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Part I

CHANGES IN THE GOVERNMENT'S ATTITUDE TOWARD COMPETITIVE MARKETING PRACTICES

At a meeting held by The New York Patent Law Association on the evening of January 21, 1955 in New York City, the subject of discussion was "Changes in the Government's Attitude toward Competitive Marketing Practices".

Senior representatives of government departments having different and contrasting duties in the specified area, and a member of the Washington, D. C., bar whose experience in this field lends weight to his views, summed up the facts and gave their conclusions as to where the government stands at mid-term of a new Administration. The New York Patent Law Association is very glad indeed to have brought these speakers together, and believes that what they said will be of interest to others besides those who sat that night in the Meeting Hall of the Bar Association.

W. HOUSTON KENYON, JR.
Chairman, Committee on Meetings
The New York Patent Law Association

INFORMAL REMARKS

By Hon. Edward F. Howrey
Chairman, Federal Trade Commission

A bureaucrat, particularly a relatively new bureaucrat like myself, has many problems, not the least of which is the preparation and making of speeches. I probably shouldn't include the making of speeches because all lawyers like to talk whenever they have the opportunity. But the preparation of a speech is hard work. It is just like digging ditches so far as I am concerned; it takes time, and unfortunately I didn't have time to prepare a speech for this occasion. I was complaining of this fact to my wife last night, and she said, "That is perfectly easy. All you have to do is use the one you used in San Francisco three weeks ago." I said, "I can't possibly do that; that speech was published and everyone will have read it." She looked at me a little pity-

ingly, I thought, and said, "Darling, I hate to be the first one to tell you, but no one reads your speeches."

Well, she meant to be reassuring, but frankly I was not reassured. In any event, I got a little stubborn about it and said, "I'm not going to use that speech! I just won't do it over again." So I come before you tonight just to tell you informally, briefly and off-the-cuff, about the Federal Trade Commission.

Mr. Kenyon, when he honored me with this invitation, suggested I talk about trademarks and I protested; I said, "I can't talk about trademarks because I don't know anything about them." He thought that was a good reason not to talk about them. As you ladies and gentlemen know, better than I, we do claim jurisdiction over false and misleading or deceptive trademarks and the mere fact that they are registered in the Patent Office does not deprive us of that jurisdiction. However we have exercised that jurisdiction sparingly since the Klessner case because, under our basic statute, we have to make a record showing of public interest, and that is not always easy to do in a problem where a trademark is involved.

And then in our trade practice rules, we have dealt with trademarks but not very extensively. I am told we have some rules where we suggest that the imitation of a competitor's trademark or trade name is an unfair trade practice. We also have some rules where we have suggested that a central filing system be established in order to avoid confusion in the use of trademarks and trade names. But that is all I'm going to say about trademarks. I'm going to talk about my special pet subject, The Federal Trade Commission.

First I might briefly recall or remind you that our national trade regulation and anti-trust policy is expressed in three basic acts, the Sherman Act, the Clayton Act and the Federal Trade Commission Act. There has been some talk about the inconsistencies between the hard composition of the Sherman Act and the Federal Trade Commission Act and the so-called soft composition of the Clayton Act or at least the Robinson-Patman Act amendment to the Clayton Act; in other words, on the one hand it is said you are supposed to compete hard and fiercely, and on the other hand, at least price wise, you are not supposed to compete too hard, or at least not discriminate.

I think those inconsistencies exist but I think they have been magnified out of all proportions by the administration of the laws. Obviously they were meant to be interpreted in pari materia. As I like to put it, the gearing of the privilege to compete with the obligation to compete fairly is not necessarily inconsistent. I think the laws can be administered consistently and we are trying to do that.

To go to the Federal Trade Commission a moment and its jurisdiction, the Commission is, or at least should be, one of the most vital agencies in Washington. Certainly it has a jurisdiction which literally staggers the imagination. We supervise the competitive practices of this great multi-billion dollar economy of ours. We have some other agencies, like the F.C.C., the I.C.C., the Civil Aeronautics Board, etc. who supervise certain segments of our economy—those vested with a public interest, but the great industrial economy of this country, the manufacturer, the wholesaler, the retailer are all under our jurisdiction. Believe me, with an economy that is approaching Three Hundred-fifty billion dollars a year—I think it's about there, maybe it's more; it may be a little less—but we are supposed to regulate or at least supervise the competitive practices of that great economy.

We do this under our basic Act, the Federal Trade Commission Act, which has the breadth and depth of the Sherman Act, or even a constitutional provision for that matter. We are directed by Congress to prevent unfair methods of competition and unfair or deceptive acts or practices.

That is our statute; and we have to complete the legislation. We have to determine what is unfair or what is deceptive. Under this broad statute we have issued orders to cease and desist in price fixing cases, in restraint of trade cases like allocation of customers or allocations of markets. Also our jurisdiction over deceptive practices, false and misleading advertising, misrepresentation and things like that, all come under our basic statute. Then in addition, we have the Clayton Act. We administer Section 2 which prohibits price discrimination, Section 3 which deals with tying clauses and exclusive dealing contracts, Section 7 which deals with mergers, and Section 8 which prevents interlocking directorates.

Then we have a number of minor statutes which Congress has a habit of passing from time to time without giving us any money to administer them, such as the Flammable Fabrics Act. Under that Act we can put a business man out of business overnight by saying, "You can't ship your merchandise in interstate commerce because they are unduly flammable." That is quite a power to have, and we are administering that act, which is brand new, very carefully. Then we have the Webb-Pomerene Act which is supposed to regulate trade associations in the export field. Normally we are supposed to prohibit price fixing, but under the Webb-Pomerene Act we condone price fixing under certain circumstances, as long as it is in export trade. So we have to wear different hats at different times.

That gives you briefly our jurisdiction. And the first question, and I'm sure if we have a panel discussion tonight, it will be asked, so I will try to answer it now; and that is what is the difference between the two anti-trust divisions, namely, the Department of Justice and the Federal Trade Commission. I couldn't answer that in the time allotted to me, but I can say this; that Congress intended the Federal Trade Commission, in my view, and as I have studied the legislative history, and if I can read the English language, Congress intended us to practice preventative law, that is, to try to stop these things on a voluntary basis or in their incipiency. Justice, on the other hand, was meant to be the prosecutor.

I would like to talk briefly if I may, about what I like to call the new program of the Federal Trade Commission. The word "program" reminds me of a conversation I had with a newspaper reporter. He was the Washington editor of a Trade Journal, and he wrote a feature story on the Federal Trade Commission. This was about a year ago, and unlike most newspaper reporters, he was kind enough to bring his story in and read it to me. About midway, he said, "The new Chairman of the Federal Trade Commission is moving slowly, carefully and cautiously to put his new program into effect." I said, "Read that again," and he repeated "slowly and carefully and cautiously." I said, "That doesn't sound very exciting, does it." He said, "No, but it sounds like a Republican."

Our commission is strictly non-partisan or bi-partisan, but I can't resist one other Republican anecdote in this bi-partisan group. We have a habit in my family; you know how customs grow up in a family, for no reason at all; a habit has grown up in my family of my driving to the party, the cocktail party or the dinner party, and my wife driving home, and as I said, there is no reason for that, it is just custom that has grown up through the years. We live out in Virginia about 20 miles on a farm, and the other night we were in town to a dinner party and we were coming home quite late. My wife is a very fast driver; we were going out toward Fairfax and my wife was driving, in fact she was going like a bat out of you know what. I stood it just as long as I could, and finally I turned to her, with considerable asperity, and I said, "Darling, I like to drive slowly in a slow zone and I like to drive fast in a fast zone;" she replied with ice in her voice, "That's a perfect definition of a Republican."

Now, to go back to the Federal Trade Commission program. As I said, one of the first things I did when I took office was to review and read and study the Congressional intent; and it seemed to me that what Congress had in mind was the establishment of a so-called board of experts, people familiar with business, lawyers, economists, businessmen, accountants, statisticians and we have even got doctors and chemists and have them examine various business practices in order to ascertain the competitive effects of such practices. I felt this intent was contrary to what is sometimes called the per se approach to trade regulations—the view that certain practices are illegal as such and a bad competitive effect can be conclusively presumed. This latter doctrine got started—it hasn't had a very long history—but it got started in the Socony case and had a rapid rise in the law. It has been extended to tying clauses and to exclusive dealing. Some lawyers are now trying to extend it to Section 7 merger cases; they say that all you have to show is that two companies merged and a substantial volume of commerce was involved in the merger, then it is illegal; injury to competition is presumed without any further proof.

That is not, in my view, what the Commission was set up to do. In the Willys-Kaiser merger, for example, we examined all the facts and decided the merger would promote competition and

would enable Kaiser and Willys combined to compete a little better against the so-called giants in the automobile industry. There were hundreds of millions of dollars involved in the automobile mergers, and if you simply take the slide rule and say a substantial volume of commerce was involved and was therefore illegal, we could not have permitted those mergers. We did permit them that is, Justice and F.T.C., because we thought if we were not to permit them, competition might be lessened rather than increased. In other words, I think one of the important things we have done at the Commission is to take what we call the rule of reason approach in merger cases; and that simply means examining the market facts of each individual case.

It had been the practice of the Commission and still is, of course, to some extent, to investigate every complaint that is filed with us. We get letters from the Hill, and we get them from individual competitiors and we check to see if we have jurisdiction, that is whether interstate commerce is involved and whether there is public interest, and then we send the case out for field investigation. Recently, however, we have been trying to select our cases or the matters which we are going to investigate on a broader basis. The coffee investigation was one of these. We had many complaints. There was wide interest in the high prices of coffee. So we thought we should make an investigation. We made both a legal investigation and an economic investigation.

We have established a new Bureau of Consultation. Again going back to legislative history, I think the Consultative Work of the Commission was meant to be a very prominent part of our work. Under that Bureau we try to get compliance by voluntary procedures, by stipulations, by trade practice rules; also we have set up a new Small Business Section. In this great country of ours with its big business and big government, and big labor unions, sometimes small business seems to get lost in the shuffle, but small business is a very important part of each community, and in effect big business and small business are interdependent. I don't think one could live without the other; that is particularly true of the distribution field. Small business is the wagon that carries the manufactured goods to the market. So we set up a Small Business Division; we try to see that their rights are protected. It has really proved its worth already.

We have had a reorganization from top to bottom. We called in an outside concern of business consultants and they did a good job. We put in an entirely new form of organization. We changed every job. That doesn't mean we put all the Democrats out and put Republicans in. Quite the contrary. We merely took out some dead wood and put live wood in its place. One of the great satisfactions to me, if I may boast a little bit more, is that when a young lawyer comes to Washington to work with the government, the majority of them now give the Federal Trade Commission as their first choice as a place to work. We are getting the top young lawyers, those who lead their classes in law school and were on the Law Review and so forth.

We also have cut out 50% of the procedural steps in the Commission. We have worked out our backlog. We have established liaison procedures with all agencies, with whom we deal, not the least of which is Mrs. Leeds' office. We meet and talk together and we are good friends. In the past, with respect to many agencies, it was just a race to see who could extend its jurisdiction the most. We have stopped that. Most of the agencies with whom we deal are now trying to work together with the view of doing away with duplication and overlapping. We do not believe in going after the same person at the same time or for the same thing.

Thank you very much.