

IN THE MATTER OF

SENSORMATIC ELECTRONICS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3795. Complaint, April 6, 1998--Decision, April 6, 1998

This consent order prohibits, among other things, the Florida-based manufacturer of electronic article surveillance equipment from entering into any agreement that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against engaging in truthful, non-deceptive advertising, comparative advertising or promotional and sales activities. In addition, the consent order nullifies the agreement, between Sensormatic Electronics Corporation and Checkpoint Systems, Inc., to restrict advertising and promotional claims about each other's products or services.

Appearances

For the Commission: *William Lanning, Michael McNeely and William Baer.*

For the respondent: *Randy Smith, Crowell & Moring, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sensormatic Electronics Corporation (hereinafter "Sensormatic"), a manufacturer of electronic article surveillance (hereinafter "EAS") equipment, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 951 Yamato Road, Boca Raton, Florida.

PAR. 2. Respondent Checkpoint Systems, Inc. (hereinafter "Checkpoint"), a manufacturer of EAS equipment, is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Pennsylvania, with its principal place of business at 101 Wolf Drive, P.O. Box 188, Thorofare, New Jersey.

PAR. 3. Respondents Sensormatic and Checkpoint are now, and for some time have been, engaged in the manufacture, advertisement, sale, distribution, installation, and maintenance of EAS systems. EAS systems are electronic devices used by retailers and others to deter and detect shoplifting and internal theft, and for other security-related purposes. An EAS system may contain many electronic components including sensors, deactivation equipment, disposable labels or tags, source tags or labels, and other electronic parts.

PAR. 4. Sensormatic and Checkpoint are the two largest manufacturers and sellers of EAS systems in the United States and the world, and together have sold over 70% of the EAS systems purchased worldwide.

PAR. 5. Entry into certain segments of the EAS market is difficult because of patent protection that exists for the technology of many components of EAS systems.

PAR. 6. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Except to the extent that competition has been restrained as alleged herein, Sensormatic and Checkpoint have been, and are now, in competition between themselves and with others as manufacturers of EAS equipment.

PAR. 8. In January of 1993, Checkpoint caused an advertisement to be placed in Billboard magazine wherein it alleged that components of Sensormatic's Ultra*Max EAS system damaged recorded media. Included in the advertisement were depictions of: audio cassettes, compact discs, reel to reel tape, and video cassettes. Thereafter, Sensormatic initiated a lawsuit in February of 1993 against Checkpoint alleging that said advertisement was false and deceptive because, among other things, the advertisement contained depictions of compact discs.

PAR. 9. Shortly after Sensormatic filed the aforementioned suit, executives of Sensormatic and Checkpoint met to discuss the settlement of the lawsuit and other business matters, including matters arising out of Sensormatic's acquisition of Checkpoint's European distributor, Sensormatic's performance under that distributorship agreement, advertising issues, and the cross-licensing of specified technologies under certain circumstances.

PAR. 10. During March, April, May, and June of 1993, high-ranking officials of Checkpoint and Sensormatic, including the Chief

Executive Officers of the respondents, met, discussed, engaged in telephone conferences, and exchanged correspondence for the purpose of entering into an agreement to settle the aforementioned lawsuit, to terminate Sensormatic as Checkpoint's European distributor, to refrain from negative advertising, and to agree to an optional cross-license of technology under certain circumstances.

PAR. 11. On or about June 27, 1993, Checkpoint and Sensormatic executed a written agreement that included provisions relating to the agreement to settle the aforementioned lawsuit, to terminate Sensormatic as Checkpoint's European distributor, to refrain from negative advertising, and to agree to an optional cross-license of technology under certain circumstances.

PAR. 12. The advertising provision of the June 27, 1993 agreement, in part, binds the parties to refrain from:

negative advertising or other negative selling, promotional activities or other communications with respect to the other party or the other party's products and services. The terms 'negative advertising' and 'other negative selling, promotional activities or other communications' are defined to mean the knowing use of (i) materially false statements about the other party or the other party's products or services, or (ii) statements that the other party's products or services cause or may cause harm to customers, consumers or merchandise or that the other party is engaging or has engaged in illegal or improper conduct. The foregoing shall not be deemed to prohibit either party from otherwise communicating the features, benefits, characteristics, functions, specifications, or performance of their respective products.

PAR. 13. The advertising provision of the June 27, 1993 agreement has also been construed to restrict comparative advertising on the features and functions of the respondents' products and the services offered by the respondents.

PAR. 14. On or about July 7, 1993, Checkpoint's CEO, A.E. Wolf, issued a memorandum to all of Checkpoint's employees explaining the advertising provisions of the June 27, 1993 agreement. Checkpoint's CEO wrote, "Basically, what it [the agreement] means is that the two parties agree to compete on a positive rather than a negative basis. Simply what that means is that we will promote the positive aspects of our own products, services and companies rather than the negative aspects of the other party."

PAR. 15. On or about July 19, 1993, Sensormatic's Vice President of Retail Sales, Dennis Gillette, issued a memorandum to Sensormatic's United States and Canadian employees explaining the advertising restrictions contained in the agreement. Gillette noted:

The [advertising] agreement allows both Sensormatic and Checkpoint to continue informing customers of the features, benefits, characteristics, functions and specifications of its products, but neither Checkpoint nor Sensormatic may convey negative information about the other party or the other party's products or services. For example, we can continue to tell customers that UltraMax products don't cause false alarms and is the only false alarm-free system but we cannot tell them that Checkpoint products do cause false alarms [emphasis in original].

This memorandum was subsequently distributed to the relevant Sensormatic employees worldwide in September 1993.

PAR. 16. Sensormatic attempted to enforce the advertising provision of the agreement in December 1993 when its attorneys alleged that a "Commentary" article authored by Checkpoint's CEO, entitled "EAS: Sound Quality Is First Concern," was published in Billboard magazine. The article did not mention Sensormatic, but expressed the opinion that some EAS technologies could degrade the quality of audio cassettes. While Sensormatic's attorneys did not claim that the information was either false or misleading, they claimed that the publication of the article violated the advertising provision of the June 27, 1993 agreement.

PAR. 17. Prior to the execution of the advertising provision of the June 27, 1993 agreement, Sensormatic and Checkpoint competed by promoting the technological attributes of their systems and pointing out the inadequacies of their competitors' systems in promotional materials and advertisements.

PAR. 18. Since the agreement of June 27, 1993, comparative advertising by Sensormatic and Checkpoint has been restricted.

PAR. 19. The advertising provision of the June 27, 1993 agreement is an agreement not to compete on an important element of competition. Retailers and other EAS customers have an interest in obtaining information relevant to their purchasing decisions. Certain information about EAS product performance is also relevant to consumers, such as potential harm to products and information about possible interactions between certain medical devices and EAS equipment. The agreement deprives retailers, other EAS customers and consumers of comparative information about the characteristics of EAS systems that they would find helpful.

PAR. 20. The conduct engaged in by Sensormatic and Checkpoint described in paragraphs eight through eighteen constitutes an agreement among competitors to refrain from making truthful, non-deceptive claims, including comparisons, criticisms, or disparaging statements in advertising.

PAR. 21. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of

Section 5 of the Federal Trade Commission Act. The acts and practices herein alleged are continuing and will continue in the absence of the relief herein requested.

Commissioner Thompson and Commissioner Swindle not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sensormatic Electronics Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 951 Yamato Road, Boca Raton, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

125 F.T.C.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondent*" means Sensormatic Electronics Corporation.

B. "*Sensormatic Electronics Corporation*" means Sensormatic Electronics Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Sensormatic Electronics Corporation, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

C. "*Checkpoint Systems, Inc.*" means Checkpoint Systems, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Checkpoint Systems, Inc., and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.

D. "*EAS system*" means electronic article surveillance equipment, including, but not limited to, sensors, deactivation equipment, labels or tags, source tags or labels, and any other component parts or related products.

II.

It is further ordered, That within three (3) days after the date this order becomes final, respondent shall declare null and void Section 4, the "Negative Advertising" provision, of the June 27, 1993 agreement between Checkpoint Systems, Inc. and respondent.

III.

It is further ordered, That respondent, directly or indirectly, or through any person, corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any EAS system, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

A. Entering into, attempting to enter into, organizing, continuing, carrying out, or acting in furtherance of any agreement or combination, either express or implied, that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises

against engaging in truthful, non-deceptive advertising, comparative advertising, and promotional and sales activities; and

B. Encouraging, advising, pressuring, assisting, inducing, or attempting to induce any non-governmental person or organization to engage in any action prohibited by this order.

IV.

It is further ordered, That respondent shall:

A. Within thirty (30) days of the date on which this order becomes final, provide a copy of this order to all of its directors and officers;

B. For a period of three (3) years from the date on which this order becomes final, and within ten (10) days after the date on which any person becomes a director or officer of respondent, provide a copy of this order to such person; and

C. Require each person to whom a copy of this order is furnished pursuant to subparagraphs IV.A and B of this order to sign and submit to its respective employer named as a respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject the respondent to civil penalties for violation of the order.

V.

It is further ordered, That respondent shall:

A. Within sixty (60) days from the date on which this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may by written notice to the respondent require, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order;

B. For a period of five (5) years after the order becomes final, maintain and make available to the staff of the Federal Trade Commission for inspection and copying, upon reasonable notice, all records of communications with EAS competitors relating to any aspect of advertising, and records pertaining to any action taken in connection with any activity covered by parts II, III, IV, and V of this order; and

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

VI.

It is further ordered, That this order shall terminate on April 6, 2018.

Commissioner Thompson and Commissioner Swindle not participating.

IN THE MATTER OF

CHECKPOINT SYSTEMS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3796. Complaint,*¹ April 6, 1998--Decision, April 6, 1998*

This consent order prohibits, among other things, the New Jersey-based manufacturer of electronic article surveillance equipment from entering into any agreement that prohibits, restricts, impedes, interferes with, restrains, places limitations on, or advises against engaging in truthful, non-deceptive advertising, comparative advertising or promotional and sales activities. In addition, the consent order nullifies the agreement, between Sensormatic Electronics Corporation and Checkpoint Systems, Inc., to restrict advertising and promotional claims about each other's products or services.

Appearances

For the Commission: *William Lanning, Michael McNeely, and William Baer.*

For the respondent: *Frank Newell, Montgomery, McCracken, Walker & Rhoad, Philadelphia, PA.*

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

¹ * Complaint previously published at 125 FTC 587 (1998).