It is ordered, That respondent Ball Brothers Company, Inc., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Ball Brothers Company, Inc., a corporation, 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.

IN THE MATTER OF

EXPOSITION PRESS, INC., ET AL.

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

Docket 7489. Complaint, May 15, 1959—Decision, Dec. 22, 1960

Order requiring a "vanity" publishing house in New York City to cease representing falsely, by use of the term "royalties" or otherwise, that it would make payments to an author based on sales of his book unless it was made clear that the author had to pay the publishing costs.

Before *Mr. Leon R. Gross*, hearing examiner.

Mr. Charles S. Cox for the Commission.

Mr. Philip Adler, of New York City, for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on May 15, 1959, charging them with

violation of the Federal Trade Commission Act in soliciting contracts for the publication of books by authors and prospective authors. After the filing of answer by respondents, hearings were held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed April 18, 1960, the hearing examiner ordered respondents to cease and desist from the practice which he found to be in violation of the Federal Trade Commission Act.

Respondents filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be denied but that the initial decision is not appropriate in all respects to dispose of this matter and should be vacated and set aside. The Commission further finds that the proceeding is in the public interest and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Exposition Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 386 Fourth Avenue, New York, New York. Respondent, Edward Uhlan, is an individual and president of said corporate respondent. Mr. Uhlan formulates, directs and controls the acts, practices and policies of the corporate respondent.

2. In the course and conduct of their business, respondents are now and have been engaged in interstate commerce through the solicitation of contracts for the publication of books and through the sale of books throughout the various states, and by causing such contracts to be forwarded through the United States mail, and otherwise, to customers located in various states other than that in which respondents' business office is located.

3. Respondents are now and have been in substantial competition with other corporations, firms and individuals engaged in contracting for the publication of books in commerce.

4. Respondents' plan of publication is one whereby the authors subsidize the publication of their books with the authors paying all or a substantial portion of the cost of same. Respondents agree to pay the authors 40% of the retail price of all the authors' books which respondents sell. Respondents stipulated in the record that the money they have paid to their authors from the sale of the au-

thors' books has been less than the amount of the authors' subsidy in at least ninety per cent of the cases.

5. In soliciting contracts for the publication of books, respondents have published advertisements in newspapers and magazines wherein they have represented, among other things, that their authors "get 40% royalties."

6. A number of authors whose books were published by respondents testified that they did not know from reading respondents' advertisement that they would have to subsidize all or a substantial portion of the cost of the publication of their books, and that it was their understanding from the advertisement that they would be paid for having their books published.

7. Upon the basis of the foregoing testimony, the Commission finds that respondents, through the use of the aforesaid advertisements, have represented that the payments made to authors constitute a net return to the authors whereas, in truth and in fact, such payments in most cases are not sufficient for the authors to recoup their investments made with respondents for the publication of the authors' books and would under no circumstances represent a net return to the authors.

8. The practice of respondents, as hereinabove found, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the payment they will receive for the publication of their books and to induce them to enter into correspondence with respondents, leading in many instances to the acceptance of a contract for respondents' services. As a result thereof, trade has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Exposition Press, Inc., a corporation, and its officers, and Edward Uhlan, individually and as an officer of said corporation, and respondents' agents, representa-

tives and employees, directly or through any corporate or other device, in connection with the solicitation of contracts for the printing, promotion, sale and distribution of books, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing through the use of the term "royalties" or in any other manner that they will make payments to an author based on sales of the author's book unless a disclosure is made in immediate conjunction therewith that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the author.

It is further ordered, That respondents, Exposition Press, Inc., a corporation, and its officers, and Edward Uhlan, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Mills not participating for the reason he did not hear oral argument.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

Respondents in this matter are charged with violating Section 5 of the Federal Trade Commission Act in the solicitation of contracts for the publication of books by authors and prospective authors. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practice found to be unlawful. Respondents have appealed from this decision.

The complaint charges that respondents' representation that they pay their authors a royalty on books published and sold by them is false, misleading and deceptive. It is alleged in this connection that respondents' plan of publication is one whereby the authors subsidize the publication of the books by paying for the cost thereof. It is further alleged that respondents agree to pay the authors 40% on the price of the books sold but that only in rare cases are the sales sufficient for the authors to recoup their investments. The hearing examiner's order would require respondents to cease representing that any payment made to an author based on sales of the author's book is a "royalty" unless respondents have repaid to the author all sums of money paid by the author for publication of his book.

Respondents' business is characterized in the record as "subsidy" or "vanity" publishing. The undisputed facts in this record show that respondents, in soliciting authors, have published an advertisement in magazines and newspapers which reads as follows:

Free to WRITERS seeking a book publisher

Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion. Free editorial appraisal. Write Dept. STM-3.

Exposition Press / 386 4th Ave., N.Y. 16

To persons responding to this advertisement, respondents have customarily sent brochures entitled "You Can Publish Your Book" and "What Every Writer Should Know About Publishing His Own Book." Thereafter, respondents have entered into correspondence with the writer leading up to the submission of the writer's manuscript and to the acceptance of a contract. The contract designates the retail price to be charged for the book and respondents agree therein "to pay to the Author a royalty of $—— per copy (40% of the retail price)" on all copies sold. The details of the subsidy payment to be made by the author are also set forth in this contract. In this connection, respondents stipulated that the money they have paid to their authors from the sale of the author's books has been less than the amount of the author's subsidy in at least ninety per cent of the cases.

Respondents first contend that the complaint does not state a cause of action, that is, that the practices with which they are charged do not constitute an unfair method of competition or unfair and deceptive acts. They argue that in their contract with authors the parties agree that the payment of 40% of the retail price is a royalty and that there is no logical or legal connection between the presence of a subsidy and the payment of a royalty. This argument is based on an erroneous interpretation of the complaint. Properly construed, the complaint charges that respondents represent that their authors will receive a net return on their books, whereas the payments made by respondents are rarely ever sufficient to cover the author's investment. The use of such representations, if shown to be deceptive as alleged, clearly constitutes an unfair trade practice within the meaning of Section 5. Respondents' argument on this point must be rejected.

Witnesses who testified in this proceeding were trade publishers who do not require their authors to subsidize the cost of publication, professional writers, and writers whose books were published by respondents. Purportedly on the basis of the testimony of the trade publishers and professional writers, the hearing examiner found that any payment made to an author based on sales of the author's

book is not a "royalty" unless respondents have repaid to the authors all sums of money paid by the author for publication of his book. Under the hearing examiner's order, the term "royalty" could not be used to describe a payment made to an author of a percentage of the retail price of his book even though the author was put on notice that he would have to pay a subsidy which would not be recovered until a certain number of his books were sold. Payments which could not be described as a "royalty" until the subsidy was repaid would then become a royalty. Thus, in effect, the hearing examiner has ruled that the term "royalty" is absolute and cannot be qualified. Respondents argue that the finding upon which this order is purportedly based is not supported by the evidence.

An examination of the testimony of the trade publishers shows that it related in substantial part to the method in which they conduct their business and the manner in which they determine the amount of royalty paid their authors. In substance, they defined "royalty" as a compensation paid to an author, generally based on a percentage of the retail or wholesale price of the book sold, for the right to publish the book. With the possible exception of one trade publisher, none of these witnesses went so far as to state that the author would have to recoup his subsidy before payments by the publisher would constitute a royalty. In fact, three of the four trade publishers called by counsel supporting the complaint, in the course of cross-examination, acknowledged that if an author would reimburse them for manufacturing costs, they could raise their royalty rates above the maximum now given.

It is true that the testimony of two of the three professional authors supports the hearing examiner's finding. However, these authors have had experience only with trade publishers who pay all of the publication costs. Their understanding of a royalty is more restricted than that of the trade publishers themselves. Moreover, their testimony conflicts with that of the "non-professional" authors who had books published by respondents. These writers had received the brochures and correspondence from respondents before entering into the contract. It is apparent from their testimony that upon reading this material, they were aware that they would be required to pay respondents a subsidy for the publication of their books. In addition, their testimony discloses that upon receiving all of respondents' literature, they understood the term "royalty" to mean a percentage of the retail price of their books and that a certain number of their books would have to be sold before they could recoup their subsidy payments. Under the circumstances, we are not convinced from the testimony of the trade publishers and the

professional writers that writers solicited by these respondents would be misled by the use of the term "royalty" into believing that a payment of a percentage of the retail price of their book represents a net return to them if they are fully aware that they are required to subsidize the cost of publication.

In the absence of such knowledge on the part of the writers, it is our opinion that the use of the term "royalty" to describe payments made to the writers does have a tendency and capacity to mislead writers into believing that these payments actually constitute a net return. In fact, the testimony of certain of the authors whose books were published by respondents supports a finding of actual deception as a result of respondents' advertisement offering 40% royalties. In substance, these authors testified from reading respondents' advertisement that they did not know they would have to pay and that they expected to be paid for having their books published.

Respondents' argument on this point is that the advertisement, the brochures and the contract must be read together and that from them it is clear that the authors, knowing they have to pay a subsidy, understand that the payments they will receive do not constitute a profit to them. However, this argument ignores the fact that respondents use the advertisement as their first step in contacting writers who at that time have no means of knowing that they must pay a subsidy. As found by the hearing examiner, respondents' advertising practice falls squarely within the principle enunciated by the court in the *Carter* case[1] that "The law is violated if the first contact or interview is secured by deception (*Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, 115 [25 F.T.C. 1715, 2 S.&D. 429]), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co., et al.* v. *Federal Trade Commission*, (7 Cir.), 153 F. 2d 103, 104, 105 [42 F.T.C. 882, 4 S.&D. 455])." In view of our conclusion on this point, an appropriate order prohibiting the practice will be entered.

Although not raised during the trial of this case, respondents on this appeal now allege bias and prejudice on the part of the hearing examiner. The fact that we have reached our decision in this matter upon a separate examination of the entire record serves to answer this allegation. However, we have given consideration to the grounds advanced by respondents and are of the opinion that their argument is without substance.

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[1] *Carter Products, Inc.* v. *F.T.C.*, 186 F. 2d 821 (7 Cir. 1951).

In support of their argument, respondents contend that the hearing examiner erred in allowing irrelevant testimony; in taking official notice of a previous order against respondents for the purpose of giving further insight into their *modus operandi;* and in referring to cease and desist orders of the type sought herein against other subsidy publishers without stating that said orders were entered by consent agreements. In our view, these actions simply reflect the hearing examiner's determination as to the factors to be considered in this case and, at most, constitute nonreversible error from which bias cannot be presumed and which in no way constituted denial of a fair trial. Likewise the hearing examiner's comments in his initial decision concerning certain of respondents' literature and statements made by respondents' counsel, if in error, obviously are based on his honest interpretation of the record. Furthermore, respondents' contention that certain statements made during the course of the hearing to the individual respondent indicated bias, is without merit. These statements, read in the context in which they were made, reflect no animosity or bias toward respondents, but were made simply to impress on the individual the finality of a certain ruling and the importance of proper conduct in the course of the hearing.

Respondents also contend that the hearing examiner exhibited bias by denying the defense of *res judicata* raised in their answer without giving them a chance to be heard thereon. The record shows that the hearing examiner had examined the record in the prior proceeding upon which the defense was based and thus had sufficient knowledge upon which to make his decision. Moreover, on the basis of this knowledge, the hearing examiner's denial was proper. The issue presented in this case was not raised in the previous complaint (Docket No. 6638) and, furthermore, the issues in the previous complaint were not disposed of by a trial on the merits but were settled by the negotiation of agreement of the parties containing a consent order.

In view of the foregoing, the initial decision is vacated and set aside. We are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.