University of Dayton Law Review

Volume 2 | Number 2 Article 8

1977

Trademark: Compulsory Licensing as a Remedy for Violation of Section 5 of the Federal Trade Commission Act

Richard C. Berry
University of Dayton

Anthony J. Muto
University of Dayton

TRADEMARK: COMPULSORY LICENSING AS A REMEDY FOR VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT—*In re Borden, Inc.*, FTC Dkt. No. 8978 (Aug. 19, 1976).

I. INTRODUCTION

The interface of trademark and antitrust law has for some time generated controversy among various segments of the legal profession. The heart of the debate has centered on the need to harmonize the preservation of economic competition, which is the goal of the antitrust laws,[1] with the entrepreneur's interest in maintaining the undivided use of the mechanism by which his product or service is identified—his trademark. The achievement of harmony between these ends depends, therefore, upon a certain characterization of the trademark; that is, the particular social and economic functions which are attributed to trademarks must be examined in the light of the proscriptions of the antitrust laws. An appropriate focus for such a discourse is a case recently before the Federal Trade Commission (FTC), *In re Borden, Inc.*[2] In that case the administrative law judge, before whom the complaint was initially heard, ordered the respondent, Borden, to license its ReaLemon trademark to all others who wished to compete in the marketing and sale of reconstituted lemon juice,[3] the trademark product. This remedy was thought necessary in order to disperse the monopoly power which Borden had been found to possess in that market, in violation of section 5 of the Federal Trade Commission Act.[4]

---

1. During hearings on the Lanham Act, representatives of the Justice Department gave testimony expressing concern that the contemplated legislation would present problems in regard to antitrust enforcement. *See, e.g., Hearings Before the Subcom. on Trade-Marks of the Senate Com. on Patents*, H.R. 82, 78th Cong., 2d Sess. 58-71 (1944) [hereinafter cited as *Hearings*].

2. FTC Dkt. No. 8978 (Aug. 19, 1976). The case is, as of this writing, pending before the full Commission. Citations to this decision refer to the full opinion issued by Judge Hanscom. An abridged version appears in [1977] 3 TRADE REG. REP. (CCH) ¶ 21,194.

3. Judge Hanscom's opinion summarized the voluminous evidence which was produced at the Commission's hearings and found that the market for reconstituted lemon juice was cognizable under the Sherman Act as a product market independent of that for fresh lemons. FTC Dkt. No. 8978 at 5-50 (1976). The judge's legal conclusion was that a submarket for reconstituted lemon juice in fact existed. *Id.* at 136-50.

4. 15 U.S.C. §§ 45(a)(6) and 45(b) provide that:

> 45(a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> 45(b) Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint. . . .

A question arises as to the appropriateness of the remedy in such a case. More specifically, can such a drastic impairment of a manufacturer's rights in his trademark be justified as necessary to further the competitive ideal of the antitrust laws? The discussion which follows will assess the impact of the decision from several perspectives. The background to the federal trademark law[5] will be sketched in order to place the decision in historical perspective. Secondly, the jurisdiction of the Federal Trade Commission Act, under section 5, which allows the order of compulsory trademark licensing, will be examined. Thirdly, the authority upon which the judge relied will be evaluated and a possible alternative basis for the decision will be proposed. Fourthly, the impact of the decision on industry, and its implications for trademark owners and the consuming public will be assessed. Finally, the authors' conclusions will be presented.

II. Facts of the Case and Decision of the Court

In the complaint brought by the FTC in 1974, Borden was charged with a violation of section 5 of the Federal Trade Commission Act. The complaint alleged that Borden, through its subsidiary ReaLemon Foods, had succeeded in carrying out plans to maintain monopoly power over the marketing and sale of reconstituted lemon juice. Specifically, it was alleged that Borden had used its dominant market position—approximately an eighty percent share of the lemon juice market—as well as its overall size and economic power to hamper the growth of smaller competitors. In its marketing plans for the 1971-1974 period, Borden had devised special tactics to be employed in geographic sections of the country where its total market share had slipped, due to the entry of competitors, from ninety-two percent at the beginning of 1970 to eighty-eight percent in August of the same year. These tactics included discriminatory pricing,[6] various promotional allowances to ReaLemon retailers,[7] and sales below cost.[8]

As a result of these marketing techniques Borden was charged with: (a) monopolizing the reconstituted lemon juice market; (b) preserving, maintaining, and furthering a highly concentrated

---

The person, partnership, or corporation . . . shall have the right to appear . . . and show cause why an order should not be entered by the Commission . . . to cease and desist from the violation of the law so charged. . . .

5. 15 U.S.C. §§ 1055-1127 (Supp. IV 1974).
6. FTC Dkt. No. 8978 at 98-99 (1976).
7. *Id.* at 100-05.
8. *Id.* at 105-34.

market structure; (c) hindering, restraining, foreclosing, and frustrating competition in the reconstituted lemon juice market; (d) increasing entry barriers in the reconstituted lemon juice market; and (e) depriving customers of the benefits of free and open competition.[9]

Having found that monopoly power existed in violation of section 5, Judge Hanscom devised a remedy to attack it. After noting that permanent injunctive relief would be inadequate to forestall Borden's marketing practices, Judge Hanscom ordered that Borden license its ReaLemon trademark to all aspiring competitors.[10]

The analysis undertaken by Judge Hanscom in order to determine whether Borden's practices constituted a violation of the antitrust laws was in no way novel. All issues dealing with the relevant product market and Borden's use of its market power to maintain a monopoly were discussed in a conventional fashion with citation to well recognized authority;[11] it is the judge's compulsory licensing order which is noteworthy.

III. Borden and the Trademark Law

The chief functions of the trademark have been summarized as follows:

> (1) [T]o identify one seller's goods and distinguish them from goods sold by others; (2) to signify that all goods bearing the trademark come from a single, albeit anonymous, source; (3) to signify that all goods bearing the trademark are of an equal level of quality; and (4) as a prime instrument in advertising and selling the goods.
>
> In addition . . . a trademark is also the objective symbol of the good will which a business has built up.[12]

There is room within the scope of such a formulation for characterizing the rights of a firm in its trademark as something akin to a property right, and some authorities have taken such a view.[13] There

9. *Id.* at 2.

10. The order Judge Hanscom issued calling for the compulsory licensing of the trademark is somewhat analogous to the divestiture remedy often employed in monopoly cases, 2 J. McCarthy, Trade-Marks and Unfair Competition § 31:23, at 415-16 (1973), and, it is well-settled that divestiture is among the remedies available to the government in anti-trust cases; *see, e.g.*, Ford Motor Co. v. United States, 405 U.S. 562 (1972).

11. *Hearings, supra* note 1, at 141-62. Among the authority relied by Judge Hanscom were the following cases: United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964); Brown Shoe v. United States, 370 U.S. 294 (1962).

12. 1 J. McCarthy, Trade-Marks and Unfair Competition § 3:1, at 86 (1973) (citations omitted).

13. For example, one authority has said that: "[a]ny attack on our trade-mark system

is room also for the more restrictive traditional view of the trademark as merely a device by which consumers identify the origin of the goods.[14] The former view is one which would be favored by many firms since they are likely to perceive in their trademark the embodiment of the goodwill which their product has generated. Indeed, from a marketing standpoint the trademark may be the *sine qua non* of success.[15]

The test by which the strength and quality of a trademark was judged at common law might be stated as follows: "[H]as the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked are manufactured by him?"[16] For centuries, all craftsmen have marked their goods in some manner for the purpose of identifying their source of manufacture. Courts have long recognized the significance of such an individual mark of identification and the potential likelihood of fraud on the consuming public if other tradesmen not responsible for the labor could nevertheless appropriate it as their own.[17] In response to this recognition, there developed at common law rules whereby trademark owners could protect their right in the mark against its use by other merchants in selling their own products.[18] Violation of the right gave rise to a cause of action for which damages were recoverable by the "mark holder."[19]

is an attack on the institution of private property itself, and that any unwarranted attack on private property necessarily is an attack on our Civil Liberty." Jackson, *Comments on the Safeguarding of the Trade-mark System,* 41 T.M.R. 512, 518 (1951) (paper delivered by the Honorable Joseph R. Jackson, Associate Judge of the United State Court of Customs and Patent Appeals).

14. This view of the nature and function of the trademark is explicated in Rodgers, *The Lanham Act and the Social Function of Trade-marks,* 14 LAW & CONTEMP. PROB. 173 (1949) and Pattishall, *Trade-marks and the Monopoly Phobia,* 50 MICH. L. REV. 967 (1952). The evolution of the concept of trademarks as mere identifiers of the source of goods towards this modern view is traced in Note, *Quality Control and the Antitrust Laws in Trade-mark Licensing,* 72 YALE L.J. 1171, 1174-78 (1963).

15. The utility of trademarks as an advertising tool is illustrated in Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 YALE L.J. 1165 (1948).

16. *Cf.* F. SCHECTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADEMARKS 47-63 (1925).

17. Millington v. Fox, 40 Eng. Rep. 956 (Ch. 1838).

18. *See, e.g.,* M'Andrew v. Bassett, 46 Eng. Rep. 965, 967 (Ch. 1864), wherein the court held that a trademark owner could maintain an action for infringement when the following elements were present:

> first, that the mark has been applied by the Plaintiffs properly (that is to say), that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the Defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description.

19. *See* Trade-Mark Cases, 100 U.S. 82, 92 (1879) wherein the now superceded 1870 trademark legislation is cited.

Statutory basis for securing trademark protection was first enacted in 1870.[20] This legislation was the precursor of that in force today—the Federal Trademark Act of 1946,[21] also known as the Lanham Act. Under the Lanham Act, owners of trademarks used in commerce may register them in the United States Patent Office.[22] The Act provides that "any word, name symbol, or device, or any combination thereof"[23] can be trademarked "by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."[24] Under court interpretations of the Lanham Act, the registered trademark holder can restrain the use of the term as a symbol to attract public attention.[25] To enjoin a competitor's use of a registered trademark, however, the owner must show that the competitor's use of the mark "is likely to cause confusion, or to cause mistake, or to deceive. . . ."[26]

By passage of the Lanham Act, Congress intended "to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not."[27] In reporting the legislation, the Senate Committee noted its expectation that these purposes could be accomplished "without the fear of fostering hateful monopolies, for no monopoly is involved in trade-mark protection. Trademarks are not monopolistic grants like patents and copyrights."[28]

It has been long been recognized that the owners of trademarks do not possess rights as extensive as those enjoyed by the owners of patents and copyrights.[29] The trademark lacks the specific constitutional underpinnings which exist for the former two rights,[30] and the special monopoly granted to the patent holder to exploit his invention is not extended to the trademark owner.[31] As Justice Holmes

---

20. *Id.*

21. 15 U.S.C. §§ 1051-1127 (1970) [hereinafter referred to as the Lanham Act].

22. 15 U.S.C. § 1051 (1970).

23. 15 U.S.C. § 1127 (1970).

24. *Id.*

25. Venetianaire Corp. of America v. A & P Impost Co., 429 F.2d 1079 (2d Cir. 1970); Application of Automatic Radio Mfg. Co., 404 F.2d 1391 (Court of Customs and Patent Appeals 1969); Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2d Cir. 1962).

26. 15 U.S.C. § 1114 (1970).

27. SEN. REP. No. 1333, 79th Cong., 2d Sess., *reprinted in* [1946] U.S. CODE CONG. & AD. NEWS 1274, 1275.

28. *Id.*

29. *See, e.g.*, United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90 (1918).

30. U.S. CONST. art. I, § 8, cl. 8.

31. In truth, a trademark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade

said in *United Drug Co. v. Rectanus,*[32] "[t]he owner of a trademark may not, like the proprietor of a patented invention, make a negative or merely prohibitive use of it. . . ."[33]

In the *Borden* case, the FTC found that Borden's ReaLemon trademark, beyond merely distinguishing Borden's lemon juice from that of its competitors, had become the centerpiece in a campaign involving the exercise of monopoly power to exclude new competitors and to drive already existing ones out of the market—an unquestionably illegal course of action.[34] The monopoly power existed as a result of the dominant position which ReaLemon had attained in the relevant market and the high recognition it commanded from consumers.[35] Clearly, a trademark capable of exerting such an influence upon the consumer can, when employed in concert with the vast economic resources of a large corporation such as Borden, result in violations of the antitrust laws.[36] This danger is perhaps greater when the owner of the trademark is a monopolist in the marketing of a highly interchangeable product, as was Borden. Maintenance of monopoly power[37] in this situation need not involve the use of the trademark in an active manner because the mark itself is the chief mode by which the monopolist's product is

> by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

United Drug Co. v. Rectanus Co., 248 U.S. 90, 98 (1918).

32. 248 U.S. 90 (1918).

33. *Id.* at 97-98.

34. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Schine Chair Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

35. It approached in many minds identification of the Borden product with the generic term for lemon juice. *See* FTC Dkt. No. 8978 at 151 (1976). It was this extremely high consumer identity level in a trade-marked product which some of the Lanham Act's proponents envisioned as a circumstance that would justify considering a mark to have been abandoned under the Act. *See* testimony of Robert W. Byerly in *Hearings Before the House Com. on Patents on H.R. 82,* 78th Cong., 1st Sess. 27 (1943); *see also* testimony of Daphne Robert in *Hearings Before a Subcomm. of the Senate Comm. on Patents on H.R. 82,* 78th Cong., 2nd Sess. 100 (1944).

36. It has been said that:

> [t]he trade mark may become a detrimental weapon if it is used to serve a harmful or injurious purpose. If it becomes a tool to circumvent free enterprise and unbridled competition, public policy dictates that the rights enjoyed by its ownership be kept within their proper bounds.

United States v. Timkin Roller Bearing Co., 83 F. Supp. 284, 316 (N.D. Ohio 1949), *aff'd & modified*, 341 U.S. 593 (1951).

37. That maintenance of monopoly power (even that which may have been lawfully obtained) can constitute an offense under the Sherman Act has been recognized at least since Judge Hand's opinion in United States v. Aluminum Co. of America, 148 F.2d 416, 431-32 (2d Cir. 1945).

differentiated from the nearly identical products of its competitors.[38]

IV. Federal Trade Commission Powers Under Section 5 of the Federal Trade Commission Act

Because courts have long protected trademarks as property rights, they have hesitated to place restrictions on them whenever implementation of less drastic means was possible.[39] The dilemma facing courts, however, is whether the policy of safeguarding trademarks can be continued in the face of antitrust violations. In relegating the solution of this question to the Commission, Congress entrusted that body with the administration of the FTC Act and reserved to the courts only limited powers of review.[40] The Act, particularly section 5, gives the Commission power to prevent persons, partnerships, or corporations from engaging in prohibited conduct in competitive circles.[41] Under the Act, the Commission has the power to issue cease and desist orders to prevent conduct which would constitute antitrust violations.[42]

Early cases held that the FTC Act authorized the Commission only to order companies involved in unfair trade practices to cease and desist their activity, a construction which is consistent with the language of the statute.[43] In *FTC v. Eastman Kodak Co.*,[44] Kodak

38. One commentator has noted that some economists believe that the advertising or product differentiation function of trademarks does not have the pro-competitive effect which other authories contend it has; *see, e.g.*, Pattishall, *Trade-Marks and the Monopoly Phobia*, 50 Mich. L. Rev. 967 (1952).

> [T]he result of effective trade-mark promotion is to differentiate the trade-marked article from . . . articles possessing the same general physical and chemical characteristics and the same physical and chemical characteristics and the same utility to the consumer, and to create for the trade-marked article a monopoly and an immunity from the rigors of competition. The trade-mark creates for its specific product an entirely separate market, where demand becomes inelastic and prices are established which are independent of the prices of other articles of the same class that would otherwise be competitive with it. . . . [P]articularly in dealing with goods of a character closely approaching the fungible, the differentiation of a product accomplished by a trade-mark is necessarily spurious, because the trade-marked product is not in fact substantially different from that of other articles of the same class.

Timberg, *Trade-Marks, Monopoly, and the Restraint of Competition*, 14 Law & Contemp. Prob. 323, 325 (1949).

39. *See* text accompanying notes 16-21 *supra*.

40. Atlantic Ref. Co. v. FTC, 381 U.S. 357 (1965); Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946); Florida East Coast Ry. Co. v. United States, 259 F. Supp. 993 (M.D. Fla. 1966); *see generally* Rushegsky, *F.T.C. Section 5 Powers and the Pfizer-Cyanamid Inbrogles: Where Do We Go From Here, or 'You Ain't Seen Nothing Yet,'* 18 Cath. U.L. Rev. 335, 346 (1968).

41. 15 U.S.C. § 45(a)(6) (1970).

42. 14 U.S.C. § 45(b) (1970).

43. FTC v. Eastman Kodak Co., 274 U.S. 619 (1927); *see also* FTC v. Western Meat

petitioned the Court of Appeals for reversal of a Commission order which instructed Kodak to sell print labs purchased with the intent to maintain its monopoly in the field of developing positive prints. Kodak bought the labs simply as leverage in order to persuade independent print labs to purchase only Kodak films in return for Kodak's promise not to operate the labs. This action was Kodak's response to a drop in its market share from ninety-four percent to eighty-one percent. The Commission ordered Kodak to cease and desist from combining and cooperating in restraint of trade, as well as ordering Kodak to sell the labs. The Court of Appeals upheld the cease and desist order but refused to affirm the mandate to sell the labs.

In affirming the Court of Appeals' decision to strike down the order to sell, the Supreme Court held that section 5 authorizes only cease and desist orders and that the Commission possessed only administrative functions, not general powers. The authority of a court of equity certainly did not extend to the Commission. The Court noted that the Commission had no power to order sanctions of such an extraordinary nature. The dissent, however, supported broader powers for the Commission. Mr. Justice Stone noted:

> The comprehensive language of § 5 neither invites nor supports a narrow construction. It is general in terms, and in the authorized prevention of unfair methods of competition the Commission is not limited to any particular method in making its orders effective.
>
> . . . .
>
> . . . The Trade Commission's function is to discourage certain trade tendencies . . . .
> [There is] an unmistakeable Congressional intent to confer on the Commission the power . . . to prevent unfair trade practices . . . .[45]

If the Commission were enabled to exercise the power to order licensing, the expansive reading given section 5 by the dissent in *Kodak* was essential. Cases leading up to the FTC decision in *Borden* strongly sanctioned increasing the powers of the FTC in dealing with unfair trade practices:

> Where there has been a continued course of unlawful price maintenance . . . it is within the *discretion of the Commission* to determine that the only effective way to terminate the effects . . . is by barring an otherwise unlawful course of conduct . . . .[46]

Co., 272 U.S. 554 (1926), Chamber of Commerce of Minneapolis v. FTC, 280 F. 45 (8th Cir. 1922); National Harness Mfrs.' Ass'n. v. FTC, 268 F. 705 (6th Cir. 1929).

44. 274 U.S. 619.

45. 274 U.S. at 627-28.

46. Sandura Co. v. FTC, 339 F.2d 847, 861 (6th Cir. 1964) (emphasis added).

> The *Commission has wide discretion* in its choice of remedies deemed adequate to cope with unlawful practices . . . in trade and commerce.[47]
>
> [T]he *Commission is not limited* to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [The Commission] cannot be required to confine its road block to the narrow lane the transgressor has travelled; *it must be allowed effectively to close all roads to the prohibited goal* . . . .[48]

Section 5 attempts to prevent companies' use of unfair competitive methods. Rather than temporarily foreclosing the use of predatory competitive practices, the Commission seeks to forestall such practices at their inception.[49] Therefore a compulsory licensing proposal would appear to be appropriate in light of the goals to be attained under section 5 of the FTC Act.

The decision cited by Judge Hanscom as the basis for his order for compulsory licensing of the ReaLemon trademark was *American Cyanamid Co.,*[50] which presented the novel question whether the FTC could order compulsory licensing of patents for a reasonable royalty. Although compulsory licensing had been ordered as a remedy prior to *American Cyanamid*, those cases were under the jurisdiction of administrative agencies other than the FTC.[51] *American Cyanamid* was the first case in which compulsory licensing was ordered under the power of section 5 of the FTC Act. In that case, Pfizer and American Cyanamid had allegedly withheld certain information in their patent applications for the production of tetracycline for which the two drug companies were competing. The FTC complaint charged the two with collusion in an agreement that provided that the company which was awarded the patent would license it exclusively to the other. Such an agreement would have effectively restricted the production and sale of tetracycline to Pfizer and American Cyanamid. The Commission found that the

---

47. Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946) (emphasis added).

48. FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) (emphasis added); *see also* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) ("anti-trust remedies should be allowed room for full play"); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963) (remedy must be "ample to deal with the evil at hand"); Florida East Coast Ry. Co. v. United States, 259 F. Supp. 993 (M.D. Fla. 1966) (FTC was to prevent unfair competition in widely divergent industries, preserving the existing price system so fundamental to the American way of life); 87 C.J.S. *Trade-Marks, Trade-Names and Unfair Competition* § 233 (1954).

49. 59 Nw. U.L. Rev. 543, 555-56.

50. 63 F.T.C. 1747 (1963).

51. *See* United States v. U.S. Gypsum Co., 340 U.S. 76 (1950); United States v. Nat'l Lead Co., 332 U.S. 319 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (all these cases were brought by the Justice Department, not by the FTC).

activity of the two companies constituted a restraint of trade and ordered a compulsory licensing of the patent as a remedy. In affirming the order, the Court of Appeals for the Sixth Circuit responded negatively to the contention that the Commission lacked authority to issue such relief:

> In the present case the Commission has not undertaken to pass upon the *validity* of the patents in question nor has it held the patents to be invalid. The order recognizes the validity of the patents . . . but compels licensing on what the Commission found to be a reasonable royalty basis. The Commission has not ruled that the act of obtaining the . . . patent by misrepresentation as such constituted a violation of Section 5, but rather that *the subsequent use, for purposes of excluding competition,* of a patent so obtained, constituted . . . a violation.[52]

The *Borden* case is similar in concept to *American Cyanamid.* The FTC rulings in both were based on the need to accomplish the goal of maintaining competition. The employment of a harsh remedy such as compulsory trademark licensing in furtherance of this goal finds additional authority in the judicially settled rule that section 5 of the FTC Act allows wide latitude in fashioning an appropriate remedy. Although *American Cyanamid* dealt with patents, and *Borden* with trademarks, the *Borden* ruling is a natural extension of the administrative power sanctioned in *American Cyanamid.* In the latter case, an exclusive patent could have been used for the achievement of market domination in the antibiotic field. Thus, the commission concluded that competition could only be restored by a forced sharing of American Cyanamid's patent right. Any other solution would have restored only temporary status quo to the marketplace.

Similarly, in *Borden,* ReaLemon's lofty market position, and the barriers to entry attendant to that position, stemmed mainly from Borden's ability to offer a "tried and true" consumer product. Because the trademark had come to represent, in the consumers' eyes, the only quality product in the marketplace, they were willing to pay a premium price for it. ReaLemon's monopoly power in the lemon juice market enabled Borden to implement temporary marketing plans whose objective was to drive competing manufacturers out of the marketplace by lowering its prices below competitive

52. American Cyanamid v. FTC, 363 F.2d 757, 769 (6th Cir. 1966) (emphasis added). The case was reversed and remanded due to the disqualification of a Commissioner, but upon remand compulsory licensing was again ordered and affirmed, *sub nom.* Charles Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1969).

levels. Of course, Borden could withstand short term depressed profit periods in isolated geographic areas because its national distribution enabled it to offset losses by maintaining the premium price in areas where it faced no competition. Since competing manufacturers were merely regional distributors, however, they were unable to match Borden's anti-competitive price-cuts. More often than not, Borden was the victor in these regional power struggles.

V. Section 33(b)(7) of the Lanham Act—An Analogy

It is interesting to speculate upon the outcome of a hypothetical suit by Borden for alleged infringement of the ReaLemon mark. It is arguable that in such an eventuality section 33(b)(7) of the Lanham Act[53] could be successfully invoked as a defense by a Borden competitor. That section provides that an owner's use of his mark in violation of the antitrust laws may be raised as a defense to an action by him for infringement.[54] A finding for the defendant in such an action could entail, at the least, the loss of the mark's status as incontestably valid,[55] or at worst, the entire loss of the owner's rights in the mark.[56] The Congressional Record indicates that Senator O'Mahoney noted that the section permits and may even require the court to license the defendant to use the trademark if the plaintiff is shown to have violated any provision of the antitrust laws dealing with monopolies, restraint of trade, price maintenance, or price discrimination.[57] If the alleged antitrust violations are proven, the mark owner will no longer enjoy exclusive right to its use; the trademark becomes unenforceable and invalid.[58]

53. 15 U.S.C. § 1115(b)(7).

54. The section reads, in elevant part, as follows:

(b) If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

. . . .

(7) That the mark has been or is *being used to violate the antitrust laws* of the United States. (emphasis added).

55. Developments in the Law, *Trademarks and Unfair Competition*, 68 Harv. L. Rev. 814, 829-30 (1955); *cf.* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 298 F. Supp. 1309 (S.D.N.Y. 1969), *modified on other grounds*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

56. For example, it has been said that in an infringement action, defended on the basis of section 33(b)(7), the plaintiff will be denied relief and the infringement action will be dismissed if the defendant can show antitrust violations. Williamson, *Trade-marks Registered Under the Lanham Act Are Not Incontestible*, 37 T.M.R. 404 (1947).

57. 92 Cong. Rec. 7524 (1946).

58. Ooms and Frost, *Incontestibility*, 14 Law & Contemp. Prob. 220 (1949).

The availability to the alleged infringer of an antitrust defense was not always recognized by the court. As recently as 1963, there were no cases allowing the infringer to raise the defense.[59] Later cases, however, have permitted the antitrust violation to be raised as a defense when the trademark itself has been employed as "an instrument to effectuate the antitrust activity" as opposed to its use in a merely collateral fashion.[60] In *Coca-Cola Co. v. Howard Johnson Co.*,[61] an infringement action was brought against Howard Johnson Restaurants which defended on the basis of alleged antitrust violations grounded on the misuse of the registered "Coke" trademark. Although the District Court for the Northern District of Georgia recognized the availability of the defense, it held that there must be a direct causal relationship between the trademark holder's allegedly wrongful use of the mark and the antitrust violation; or, put another way, if the antitrust violations are the result of conduct wholly peripheral to the company's use of its trademark, then the asserted defense will fail.[62]

The extent of the utility of the antitrust defense to the defendant in an infringement suit—that is, whether it entails dismissal of the suit or merely loss of the mark's incontestibility—was not determined in *Coca-Cola* because there was found to be no causal relation between the alleged antitrust violations and the trademark's use. The court did, however, discuss in dicta two cases representing the contending theories on the scope of the antitrust defense —*Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*[63] and *Phi Delta Theta Fraternity v. J.A. Buchroeder & Co.*[64]

In the *Carl Zeiss* case, Judge Mansfield of the Southern District of New York adopted a construction of section 33(b)(7) of the Lanham Act which restricted its effect such that, if the plaintiff were successful, the trademark's incontestability (or conclusively pre-

59. *Cf.* Drop Dead Co., Inc. v. S.C. Johnson & Son, Inc., 326 F.2d 87 (9th Cir. 1963); Pepsi-Cola Co. v. Coca-Cola Co., 14 N.Y.S.2d 395, 399 (Kings County Sup. Ct. 1939).

60. Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366 (7th Cir. 1976), *cert. denied*, 97 S. Ct. 91 (1976); Coca-Cola Co. v. Howard Johnson Co., 386 F. Supp. 330, (N.D. Ga. 1974); Phi Delta Theta Fraternity v. J.A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966).

61. 386 F. Supp. 330 (N.D. Ga. 1974).

62. *Id.* at 335-37. *See also* Carpa Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976); Boston Professional Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc., 360 F. Supp. 459 (N.D. Tex. 1973), *modified*, 510 F.2d 1004 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); Federal Folding Wall Corp. v. Nat'l Folding Wall Corp., 340 F. Supp. 141 (S.D.N.Y. 1971); W.E. Bassett Co. v. Revlon, Inc., 305 F. Supp. 581 (S.D.N.Y. 1969), *modifed*, 435 F.2d 656 (2d Cir. 1970).

63. 298 F. Supp. 1309, 1311-14 (S.D.N.Y. 1969), *modified on other grounds*, 433 F.2d 686, *cert. denied*, 403 U.S. 905 (1971).

64. 251 F. Supp. 968 (W.D. Mo. 1966).

sumed validity) under the Act would be removed; the mark would be only prima facie valid and therefore subject to attack in infringement litigation.[65] The court further noted that, quite apart from considerations of section 33(b)(7), a court's inherent equitable powers can be used to intervene and deny enforcement of a mark employed to violate the antitrust laws.[66]

In *Coca-Cola*, the court's discussion of Judge Mansfield's formulation in *Carl Zeiss* made clear that the antitrust defense, whether predicated upon section 33(b)(7) or upon appeal to the court's power to intervene in equity, would fail unless the alleged offenses were causally related to the owner's use of his trademark.[67]

Equally subject to this limitation, according to the *Coca-Cola* court, was the broad construction of the 33(b)(7) defense announced in the *Phi Delta Theta* case. There it was said that the antitrust defense, beyond merely removing the mark's incontestability, "may require a decree cancelling the registration of the particular marks involved."[68]

In light of the above authority it may be posited that, if a Borden competitor had been the subject of suit by Borden for infringement of the ReaLemon trademark, such competitor might have pleaded as a defense the antitrust violations alleged to have been committed by Borden. It would be necessary in that case to demonstrate that the causal nexus required by *Coca-Cola* was present in regard to Borden's use of the ReaLemon name in connection with its dealer promotions, predatory pricing, and other tactics alluded to above. Once established, the causal link would allow the maintenance of the defense under 33(b)(7) or, under *Carl Zeiss,* even in equity. Under precedent such as *Phi Delta Theta,* Borden might well lose the ReaLemon mark by virtue of the court's refusal to enforce it or decree to cancel its registration. At the least, under *Carl Zeiss,* the mark would lose its incontestability.

Assuming arguendo that the required antitrust violations had been established against Borden, an analogy may be drawn between the hypothetical infringement defense tactic discussed above and the compulsory licensing actually ordered by Judge Hanscom. It is highly significant that the federal trademark legislation specifically provides for the defense, and that recent case law has given effect

65. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 298 F. Supp. at 1312-13.

66. *Id.* at 1314; *cf.* Union Carbide Corp. v. Ever-Ready, Inc., 531 F.2d 366, 389 (7th Cir. 1976), *cert. denied,* 97 S.Ct. 91 (1976).

67. Coca-Cola Co. v. Howard Johnson Co., 386 F. Supp. at 335.

68. Phi Delta Theta Fraternity v. J.A. Buchroeder & Co., 251 F. Supp. at 974.

to that policy by recognizing violations of the antitrust laws as a defense to infringement actions brought by trademark owners. The analysis undertaken by Judge Hanscom placed the ReaLemon mark at the center of Borden's putatively violative conduct. In fact, that lengthy analysis concludes, essentially, that the ReaLemon mark was the *sine qua non* of the success of Borden's program to regain its market share. Such analysis is arguably no different in kind from that necessary to establish the causal link between a trademark owner's assertedly violative conduct and his use of the mark which the *Coca-Cola* court required in the 33(b)(7) setting. The policy of the authors of the Lanham Act in enacting that section, and of the courts in construing it, must be taken as consistent with the mandate of the FTC to aid in the enforcement of antitrust laws.[69]

VI. DECISION'S IMPACT

In light of the foregoing discussion, it appears that the Commission was within its authority in ordering Borden to license its ReaLemon trademark to anyone who desired to pay the required .5 percent royalty fee. The Commission's order was divided into two distinct parts: (1) the licensing mandate and (2) instructions to cease and desist from certain prohibited practices.[70] The licensing arrangement called for Borden to keep open the offer to license the ReaLemon trademark to anyone for a period of ten years. The only restric-

69. It is unlikely, too, that upon court review of *Borden,* the Commission order will be reversed. The function of the courts has been limited to determining whether the Commission's decision is warranted on the basis of the facts and surrounding circumstances and whether the decision has some reasonable basis in law. Atlantic Refining Co. v. FTC, 381 U.S. 357, *reh. denied,* 382 U.S. 873 (1965); FTC v. Ruberoid, 343 U.S. 470, 473 (1952); Siegel Co. v. Trade Comm'n, 327 U.S. 608, 613 (1946). In deferring to the judgment of the Commission, courts have held that methods of unfair competition are best prevented through the "action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations . . . to eradicate evils with the least risk of interfering with legitimate business operations." *Atlantic Refining Co.,* 381 U.S. at 367.

There are three requirements necesssary for courts to uphold a Commission order on review: (1) petitioner's business methods must be unfair, (2) the methods must be in interstate commerce, and (3) the Commission ruling must be in the public interest. FTC v. Royal Milling Co., 288 U.S. 212, 216 (1933).

The actions of Borden were found by Judge Hanscom to violate section 5, thereby satisfying the first requirement, and the judge also found that the activities were carried on in interstate commerce. With respect to the third requirement, the Supreme Couut has held in FTC v. Klesner, 280 U.S. 19 (1929), that the public interest must be specific and substantial. The considerations involved in the public interest include: (1) present or future threat to competition, (2) flagrant oppression of the weak by the strong, or (3) aggregate loss to the public which is serious and widespread.

A court could find that Borden's conduct was within the ambit of all three of the above considerations and that the Commission's order was, therefore, eminently supportable.

70. FTC Dkt. No. 8978, at 167-70 (1976).

tions placed on licensees under the plan were: (1) agreement to disclose conspicuously on all containers the identify of the manufacturer or distributor and (2) payment of one-half of one percent of dollar sales of all lemon juice sold under the ReaLemon trade name.[71] The fee was mainly designed to cover expenses incurred by Borden in the administration of the all-important quality control program pursuant to manufacture and distribution of ReaLemon by licensees. This quality control program is essential to any hope Borden might have in maintaining the integrity of its ReaLemon trademark.

In any licensing arrangement, the touchstone of the validity of the trademark is retention of control by the licensor over the nature and quality of the licensee's product in order to ensure that consumers are guaranteed quality consistent with that provided them by the trademark holder.[72] In licensing arrangements, whether voluntary or compulsory, any relaxation of quality control standards that permits inferior goods to be presented to the public could result in trademark misuse.[73]

Another important reason for the licensor to maintain control over the nature and quality of the goods manufactured by the licensee is that, if such control is not exercised, the original trademark holder may run the grave risk of forever losing all rights of the trademark.[74] Under the Lanham Act, a trademark may be cancelled if abandoned; that is, if the owner undertakes any course of action that would cause the mark to lose its significance as an indication of origin.[75] The only way Borden will be able to maintain its rights to the ReaLemon trademark is to be certain that all licensees are in full compliance with the compulsory licensing restriction, which calls for clear identification of the manufacturer or distributor to

71. *Id.* at 167-68.

72. Smith v. Dental Products Co., Inc., 140 F.2d 140 (7th Cir. 1944), *cert. denied*, 322 U.S. 743 (1944); Morse-Starrett Products Co. v. Steccone, 86 F. Supp. 796 (N.D. Cal. 1949), *reversed in part*, 205 F.2d 244 (9th Cir. 1953) (order discharging prior order to show cause for contempt reversed and remanded).

73. Siegel v. Chicken Delight Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Dawn Donut Co. Inc. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959); Pike v. Ruby Foo's Den, Inc., 232 F.2d 683 (D. C. Cir. 1956); Alligator Co. v. Robert Bruce, Inc., 176 F. Supp. 377 (E.D. Pa. 1959); Coca-Cola Co. v. State, 225 S.W. 791 (1920); *see generally* Comment, *Abuse of Trademarks: A Proposal for Compulsory Licensing*, 7 U. OF MICH J.L. REF. 644 (1974); Comment, *Quality Control and the Anti-Trust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963); Timberg, *Trademarks, Monopoly, and the Restraint of Competition*, 14 LAW & CONTEMP. PROB. 323 (1949).

74. Franchised Stores of New York, Inc. v. Winter, 394 F.2d 664 (2d Cir. 1968).

75. 15 U.S.C. § 1064 (1970).

alert consumers to the product's origin.[76] This, of course, will be oppressive to Borden in terms of investigation and supervision, but it is essential that such efforts be undertaken since a valuable consumer franchise is at stake.[77]

If, through inability to adopt effective procedures, a trademark holder fails to control licensees, the owner can lose rights to the trademark if it comes to signify in the public mind a generic term for a kind of product rather than one particular manufacturer's brand. For instance, cellophane was originally a trademarked name but now exists as the generic term for a kind of waxed wrapping paper.[78] It can no longer be used or licensed for use exclusively by one manufacturer. Such dedication to the public use can occur when the trademark owner permits use of his mark by others without control or when the public no longer regards the mark as referring to a common source.[79] The Lanham Act provides that no incontestable right shall be obtained in a mark that has become a generic description of an article.[80]

One might pose the question at this point: Why should Borden be concerned with a potential cancellation of the trademark since it has been forced to license the trademark to all who want it? There are two reasons for concern. First, even though anyone can purchase a license to use the ReaLemon trademark, not all related businesses will take advantage of the opportunity, either because they have no interest in meeting licensing restrictions or because they choose to market their own brand in competition with ReaLemon. Second,

---

76. 15 U.S.C. § 1127 (1970).

77. Borden can guarantee quality control through the employment of one or more methods: (1) specification of standards, Coca-Cola Co. v. J.G. Butler & Sons, 229 F. 224 (D.C. Cir. 1916); (2) testing of samples, Crown Fabrics Corp. v. American Viscose Corp., 145 F.2d 246 (Court of Customs and Patents Appeals 1944); (3) plant supervision, Bacardi Corp. of America v. Domeneck, 311 U.S. 150 (1940); (4) product inspection, Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959); (5) training of the licensee's workers, Arthur Murray, Inc. v. Horst, 110 F. Supp. 678 (D. Mass. 1953); (6) approval of the licensee's ads, Smith v. Dental Products, Co., 140 F.2d 140 (7th Cir. 1940), *cert. denied,* 322 U.S. 743 (1943); or (7) requiring refunds to dissatisfied buyers, B.B. & R. Knight v. W.C. Milner & Co., 283 F. 816 (N.D. Ohio 1922). Judge Hanscom's order allows for wide latitude in the administration of a quality control program, apparently in recognition of the crucial importance to Borden in regulating the licensee's activity to the fullest possible extent. The order specifically states that the "license may contain provisions . . . (b) providing for reasonable quality control standards . . . equal to the quality of . . . Borden's ReaLemon. . . ." FTC Dkt. No. 8978, at 167-68 (1976).

78. DuPont Cellophane Co. v. Waxed Products Co., 85 F.2d 75 (2d Cir.), *cert. denied,* 299 U.S. 601 (1936).

79. Dixie-Cola Laboratories v. Coca-Cola Co., 117 F.2d 352 (4th Cir.), *cert. denied,* 314 U.S. 629 (1941); McKesson & Robbins, Inc. v. Charles H. Phillips Chemical Co., 53 F.2d 342, *modified on rehearing,* 53 F.2d 1011 (2d Cir. 1931), *cert. denied,* 285 U.S. 552 (1932).

80. 15 U.S.C. § 1065 (1970).

even though some or many will capitalize on the compulsory licensing opportunity, these potential licensees can choose at any time to discontinue their use. If so, Borden will want to be able to reinstate its exclusive claim to the use of the registered trademark which it will have fought hard to protect from becoming a generic term. If Borden can maintain the trademark right, it will still have access to a powerful marketing tool.

The necessity to maintain quality control standards in licensing arrangements is not only for the benefit of the licensor but is equally important to the loyal users of the licensor's brand. The Lanham Act was enacted in part to protect the public against falsely marked goods and misleading advertising claims that attempt to persuade the consumer that Brand X is the same product as the authentically trademarked product.[81] When trademarks have been licensed, the licensor owes the public an affirmative duty to guarantee that the licensed trademark represents goods of a nature and quality consistent with the licensor's own. This assurance of uniform quality is the only safeguard from consumer confusion and deception in purchasing a trademarked good produced by a variety of companies. Indeed, the intent of the Lanham Act in so securely guarding the trademark's sanctity is to provide consumers with the information necessary to purchase the licensee's product with some reference to the prior satisfaction they may have had in using the licensor's trademarked product.[82] In sum, if there is a widespread and uncontrolled use of the trademark by licensees, there could be a detrimental effect on both the licensor and the buying public.

From a general industry and free enterprise standpoint, unrestricted licensing will most likely serve to discourage research, development, and innovation in an industry by a manufacturer who reads the impact of the *Borden* case as depriving him of the fruits of his labor. If such a company should expend great sums of money and manpower to build a reliable quality image in a trademarked product only to be forced to relinquish exclusive use of it, little incentive is offered for the undertaking of future similar projects.

Not only will licensors be discouraged from development of new products by fear of compulsory licensing decrees, but licensees who have the opportunity to "share" in the product of another's industrious labors will also be discouraged from independent innovation.

---

81. Franchised Stores of New York, Inc. v. Winter, 394 F.2d 664 (2d Cir. 1968).

82. Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); Caron Corp. v. Maison Jeurelle-Seventeen, Inc., 26 F. Supp. 560 (S.D.N.Y. 1938); 72 YALE L.J. 1171 (1963).

Compulsory trademark licensing, by encouraging actual and potential competitors to become licensees rather than innovators, may impede research and eliminate the competitive spirit that trademarks are intended to engender. In markets where a firmly established trademark already exists and has received widespread consumer acceptance, existing competitors and new entrants, neither confident nor financially able to compete, may choose instead to form a licensing relationship and "ride the coattails" of an accepted trademark name. Rather than meet the heavy financial burden entailed by entry into a particular field, the potential competition need only satisfy the quality control requirements of a licensor and pay the required royalty. Without the windfall of a compulsory licensing decree, such a market entrant or existing competitor would find it necessary to develop its own trademark and to provide a product superior to the older, well-established product. Obviously, those companies financially unable to do that will choose the licensing route over the research and development route.[83] If the licensing route is chosen by the majority of existing competitors in the industry, market entry becomes exceedingly difficult for the nonlicensed new market entrant facing an industry dominated by a product whose recognition factor and quality standards have been fixed and are being strictly controlled by the licensor who was the market leader. If the licensees have adhered to the licensor's quality control standards to the satisfaction of consumers, the newcomer who chooses not to license may find a formidable barrier to market acceptance.[84]

As a modified remedy, Judge Hanscom could have provided for a higher royalty payment from each licensee. Such a ruling would not have been unprecedented since the royalty payment called for in the very case principally cited as the basis for the decision, *American Cyanamid*,[85] provided for a 2.5 percent royalty payment without imposing the obligation for quality control. In essence, the royalty represented a payment for recoupment of expenditure for formulation and development of the patent. In the instant case, however, Borden was left virtually uncompensated.

VII. CONCLUSION

The order issued by Judge Hanscom in the *Borden* case repre-

83. *See generally* 72 YALE L.J. 1171 (1963).

84. Associated Press v. United States, 326 U.S. 1 (1945); United States v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800 (D. Kan. 1957), *aff'd per curiam*, 355 U.S. 10 (1957).

85. 63 F.T.C. 1747 (1963).

sents an innovative exercise of the broad powers possessed by the FTC to prescribe appropriate remedies for violations of section 5 of the FTC Act.[86] Given the prominent role of the ReaLemon trademark in the respondent's antitrust violations, the remedy chosen—compulsory licensing of the mark—was eminently suited to the objective of restoring competition to the bottled lemon juice market.[87]

Although the order was rightly based upon the *American Cyanamid* precedent, a complementary rationale for the decision, based upon section 33(b)(7) of the Lanham Act, might have been espoused by the judge.

In addition, there is a recognition that if the courts are overprotective of a trademark, the competitors of the mark's owner may be commercially handicapped and competition may disappear from the marketplace. In an address advocating protection of trademark rights, an Associate Judge of the United States Court of Customs and Patent Appeals stated that "use of trademarks *legitimately* employed provokes competition and does not destroy it."[88] The implication of this statement is that an illegitimate or unwarranted use of a trademark could lead to inhibition of open competition, in which case trademark protection should not be of prime importance.

Once the remedy has been fashioned, it becomes the responsibility of the FTC[89] to insure that avoidance of consumer deception in selecting products is preserved. As established earlier,[90] this is one of the functions of the trademark law. The FTC accepted this responsibility in the *Borden* case by including language in the order that will require each licensee to conspicuously identify itself as the manufacturer or distributor. Such notification will clearly inform consumers as to the origin of the product. Further, as discussed earlier, the FTC also made provisions for Borden to closely monitor product quality to insure consistency with the standards that ReaLemon purchasers have come to expect.

---

86. FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965); 68 HARV. L. REV. 814, 893, 907-08 (1955). *See* Business Week, Dec. 13, 1976, at 52-59 for a discussion of the FTC's expanded rule from a business perspective.

87. 68 HARV. L. REV. at 896; Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) (proper focus of concern is whether the manufacturer has the power to raise prices and impose other unreasonable burdens or terms in the marketplace by virtue of the trademark recognition).

88. Paper delivered by Honorable Joseph R. Jackson at 73rd Annual Meeting of Trademark Association in 1951.

89. 68 HARV. L. REV. at 893.

90. Millington v. Fox, 40 Eng. Rep. 956 (Ch. 1838); *see also* Handler, 38 T.M.R. 387.

Whatever view is taken of the propriety of the compulsory licensing remedy awarded in *Borden*, it is clear that Judge Hanscom's order, if upheld on appeal to the full Commission, will have a far-reaching effect upon the marketing strategies of firms which own trademarks associated with products which command a monopoly share of the market. At the very least, an affirmance of the order would serve notice that the FTC stands prepared to exercise vigilance in cases where the trademark is shown to have been employed in furtherance of acts constituting antitrust violations and, if necessary, to order divestiture of the mark.

Richard C. Berry
Anthony J. Muto