

any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

It is further ordered, That respondent, Exquisite Form Brassiere, Inc., 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 the order to cease and desist.

By the Commission, Commissioners Anderson and Elman concurring in the result.

IN THE MATTER OF
IDEAL TOY CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8530. Complaint, Sept. 12, 1962—Decision, Jan. 20, 1964

Order requiring a distributor of toys in Hollis, N. Y., to cease representing falsely by means of television commercials that its toy "Robot Commando" would perform acts as directed by vocal commands, including moving forward, turning, firing a "missile" and firing a "rocket".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ideal Toy Corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 184-10 Jamaica Avenue, Jamaica, Long Island, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "Robot Commando" and "Thumbelina" doll, to distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said toys and related products, including its said "Robot Commando" and "Thumbelina" doll, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

PAR. 5. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of the said "Robot Commando" and "Thumbelina" doll respondent made certain statements, representations and pictorial presentations with respect thereto by means of commercials transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across State lines.

PAR. 6. Through the use of aforesaid advertisements, and others containing statements and representations of the same import not specifically set forth herein, respondent has represented, directly and by implication:*

1.(a) That "Robot Commando" will perform an act and a series of acts as directed by commands given vocally (See exhibits "A" and "B"). These acts include:

- (1) Moving forward;
- (2) Turning (See exhibits "C" and "D");
- (3) Firing a "missile" (See exhibit "E");
- (4) Firing a "rocket" (See exhibit "F"); and

(b) That "Robot Commando" as packaged and sold to the purchasing public is operable in the manner depicted in the television advertising, without additional components.

2. That "Thumbelina" doll moves from one side to the other (See exhibits "G" and "H"), and moves its arms apart while lying on its side (See exhibits "I" and "J").

PAR. 7. Enlargements of individual frames extracted from said television commercials, illustrating typical representations with re-

* Pictorial exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", and "J" are omitted in printing.

spect to the manner in which the said "Robot Commando" and "Thumbelina" doll purport to perform, as alleged in Paragraph 6 above, are attached hereto, marked exhibits "A" to "J", inclusive, and incorporated herein by reference.*

PAR. 8. In truth and in fact:

1. Each act performed by "Robot Commando" is governed by the manual setting of a control on the said toy. The toy will perform only that act for which the controlling device has been manually set. The initial action of the toy is commenced by blowing into a microphone. The sound of the voice, unless accompanied by the action of blowing into the microphone, will not commence the toy's action. Furthermore, the control must be manually changed after the performance of any one act before the toy will perform a different act and the sound of the voice itself, or as part of the action of blowing, will not cause the toy to change from one action to another.

"Robot Commando" is not, as depicted, a moving toy, and is not operable in the manner depicted in the television advertising, unless batteries, which are not included in the toy as packaged and sold to the purchasing public, are separately obtained and added thereto.

2. "Thumbelina" doll does not move from one side to the other and does not move its arms apart while lying on its side in the manner depicted.

Therefore, the statements, representations and depictions referred to in Paragraphs 5 and 6 are false, misleading and deceptive.

PAR. 9. Respondent's toys, including the "Robot Commando" and "Thumbelina" doll, are designed primarily for children, and are bought either by or for the benefit of children. Respondent's false, misleading and deceptive advertising claims thus unfairly exploit a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representations may be exaggerated or untrue. Further, respondent unfairly plays upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related products through false, misleading and deceptive claims of their performance, which claims appeal both to adults and to children who bring the toys to the attention of adults. As a consequence of respondent's exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform acts not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

* Pictorial exhibits "A" to "J" are omitted in printing.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the products of respondent, by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Berryman Davis and *Mr. Walter T. Evans* of Washington, D.C., for the Commission.

Regan, Goldfarb, Powell & Quinn of New York, N.Y., by *Mr. Sidney P. Howell, Jr.*, of counsel, for the respondent.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

JANUARY 20, 1964

The respondent, Ideal Toy Corporation, is engaged in the manufacture, sale and distribution of toys. It is charged under Section 5 of the Federal Trade Commission Act with having engaged in false, misleading and deceptive representations in its television advertising of two toys:—one, a somewhat complex apparatus having, generally, the appearance of a strangely grotesque mechanical man with moving arms and opening head or turret on a rolling and legless base, called Robot Commando; the other, a doll, Thumbelina, rather life-like in texture or appearance to the touch, and in design or form like a baby.

The alleged deceptive practices as far as Robot Commando is concerned are three, (1) that the respondent represented falsely that Robot Commando would perform certain acts to which reference will be made below when instructed so to do vocally, that is to say, merely by use of the voice, (2) that the advertising deceptively made it to appear that the toy was autonomous by showing it in operation and not disclosing that batteries were necessary to provide the power necessary for its operation, and (3) by failing to disclose that the batteries had to be purchased separately from and in addition to the purchase of the package in which the toy was contained.

As to the doll, it is charged that the television presentation advertising Thumbelina made it appear that it moves from one side

to the other and moves its arms apart while lying on its side, when, in fact, Thumbelina "does not move from one side to the other and does not move its arms apart while lying on its side in the manner depicted".

Robot Commando is controlled and operated from a device which resembles a microphone connected to the toy by a flexible insulated cable. It is intended that this device be held in the hand like a microphone. The following illustration of the device is from the literature accompanying the toy.*

In addition to this manual device, batteries must be installed in the toy itself. The first step necessary to initiate any movement is to push from right to left (or from "Off" to "On") the horizontal control bar which is within the device just under the instruction, "Push Control Bar". The mere pushing of this bar from "Off" to "On" is not sufficient to cause movement because an additional electrical contact must be made. This contact is made when a blast of breath is blown in the direction of and at a diaphragm located within the device behind the ornamental grillwork. Once this contact is made, the toy will operate and perform,—turning left, moving forward, turning right, firing missiles or firing a rocket,—each performance being effectuated by moving another control, this time the button, which, by turning on a vertical ratcheted track in a slot, moves up or down to any of the indicated positions,—"Turn Left", "Forward-Forward", "Turn Right", "Fire Missile", or "Fire Rocket".

It is necessary to blow only once. Once the final contact is made, no additional blowings are necessary, provided that the horizontal slide control bar is not pushed back to the right side, on "Off".

The toy is quite attractive and striking to the imagination, particularly to that of children and possibly adults as well. The commands, when activated as related, are obeyed and executed by Robot Commando in that it will move forward, it will move to the left, it will move to the right, and it will fire missiles and a rocket (provided, of course, that the person or child using it remembers to put the missiles and rocket into the receptacles designated for them). On the other hand, the voice command has nothing at all to do with these activities. This is only "window dressing" which serves to give the child a feeling of power or control or mastery. It is a sort of play-acting or fantasy, not uncommon to children or even some if not many adults.

Missiles resembling cannon balls are caused to be propelled through the air in a sort of upward course until their apogee is reached, from which they then descend toward the floor continuing on their

* Illustration of the device is omitted in printing.

course until they hit or happen to strike something which intercepts their movement. This propulsion is caused by the jerky turning and complete revolution of each of the arms of Robot Commando. The missiles or balls are inserted in the arms at the shoulders. At the tip of each of the arms there is an open-end box or receptacle into which the missiles or balls then fall. As the arms make their complete and jerky revolution, the centrifugal force of the turning ejects the balls or missiles at about the time that the turn-arounds point the arms upward.

The rocket (provided of course, that it has been set into the head or top portion of Robot Commando) is propelled upward until it reaches its apogee and then it, too, follows the curved course started and ultimately drops to the floor, unless it strikes an article which happens to get in or is placed in its way.

Respondent has advertised this toy extensively on television. The alleged deceptive representations are contained in an audio-video transcription which was run from about September 16, 1961 until about November 20, 1961, at which time there was a change. It is possible that this particular transcription could have been used by some television stations for a fringe period after November 20, 1961. The evidence is that complete replacement would have been accomplished everywhere by December 1961 (Tr. pp. 15, 16). The entire country was pretty well covered by this broadcasting on television. About 20 or 25 major cities were the subject of concentrated coverage and it was carried on or in connection with two network programs (Tr. p. 17).

The hearing examiner viewed and heard this transcription several times during the hearing. He is of the opinion, and therefore finds, that the television script and picture definitely gave the viewer the impression that only the child's voice command is necessary to cause the toy to perform the acts mentioned and that it was offered for sale as a complete operating unit because, not only did it not make clear the need for batteries, it failed to disclose that the toy would not operate without the batteries which had to be purchased separately. These findings are made because it cannot be said that a toy is controlled merely by the voice when the real control is first the sliding of a bar from right to left to make the connection with the battery power, then the activation of the power by a fairly strong blowing or gust of breath against a diaphragm, and finally the sliding up or down of the button to the various command positions on the manual device. And, even if the viewer has caught the announcer's casual reference to Robot Commando as being "battery-operated" and thus knows that battery power is necessary, it is rea-

sonable to assume that the necessary batteries come along with the toy on purchase.¹ An advertiser is not required, as expostulated by respondent's attorney, to choose between advertising all acts or none, if the time limitation of the broadcast does not permit a complete demonstration. He is required only to refrain from depicting falsely or inadequately those acts which he chooses to show in the limited time available for the broadcast.

It seems hardly necessary to comment on the difference between a toy which can operate only on reception of a child's voice and a toy which has to be operated by a combination of electric power activated by batteries plus blowing and plus mechanical setting in the preset places for obtaining the desired action. Imagine the disappointment of both a parent or friend and the child, particularly the child who cannot read, who gets the toy either with or without the batteries and then says "Forward", "Left", "Right", "Fire" and nothing happens. Imagine the additional disappointment when it is found necessary to make another trip away from home to buy the batteries, if one had not, by the time of purchase, become aware that batteries were not included in the purchase.

Advertising such as this is deceptive. *Carter Products, Inc. v. F.T.C.*, 186 F. 2d 821. It ought not to be practiced by companies doing such a tremendous business as this respondent did all over the United States,² particularly when it was done just before Christmas, in September, October and November, November and December being the two months when 60 percent of the entire year's sales to consumers are made (Tr. p. 44).

To the credit of the respondent, it must be noted that it prepared new advertising promptly after it became aware of the deceptive

¹ The casual reference, "battery-operated to obey your command", is entirely lost to the viewer amidst the noise and vividness of the video presentation. As a matter of fact, the hearing examiner was completely unaware of it until his attention was directed to it by respondent's attorney in a post-hearing brief.

The entire audio with the changes in picture sequences indicated by the word "pause", was:

"MUSICAL SOUND EFFECTS (pause) ANNCR: (V.O.) Ideal's Robot Commando is here (to help you.) He's your one man army. (pause) No enemy can destroy him. He fights off tanks * * * (pause) hurls missiles * * * one after another * * * (pause) even a squadron of planes can't stop him. (pause) Robot Commando fires his secret weapon. (pause) He takes orders from no one except * * * (pause) you! (pause) BOY: (DIRECT) Forward! (pause) ANNCR: (V.O.) Ideal's Robot Commando is battery-operated to obey your command. (pause) Adjust the control * * * speak into the microphone. BOY: (DIRECT) Left! Fire! Fire! ANNCR: (V.O.) Ideal's Robot Commando is here (to help you.) (pause) Look for your Robot Commando. He's looking for you! (CX 1a 1b)".

² This should not be read as condoning deceptive advertising by small businessmen or those operating only locally: it is to be read as a factor showing large public interest. To paraphrase and distinguish the remark in *Exposition Press, Inc. v. F.T.C.*, 295 F. 2d 869, 873, this is not a case involving a toy at which the Commission's dynamite is aimed; it is a case involving a potentially worst deception at a critical buying time.

nature of this advertising.³ This was done either simultaneously with or within days before or after the first communication from the Federal Trade Commission indicative of the Commission's interest in the practice and its probable disapproval. (The precise time cannot be fixed because the testimony is to the effect that revision of this advertising, because of complaints, was already under way but not completed at the time when the Commission's investigating attorney first came to the respondent and made known the Commission's interest [Tr. pp. 134, 135, 147].) Respondent's new audio and video transcriptions do refer to the need for blowing, manual setting and batteries but this Hearing Examiner expresses no opinion as to the adequacy of these references. It should be observed also that respondent received a negligible number of complaints about the advertising and that, according to its attorney's argument, there may be a good and universally heeded reason for not packing batteries with toys. (He argued that batteries deteriorate with shelf age and any battery operated article always ought to be operated with fresh or live batteries [Tr. pp. 61-63, 152-155].) The fact that a negligible number of complaints was received is not evidence that there was no deception. This is not the test and is not a valid argument. Many people who are deceived or disappointed do not bother to complain. If, in fact, as this Hearing Examiner believes after viewing the evidence, the advertising is deceptive, the mere fact that customers who may have been deceived do not complain is not reason to excuse or condone the advertising.

The case as to the doll, Thumbelina, is not as sharply in focus as it is for Robot Commando. During the hearing, all the lawyers, respondent's vice president and the hearing examiner had ample opportunity to observe Thumbelina's action. It is operated by some sort of spring device which is incorporated in the body and attached inside its head. The spring is wound up by a knob located in the back and made perfectly visible and clear to the viewer. The winding-up of the spring, followed by its slow unwinding, causes the head to move about on a sort of eccentric. This moving about of the head draws up the body in writhings and contortions. By the combination of movement with the normal aid given to any object by gravitational force, Thumbelina, if it happens to be lying on its side, will turn or flop over and land on its back. If the arms are

³ This is true also with respect to the doll, Thumbelina. Because her action in the particular advertising under attack was so fortuitously favorable and did raise questions as to veracity, the respondent soon and before the first visit of the Commission's investigating attorney, prepared another film, not so fortuitously striking in doll action (Tr. pp. 124, 147).

first placed together, they tend to and do move apart during the course of the turning or writhing.

The question with which we are here concerned is whether it does these things in the manner in which the television presentation showed that they were done, or, as stated in the complaint, "*in the manner depicted.*" It is the Hearing Examiner's opinion, after both having viewed and heard the television presentation several times and played with the doll that the doll does not quite perform entirely in the manner shown in the television presentation.

As far as the arm movement is concerned, when the arms were together in the television presentation, they moved apart. This is what the doll actually does during its contortions, provided they are first placed together and not locked. Consequently, this particular portion of the complaint will not be sustained.

However, when the doll was lying on its side in the television presentation, it was shown to turn over. The portion of the presentation to which the charge is directed goes like this: After Thumbelina, the doll, is placed on the princess's bed lying on its right side, the princess lies down on the bed alongside of the doll, the doll then starts to turn off the right side toward the left and, as it approaches the left, it keeps going to a point about 120 degrees on the arc, at which time the princess takes hold of it and clasps it to her body in fond affection, bringing the doll to the full cycle (Tr. pp. 79-82). The advertising is clever and the result fortuitously striking, because it leaves the viewer with the distinct impression that a full 180 degree turn is one of the doll's accomplishments. The critical and analytical viewer will not be in doubt that when the princess lay down on the bed, she created somewhat of an incline which helped along the turning-over process. This was due to the resulting force of gravity, and this is precisely what would happen if a child, playing with the doll, went through the same performance under the same very favorable and carefully arranged conditions.

It is not suggested, and the hearing examiner does not believe, that any special device or "mock-up" was used to cause the doll to do what it would not do under the precise and favorable circumstances depicted in the broadcast. This, however, brings us squarely up against the situation suggested by the Court of Appeals in *Colgate-Palmolive Company v. Federal Trade Commission*, 310 F. 2d 89 at 91, where the Court said: "But, equally, should he (the advertiser) be allowed to use his own (dairy) cream if he knows that by the normal photographic process its color would be changed so as to appear substantially better on the screen than it was? We suspect the Commission would think it clear he could not." Although the

Court asked the question, it indicated approval of the probable action which it suggested the Commission could take by saying "We suspect the Commission would think it clear he could not." In this case, we now have reached the type of screen depiction anticipated by the Court. That this sort of deception was correctly anticipated is borne out by the facts of this case to which respondent's own vice president testified after being asked how he came to approve the broadcast if the doll did not, in fact, "move from its back to its left shoulder":

When I saw this commercial—and it is a lovely commercial—I was so impressed with the charm and the appeal that I think the commercial did portray, which the doll deserved, frankly, I just fell in love with it and I thought it would be the right thing for that particular doll. *I did question the last sequence because, as I explained, it would not do that turn on the table top.* When I was told about that by all who were involved at the commercial that the doll actually did do that, I accepted it. I was told by all who were there that I trust that the doll made this additional turn because the doll was in a bed and because of no other help. That being the case, I said fine, let's go with it * * * I did approve the commercial and we showed it to many people. We showed it to the National Association of Broadcasters. We showed it to the Columbia Broadcasting System, ABC, NBC and all the networks. Everyone approved the commercial. In fact, they all loved the commercial. They loved the doll. *There were questions asked about that last scene and I explained it just as I explained it here and they accepted the explanation as being authentic.* (Tr. pp. 102-104, emphasis added.)

In fairness to the respondent, it should be repeated here that this awareness of the deceptive nature of the telecast prompted the respondent ultimately to change the telecast of its own volition. Even though, as noted above, no special device or mock-up was used to cause the doll to do what it did in the telecast, the telecast gave the false impression that the doll could make a complete 180 degree turn. The temptation to take advantage of the accidentally favorable impression proved too great for the respondent, despite its high standards. This demonstrates the need for governmental sanctions to strengthen the will not to deceive. There is just as much a duty on the part of an advertiser not to create false impressions by failing to correct them when they accidentally are caused by fortuitous circumstances in the photographing process as it is his duty to refrain from creating the special circumstances or photographic props and mock-ups in a television presentation which will result in a false representation. To the extent, therefore, that it is charged that the doll was falsely depicted as making a complete turn from one side to the other, that portion of the charge will be sustained.

Respondent argues that, in any event, even if false representations are found, no order should be entered. In support, it lays great stress on (1) its complete cooperation with the Federal Trade Commission in its investigation, (2) its prompt correction on its own

initiative of the offensive or "doubtful" portions of the broadcasts and (3) its leadership and participation in self-policing activities by a special toy review board of the National Association of Broadcasters.⁴ These should not be minimized. In another situation this hearing examiner might have felt that an order to cease and desist ought not to be entered herein in view of all the considerations just mentioned. This would be particularly so if Federal Trade Commission orders were penal, which they are not.⁵ The hearing examiner is very much concerned with the fact that the toy industry is a most "sensitive to the Christmas season" industry. It does not take more than a few days in the short period before Christmas to grab off a proportionately large amount of business by just a little bit of deceptive television broadcasting. This sort of raid on susceptible buyers at a critical gift buying time must be eliminated. The Federal Trade Commission must not take a position in a "hard" case like this that a "one-shot" deception will be tolerated. "Hard cases make good law" and this is one of them. It is for this reason that in this particular case, bearing in mind the remedial nature of the legislation under which this proceeding is brought and the corrective measure available to stop this type of "hit and run" assault upon the public's buying impulses during critical buying seasons, the Hearing Examiner will enter an order to cease and desist by reason of the practices found to have been deceptive.

For completeness, I shall refer briefly to other arguments made on behalf of respondent. It is argued that the video shows the boy first setting the manual control before every change in Robot Commando's action. This is so but can be comprehended and understood only if the video is carefully analyzed after one's attention is directed to the fact that the boy's manipulation of the control device is not just a jerky movement but an operational activity. The claim "VOICE CONTROLLED" for Robot Commando is sought to be

⁴ An association of television stations, not advertisers.

⁵ As far back as the January term, 1845, Mr. Justice Story, in *Taylor v. United States*, 3 How. 197 at 210, 11 L. Ed. 559, 565, pointing to the fact that remedial legislation should be given liberal construction to effectuate its objectives said, "In one sense, every law imposing a penalty or forfeiture may be deemed a penal law: in another sense, such laws are often deemed and truly deserve to be called remedial. The judge was therefore strictly accurate when he stated that 'It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them.' and he added, 'It is in this light * * * I would construe them so as most effectually to accomplish the intention of the legislature in passing them.' The same distinction will be found recognized in the elementary writers, as for example in Blackstone's Commentaries * * * and Bacon's Abridgment * * * and Comyns' Digest * * * and it is abundantly supported by the authorities."

justified by the strained argument that the electrical contact is made when the diaphragm is caused by a sharp blowing of breath to make the contact and, since breath is a component of voice, "voice must include the delivery of breath" and so the toy is voice controlled! By resorting to this argument, the respondent is pressing the processes of logical illation a little too far and, by doing so, it tends to obscure another element in this case,—the necessary manual setting of the button for each operation.

Careful consideration has been given to the proposed findings and conclusions submitted by counsel supporting the complaint and arguments, both written and oral, by counsel for the respondent. Many of the proposals have not been accepted or are considered by the Examiner to be substantially the same as findings above and ultimately made herein. To the extent that any proposed finding, conclusion or argument is not adopted, either directly or in substance, the same has been rejected because of irrelevance, immateriality, lack of support in the evidence, or as contrary to law or unnecessary. Any motion, the granting of which would be inconsistent with this decision, is denied.

The following are my ultimate

FINDINGS OF FACT

1. Respondent, Ideal Toy Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

2. The principal office and place of business of the respondent is 184-10 Jamaica Avenue, Hollis, New York.

3. Respondent is now, and for some time last past, has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products to distributors and retailers for resale to the public. Among these toys are included those named "Robot Commando", a mechanical warrior, and "Thumbelina", a doll.

4. Respondent's gross sales for the year 1961 exceeded \$30,000,000, of which almost 10% were attributable to Robot Commando and more than 10% were attributable to Thumbelina. Sixty percent of respondent's total sales are made in November and December while the remaining forty percent are spread over the other ten months of the year.

5. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its toys and related products, including Robot Commando and Thumbelina, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all

times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

7. In the course and conduct of its business and for the purpose of inducing the purchase in commerce of Robot Commando and Thumbelina, respondent made certain representations and pictorial presentations with respect thereto by means of commercial advertisements transmitted by television stations located in various States of the United States and in the District of Columbia.

8. Through use, during the time hereafter mentioned, of one of the aforesaid advertisements respondent represented, directly or by implication that:

(a) Robot Commando would perform various acts when directed alone by commands given vocally. These acts included (1) moving forward, (2) turning, (3) firing a "missile", (4) firing a "rocket".

(b) Robot Commando, as packaged and sold to the purchasing public, is operable in the manner depicted in the television advertising, without components other than those shown or disclosed.

9. Through use, during the time hereafter mentioned, of one of the aforesaid advertisements respondent represented, directly or by implication that Thumbelina doll moves from one side to the other, and moves its arms apart while lying on its side.

10. The enlargements of individual film frames, copies of which are attached to the complaint as exhibits, are extracted from actual television films utilized by the respondent in its advertising, and illustrate typical representations with respect to the manner in which Robot Commando and Thumbelina doll purport to perform.*

11. Each act performed by Robot Commando is governed by the manual setting of a control on the said toy. The toy will perform only that act for which the controlling device has been manually set. The initial action of the toy is commenced by setting an "On" switch, then blowing upon a metal diaphragm set within the microphone appearing control device. The sound of the voice, unless preceded or accompanied by the action of blowing on the diaphragm, will not cause the toy's action, it being necessary for the completion of the electrical connection that a contact be effected by the depressing of the diaphragm. Furthermore, the control must be changed manually after the performance of any one act before the toy will perform

* Pictorial exhibits are omitted in printing.

Conclusion

64 F.T.C.

a different act and the sound of the voice itself, or as part of the action of blowing, will not cause the toy to change from one action to another.

12. Robot Commando is not, as depicted, a moving and autonomous toy, and is not operable in the manner depicted in the television advertising, unless batteries, which are not included in the toy as packaged and sold to the purchasing public, are separately obtained and inserted therein.

13. Thumbelina doll does not move from one side to the other but does move its arms apart while lying on its side in the manner depicted.

14. The film demonstrating Robot Commando, which contained the representations found, was broadcast over two nation-wide television networks and by numerous independent television stations between September 16, 1961, and November 21, 1961, and the time of the day at which and the programs in connection with which it was broadcast were calculated so that it would be seen by children and actually was so seen.

15. The film demonstrating Thumbelina, containing the representations found, was broadcast over two nation-wide television networks and numerous independent television stations between September 16, 1961, and November 7, 1961, and the time of the day at which and the programs in connection with which it was broadcast were calculated so that it would be seen by children and actually was so seen.

And the following are my

CONCLUSIONS

I. The representations and depictions set forth in Finding 8 are false, misleading and deceptive, but only the representation of movement from one side to the other set forth in Finding 9 is false, misleading and deceptive.

II. Respondent's toys, including the Robot Commando and Thumbelina doll, are designed primarily for children. False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue. Further, the use of such advertising plays unfairly upon the affection of adults for children, especially parents and other close relatives. By subjecting such persons to importuning and demands on the part of children who have been entranced by imaginative and deceptive properties claimed for such toys, which importuning and demands can be resisted even by adults not deceived

only upon pain of having dissatisfied, unhappy, hating or rebellious children, respondent tends to create disturbed home and family relationships.

III. When such toys are purchased in the expectation that they will have characteristics or perform acts not substantiated by the facts, the purchasers are misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

IV. The use by respondent of the aforesaid false, misleading and deceptive representations has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the representations were true and into the purchase of substantial quantities of the products of respondent, by reason of such erroneous and mistaken belief.

V. The aforesaid acts and practices of respondent were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

VI. This proceeding is in the public interest and the Federal Trade Commission has jurisdiction of the subject matter and of the respondent.

Upon the entire record, and considering the purposes and objectives of the law, it is my further conclusion that, in order to achieve effective enforcement of the law, it is necessary and appropriate to enter the following

ORDER

It is ordered, That respondent, Ideal Toy Corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of toys or related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising any toy manufactured, sold or distributed by it by presenting a visual demonstration represented as or appearing to be but not being the manner in which the toy performs, functions or acts, when the visual demonstration is, in fact, presented under circumstances helped or induced by undisclosed attachments, aids, factors or arrangements.

2. Failing to disclose clearly and conspicuously in any advertisement that elements, attachments, aids or batteries are necessary for the performance of any such toy in the manner

depicted unless such elements, attachments, aids or batteries are packed and sold with the toy and payment therefor is included in and a part of the price charged for such toy; or, if any such element, attachment, aid or battery is not so included, failing to disclose clearly and conspicuously in such advertisement both the necessity for such attachment, aid or battery and the fact that it must be purchased and paid for separately.

OPINION OF THE COMMISSION

By *ELMAN Commissioner*:

The complaint in this matter charges respondent with false advertising of two toys made by it, "Robot Commando" and "Thumbelina", in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision upheld the complaint and entered an order to cease and desist, and respondent has appealed. Complaint counsel has also appealed, challenging the scope of the examiner's order.

"Robot Commando" is a battery-operated toy that performs certain motions. It is controlled by a device resembling a microphone, attached to the "robot" by a cable. The "microphone" has a mouthpiece, and also a knob that can be set to any one of the following positions: "Turn Left", "Forward Forward", "Turn Right", "Fire Missile", "Fire Rocket". To make the toy perform, one must first blow into the microphone, then move the knob to one of the five positions. Although one can, if one wishes, speak the appropriate command into the mouthpiece—the expulsion of breath that occurs in speaking will activate the mechanism—the toy is not controlled by, or responsive to, vocal commands as such. Thus, if one says "Turn Left" and then does not set the knob to one of the five positions, nothing will happen, while if one says "Turn Left" and then sets the knob to "Turn Right", the robot will turn right, not left.

The examiner found that respondent had advertised "Robot Commando" as being voice-controlled, and also had failed to disclose in its advertising that the toy requires batteries and that batteries are not sold with the toy. The members of the Commission have viewed the television commercial upon which the findings are based, and on the basis of this first-hand examination we agree that respondent has misrepresented "Robot Commando" as being voice-controlled and that such misrepresentation is unlawful.

The commercial shows a child operating the toy seemingly by speaking into the microphone; the legend "voice controlled" appears on the screen; and the announcer states: "[Robot Commando] takes

orders from no one except * * * you! Ideal's Robot Commando is battery-operated to obey your command. Adjust the control * * * speak into the microphone." The net impression of the commercial—on adult viewers, let alone on the young children to whom the advertising message is primarily directed—is that "Robot Commando" obeys spoken commands;¹ whereas in fact voice or speaking as such plays no role whatever in the control of the toy.

This false impression is a material inducement to the purchase of the toy. Obviously, a toy that obeys spoken commands is more marvelous and thrilling to a child than one that responds only to a combination of mechanical controls, i.e., blowing into a mouthpiece and then moving a knob. Since the fact of voice control appears to be an important element in the desirability of a toy such as "Robot Commando" to children and to the adults who purchase toys for them, respondent's misrepresentation is an unlawful deception.

On the other hand, we do not think it necessary in this case to take corrective action with respect to respondent's failure to make clear disclosure in its advertising that "Robot Commando" is battery-operated and that batteries are not supplied by respondent with the toy. It does not appear that a substantial segment of the purchasing public to whom respondent's television advertising is directed believes, in the absence of some affirmative representation to that effect, that a toy such as "Robot Commando" is not battery-operated or that batteries, if necessary, are supplied by the manufacturer. Disclosure of these facts is made by respondent on the carton in which "Robot Commando" is sold to the consumer, and on the instruction sheet enclosed in the carton.

"Thumbelina", the other toy involved in this case, is a wind-up doll which performs writhings and contortions intended to simulate a baby's movements. The television commercial upon which the charge of false advertising of "Thumbelina" is based shows the doll, which is lying on a bed, turn over from the doll's right to its left side. This movement is possible only because the surface of the bed in the commercial is somewhat inclined, due to the weight of a child who is lying next to the doll in the bed. The doll will not perform such a movement on a level surface.

Although the commercial gives a somewhat exaggerated impression of the doll's capabilities, we do not think that an actionable deception has been established. The doll will in fact turn over under the

¹ Although in the commercial the child is shown manipulating the microphone before each new motion of the Robot, and although the announcer says, at one point, "Adjust the control", the significance of the child's hand motions and of the announcer's statement is lost on the viewer. The hand motions are jerky and appear accidental, while the announcer's remark makes no distinct impression on the viewer.

conditions depicted in the commercial, and those conditions—the weight of the child causing the incline in the bed's surface—are clearly disclosed to the viewer. At most, in the words of the hearing examiner, the performance of the doll in the commercial is “fortuitously striking”, respondent having taken “advantage of the accidentally favorable impression” created by the conditions of the telecast (initial decision, pp. 305, 306). Moreover, it is not clear that the commercial's exaggerated impression was such as to significantly enhance the desirability of the toy in the eyes of many viewers.

We turn now to the issue of relief. Respondent contends that no cease and desist order should be entered, owing to its “abandonment” of the challenged practice. Complaint counsel contends that the examiner's order is too narrow. As has been pointed out many times, the purpose of adjudicative proceedings before the Commission is not to enter broad or narrow, general or specific, affirmative or negative, or tough or easy orders, as such; it is to prevent the future occurrence of the unlawful practice. See, e.g., *All-Aluminum Products, Inc.*, F.T.C. Docket 8485 (decided November 7, 1963) [63 F.T.C. 1268]. This guiding principle, not mechanical rules or formulas, should determine the form of relief appropriate in a particular case.

There are cases in which the probability of the recurrence of the unlawful practice is so remote that no cease and desist order at all is warranted. This is not such a case, however, even though respondent withdrew the “Robot Commando” commercial that is the basis of our finding of deception prior to the commencement of this action. It is not clear that the representation that the toy is voice-controlled has been completely eliminated in respondent's revised advertising. Moreover, respondent withdrew the commercial in question only after it had been broadcast repeatedly throughout the nation for more than two months in the late fall—the critical pre-Christmas buying season² of 1961, a year in which respondent's gross sales of “Robot Commando” amounted to almost \$3,000,000. Deceptive advertising on such a scale cannot be dismissed as a merely technical, insignificant, isolated or inadvertent violation of law, promptly abandoned, and not warranting entry of a formal order to cease and desist.³

We also reject respondent's argument—which is advanced obviously as a makeweight and has not been developed in any detail on

² Sixty percent of respondent's total annual sales take place in the months of November and December.

³ For these reasons, we also reject respondent's contention that the present proceeding is not in the public interest because it does not involve a substantial violation of law.

this appeal—that its advertising practices are adequately supervised and regulated by the National Association of Broadcasters, a private group, so as to obviate all need for a formal order. Respondent concedes that the Association cannot apply formal sanctions for violations of its rules, and respondent has not even shown that the Association's rules effectively preclude the kind of advertising that we have found to be deceptive and unlawful. On the contrary, respondent states that the Association approved the particular "Robot Commando" commercial involved in this case.

The order which we deem appropriate to prevent repetition of respondent's unlawful practice differs somewhat from the proposed orders submitted by the parties, and also from that contained in the initial decision. The unlawful practice is the misrepresentation of the performance of a toy, and there is no rational basis for distinguishing, in the order, among various kinds of toys, advertising media, or techniques of misrepresentation. On the other hand, the record does not justify a blanket prohibition of all false and misleading advertising by respondent. Our order neither is confined to the specific acts of deception upon which the finding of unlawfulness is based, nor extends to all possible forms of deceptive conduct in which respondent might engage. Rather, it forbids the deceptive practice in which respondent has been found to have engaged.

Commissioner Anderson did not participate for the reason he did not hear oral argument.

FINAL ORDER

Upon consideration of the cross-appeals of the parties from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That:

(1) The findings of fact and conclusions of law contained in the initial decision are adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

(2) The complaint is dismissed with respect to the allegations concerning the "Thumbelina" toy and the failure to disclose in respondent's advertising that the "Robot Commando" toy is battery-operated.

(3) Respondent, Ideal Toy Corporation, a corporation, and its officers, representatives, employees, successors and assigns, directly or under any name or through any corporate or other device, in con-

Complaint

64 F.T.C.

nection with the offering for sale, sale and distribution of toys, in commerce, shall forthwith cease and desist from:

Stating, implying, or otherwise representing, by words, pictures, depictions, demonstrations or any combination thereof, or otherwise, that any toy performs in any manner not in accordance with fact.

(4) Respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a written report setting forth in detail the manner and form of its compliance with the terms of the order.

By the Commission, Commissioner Anderson not participating for the reason he did not hear oral argument.

IN THE MATTER OF

AMERICAN CEMENT CORPORATION

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

Docket C-681. Complaint, Jan. 20, 1964—Decision, Jan. 20, 1964

Consent order requiring a portland cement manufacturer in Los Angeles—one of the ten largest in the United States, operating seven cement manufacturing plants in Pennsylvania, Michigan, California, Arizona and Hawaii, and a principal supplier in the New York City area herein concerned—to divest itself within 9 months of all the stock, assets and tangible and intangible properties, rights and privileges acquired in its acquisition of a manufacturer operating four ready-mixed concrete plants in the New York City area, one of the five largest consumers of portland cement in that area.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondent has acquired the assets and stock of another corporation in violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec 18), as amended; and therefore, pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. (A) American Cement Corporation (American), respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 2404 Wilshire Boulevard, Los Angeles, California.