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REGULATION OF BUSINESS-FEDERAL TRADE COMMISSION ACT-LEGALITY OF OFFERS OF "FREE GOODS" UPON AGREEMENT TO PURCHASE OTHER MERCHANDISE

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REGULATION OF BUSINESS—FEDERAL TRADE COMMISSION ACT—LEGALITY OF OFFERS OF "FREE GOODS" UPON AGREEMENT TO PURCHASE OTHER MERCHANDISE—On June 30, 1948 the Federal Trade Commission issued a complaint against Walter J. Black, Inc., a corporation doing business as the Classics Club and the Detective Book Club. The Commission charged that use by the re-

spondent of the word "free" in its advertising was false, misleading, and deceptive. The alleged deception consisted in the fact that in order to obtain the books designated as "free" the prospective purchaser was required to join respondent's club and thereby obligated himself to purchase at least four books a year from the respondent. The hearing examiner in his initial decision found that respondent's use of the word "free" was in fact misleading and deceptive. Respondent appealed to the Commission. *Held,* Commissioner Mead dissenting, complaint dismissed. *Walter J. Black, Inc.,* F.T.C. Dkt. 5571 (1953).

The instant case is the latest development in a series of decisions and administrative interpretations which reveal sharply conflicting attitudes toward the problem of "free goods" offers. Wide use of the "free goods" device in advertising and other promotional efforts by American business makes the problem one of much significance. The offer involved in the instant case should be distinguished from other and related types of "free goods" offers as to which there is less controversy. It is settled, for example, that it is a violation of section 5 of the Federal Trade Commission Act[1] to offer one of two articles of merchandise "free" when the cost of both articles is actually recovered by the seller in the price of the article which must be purchased.[2] Similarly within the prohibition of the act is an offer of "free" merchandise which may be obtained only after services rendered.[3] It is equally unlawful to increase the regular price, reduce the quality, or reduce the quantity of the article of merchandise which must be purchased in order to obtain the "free" article. Any free goods offer, moreover, must meet the requirement that the terms of the offer be stated clearly and conspicuously at the initial point of contact with the public.[4]

The question which the Commission chose[5] to regard as presented in the principal case is the legality of offers which involve a contractual undertaking by the prospective buyer to purchase a specified amount of other merchandise during a given time in order to qualify for the "free" merchandise. As one

[1] 38 Stat. L. 719 (1914), as amended by 52 Stat. L. 111 (1938), 15 U.S.C. (1946) §45.

[2] FTC v. Standard Education Society, 302 U.S. 112, 58 S.Ct. 113 (1937). Respondents in that case were engaged in selling encyclopedias. As part of their selling plan they represented to prospective customers that the price of $69.50 was for a loose-leaf extension service and that the encyclopedia itself was being given free whereas in fact both encyclopedia and service together sold regularly for $69.50. Such misrepresentation is clearly illegal under any past or present Commission interpretation of the word "free." Also see an early decision on the question in Consolidated Book Publishers, Inc., v. FTC, (7th Cir. 1931) 53 F. (2d) 942.

[3] Progress Tailoring Co. v. FTC, (7th Cir. 1946) 153 F. (2d) 103; Fred Schambach, F.T.C. Dkt. 5405 (1952).

[4] These were the requirements laid down by the Commission for a legal "free goods" offer in Samuel Stores, Inc., 27 F.T.C. 882 (1938).

[5] The record no longer really presented the question since respondent's current advertising indicated that the enrollee was not obligated to take any specific number of books and that he might reject any book before or after receipt. Commissioner Mead, who continues to feel that the 1948 administrative interpretation (see note 9 infra) is the sound

writer recently phrased the question, "how free is 'free'?"[6] The early answer of the Commission was given in *Samuel Stores, Inc.*[7] Offers of "free goods" conditioned upon the performance of obligations were held not unlawful per se, the Commission adopting a rule of reason which judged the lawfulness by the "terms of the offer and the underlying and surrounding facts."[8] Ten years later, however, in 1948, the Commission reversed its position in the *Stores* case and released an administrative interpretation which indicated a readiness to find all offers conditioned on purchase of other merchandise illegal.[9] Acting under this new interpretation the Commission re-opened proceedings against the Book-of-the-Month Club. The Commission's charges centered on the book club's widely advertised offers to give a "free" book to new members enrolling in the club. Such subscribers obligated themselves to purchase at least four books a year from a list selected by the club. At the hearing before the examiner there was testimony to the effect that if the purchaser did not fulfill this obligation, respondent then demanded of him the regular price of his "free" book. On appeal to the Commission, the examiner's finding that respondent's offer was misleading and deceptive was sustained.[10] The Commission's decision in the *Stores* case was expressly overruled. A petition to the Court of Appeals for the Second Circuit to set aside the Commission's order was denied.[11]

It is in this posture of the decisions that the Commission has again reconsidered its position.[12] In what is essentially a reversion to its initial doctrine in *Samuel Stores* the Commission will no longer proceed against every offer of "free goods" which is conditioned upon an agreement to purchase other merchandise. Those likely to be affected by FTC action in this area will doubtless be as much concerned with the stability as with the soundness of this latest opinion. It would seem, however, that the view is sound. Does the offer to a prospective purchaser of a "free" book if he will agree to purchase others have the forbidden capacity or tendency to deceive, assuming

approach, was thus able to concur in the dismissal of the complaint while dissenting from the policy statement of the majority.

[6] 48 N.W. UNIV. L. REV. 505 (1953).

[7] Note 4 supra.

[8] 27 F.T.C. 882 at 887 (1938).

[9] 16 C.F.R. §4.1 (1949). This interpretation had been released for publication on January 30, 1948, the release noting that Commissioners Freer and Mason had voted against its adoption.

[10] Book-of-the-Month Club, F.T.C. Dkt. 5572 (1952).

[11] Book-of-the-Month Club v. FTC, (2d Cir. 1953) 202 F. (2d) 486. On petition to the court of appeals following the decision in the Walter J. Black case, the proceeding was remanded to the Commission, which on March 9, 1954 issued a modified cease and desist order, Commissioner Mead dissenting, in accord with its latest view respecting "free goods" offers. F.T.C. Dkt. 5572 (1954).

[12] More recent litigation further illustrates the approach of the Commission following the administrative interpretation of 1948. Two post-1948 decisions are Joseph Morse, Trading as Unicorn Press, 47 F.T.C. 258 (1950), and Joseph Rosenblum, Trading as Modern Manner Clothes, 47 F.T.C. 712 (1950), affd. per curiam without opinion (2d Cir. 1951) 192 F. (2d) 392, cert. den. 343 U.S. 905, 72 S.Ct. 635 (1952).

the prospect to be at most of ordinary intelligence?[13] The purchaser's undertaking, while it may be one which he would not otherwise assume, is made after full and fair disclosure of the terms of the offer. Surely this practice does not resemble the case of actual misrepresentation in which prices are switched or juggled in an effort to make immediate recovery of the cost of the "free" article. It is difficult to condemn such offers as unethical or immoral, and it is equally difficult to believe that the American book-buying public really needs to be protected against promotional efforts of this kind.

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[13] Two important and well-accepted legal propositions are implicit in this statement of the issue. The first is that in a proceeding under §5 of the Federal Trade Commission Act the Commission need show only capacity or tendency to deceive, not actual deception. FTC v. Algoma Lumber Co., 291 U.S. 67, 54 S.Ct. 315 (1934); Charles of the Ritz Distributors Corp. v. FTC, (2d Cir. 1944) 143 F. (2d) 676. The second proposition is that the act must be interpreted in order to afford protection to the unwary and the undiscriminating. The classic statement of this doctrine appears in FTC v. Standard Education Society, note 2 supra. There is much concern in many of the decisions and briefs with the proper dictionary definition of the word "free." It would seem, however, that more is accomplished toward a solution of these questions if attention is fixed rather on the prospective purchaser. What does *he* think "free" means?