufacturing, or distributing any numismatic item that is not plainly and permanently marked "Copy", as required by federal regulations.

Appearances

For the Commission: *Justin Dingfelder* and *Ronald G. Issac*.

For the respondent: *James R. Michal, Jackson, Campbell & Parkinson*, Washington, D.C.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW
JUDGE

FEBRUARY 13, 1978

I. SUMMARY OF PROCEEDINGS

On January 17, 1977, the Federal Trade Commission issued a complaint alleging that Gold Bullion International, Ltd. ("Gold Bullion") and its officers H. Kenneth Costello, [2] Walter N. Thompson, and William H. Bogart violated Section 2(b) of the Hobby Protection Act and Section 5 of the Federal Trade Commission Act. The complaint also named as respondents B.H. Mayer's Kunstprageanstalt of Pforzheim, West Germany, a corporation, and Bernhard H. Mayer, an officer of both Gold Bullion and B.H. Mayer's Kunstprageanstalt.

The complaint alleges that respondents, subsequent to November 29, 1973, imported into the United States for distribution in commerce privately minted copies of German 5, 10 and 20 Reichmark gold coins, Mexican 50 Peso gold coins, Austrian 100 Corona gold coins, and other gold coins. The complaint further alleges that the coins are imitation numismatic items as defined in Section 7 of the Hobby Protection Act and that the coins were not marked "copy" as required by Section 2(b) of the Act.

A prehearing conference was held on March 31, 1977 at the

¹ Complaint previously published at 90 F.T.C. 411.

request of Michael Stachowski, counsel for B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. Complaint counsel and attorneys representing William H. Bogart, Bernhard H. Mayer and B.H. Mayer's Kunstprageanstalt were present and agreed to file answers to the complaint.

On April 8, 1977, respondent William H. Bogart filed his answer admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against the respondents.

On April 12, 1977, respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer filed their answer, generally denying the allegations of the complaint and averring that the Federal Trade Commission lacks both personal and subject matter jurisdiction.

On April 21, 1977, respondents Gold Bullion, H. Kenneth Costello and Walter N. Thompson filed their answers admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against them. [3]

On April 28, 1977, complaint counsel served on respondent Gold Bullion a request for admissions of fact to which respondent replied on May 10, 1977.

On May 11, 1977, complaint counsel and counsel for respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer moved to withdraw this matter from litigation with respect to these respondents for the purpose of considering an executed proposed consent agreement. On June 1, 1977, I certified the executed agreement to the Commission, which, on August 9, 1977, voted to accept the modified consent agreement and decision and order as to B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. The Commission issued its final decision and order as to these respondents on November 1, 1977.

On June 20, 1977, a subpoena *duces tecum* was served on Gold Bullion for the production of documents relating to its activities with B.H. Mayer's Kunstprageanstalt. In response to my order of July 5, 1977, counsel for Gold Bullion delivered the subpoenaed documents to complaint counsel on August 1, 1977.

A prehearing conference was held on June 23, 1977 to discuss the dates by which lists of potential witnesses and exhibits should be submitted and the date and place of evidentiary hearings. The general round of hearings was set for October 17, 1977 thru October

28, 1977, with a special hearing to be held in August to take the testimony of complaint counsel's witness Bernhard H. Mayer.

On August 22, 1977, the Commission was served with a subpoena *duces tecum* on behalf of respondents for documents relating to Gold Bullion. Complaint counsel responded to the subpoena on August 24, 1977. At the same time complaint counsel filed a request for admissions of genuineness of documents; respondents' counsel did not respond and thereby admitted the request.

Complaint counsel furnished their lists of witnesses and documentary exhibits to respondents' counsel on August 29, 1977. A supplemental list was provided on October 14, 1977. Respondents' counsel provided complaint counsel with their description of witnesses and documentary exhibits on September 30, 1977. Two supplemental lists were received from respondents' counsel on October 5, 1977 and October 14, 1977, respectively. [4]

Hearings were held in complaint counsel's case-in-chief on August 30, 1977 and from October 17 to October 18, 1977. Respondents' hearings in defense were held from October 18 to October 19, 1977. All hearings in the case were held in Washington, D.C. The record was closed on November 1, 1977.

Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on December 1, 1977 and their replies ten days later. The following findings of fact, conclusions of law and order are based upon the record in this case and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. FINDINGS OF FACT¹

A. DESCRIPTION OF THE CORPORATE RESPONDENT

1. Respondent Gold Bullion International, Ltd. is a corporation organized and existing under and by virtue of the laws of the State of New York (Gold Bullion Ans., ¶1), with its principal office and place of business formerly located at Suite 216-A, State Tower Building, Syracuse, New York (CX 45e(4)).

2. Gold Bullion was created and existed for the purpose of importing, selling and distributing gold bullion coins and gold bullion products to coin dealers for resale and to consumers (Tr. 17, 541).

3. Gold Bullion actually engaged in the business of importing,

¹ Abbreviations used in this decision are: Tr. - Transcript of testimony. CX - Commission exhibits. RX - Respondents' exhibits. Ans. - Answer. Adm. - Answers to complaint counsel's requests for admissions.

selling and distributing gold bullion coins from October 1974, when the corporation was formed, until [5] February 1975, when it ceased active business operations after several shipments of coins had been seized by U.S. Customs (Tr. 16, 35, 455-59, 504).

4. Gold Bullion is still in existence for purposes of a pending civil libel action (Tr. 457, 475-76).

B. DESCRIPTION OF THE INDIVIDUAL RESPONDENTS

5. Respondent H. Kenneth Costello has been president of Gold Bullion since its inception (Tr. 489). He took part in the formation of the corporation, contributed \$5000 towards the initial capitalization, in exchange for which he received an initial 27 percent ownership interest (subsequently reduced), and agreed to serve as president at a salary which was never drawn (Tr. 488-90, 574-75).

6. Respondent Walter N. Thompson has been the vice-president and treasurer of Gold Bullion since its inception (Tr. 434, 462). He took part in the formation of the corporation, contributed \$5000 towards the capitalization, in exchange for which he received a 15 percent ownership interest, and agreed to serve in the above-mentioned capacities (Tr. 434).

7. Respondent William H. Bogart has been secretary of and legal counsel to Gold Bullion since its inception (Tr. 542-43). He took part in the formation of the corporation, contributed \$5000 towards the initial capitalization, in exchange for which he received an initial 33 percent ownership interest (subsequently reduced), and agreed to serve in the above-mentioned capacities (Tr. 541-44, 574-75).

8. Bernhard H. Mayer owns and operates B.H. Mayer's Kunst-prageanstalt, a family owned mint located in Pforzheim, West Germany, which manufactures coins, medals, and other metallic pieces (Tr. 14).

9. Mr. Mayer has been the major shareholder in Gold Bullion since its inception (Tr. 16). He has also been a director and officer of this respondent since its inception (Tr. 17). [6]

10. The impetus for the formation of Gold Bullion came from Messrs. Bogart and Mayer who discussed business opportunities growing out of the legalization of gold ownership in the United States (Tr. 71-75, 539-41, 569-70). Mr. Bogart recommended Messrs. Costello and Thompson to Mr. Mayer as persons potentially interested in the marketing of gold bullion items (Tr. 542).

11. Messrs. Bogart, Costello, Thompson, and Mayer were the persons responsible for the ownership and operation of Gold Bullion (Tr. 17). There were no other officers besides these four men (Tr. 576).

12. Gold Bullion had only two employees besides its officers—a secretary and a Mr. Carroll. Mr. Carroll was employed by Gold Bullion for only a month or less (Tr. 571).

13. Although Messrs. Costello and Thompson placed orders with B.H. Mayer Kunstprageanstalt for particular gold bullion coins (Tr. 573), Mr. Mayer made the decisions as to the types of coins that Gold Bullion imported, sold and distributed into the United States and did the research regarding whether particular coins were or were not legal tender under German laws and, thus, able to be reproduced (Tr. 80-82, 437-38, 470-71, 491, 496, 502, 544, 550).

14. As legal counsel for Gold Bullion, Mr. Bogart was responsible for determining the legality of marketing gold bullion coins in the United States (Tr. 545-47). He did not actively participate in the daily business operations of Gold Bullion (Tr. 544).

15. Messrs. Costello and Thompson were responsible for the daily operation and management of Gold Bullion (Tr. 437, 572-73). At times, Mr. Thompson personally sold coins to private parties (Tr. 463).

16. After Gold Bullion ceased doing business, Mr. Mayer and the individual respondents formed B.H. Mayer's of America, an American corporation which markets numismatic items such as silver bars and commemorative medals produced by B.H. Mayer's Kunstprageanstalt (Tr. 58, 460-61). There is no evidence, however, that it markets the kinds of coins which are at issue in this case. [7]

17. Mr. Costello is presently employed as a licensed stockbroker (Tr. 487-88). He has not had any involvement with B.H. Mayer's of America (Tr. 507) and he does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 505-06).

18. Mr. Thompson is presently employed as a licensed securities dealer (Tr. 435). He was associated with B.H. Mayer's of America from the time Gold Bullion ceased active operation until October 1976 (Tr. 460-61). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 458-59).

19. Mr. Bogart is presently employed as a private attorney (Tr. 538). He served as president of B.H. Mayer's of America from late fall 1975 until summer 1976 and remained on as legal counsel and as secretary until fall 1977 (Tr. 563-64). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 566).

C. THE MANUFACTURE AND IMPORTATION OF THE GOLD COIN
REPRODUCTIONS

(1) *The Nature of Respondents' Business*

20. The gold coins sold and distributed by Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Gold Bullion Adm., ¶4; Tr. 24).

21. B.H. Mayer's Kunstprageanstalt did not manufacture and ship coins to Gold Bullion unless they were ordered by Gold Bullion, and invoices were made out only for coins that were actually shipped (Tr. 39, 42).

22. The coins that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion in the United States were shipped for the account of Gold Bullion International, Ltd., Suite 216-A, State Tower Building, Syracuse, New York (CXs 67a, 68a). Gold Bullion was the actual owner of these coins for Customs purposes (Tr. 342).

23. The gold coins were purchased from B.H. Mayer's Kunstprageanstalt from October 1974 to January 1975 and shipped from West Germany to the United States for sale and distribution in the United States (Gold Bullion Adm., ¶¶2 and 6). [8]

24. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not manufactured for any government (Tr. 28, 33-34).

25. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not original coins but so-called "restrikes"² (Tr. 33).

26. The original coins which B.H. Mayer's Kunstprageanstalt copied for Gold Bullion were German 5 Mark, 10 Mark, and 20 Mark gold coins, Austrian 100 Corona, 1 Ducat, and 4 Ducat gold coins, a French 10 Franc gold coin and a Mexican 50 Peso gold coin (Tr. 23-24; CXs 6, 16, 18, 19, 45e(1)-(4), 48d, 49e, 67a-c, 68a-c).

27. None of the coins that Gold Bullion ordered from B.H. Mayer's Kunstprageanstalt and imported into the United States were marked "copy" (Gold Bullion Adm., ¶8; Tr. 38, 43, 49).

28. On January 7, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package of gold coin restrikes consisting of one 100 Corona, five 10 Francs, six 50 Pesos, and twenty-nine 5 Reichmarks (Tr. 57; CXs 6, 49(c)). The coins were not marked "copy" (Tr. 47). On February 5, 1975, the shipment of coins was seized by the United States Customs Service for alleged violation of the Hobby Protection Act in that they were not marked "copy" (Tr. 323-27; CX 49(b)-(e)).

² This term is used sometimes herein to refer to Gold Bullion's copies of original coins, although the numismatic community gives a narrower definition to that term. See Finding 72, *infra*.

29. On January 29, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package containing in part ninety 5 Reichmarks and one hundred ten 10 Franc gold coin restrikes (Tr. 37-38; CX 18). On January 30, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion 97 copies of the 50 Peso gold coin (Tr. 41; CX 19). The coins were not marked "copy" (Tr. 38). On February 18, 1975, U.S. Customs seized the January 29 and January 30 shipments for suspected violation of the Hobby Protection Act in that the coins were not marked "copy" (CX 48a-d). [9]

(2) The Date of Manufacture of the Coins

30. B.H. Mayer's Kunstprageanstalt does not maintain records that would disclose the date of manufacture of the coins shipped to Gold Bullion (Tr. 49, 97, 122-23). However, Mr. Mayer testified that some of the coins shipped to Gold Bullion were manufactured after November 29, 1973 (Tr. 49).³ The difficulty is in determining precisely when each type of coin was manufactured.

31. In order to mint coins you first have to have a die for each type of coin that is to be minted (Tr. 18).

32. The only original dies that B.H. Mayer's Kunstprageanstalt possessed were the dies for the 5, 10, and 20 Reichmarks (Tr. 19, 76). The dies used to manufacture the 1 Ducat and the 10 Franc were made later on, although before the existence of Gold Bullion (Tr. 76-77, 90). The dies used to manufacture the 100 Corona, the 4 Ducat, and the 50 Peso were made especially for Gold Bullion (Tr. 77-78, 89-90, 98, 122).

33. All of the 50 Pesos and 100 Coronas that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Tr. 98).

34. Since all of the 50 Pesos, the 4 Ducats, and the 100 Coronas were minted by B.H. Mayer's Kunstprageanstalt from dies made after Gold Bullion was formed (October 1974), they had to have been manufactured after November 29, 1973.

35. The only coins that B.H. Mayer's Kunstprageanstalt had in stock at the time Gold Bullion began doing business were the 5, 10, and 20 Reichmarks, the 1 Ducat, and the 10 Franc (Tr. 96-97, 123). The number of these coins that B.H. Mayer's Kunstprageanstalt had in stock at the time it began shipping to Gold Bullion was very small and did not last more than one or two weeks. Mr. Mayer concluded that his company did not have enough of these coins in stock [10] to

³ The date when the Hobby Protection Act was enacted. Section 8 of the Act states:

This Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of this Act.

account for all the coins that were shipped to Gold Bullion (Tr. 135-36). In light of the small stock of these coins which existed in October of 1974, I conclude that at least some of these coins were manufactured and shipped to Gold Bullion after November 29, 1973.

36. On January 16, 1975, a shipment of gold was delivered to B.H. Mayer's Kunstprageanstalt from Degussa [the processor of the gold sheets from which the coins were manufactured] (Tr. 54-56, 100-01). The date of the shipment was the same as that on the invoice (Tr. 101; CX 55). The invoice indicates that the gold was to be used for the manufacture of coins for Gold Bullion (CX 55). The gold could only have been used to manufacture either 1 or 4 Ducat coins (Tr. 56). Inasmuch as the Degussa firm is located in Pforzheim, West Germany (Tr. 50), it takes only five minutes for the gold to get from Degussa to B.H. Mayer's Kunstprageanstalt (Tr. 100).

37. It normally took between one day and one week for gold received from Degussa to be minted into coins and shipped to Gold Bullion (Tr. 110, 135). About one hundred fifty 1 Ducats were struck from the gold received from Degussa on January 16, 1975 (Tr. 101-02), and on January 21, 1975, ninety-five 1 Ducats were shipped to Gold Bullion (CXs 68b, 68c)—five days later.

38. Because the gold was used only for the production of 1 or 4 Ducat coins and because 1 Ducat coins were actually manufactured and shipped to Gold Bullion shortly after receipt of the gold from Degussa, I find that some 1 Ducats were manufactured after November 29, 1973 and shipped to Gold Bullion.

(3) The Use of the Original Gold Coins in Exchange

39. The copies of the German 5 Mark that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1877 with the image of Wilhelm I on their face and were marked with an "A" mint mark (CXs 46a, 47b). An "A" mark indicates the Berlin Mint (Tr. 244).

40. The German Government's Berlin Mint issued a 5 Mark gold coin in 1877 (Tr. 233-34). The coin was minted with the image of Wilhelm I on its face (Tr. 234). [11]

41. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 10 Mark gold coin copies. One type was dated 1888, Berlin mint mark, with the image of Wilhelm II (CXs 46b, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384-85; CX 71c-d).

42. The Berlin Mint did not issue a 10 Mark gold coin in 1888 with the image of Wilhelm II but it did issue a 10 Mark gold coin in 1889 with the image of Wilhelm II (Tr. 244-45; RX 43n).

43. The 1888 Wilhelm II 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1889 Wilhelm II 10 Mark gold coin issued by the Berlin Mint with respect to the date (Tr. 305; CX 46b; RX 43n).

44. The Berlin Mint did not issue a 10 Mark gold coin in 1887 with the image of Wilhelm I, but it did issue a 10 Mark gold coin in 1888 with the image of Wilhelm I (Tr. 249; RX 43n).

45. The 1887 Wilhelm I 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 Wilhelm I 10 Mark gold coin issued by the Berlin Mint with respect to the date (CX 71c-d; RX 43n).

46. Since the dates imprinted on them are different than the dates on the original coins, the two Gold Bullion 10 Mark gold coins are not copies of 10 Mark gold coins actually issued by the German government and used in exchange. Furthermore, there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals.

47. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 20 Mark gold coin copies. One type was dated 1887, Berlin mint mark, with the image of Wilhelm II (CXs 46c, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384-85; CX 71a-b).

48. The Berlin Mint did not issue a 20 Mark gold coin in 1887 with the image of Wilhelm II, but it did issue 20 Mark gold coins in 1888 and 1889 with the image of Wilhelm II (Tr. 245; RX 43n). [12]

49. The 1887 Wilhelm II 20 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 and 1889 Wilhelm II 20 Mark gold coins issued by the Berlin Mint with respect to the date (Tr. 306; CX 46c; RX 43n).

50. The Berlin Mint issued a 20 Mark gold coin in 1887 with the image of Wilhelm I and the Gold Bullion 20 Mark 1887 Wilhelm I is a copy of the original (Tr. 248, 251, RX 43n).

51. However, the Gold Bullion 20 Mark gold coin bearing the portrait of Wilhelm II and dated 1887 is not a copy of the 20 Mark gold coins actually issued by the German Government and used in exchange. Aside from speculation by complaint counsel's expert witness (Tr. 312-13), there is no evidence that suggests that consumers would confuse the Gold Bullion coin with the original.

52. The copies of the Austrian 100 Corona that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(2)).

53. The Austrian Government issued 100 Corona gold coins in 1915 (Tr. 34, 224).

54. The copies of the Austrian 1 Ducat and 4 Ducat that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(3)).

55. The Austrian Government issued 1 Ducat and 4 Ducat gold coins in 1915 (Tr. 34, 224).

56. Mr. Harvey Stack, a partner in Stack's, America's largest and oldest coin dealer (Tr. 202), testified for complaint counsel as an expert numismatist. On direct examination, he testified that the German 5, 10 and 20 Mark and the Austrian 1 and 4 Ducat and 100 Corona coins were used in exchange or were intended to be used in exchange (Tr. 224-27, 241-42, 248-50).

57. However, on cross-examination, Mr. Stack conceded that he was not certain about the use of 100 Corona coins: [13]

Q. . . Do you have any information or knowledge, sir, from your years of experience as a numismatist that the 1915 100 corona was ever used in exchange?

A. I really can't say.

Q. You don't know.

A. I don't know because I wouldn't want to make a false statement.

Q. That is all I am asking. You don't know?

A. I don't know. (Tr. 284-85).

58. Cross-examination also revealed Mr. Stack's uncertainty about whether the 1915 1 and 4 Ducats were actually used in exchange (Tr. 287-88, 320-21), and I find that complaint counsel have not proved that the 100 Corona and 1 and 4 Ducat coins were used in exchange.

59. According to Mr. Stack, "the original issue" 5, 10 and 20 Mark gold coins were used in exchange by the German Government (Tr. 248).

60. The copies of the French 10 Franc that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1862 (CXs 47c, 45e(3)).

61. The French Government did issue a 10 Franc gold coin in 1862 (Tr. 204; CX 61).

62. The 10 Franc issued by the French Government in 1862 was used in exchange (Tr. 33, 207).

63. The copies of the Mexican 50 Pesos that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1821-1947 (CXs 47a, 45e(3)).

64. The Mexican Government did issue a 50 Peso coin in 1947 marked 1821-1947. The date 1821 stands for the year Mexico obtained its independence. The date 1947 was the year the coin was issued (Tr. 215-16; RX 21g). [14]

65. The Mexican 50 Peso gold coin issued in 1947 can be exchanged at a bank for other currency or traded in a store for goods

or services. The exchange value is based upon the daily gold rate. Therefore, the Mexican 50 Peso gold coin is used in exchange (Tr. 218, 298-300, 532-35).

66. In conclusion, I find that B.H. Mayer's Kunstprageanstalt manufactured the following coins after November 29, 1973, and that these coins are copies of government originals or restrikes which were used in exchange:

- German 5 Mark
- German 20 Mark 1887 Wilhelm I
- French 10 Franc
- Mexican 50 Peso

67. The other coins manufactured by B.H. Mayer's Kunstprageanstalt do not come within the provisions of the Hobby Protection Act either because there was no original coin issued by a government (the Gold Bullion 10 Mark Wilhelm II 1887, 10 Mark Wilhelm II 1888 and 20 Mark Wilhelm II 1887) or because there is no evidence that the original coins were used in exchange (Austrian 1 and 4 Ducat and 100 Corona).

D. THE POSSIBILITY OF CONSUMER DECEPTION

68. The gold coin copies imported and distributed by Gold Bullion were sold and marketed for their gold value and not for their numismatic value (Tr. 87, 91, 137, 141, 440, 492, 495, 551). The selling price of these coins was predicated upon the daily closing price of gold on the London exchange as of the order date plus a small percentage markup (Tr. 440, 492). Stack's, a reputable coin dealer, sells government restrikes on the same basis (Tr. 231-32).

69. The coins sold by Gold Bullion had "fineness" markings on them. A fineness marking indicates gold content. Fineness markings do not ordinarily appear on original coins (Tr. 21, 253-56).

70. Since fineness markings are small, there is a possibility that such markings could go unnoticed by consumers (Tr. 256-57). [15]

71. Gold Bullion represented only that the coins it imported and sold were restrikes. There were no direct representations made that the coins were original coins. Gold Bullion's advertising mentioned B.H. Mayer's Kunstprageanstalt as the source of the coins, although it did not expressly state who manufactured the coins (Tr. 442-44; CX 45e(4)).

72. A restrike, as the term is used by the numismatic community, is a coin struck by a duly authorized government, generally within its own mint, using original dies or copies of dies which had once been used to strike coins of a design originally used in circulation or previously approved for issuance. The coins that Gold Bullion

imported and sold were not "restrikes" as the term is used by the numismatic community (Tr. 221, 239-40, 258-59; CX 66e).

73. While official government gold restrikes of coins are sold only on the basis of their gold value (Tr. 228, 237-38), such restrikes are still considered numismatic items. A numismatic item has no special connotation in the numismatic community; it is a monetary unit and, as such, it is part of numismatic history (Tr. 228-29, 311). Even though it is "official," a government restrike may have no more value than a private one.⁴

74. There is a possibility that coin collectors might mistakenly believe that Gold Bullion's coins were official restrikes or, even, original coins (Tr. 211, 222, 234-35). However, a coin collector could also be misled into believing that a government restrike was an original coin (Tr. 261-62).

75. Restrikes of gold coins—whether by a private mint or by a government mint—are not sold for their numismatic value but for their gold content. Reputable dealers make no claim that government restrikes have [16] some value beyond their gold content,⁵ and Gold Bullion has made no such claim.

76. It is, therefore, unlikely that the average purchaser of restrikes is collecting them for any purpose other than their gold content. If that is so—and complaint counsel have presented no reliable contrary evidence—then the average consumer does not believe that the Gold Bullion restrikes have a value in excess of their gold content.

77. Of course, as I note above, it is possible that some coin collectors might believe that the Gold Bullion coins are original numismatic items with a value exceeding their gold content. However, this is simply a guess, for complaint counsel have not presented any consumer testimony which would resolve this question.⁶ Therefore, I find that complaint counsel have not established that the appearance of Gold Bullion's coins would probably deceive coin collectors into believing that they have purchased original numismatic items. [17]

⁴ For example, an original Austrian 100 Corona coin is worth between \$750 and \$1000. The government restrikes sell only at the gold exchange rate, as does the Gold Bullion restrike (Tr. 228-29).

⁵ Q. Mr. Stack, wait a minute. Why do you sell these restrikes? Do you tell the people who buy them that they are buying a restrike because it is a valuable coin to be collected because it may go up in value in the future? Or are you telling them it is a convenient way to buy gold, as far as you are concerned?

A. The Witness: As far as I am concerned, it is a convenient way of buying gold and trading gold coins. (Tr. 272).

⁶ Mr. Stack stated that the similarity in design between an original coin and a Gold Bullion restrike would lead a consumer into believing that he is buying a genuine coin (Tr. 222). While his testimony is entitled to some weight, it is not sufficient, I believe, in this case of first impression to warrant a finding that Gold Bullion's coins have deceived or might deceive the average coin collector, who, if there were any doubt about the genuineness of a coin, could seek the advice of a coin dealer (Tr. 222-23).

III. CONCLUSIONS OF LAW

A. THE HOBBY PROTECTION ACT

Section 4(a) of the Hobby Protection Act (Pub. Law 93-167, 87 Stat. 686, 15 U.S.C. 2101, *et seq.*) provides that the Act shall be enforced by the Federal Trade Commission under the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C. 41, *et seq.*). Section 4(b) of the Hobby Protection Act gives the Commission the power to prevent any person from violating the provisions of the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of the Hobby Protection Act.

Section 7(3) of the Hobby Protection Act defines "original numismatic item" as "anything which has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. Such term includes coins, tokens, paper money, and commemorative medals."

Section 7(4) defines "imitation numismatic item" as "an item which purports to be, but in fact is not, an original numismatic item or which is a reproduction, copy, or counterfeit of an original numismatic item."

Section 8 provides that the Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of the Act. The Act took effect on November 29, 1973.

The importation into the United States, for introduction into or distribution in commerce of any imitation numismatic item which is not marked "copy" violates Section 2(b) of the Hobby Protection Act and the Federal Trade Commission Act. There is no requirement that knowledge or intent to deceive be shown in order to prove that the Hobby Protection Act has been violated.

B. CERTAIN GOLD BULLION COINS ARE COPIES OF ORIGINAL NUMISMATIC ITEMS

Whether they are original issues or government restrikes, the German 5 Mark and 20 Mark 1887 Wilhelm I, [18] the French 10 Franc and the Mexican 50 Peso are "original numismatic items" under the Hobby Protection Act. Respondents argue, however, that because the corresponding Gold Bullion coins are stamped with a "finess" mark, this distinguishes them from the original coins.

The average coin collector might well be aware of the distinction

between original coins or government restrikes and coins bearing a "finess" mark and the persons who collect gold coins strictly for their gold content might not care whether they are issued by a government or a private mint.

However, Congress considered these possibilities and concluded (1) that collectors of gold coins are concerned about the origin of those coins and (2) that fineness markings do not adequately distinguish original numismatic items from copies. Concerned about potential deception in the marketing of coin reproductions, Congress explored the use of other terms besides the word "copy." The word "copy" was apparently agreed upon because it is short, compact, and easily understood by everyone. See, *Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China: Hearings on H.R. 4678, H.R. 1068, H.R. 3448, H.R. 3747, and H.R. 4551 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 34, 44-45 (1973)*. No substitutions for the word "copy" can be made without violating the Hobby Protection Act, for Congress has made it clear that this is the best way to guard against the possibility, however slight, of deception.⁷

While the record indicates that respondents' literature and its disclosures to customers should inform them that the coins they are buying are neither original coins nor restrikes issued by a government and while I find it impossible to infer, from this record, that any of Gold [19] Bullion's customers were deceived into believing that they were purchasing original numismatic items,⁸ there is still the possibility that these coins could be represented and resold as originals by unscrupulous persons.

In any event, Congress has concluded that copies of original numismatic items which are not marked as such are inherently deceptive, and my conclusion that this record fails clearly to show deception is unimportant, for that is not a necessary element of proof under the Hobby Protection Act.

C. MEANING OF THE TERM "USED IN EXCHANGE"

Respondents argue that certain coins, such as the 1947 Mexican 50

⁷ Complaint counsel also argue that the 10 Mark Wilhelm I 1887, 10 Mark Wilhelm II 1888 and the 20 Mark Wilhelm II 1887 coins are copies of original numismatic items. I disagree. The difference in date between the original coins and the Gold Bullion coins so distinguishes them that I do not believe the latter are copies of the former.

⁸ Of course, proof of actual deception is not necessary in Section 5 cases. Only capacity to deceive need be shown and this may be inferred despite the lack of consumer testimony. However, this is a case of first impression and there is no backlog of experience upon which I can rely to infer deception, nor were there any statements made by respondents which contain such deceptive potential that consumer testimony would be superfluous. See *Leonard F. Porter, Inc., et al.*, 88 F.T.C. 546, 625 (1976).

Peso, were not "used in exchange" within the meaning of the Act because their exchange rate was tied to the daily price of gold rather than to the face value of the coin. Complaint counsel counter this argument by arguing that whether a coin is traded in a grocery store for a loaf of bread or taken to a bank to be exchanged for currency, it is still "*used in exchange*" if one can demand compensation for it in the form of goods or services. The use of certain of the coins, such as the Mexican 50 Peso, on a barter basis confirms that the coins were used in the normal flow of commerce. If a coin that is actively traded in the marketplace and is used as a means of payment is not considered to be "used in exchange," then that term would take on a highly technical and artificial meaning other than that which was intended. For instance, during hearings on the Hobby Protection legislation, there was testimony that silver ingots were once "circulated as [20] money or exchange" during the silver-rush days of the Old American West. Congressman Bob Eckhardt of Texas, presiding at the hearings, agreed that the ingots were "used in exchange" and I believe that this broad interpretation of the phrase should apply when deciding whether coins were "original numismatic items."

D. THE ARGUMENT THAT GOVERNMENT RESTRIKES ARE NOT
"ORIGINAL NUMISMATIC ITEMS"

Respondents assert that government restrikes are issued, not for purposes of being used in exchange, but to sell gold at the best possible price. Therefore, they claim, Gold Bullion copies of such restrikes do not violate the Hobby Protection Act since the restrikes were not issued as part of the country's coinage and are not "original numismatic items."

The evidence in this record reveals that certain coins—whether original issues or restrikes—were, regardless of the intent of the government when they were issued, used in exchange. This satisfies the requirements of the Hobby Protection Act.

E. LIABILITY OF THE INDIVIDUAL AND CORPORATE RESPONDENTS

It is well settled that to promote the full effectiveness of its orders and to prevent those orders from being evaded, the Commission has the authority to name the officers, directors, and stockholders of a corporation as respondents in their individual capacities when they have played a significant role in the acts or practices giving rise to the complaint, *FTC v. Standard Education Society*, 302 U.S. 112, 119-20 (1937); *Rayex Corp. v. FTC*, 317 F.2d 290, 295 (2d Cir. 1963).

Despite respondents' argument to the contrary, it is clear that the individuals named in the complaint controlled the acts and practices of the corporate respondent or had the ability to exercise control by virtue of their ownership of the corporate respondent. It is also undisputed that an order against the individuals who controlled the activities of a defunct corporation may be appropriate, *Pati-Port, Inc. v. FTC*, 313 F.2d 103, 105 (4th Cir. 1963). [21]

Nevertheless, the basic purpose of an order directed to individual respondents is to "prevent recurrence of the particular violations for which named individuals have been responsible." *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1565 (1975). If the individuals were not responsible for the violations, then there is little likelihood of recurrence of those violations.

The individual respondents were, in one sense, "responsible" for the violations revealed in this record, for they did import and resell copies of original numismatic items without marking them as such; however, in a more important sense, they were not "responsible," for this record does not reveal any instance of actual deception of customers by these respondents, any intent to deceive their customers or any knowledge, prior to the seizure of their coins by U.S. Customs, that they were violating the Hobby Protection Act.

The absence of proof of conscious, purposeful violations of the law coupled with testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion distinguish this case from those where the individual respondents were either still engaging or were likely to engage in the same unlawful behavior with the same or another company. See, e.g., *FTC v. Standard Education Society*, *supra*; *Dlutz v. FTC*, 406 F.2d 227 (3d Cir.), *cert. denied*, 395 U.S. 936 (1969), *reh. denied*, 396 U.S. 869 (1969); *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *United States v. Bestline Products Corp.*, 412 F. Supp. 754 (N.D. Calif. 1976).

If the record revealed that respondents had acted in bad faith or were likely to again violate the same law, then they would be held accountable.

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. [22] *Eugene Dietzgen Co. v. FTC*, 142 F.2d 321 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1945). I conclude that it is unnecessary to enter an order against the respondents in their individual capacities.

Respondents claim that issuance of a cease and desist order would be improper because they discontinued their business activities approximately two years prior to issuance of the Commission's complaint. However, discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a cease and desist order, *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *Libby-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (D.C. Cir. 1974); *Diener's Inc. v. FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Eugene Dietzgen Co. v. FTC*, *supra* at 330; *Galter v. FTC*, 186 F.2d 810 (7th Cir.), *cert. denied*, 342 U.S. 818 (1951); *Fairyfoot Products v. FTC*, 80 F.2d 684, 686 (7th Cir. 1935), especially where, as here, discontinuance was not voluntary but was prompted by the U.S. Customs' seizure of their coins. *Coro, Inc. v. FTC*, *supra* at 153.

Respondents argue that if an order is entered, it should not include a provision that a notice be sent to each purchaser of a gold bullion coin purchased from respondent because there is no record evidence of actual consumer deception. That is correct, yet Congress has determined that copies, not so marked, of original numismatic items are deceptive;⁹ therefore, an order provision which alerts consumers that coins which they purchased from Gold Bullion are not original numismatic items is proper. Of course the notice provision shall apply only to those coins which I have found should have been marked as copies.

F. SUMMARY

1. The Commission has jurisdiction over the acts and practices of respondents. [23]

2. Respondents imported into the United States, for sale and distribution in commerce, copies of gold coins which were manufactured after November 29, 1973, the effective date of the Hobby Protection Act.

3. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents into the United States for sale and distribution in commerce are copies of original coins or restrikes which were used in exchange. Section 7(2) of the Hobby Protection Act, 15 U.S.C. 2106(2).

4. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by

⁹ Section 2(b) of the Act states: "The manufacture. . . or the importation. . . of any imitation numismatic item which is not plainly and permanently marked 'copy' is unlawful and is an unfair or deceptive act or practice. . . ."

respondents are imitation numismatic items. Section 7(4) of the Hobby Protection Act, 15 U.S.C. 2106(4).

5. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents were not marked copy. Section 2(b) of the Hobby Protection Act, 15 U.S.C. 2101(b).

6. None of the other coins imported by respondents come within the provisions of the Hobby Protection Act.

7. The public interest requires that an order be entered against Gold Bullion International, Ltd., but not against the individually named respondents. The following order is therefore entered.

ORDER

It is ordered, that respondent Gold Bullion International, Ltd., a corporation, its successors and assigns, its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as [24] defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic items, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93-167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "copy" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "copy" shall appear in conformance with 16 C.F.R. 304.6, *i.e.*, in capital letters, in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, and to each purchaser of its German 5 Mark and 20 Mark Wilhelm I 1887, French 10 Franc and [25] Mexican 50 Peso coins. Each purchaser of the above-listed coins shall also be advised in writing on Gold Bullion International, Ltd., stationery that the coins they have purchased are not original numismatic items and that a private right of action for damages under Section 3 of the Hobby Protection Act exists.

It is further ordered, That respondent notify the Commission at

least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

This is the first case to be tried under the Hobby Protection Act, 15 U.S.C. 2101, *et seq.* (1974), which requires, *inter alia*, that imported or domestic "imitation numismatic items" manufactured after November 29, 1973, be marked with the word "Copy."

The complaint in this matter was issued on January 17, 1977, and charged respondents with violations of the Hobby Protection Act by virtue of their importation into the United States of gold coins alleged to constitute "imitation numismatic items," which did not bear the word "Copy." A brief trial before Administrative Law Judge (hereinafter "ALJ") Lewis Parker led to his initial decision, finding violations of law as to certain of the imported coins, but not as to others. Judge Parker entered an order to cease and desist against the corporate respondent Gold Bullion International, Ltd., requiring that it refrain from future violations of the Hobby Protection Act and notify past [2] purchasers of certain unmarked coins that such coins had been sold in violation of the Act and that the purchasers would have a private right of action as provided by the Act (15 U.S.C. 2102). Judge Parker omitted an order against individual respondents Costello, Thompson, and Bogart.¹ This matter is before the Commission upon cross-appeals of the parties, with respondents urging that no violations have occurred and that no order should be entered, while complaint counsel assert that more violations should have been found and the ALJ's order should extend to the individuals.

A. *The Respondents and Their Coins*

Respondent Gold Bullion International, Ltd. is a New York State Corporation, created for the purpose of importing, selling, and

¹ Two other respondents in this case, an individual B.H. Mayer, and the mint that manufactured the coins in question, B.H. Mayer's Kunstprageanstalt, were dropped from the case after they signed consent orders.

distributing gold bullion coins and gold bullion products directly to consumers and to coin dealers for resale. (I.D. 1-2)² Gold Bullion enjoyed a brief, but not unnoticed operating history, importing coins and bullion from October 1974, until February 1975, when it discovered that U.S. Customs had become the principal collector of its coins. The corporation remains in existence only [3] for the purpose of prosecuting certain civil litigation. Individual respondents Costello, Thompson, and Bogart were respectively the president, vice-president and treasurer, and secretary and legal counsel to Gold Bullion. Each contributed \$5000 to the corporation's initial capitalization, and, along with respondent Bernard Mayer, were the corporation's sole stockholders. These four individuals were the only officers of the corporation, and were responsible for its ownership and operation. (I.D. 11) Messrs. Costello and Thompson were responsible for the daily operation and management of the company. (I.D. 15)

The coins imported by Gold Bullion were manufactured for it by B.H. Mayer's Kunstprageanstalt, a private German mint. They were not intended for the use of any government, and did not bear the word "Copy" on them. The coins manufactured by B.H. Mayer's for Gold Bullion, imported into the United States, and at issue in this appeal are:

German 5 Mark

German 10 Mark (dated 1887 with image of Kaiser Wilhelm I)

German 10 Mark (dated 1888 with image of Kaiser Wilhelm II)

German 20 Mark (dated 1887 with image of Kaiser Wilhelm I)

German 20 Mark (dated 1888 with image of Kaiser Wilhelm II)

French 10 Franc

Mexican 50 Peso³

B. *Date of Manufacture*

A threshold issue is whether the coins in question were manufac-

² The following abbreviations will be used throughout:

I.D. - Initial Decision (finding no.)

I.D. p. - Initial Decision (page no.)

Tr. - Transcript of testimony (page no.)

CX - Complaint counsel's exhibit no.

RX - Respondents' exhibit no.

³ The complaint also alleges violations with respect to Austrian 100 Corona and 1 and 4 Ducat coins, but these were dismissed by the ALJ (I.D. 57-58; p.23) and complaint counsel have not appealed from this ruling.

tured after November 29, 1973, because the requirements of the Hobby Protection Act apply only to "imitation numismatic items manufactured after the date of enactment of this Act." (15 U.S.C. 2106) [4]

There is no dispute that all the Mexican 50 peso coins were manufactured after November 29, 1973, because the die for this coin was made specifically by B.H. Mayer's for Gold Bullion, after the latter's formation in Fall, 1974. (I.D. 32) Respondents, however, object to the ALJ's findings that at least some samples of each of the other coins in issue were made after November 29, 1973.

B.H. Mayer's Kunstprageanstalt maintained no records of the date of manufacture of its coins. Instead, the ALJ relied upon the testimony of Mr. Mayer, who indicated that he had only a small supply of marks and francs in stock at the time he began shipping to Gold Bullion (in October, 1974) and that this stock did not last more than one or two weeks. (Tr. 135-36) Assuming, therefore, *arguendo* that the small stock of coins existing in October, 1974, 11 months after the effective date of the Act, was itself manufactured before November 29, 1973, it would nevertheless be true that at least some of the coins shipped to Gold Bullion were manufactured subsequently, once the inventory on hand in 1974 ran out.

Other facts of record lend support to the ALJ's conclusion on this point. The die for the French 10 franc coin was apparently manufactured close to the effective date of the Hobby Protection Act so that Mr. Mayer could not be sure whether it was before or after. (Tr. 122) Consequently, it seems most unlikely that a significant supply of francs would have been minted before the effective date of the Act and still have been in existence when the time came, nearly one year after the Act's effective date, to ship to Gold Bullion.

With respect to the reichmarks, (the dies for which were manufactured long before the effective date of the Act, Tr. 122) B.H. Mayer's sold supplies of the coins continuously to German customers, and Mr. Mayer testified that his practice was to mint large supplies of these coins in response to specific orders, rather than in anticipation of them. (Tr. 141) Accordingly, we find it quite likely that part or all of even the small inventory existing in 1974 to which Mr. Mayer made reference (Tr. 135-36) was manufactured after the effective date of the Act, as well as other reichmarks subsequently manufactured for Gold Bullion when the inventory was depleted. [5]

Respondents' counter to the evidence cited above consists of the testimony of respondents Costello and Thompson, who indicated that when they visited the mint, in February 1975, and August 1974, respectively, they observed large inventories of reichmarks, alleged-

ly contrary to the claim of Mr. Mayer. Mr. Costello's testimony, however, seems of doubtful relevance because he visited somewhat later than the time period to which Mr. Mayer's testimony referred.⁴ With respect to Mr. Thompson's testimony, the ALJ presumably concluded that greater weight and credibility was to be attached to the recollection of Mr. Mayer, the mint owner and operator, who was likely to have most familiarity with the state of his inventory. We see no reason to disturb the judge's evaluation on this issue of witness credibility.

For the foregoing reasons, we believe that a substantial and preponderant quantity of record evidence supports the view that many, if not all of the coins imported by Gold Bullion were manufactured after the effective date of the Hobby Protection Act.⁵

C. "Original Numismatic Items"

Respondents further contend that the original coins of which theirs are copies are not "original numismatic items" within the meaning of the Act because they have not been shown to "ha[ve] been a part of a coinage or issue which has been used in exchange." 15 U.S.C. 2106. Respondents' objections with respect to the European coins in question apparently go simply to the weight of the evidence as to these coins' usage. Their objection with respect to the Mexican 50 Peso coin involves the definition of the term "used in exchange." [6]

We believe that the law judge's interpretation of the statutory language is correct. Respondents argue, in essence, that the term "used in exchange" should be confined to "legal tender," thereby excluding coins that may have been issued principally for the purpose of disposing of governmental supplies of gold, and the value of which has fluctuated in relation to the price of gold.

Had Congress meant to confine the Act's application to once-valid "legal tender," however, we think it could and would have used that term. Instead it used statutory language that plainly denotes more than simply "legal tender." Coins or other issue may be traded for goods and services in a society notwithstanding that they were not created for that express purpose and are not recognized by a government as legal tender.⁶ Coins are "used in exchange" if they

⁴ Existence of large stacks of coins in February 1975 would most likely have been attributable to production undertaken for Gold Bullion itself.

⁵ We do note, however, that the record lacks clear proof that more than one 20 Mark Wilhelm I (1887) was imported. Given the profusion of evidence as to other coins, we shall drop this one coin from consideration.

⁶ "Legal tender" is defined by one source as "that kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount." *Black's Law Dictionary* 1637 (Rev. 4th ed. 1968)

(Continued)

have been, as the law judge observed, "actively traded in the marketplace and . . . used as a means of payment." (I.D. p. 19)

Moreover, this most plausible facial construction of the statute finds support in the legislative history. As the ALJ observed, there was testimony before Congress that silver ingots were once "circulated as money or exchange" during the silver-rush days of the Old American West. Congressman Eckhardt, presiding at the hearings, agreed that the ingots had been "used in exchange" and it was explained, without subsequent contradiction or dissent in the legislative history, that the term "covers a waterfront." Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China. Hearings on H.R. 4678, H.R. 1068, H.R. 3668, H.R. 3747, H.R. 4551. Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess. (1973), p. 47. [7]

Respondents claim to find support in the declaration of both House and Senate that the Act was designed to fill the void in the counterfeit laws:

The Federal counterfeit laws (18 U.S.C. Chapter 25) are sufficient to prevent the manufacture or importation of *imitations of existing currency*. However, there are no comparable provisions of Federal law which provide protection from imitation numismatic items or political items. The legislation reported by the Committee on Commerce is designed to fill this void. S. Rep. No. 98-354, p. 3; H.R. Rep. No. 93-159, p. 4 (emphasis added.)

This language, quoted at p. 12 of respondents' Appeal Brief tells us only that Congress perceived the gap in the counterfeit laws to be their failure to cover imitations of no longer "existing *currency*." If anything, such language favors an expansive interpretation of the Hobby Protection Act, because "currency," rather than meaning simply "legal tender," generally refers to

That which is in circulation or passes from hand to hand, as a medium of exchange, including coin, government notes, and bank notes; as, the silver *currency*; the note *currency*. The term *currency* includes as well the part circulating at its market value (for example, gold coins in the United States) as the part that owes more or less of its purchasing power to government fiat or to its representative character (as paper money, subsidiary coins, or bank notes). . . . *Webster's New International Dictionary*, 2d ed., p. 648.⁷

⁷ "The word 'money', in its generic sense, is one of comprehensive import, and includes any lawful circulating medium of exchange. . . [a]ll legal tender is money, but not all money is legal tender." *Vick v. Howard*, 136 Va. 101, 108-09, 116 S.E. 465, 467-68 (1923).

⁸ The same dictionary notes that "legal tender" is merely "That *currency*, or money, which the law authorizes a debtor to tender and requires a creditor to receive in payment of money obligations." *Id.* 1412. *Cf. Tyson v. United States*, 285 F.2d 19, 21 (10th Cir. 1960), distinguishing between coins that are "legal tender" and coins that are "accepted as currency in fact by circulation."

For the foregoing reasons, we conclude that the Hobby Protection Act applies to imitations of coins that at one time have been actively traded in the marketplace, and used as a means of payment. [8]

The most pertinent application of this holding is to so-called "governmental restrikes"⁸ that have been used in exchange. Such restrikes are, of course, at once both copies of earlier issues as well as original issues in their own right, and they may often assume significant numismatic value. (Tr. 231) When "used in exchange" we believe that government restrikes become "original numismatic items" within the contemplation of the Act and copies of such restrikes must be appropriately marked.⁹

Applying the foregoing to the 50 Peso Mexican coin, it is clear from the testimony of experts called by both sides that this coin, although traded primarily on the basis of its gold value, and not recognized as "legal tender," has nevertheless been "used in exchange" within Mexico. (Tr. 218; 534-35)

With respect to the European coins, respondents contest the weight of the evidence indicating that they were circulated as currency within their respective countries. Here, again, we believe that the evidence preponderates in favor of complaint counsel's position. The record shows that specimens of the 1862 Napoleon III 10 franc coin copied by Gold Bullion are in the public domain, and complaint counsel's expert testified that the coin was struck for circulation. (Tr. 207). We believe such evidence was sufficient to create a *prima facie* showing that the coin had been used in exchange, and respondents submitted no evidence to contradict that showing. [9]

With respect to the German 5 Reichmark coins, the record again reflects that the originals that Gold Bullion copied were issued by the German government, (Tr. 234) and samples remain in the public domain nearly a century after issuance, as evidenced by the fact that complaint counsel's expert had examined many of them. (Tr. 234) Moreover, from our review of the record it appears that the testimony by Messrs. Mayer and Stack that the coin was "used in exchange" (Tr. 26, 85, 248) referred to the 1887 Wilhelm I, 5 Mark coin of which Gold Bullion's version was an imitation.

⁸ One expert witness stated that in his view the term "restrrike" should apply only to coins minted by governments. (Tr. 221) Gold Bullion, however, used the term "restrrike" to apply to reproduction by a private mint, for non-governmental purposes, of coins originally minted by or for governmental units. Although the issue was not involved in the case, it is clear that there is sufficient opportunity for deception in use of the term "restrrike" to apply to private reproductions, so that any such use of the term should, at a minimum, be qualified by language in immediate proximity to it.

⁹ The Commission has exempted by rule restrikes (by the United States or any foreign government) of original numismatic items, 16 C.F.R. 304.1(d), but this regulation did not become effective until after Gold Bullion had begun importing, and in any event, has no applicability to Gold Bullion's non-governmental restrikes.

Finally, as regards the 10 and 20 mark coins that are the subject of complaint counsel's appeal (part "D" *infra*) we think the judge also properly concluded that these were used in exchange (I.D. 42, 44, 46, 51). All the relevant coins were issued by the Berlin mint and complaint counsel's expert testified that they were used in exchange. (Tr. 248)¹⁰

D. "Imitation Numismatic Item"

The ALJ found that no violation had occurred with respect to Gold Bullion's 20 Mark Wilhelm II (1887), 10 Mark Wilhelm I (1887) and 10 Mark Wilhelm II (1888) coins, because coins of those precise descriptions were never circulated by the German government. Therefore, Gold Bullion's coins were presumably not "copies" of an "original numismatic item." (I.D. 46, 51; p. 18n) In reaching this conclusion we believe the ALJ misapplied the language of the Hobby Protection Act, and we reverse his conclusions on this point, and hold that violations have occurred as the result of importation of the coins in question. [10]

The German government never issued a 20 Mark Wilhelm II coin in 1887, doubtless out of respect for Kaiser Wilhelm I, who occupied the throne throughout that year. (Tr. 245) Germany did, however, issue a 20 Mark Wilhelm II coin dated 1888. Similarly, it issued a 10 Mark Wilhelm I in 1888, (instead of 1887 as marked on Gold Bullion's coins) and a 10 Mark Wilhelm II in 1889 (instead of 1888 as marked on Gold Bullion's coins.)

The Hobby Protection Act plainly does not require marking only of coins that are exact replicas, in every detail, of original government coinage.¹¹ Rather, an "imitation numismatic item" is defined as a "reproduction, copy or counterfeit of an original numismatic item." [15 U.S.C. 2106(4)] While we are left for an elucidation of the meaning of "reproduction" and "copy" to the dictionary, or cases drawn from such relatively remote areas as copy right law¹² we need not write upon a legally barren slate when construing the meaning of "counterfeit." [11]

¹⁰ Although respondents contend that this testimony did not relate to the specific coins at issue here, we think it plain from the record that complaint counsel's question and Mr. Stack's answer at Tr. 248 referred to the particular mark coins as to which complaint counsel had just been questioning Mr. Stack at Tr. 243-245, which are the ones at issue here.

¹¹ Indeed, it is not clear that there is such a thing as an "identical copy" because no matter how competent a private mint may be, its version of an original government issue will likely deviate from the original issue in certain minor respects, for example, coloration, sharpness and detail of imagery or edge devices (Tr. 206-7). Such differences of course, would only be apparent, if at all, to the most skilled experts, and even they may be fooled. The Hobby Act was designed to guard against copies that the ordinary collector could not recognize as such. The question here, then, is whether a deviation of one year in the date is a sufficiently large deviation as to render the coin neither a "copy, imitation, or counterfeit" of the original.

¹² Complaint counsel cite cases defining "copy" as "that which ordinary observation would cause to be

(Continued)

As both parties acknowledge, and as the legislative history makes clear, the Hobby Act was in essence intended to fill in the gaps left by the criminal counterfeit laws, 18 U.S.C. 471, *et. seq.*, which forbid counterfeits of existing media of exchange but do not extend to counterfeits of coins that are no longer, but in the past "ha[ve] been used in exchange." 15 U.S.C. 2106(3). It seems quite appropriate, therefore, that in seeking to determine what constitutes a "counterfeit" of an "original numismatic item" we look first to see what Congress and the courts have concluded constitutes a "counterfeit" of currently valid items of exchange.

Courts construing the criminal counterfeit statutes have recognized that the alleged counterfeit need only be "sufficiently complete to be an imitation of and to resemble the genuine article." *United States v. Johnson*, 434 F.2d 827, 830 (9th Cir. 1970) emphasis added. The likeness or resemblance must be one such "as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *United States v. Smith*, 318 F.2d 94 (4th Cir. 1963). It is not necessary that the similarity be so great as to deceive experts or cautious persons. *United States v. Weber*, 210 F. 973, 976 (W.D. Wash. 1913); *United States v. Sprague*, 48 F. 828 (D.C. Wis. 1882). Applying these standards, courts have recognized that a "counterfeit" coin may embody fairly significant deviations from the genuine issue it is designed to copy. For example, a photocopy of a \$10 dollar bill was found to be a counterfeit, *U.S. v. Johnson, supra* 424 F.2d at 829, as was an instrument that resembled ten-dollar federal reserve notes although lacking two serial numbers and the treasury seal on its face. *United States v. Chodor*, 479 F.2d 661, 664 (1st Cir.), *cert. denied* 414 U.S. 912 (1973).

Applying these principles here,¹³ we think it plain that a deviation of one digit in the date on a coin is not likely to distinguish it sufficiently from the original [12] to alert an "unsuspecting person of ordinary observation and care" whom the criminal counterfeit law protects, let alone the "ignorant, unthinking and credulous" who are not excluded from the protection of civil consumer law. *Aronberg v. FTC*, 132 F.2d 165 (7th Cir. 1942); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1962).

recognized as having been taken from or the reproduction of another," *King Features Syndicate v. Fleischer*, 299 F. 533, 535 (2d Cir. 1924) and "that which comes so near to the original as to give every person seeing it the idea created by the original." *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1907); *McConnor v. Kaufman*, 49 F. Supp. 738, 745 (S.D.N.Y. 1943). We reach an essentially similar result here.

¹³ The ALJ apparently recognized the applicability of the standard we have articulated because in finding no violations as to the marks in question he concluded that "there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals." (I.D. 46) In fact, as we note in the text, the record contains abundant evidence to support a finding of deceptive potential.

While those who ordinarily deal in coins may well possess a degree of knowledge as to coins superior to that of an average member of the public, it is nevertheless likely that a purchaser lacking access to a manual (and one which he or she is prepared to trust) listing the precise dates of issue of the coins in question, might be fooled as to the authenticity of a coin identical in all respects but the date of the original issue. This is, moreover, not mere inference on our part.¹⁴ Complaint counsel's expert witness, whose business it is to deal with coin collectors, and who, therefore, knows better than most people what is likely to mislead such collectors, testified that in his view slight variations in the date of a reproduction might well be insufficient to alert some collectors as to the coin's lack of authenticity. Moreover, this expert backed up his opinion by mentioning cases in which customers had taken for real, counterfeits of old American coins that differed from the real ones only in their date. (Tr. 312-13). [13]

Further confirmation that the 10 and 20 mark coins here in question were sufficiently like the original German issue as to be reasonably mistaken for them comes from respondents' own promotional material, in which all of Gold Bullion's coins were described as "restrikes of Gold Coins from Europe and other countries."¹⁵ CX 45(e)(4), emphasis added. Unless respondents were deliberately misrepresenting the truth, which they strenuously deny ever having done, then we can only assume that the resemblance of their coins to the original government issues was sufficiently great as to convince these highly knowledgeable parties that they were selling a "reproduction, copy or counterfeit" (i.e., a restrike) of "original numismatic items."

Ignoring their prior representations to consumers, respondents argue that the date of a coin is one "material factor" in its definition, citing for support excerpts from the *Standard Catalog of World Coins* (RX 43). But all that this catalog points out is that the date borne by a coin is one important factor by which one may identify the coin and verify its authenticity. (RX 43f). This does not mean that an alteration of one digit in the date on an imitation of an

¹⁴ Such an inference, however, would not be unwarranted in the exercise of the Commission's expertise. In the typical counterfeit case the court or jury must determine for itself whether the alleged counterfeit bears sufficient resemblance to the original as to be capable of being mistaken for it. There is no necessity to demonstrate that the counterfeit has actually been successfully passed off, only that the effort has been made. By the same token, it is the Commission's proper function to infer that a coin bears sufficient resemblance to an original as to constitute a counterfeit of it under the Hobby Act, notwithstanding the absence of evidence of deception.

¹⁵ Respondent Thompson testified that "[t]he term restrike to me means a reproduction of an existing coin," (Tr. 439), which definition he quickly expanded to include "a coin that has existed. . . [a]t one time." (Tr. 439) Having represented *all* of their coins as being reproductions of originals in their promotional materials, respondents are in a peculiarly poor position to assert before the Commission that any of their coins is not a "reproduction, copy or counterfeit" of such originals.

original renders the copy no longer a "counterfeit" capable of fooling one who does not consult the *Standard Catalog of World Coins*, just as the use of fake serial numbers or the omission of serial numbers entirely would not suffice to remove an imitation \$10 note from the purview of the counterfeit laws. *United States v. Chodor, supra*, 479 F.2d at 664. [14]

The position of respondents seems to be that there are certain features of a coin that determine its "identity" or "essence," which are the date, and that a simulation that fails to embody in precise detail that "essence" is neither a "reproduction, copy, or counterfeit," regardless of what a purchaser might believe. This approach, however, lacks foundation in the wording of the statute or in its history and intent, and would create insuperable problems of construction.¹⁶ [15]

For the foregoing reasons, we conclude that a coin is an "imitation numismatic item" within the meaning of the Hobby Protection Act if it is not sufficiently different from an original numismatic item as to alert an unsuspecting purchaser to the difference. Applying that principle here, we find that minor variations in dates between an original and its alleged "copy" are insufficient to deprive the latter of its status as a "reproduction, copy or counterfeit" of an "original numismatic item" and do not eliminate the requirement that the latter be marked with the word "Copy." Accordingly, respondents violated the law by their failure to mark "Copy" upon their 10 Mark Wilhelm I (1887), 10 Mark Wilhelm II (1888), and 20 Mark Wilhelm II (1887).

E. *Liability of Individual Respondents*

The administrative law judge determined that no order should be entered against the individual respondents in this case, although he found that they were responsible for the activities and law violations of Gold Bullion. In the law judge's view, no order is needed because of

The absence of proof of conscious, purposeful violations of the law coupled with

¹⁶ For example, another "basic attribution consideration" of a coin is its nationality, which encompasses the symbols and figures imprinted on the coin. (RX 43) Does this mean, therefore, that a private mint can avoid the Hobby Act's requirements by placing a mustache, or 5 o'clock shadow, on the face of a Kaiser or King who was clean-shaven on the original? Unless the meaning of "reproduction, copy, or counterfeit" is made to turn upon the reasonable possibility that the coin in question could be mistaken for an original, there is no practical way to give meaning to the statutory language, or to protect it from ready evasion.

The approach we take here is not meant to read into the Hobby Protection Act a necessity to show "deception" that Congress clearly abjured. In passing the Act, Congress *presumed* that copies of original numismatic items could deceive collectors, and, therefore, required that all of them be marked. With respect to coins that are plainly copies, it is no defense under the law to argue that no collector has (yet) been deceived. The question of "capacity to deceive" arises only where, as with the 10 and 20 mark coins in this case, the alleged "imitation numismatic items" vary in certain minor respects from originals, so that there is doubt as to whether they are "reproduction, copy, or counterfeit" within the meaning of the Act.

testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion. . . (I.D. p. 21)

We believe that the law judge's conclusion is in error for several reasons. In the first place, respondents' present intention not to become involved again in the sale of imitation numismatic items offers very little guarantee to the public that they will not undertake such a business in the future. Nor does the fact that respondents are gainfully employed in fields unrelated to the marketing of gold coins afford such protection. Respondents were also gainfully employed outside the numismatic area prior to their formation of Gold Bullion, and there are no objective circumstances that would preclude, or minimize the likelihood of their re-entering the coin business in the future. Indeed, the expertise they have gathered in that area from their operation of Gold Bullion would seem to increase the chance that one or more of them might return to this area as a primary or secondary occupation in the future. [16]

Secondly, ignorance, or disregard of the law is no defense to entry of an order against one who has violated the law for those reasons. The evidence indicates that when respondents began the operation of Gold Bullion they were ignorant of the requirements of the Hobby Protection Act. It appears that in Gold Bullion's final days, that ignorance was remedied by respondents' receipt of a letter from Federal Trade Commission staff informing them of the law's requirements. Notwithstanding their receipt of a copy of the law, respondents halted the importation and sale of unmarked imitation numismatic items only as a result of seizure by the Customs Service of their coins, not as a result of reading and applying the law.¹⁷

In any event, if respondents have been capable of ignoring the law, or misconstruing its requirements in the past, there is no reason to assume they may not do so in the future. To conclude that an order should be entered against them, there need not be reason to question respondents' good faith. There is no evidence in the record that they have sought to mislead anyone, and one may presume that their violations resulted until January 10, 1975 or so from ignorance of the law, and thereafter, at most, from good faith disagreement with the views of FTC staff that they were violating it. However, one purpose of a lawsuit is to resolve such good faith disagreements, and to

¹⁷ The record indicates that on approximately January 10, 1975, Gold Bullion received from Federal Trade Commission staff notification that their coins were suspected of violating the Hobby Protection Act, along with a copy of the Act. (Tr. 465-66; RX 12). Nevertheless, respondents imported a shipment of coins as late as January 30, 1975 (Tr. 467-68; CX 18-19), despite the availability of a telex machine (Tr. 464) that could have been used to halt the shipment from Germany, and they sold gold coin replicas in the United States as late as February 6, 1975. (Tr. 468).

ensure future adherence to the law, notwithstanding what may continue to be one side's good faith belief that it has done no wrong. Entry of an order is the customary and surest means of accomplishing this. [17] Accordingly, we believe that protection of the public interest and prevention of recurrence of violations requires that the order entered against Gold Bullion¹⁸ also extend to the individuals who founded, operated, and controlled it, and were responsible for its practices. *Virginia Mortgage Exchange, Inc.*, 87 F.T.C. 182, 202-03; *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1565 (1975), *aff'd* 553 F.2d 97 (4th Cir. 1977).

We have, however, modified the boilerplate reporting requirement proposed by complaint counsel, so as to require only that respondents report to the Commission, for a ten year period, any affiliation by them with a business involving numismatic or political items. As a result, aside from requiring the routine filing of a compliance report in 60 days, the order we enter will impose absolutely no obligations upon respondents of any sort so long as they are not involved in occupations that would be subject to the Hobby Protection Act. [18]

F. Notice to Consumers

The administrative law judge ordered respondents to send letters to purchasers of those coins as to which he found that violations had occurred, notifying them of the violation and of the fact that they would have a private right of action under the law. While this is an entirely proper remedy for Hobby Protection Act violations, we have determined to omit the requirement under the precise circumstances of this case.

The record reflects that Gold Bullion's coins were sold principally for their gold value. Prices fluctuated daily based upon the value of gold. Of course, Gold Bullion's coins sold at a premium over the world spot price of bullion, the premium varying with the particular type of coin. While Gold Bullion asserts that the literature accompanying its coins was sufficient to place all purchasers on notice that its coins were no more than private mint copies, it is possible that the premiums that Gold Bullion's coins commanded were, in some measure, a function of consumers' mistaken beliefs that the coins were government issue.¹⁹ However, even under these

¹⁸ We reject respondent's contention that no order should enter against Gold Bullion itself. If the corporation is finally liquidated the order will be moot, but if it should continue to remain in existence it is entirely appropriate that it be placed under order to prevent recurrence of its illegal conduct.

¹⁹ The premiums may also be due in varying measure to such factors as the services provided by Gold Bullion in obtaining, packaging, and merchandising the gold, as well as the aesthetic value of the coin. There is record evidence to indicate that government-minted coins are better vehicles for the exchange of gold than those created

(Continued)

circumstances, the premium would have constituted only a small fraction of the purchase price and come to only a few dollars.

For the foregoing reasons, we suspect that whatever private rights of action might be available to the *immediate purchasers* of Gold Bullion's coins would not be substantial. Moreover, the notice in question would have considerable capacity to mislead such purchasers, both because of the generally limited value of their private right, and, also, [19] because there may be some question as to the date of manufacture of individual coins and therefore as to whether particular individual recipients of the notices would have any rights at all.²⁰ Weighing the opportunities for deception of consumers against the likely minimal benefits to be derived from a notice in this case, we believe that it should be omitted.

The foregoing is not to say that there have not been or may not in the future be major victims of the law violations in this case. Such victims, however, seem most likely to be those who may repurchase Gold Bullion's coins from original or subsequent purchasers, absent the accompanying disclosures of private origin that Gold Bullion itself may have made. There can be little doubt that the original government versions of the coins that Gold Bullion has copied may now have, or in the future may come to possess, numismatic value far in excess of their gold content. (Cf. Tr. 228-29) The coins that Gold Bullion has placed into the stream of commerce may, therefore, be resold for many times their true value, to the severe detriment of those who purchase them. Although respondents have repeatedly insisted that they cannot be responsible for the sharp practice of others, that is precisely their responsibility under the law. Congress, when it enacted the Hobby Protection Act, was specifically concerned with the problem of unidentified copies of originals that might be sold [20] initially with disclosure of their counterfeit status, but could then be resold without such disclosure.²¹ Accordingly, it placed upon those in the best position to bear it, the obligation to

by private mints, because governments are widely assumed to have a greater stake in preserving the integrity of their issue. (Tr. 309) Such issue is, therefore, likely to trade more freely, with less need for assay, and, as a result, to command a higher premium. In any event, the extent to which the value of a gold coin results from perceptions of its origin may vary among individual consumers.

²⁰ As noted, we have no doubt that most of the coins manufactured by B.H. Mayer's Kunstprageanstalt for Gold Bullion postdated November 29, 1973. However, some may not have. While this state of facts is quite sufficient to establish violation of the Hobby Protection Act, a court trying a private case might not find it sufficient to establish violation in the case of any particular coin. Then again, the court might well conclude that respondents' lack of record-keeping cannot be allowed to immunize them from liability, and rule for plaintiffs. The issue, however, is obviously one that could cloud private litigation. To avoid deception, any notice to consumers would have to be cast in sufficiently equivocal terms as to avoid misrepresenting the likelihood of success.

²¹ "Many museums and similar institutions reproduce numismatic items in their collections which are sold with literature or packaging which clearly indicate that the items are reproductions. Unfortunately, the article and literature or packaging indicating that the coin is a reproduction may subsequently be separated. These coins, too, are subsequently sold or traded as originals." S. Rep. 93-345, p. 2; See also H.R. Rep. 93-159, pp. 3-4.

mark such counterfeits with the word "Copy." Affixation of the word "Copy" to Gold Bullion's coins would guarantee that those coins could never be passed off as originals, and it is obviously the importer or domestic manufacturer, as the law prescribes, who is in the best position to accomplish this simple task. However, the damage in this case has been done; notification of immediate purchasers is unlikely to accomplish any significant benefit; and a "recall" of the offending coins for imprinting does not appear practical. Accordingly, the notification provisions of the proposed order will be omitted.

To help guarantee that others will not violate the Hobby Protection Act in the future, however, we have, in addition to entering the appended order, also prepared a synopsis of our determinations in this case. This will facilitate application of the Commission's holdings in this case to others who may engage in the same practices as respondents have been engaged in, pursuant to the provisions of 15 U.S.C. 45(m)(1)(B), [§205 of the Magnuson-Moss Act]. That synopsis appears on the following page.²²

ATTACHMENT

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) GOLD BULLION INTERNATIONAL, LTD., DKT. 9094

It is unlawful under the Hobby Protection Act (15 U.S.C. 2101, *et seq.*) and an unfair or deceptive act or practice under Section Five of the Federal Trade Commission Act (15 U.S.C. 45) to manufacture in the United States or import into the United States, for introduction into or distribution in commerce, any "imitation numismatic item"¹ which is not plainly and permanently marked "COPY."²

²² The Commission's decision to prepare a synopsis of its determinations in this case is undertaken in the exercise of its discretion, in order to simplify application of those determinations to other cases. Such a procedure is not required by 15 U.S.C. 45(m)(1)(B).

¹ An "imitation numismatic item" is an item which purports to be, but in fact is not, an "original numismatic item" (a) or which is a reproduction, copy or counterfeit of an "original numismatic item." Imitation numismatic items include not only those items that are exact replicas in every detail of original numismatic items, but in addition, they include items that might reasonably be mistaken for "original numismatic items" by an unsuspecting consumer exercising ordinary observation and care. For example, a coin that resembles an "original numismatic item" in all respects except for a minor variation in the date would still be an "imitation numismatic item."

(a) An "original numismatic item" is anything that has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. The term includes coins, tokens, paper money, and commemorative medals. An item has been "used in exchange" if it has been traded in the marketplace and used as a means of payment. Thus, the term applies to more than simply "legal tender."

² Rules issued by the Federal Trade Commission require that the word "COPY" shall be marked upon the item legibly, conspicuously and nondeceptively. The word "COPY" shall appear in capital letters, in the English language. The word "COPY" shall be marked on either the obverse or reverse surface of the item. It shall not be marked on the edge of the item. An imitation numismatic item of incusable material shall be incused with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a

(Continued)

FINAL ORDER

92 F.T.C.

FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted portions of the appeals of each side. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for Findings 46; 51; the words "German 20 Mark 1887 Wilhelm I" in finding 66; 67; 76-77; page 18, footnote; page 19, all of footnote after word "testimony"; page 21, second paragraph, everything after semi-colon; page 21, third, fourth and fifth paragraphs; page 22, second full paragraph; page 23, findings 6 and that part of 7 following the comma; pp. 23-25 "Order."

Other findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. [2]

It is further ordered, That the following order to cease and desist be entered:

ORDER

It is ordered That respondents Gold Bullion International, Ltd., a corporation, its successors and assigns, and its officers, and H. Kenneth Costello, Walter N. Thompson, and William H. Bogart, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic item, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93-167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. §304.6, *i.e.*, in capital letters, in the English language, incused in sans-serif letters having a

minimum depth of three-tenths of one millimeter (0.3 mm) or to one-half the thickness of the reproduction, whichever is the lesser. An imitation item composed of nonincusable material shall be imprinted with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm). In either case, the minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That for a period of ten years from the effective date of this order, each individual respondent named herein promptly notify the Commission of [3] any affiliation with a business or employment that involves the manufacture in the United States or importation into the United States of numismatic or political items. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business of employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

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

Commissioner Pitofsky did not participate.

Interlocutory Order

92 F.T.C.

IN THE MATTER OF
THE TIMES-MIRROR COMPANY

Docket 9103. Interlocutory Order, July 25, 1978

This order grants the appeal of complaint counsel for reinstatement of count II of the complaint, dismissed by order of the administrative law judge.

ORDER GRANTING COMPLAINT COUNSEL'S APPEAL FROM
ORDER DISMISSING COUNT II OF THE COMPLAINT

On July 27, 1977, the Commission issued its complaint in this matter alleging violations of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) in connection with respondent's sale of retail advertising in The Los Angeles Times.

This matter is now before the Commission on appeal by complaint counsel, pursuant to Section 3.23(b) of the Commission's Rules of Practice, from the order of the administrative law judge (ALJ) dismissing count II (the Robinson-Patman charge) of the complaint.¹ The ALJ ruled that newspaper advertising is not a "commodity" within the meaning of section 2(a) and, therefore, count II fails to state a claim upon which relief can be granted. For the reasons set forth below, we disagree with the ALJ's holding and reinstate count II of the complaint.

In reaching his decision, the law judge relied on court decisions holding that the term "commodities" is limited only to tangible products, not intangibles or services.² In addition, he looked to statements made after passage of the Robinson-Patman Act by one of its co-authors to the effect that such items as advertising, insurance and brokerage service are not commodities for purposes of the Act.³ The judge also cited two recent district court decisions specifically holding that newspaper advertising is not a commodity within the meaning of Section 2(a) of the Robinson-Patman Act.⁴ After reviewing these authorities, the ALJ concluded that, although newspapers are tangible goods, the respondent is selling "the service

¹ The allegations of count I of the complaint, relating to Section 5 of the FTC Act, are not at issue here.

² *E.g., Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance not a commodity); *Baum v. Investors Diversified Services, Inc.*, 409 F.2d 872 (7th Cir. 1969) (mutual fund shares not commodities); *Tri-State Broadcasting Co. v. United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966) (sale of news reports treated as sale of a privilege); *CBS v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) (sale of broadcast advertising time not a commodity).

³ W. Patman, *Complete Guide to the Robinson-Patman Act* (1963) at 33.

⁴ *National Tire Wholesale, Inc. v. Washington Post*, 441 F. Supp. 81 (D.D.C. 1977), *appeal docketed*, No. 781148 (D.C. Cir. Feb. 22, 1978); *National Auto Brokers Corp. v. General Motors Corp.*, 1974-2 Trade Cases ¶75,281 (S.D.N.Y. 1974).