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TRADING STAMPS

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In the nearly 66 years since the origin of the trading stamp plan, the stamp business has become a force in merchandising. The system, sometimes the subject of legal controversy, is now established as one of the basic competitive devices used by retailers.[1]

Trading stamps have been defined "as those 'little pieces of gummed paper' issued by retailers to customers who in turn accumulate them in sufficient quantities to exchange for an item of value."[2] They were first issued in 1891 in Milwaukee, Wisconsin, by Schuster's Department Store. In 1896 The Sperry and Hutchinson Company was organized as an independent trading stamp company and began to make a stamp service available to a group of retailers in New England, who in turn gave the stamps to their customers as purchases were made. As stamp books were filled, they were redeemable for merchandise supplied by the stamp company. The success of the plan brought about a rapid increase in the number of retailers using stamps and also in the number of stamp companies issuing them.[3]

Trading stamp companies have enjoyed their greatest growth since World War II, especially since 1953. It was during the 1950's that food supermarkets began using trading stamps on a very large scale. As of 1958, it has been estimated that forty to fifty per cent of retail food sales were made through supermarkets using trading stamps.[4]

In mid-1957, there were approximately 200 trading stamp companies.[5] A trading stamp company has been defined as "an organization set up solely to distribute trading stamps to all types of retailers and offering a plan by whch stamps may be redeemed."[6] An estimated one-fourth million retail outlets (all types), located in all the then forty-eight states, were issuing trading stamps as of January, 1957.[7]

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1 Haring & Yoder, Trading Stamp Practice and Pricing Policy 3 (Bureau of Business Research, Indiana University, 1958). This is a leading study of the industry and is hereinafter referred to as HARING & YODER.

2 U.S. Department of Agriculture, Trading Stamps and Their Impact on Food Prices 1, note 1 (1958). (Marketing Research Report No. 295).

3 HARING & YODER, 4.

4 *Id.* at 6-8.

5 U.S. Department of Agriculture, *op. cit. supra* note 2, at 2. For other statements as to the number of stamp companies, see Vredenburg, Trading Stamps 33-35 (Bureau of Business Research, Indiana University, 1956); HARING & YODER, 19.

6 U.S. Department of Agriculture, *op. cit. supra* note 2, at 2, n. 4.

7 *Supra* note 4. Kansas later prohibited their issue.

During 1956, the stamp companies maintained some 1,400—1,600 redemption centers in the United States[8] and in 1957 were estimated as doing a one-half billion dollar business.[9] Available data indicate that approximately two-thirds of American families were saving stamps in 1958.[10]

As the foregoing statistics show, trading stamps are now an important aspect of modern retailing. They are essentially a promotional device in a highly competitive field; as such, their use has generated a considerable amount of controversy.[11]

THE STATUS OF TRADING STAMPS UNDER STATE LAWS

In the early part of this century, attempts were made in various states to apply their "gift enterprise" laws to trading stamps. These laws were directed against numerous types of lotteries and gambling and were uniformly held to have no application to the issuance of trading stamps, because no element of chance was involved,[12] except in those instances where the act specifically included a prohibition against the giving of any article or thing in connection with the purchase of any other product. In these latter cases, the laws were generally held to be unconstitutional insofar as they applied to trading stamps.[13] Legislation which imposed prohibitive taxes on trading stamp companies and stamp-issuing retailers has also been held to be unconstitutional.[14]

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8 *Supra* note 5.

9 HARING & YODER, 19-20. But see U.S. Department of Agriculture, *op. cit. supra* note 2, at 31-32, where the estimate made is somewhat smaller for 1956.

10 HARING & YODER, 12. Dr. Charles F. Phillips, President, Bates College, in testifying before the Subcommittee on Consumers Study of the House Committee on Agriculture, in New York City on October 9, 1957, stated that "trading stamps are now saved by at least half of all our families."

11 HARING & YODER, 299.

12 State v. Shugart, 138 Ala. 86, 35 So. 28 (1903); Tumlin Bros. Co. v. Daniel Bros. Co., 141 Ga. 613, 81 S.E. 793 (1914); Commonweath v. Sisson, 178 Mass. 578, 60 N.E. 385 (1901); City of Winston v. Beeson, 135 N.C. 271, 47 S.E. 457 (1904).

13 City of Denver v. Frueauff, 39 Colo. 20, 88 Pac. 389 (1907); People v. Sperry & Hutchinson Co., 197 Mich. 532, 164 N.W. 503 (1917); State v. Sperry-Hutchinson Co., 110 Minn. 378, 126 N.W. 120 (1910); State v. Sperry & Hutchinson Co., 94 Neb. 785, 144 N.W. 795 (1913); Young v. Commonwealth, 101 Va. 853, 45 S.E. 327 (1903). *Contra*, Lansburgh v. The District of Columbia, 11 App. D.C. 512 (1897); Humes v. City of Fort Smith, 93 Fed. 857 (C.C.W.D. Ark. 1899).

14 See, *e.g.*, State v. Lothrops-Farnham Co., 84 N.H. 322, 150 Atl. 551 (1930). Among the cases holding that attempts to prohibit or unduly interfere with the issuance of trading stamps are unconstitutional under the state constitutions involved, see, *e.g.*, Lawton v. Stewart Dry Goods Co., 197 Ky. 394, 247 S.W. 14 (1923); Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269 (1940); People v. Victor, 287 Mich. 506, 283 N.W. 666 (1939).

The rather recent Iowa case of *Sperry & Hutchinson Co. v. Hoegh*[15] sets out at some length the majority view on attempts to prohibit the use of trading stamps. The provisions of the state "gift enterprise" statute there involved included as a prohibited "gift" the issuance of trading stamps redeemable by a stamp company, instead of by the retailer himself. This prohibition was held unconstitutional by the Supreme Court of Iowa, because the act, in the court's opinion, violated the state constitutional provision requiring that a law must operate "alike upon all within a reasonable classification."

"During the past half-century," said the court, "many states have enacted laws similar to our gift enterprise statutes." The court was convinced by its study of the cases "that the overwhelming weight of authority is that such statutes as ours are unconstitutional as not being within the sphere of police power." Citing numerous cases in support, the court observed that "courts have quite generally held that antitrading stamp legislation is unconstitutional as not a proper exercise of police power." The decisions in the cited cases, said the court, were generally based on the broad ground that:

> [A]ntitrading stamp laws constitute unnecessary restrictions on the right of contract; unwarranted interference with a natural right to attract custom; prohibit contractual relations which do not affect the public health or morals or welfare; and are not the proper exercise of police powers.

Referring to the United States Supreme Court cases of *Rast v. Van Deman & Lewis Co.*,[16] *Tanner v. Little*,[17] and *Pitney v. State of Washington*,[18] all decided in 1916, and which in general held that state "legislation relative to coupons and stamps is not unconstitutional under the Fourteenth Amendment of the United States Constitution," the court pointed out that "a reading of the cases first cited in this division [of its opinion] will show that the majority of state court opinions since the *Rast* case, refuse to follow the reasoning of the federal cases."

"In our judgment," continued the court, "the great weight of authority and the better reasoning support the view that legislation which practically prohibits the use of trading stamps is not a constitutional exercise of the police power," admitting, however, that for the purpose of the case, it did not have to decide whether the legislature could constitutionally prohibit the issuance of trading stamps.

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15 246 Iowa 9, 65 N.W.2d 410 (1954). For a recent expression of the minority view on the basic question by the Supreme Court of Wyoming, see Steffey v. City of Casper, 357 P.2d 456 (1960); on rehearing, 358 P.2d 951 (1961).

16 240 U.S. 342 (1916).

17 240 U.S. 369 (1916).

18 240 U.S. 387 (1916).

The Iowa statute is illustrative of the antitrading stamp laws which have been enacted from time to time by state legislatures since retailers began to use this competitive device.

An important aspect of the attack on trading stamps is the contention that their issuance with the sale of a "fair traded" item at the "fair trade" price constitutes an unlawful price reduction. Since numerous states have fair trade laws which generally permit resale price maintenance of trade-marked commodities,[19] the issue has frequently been before the courts. It was first passed on in *Bristol-Myers Co. v. Lit Bros.* by the Pennsylvania Supreme Court in 1939.[20] There it was contended by the plaintiff that the issuance of trading stamps by the defendant resulted in a reduction of the price below that fixed by plaintiff under the state's price maintenance law ("Fair Trade Act"). This argument was rejected by the court, which held that the issuance of trading stamps with merchandise sold at the "fair trade" minimum price was not a violation of the act.

A similar result was reached in the California case of *Weco Products Co. v. Mid-City Cut Rate Drug Stores.*[21] There it was held that trading stamps were a discount for prompt payment and not a deduction from the purchase price; that "the giving of trading stamps . . . does not effect a reduction in the price of the articles sold such as to constitute a violation of the Fair Trade Act."[22]

A contrary result is suggested in *Bristol-Myers v. Picker*, decided in 1950 by the New York Court of Appeals.[23] There it was held that cash register receipts redeemable in merchandise, when issued in connection with "fair traded" articles sold at the minimum prices fixed by the manufacturer, were in violation of that state's price maintenance law.[24]

The more prevalent view, with some decisions to the contrary, would seem to be that the use of trading stamps does not illegally

[19] Report of the Attorney General's Committee to Study the Antitrust Laws, 150-152 (1955).

[20] 336 Pa. 81, 6 A.2d 843 (1939). This was followed in Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956).

[21] 55 Cal. App.2d 684, 131 P.2d 856 (1942).

[22] *Accord,* Corning Glass Works v. Max Dichter Co., 102 N.H. 505, 161 A.2d 569 (1960) where the New Hampshire Supreme Court held in part: "In practical effect, the giving of stamps comes to no more than a normal cash discount, which has never been regarded as an unfair practice any more than the extension of credit. . . . The practices . . . may be equated to the offering of free delivery or free parking."

[23] 302 N.Y. 61, 96 N.E.2d 177 (1950).

[24] In Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958), the Massachusetts Supreme Judicial Court held to the same effect with respect to trading stamps.

affect the fair trade price and hence there is no violation of the pertinent state statute when they are issued in connection with a fair trade sale at the permitted minimum price.[25]

A somewhat similar problem with reference to the issuance of trading stamps has arisen under the "Unfair Practices Acts," often called "sales-below-cost" acts. These acts generally prohibit retail sales below a certain price which represents a theoretical "cost" determined according to specific formulae.

In *Safeway Stores v. Oklahoma Retail Grocers Association*,[26] the Supreme Court of Oklahoma, after a review of the authorities, held that "the giving of such [trading] stamps did not constitute a price cut or unfair competition, but that such stamps merely constituted a discount for cash"; hence there was no violation of the state's Unfair Sales Act.[27]

The question has arisen in New Jersey as to whether the issuance of trading stamps in connection with the retail sale of gasoline has the effect of reducing the required posted price. In *Sperry and Hutchinson Co. v. Margetts*,[28] the New Jersey court held there was no such effect and pointed out that "plaintiff's 'cooperative discount system' is in aid of what has come to be the normal cash discount and the only practical means to that end where there are intermittent purchases in small lots." It concluded that such a "cash discount is a term of payment merely, not a price adjustment; it is a mode of financing, not a reduction in price," and hence did not violate that state's Motor Fuel Act.

Thus, as regards trading stamps and the various "Unfair Practices Acts," including the "Motor Fuel Act" mentioned, the reported cases to date are unanimous in holding that the use of such stamps does not reduce the statutorily-defined minimum price at which goods can legally be sold.

Mention should be made of the Oregon case of *Sperry &*

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25 For a collection of the reported cases on the issue of trading stamps under fair trade acts see Annot., 22 ALR 2d 1212 (1952), ALR 2d Supp. Service 1933 (1960), ALR 2d Supp. Service 141 (1961).

26 322 P.2d 179 (1957), *aff'd*, 360 U.S. 334 (1959).

27 *Accord*, Food & Grocery Bureau v. Garfield, 20 Cal. 2d 228, 125 P.2d 3 (1942); Trade Commission v. Bush, 123 Utah 302, 259 P.2d 304 (1953).

For a collection of the reported cases on the issue of trading stamps under unfair sales acts, see Annot., 70 ALR 2d 1080 (1960). As there stated, the courts which "have been called upon to pass on this question have uniformly answered it in the negative [that is, the issuance of trading stamps does not violate the unfair sales acts]. It should be noted, however, that there are no reported cases from many jurisdictions which have enacted unfair sales acts."

28 15 N.J. 203, 104 A.2d 310 (1954).

Hutchinson Co. v. Hudson,[29] where it was held that trading stamps were not in the nature of securities, and hence not subject to the state's "blue sky" law, but, instead, were essentially a cash discount device.

The result today is that, in all the states but one, trading stamps are used as a legitimate and fair method of competition.[30]

TREATMENT OF TRADING STAMPS BY THE FEDERAL GOVERNMENT

There are no adjudications as to the legality or illegality of trading stamps under federal law. However, various agencies and departments of the United States Government have from time to time had occasion to consider this competitive device and their conclusions are of interest here.

A few years ago the Federal Trade Commission conducted an investigation of the trading stamp industry, including the operations and business methods of a number of the trading stamp companies. The basic purpose of the Commission was to determine whether the use of trading stamps was an unfair method of competition or an unfair or deceptive act or practice in violation of Section 5(a) of the Federal Trade Commission Act.[31] On October 3, 1957, the Commission issued a press release, the opening paragraph of which was as follows:

> The Federal Trade Commission announced today that it did not consider trading stamp plans in themselves to be an unfair method of competition under the laws it administers, and concluded not to issue any complaints at this time prohibiting the use of trading stamps.

In the course of its release, the FTC referred to Section 5 of the Federal Trade Commission Act and said:

> This section has been construed by the courts to confer a broad

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29 190 Ore. 458, 226 P.2d 501 (1951).

30 "Trading stamps are now used in every State except Kansas, where they are prohibited. In Washington, Wisconsin, and Wyoming stamps may be redeemed only for cash. Fifteen States require that stamps be redeemable in cash or merchandise at the option of the purchaser. Ten States require that trading stamp companies be bonded." Senate Committee on the District of Columbia, Report No. 866, 87th Cong., 1st Sess. (Sept. 1, 1961). Also, the use of trading stamps is now permitted in the District of Columbia, *infra* note 36.

In 1961, Montana enacted a law imposing a prohibitive license tax on the issuance of trading stamps, to go into effect June 30, 1962. Ch. 153, Montana Session Laws of 1961. A case testing the constitutionality of this law is presently pending before the District Court for the First Judicial District of Montana (Garden Spot Market v. Byrne, No. 28502).

31 15 U.S.C.A. § 45(a). This section makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."

> discretion on the Commission in its initial determination of what is an unfair method of competition or an unfair or deceptive act or practice in commerce. However, the Commission recognizes that this discretion must be exercised within established principles of law and in situations where the unfavorable impact upon commerce must be definitely revealed.[32]

There is one reported case involving the Sherman Act in which the allegations of antitrust violations related directly to the issuance of trading stamps. In *United States v. Gasoline Retailers Association*,[33] it was held that an agreement between competing gasoline retailers and a labor union prohibiting, *inter alia*, the giving of premiums, including trading stamps, in connection with retail gasoline sales was a *per se* violation of the Sherman Act.

Reference has already been made to the 1958 study of trading stamps by the United States Department of Agriculture.[34] As pointed out in its report, the question of who actually bears the cost of trading stamps "is one of the most controversial issues in the history of food retailing."[35] Based on its study of this question, the Department came to the conclusion that:

> Consumers are interested in trading stamps for other reasons than the effect on retail prices. They also are interested in what they can expect in return for accumulating stamps. In a previous publication by the Department, it was pointed out that the merchandise which the consumer receives by redeeming stamps is about 2.0 per cent of the purchase dollars required to fill a stamp book and may range from 1-2/3 to 2-1/2 per cent, depending on pricing policies of stores from which a similar article could be purchased. This study indicates that average prices paid by consumers in stamp stores increased 0.6 per cent more than in non-stamp stores —a difference equal to about 30 per cent of the average merchandise value of stamps.[36]

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32 The concept of "unfair methods of competition" is a flexible one "to be defined with particularity by the myriad of cases from the field of business." It not only includes violations of the Sherman and Clayton Acts but also incipient "acts and practices which, when full blown, would violate those Acts." Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-395 (1953). To this concept there was added (by an amendment in 1938) that of "unfair or deceptive acts or practices in commerce." This enabled the Commission to prevent or stop such acts "which injuriously affected the public interest alone, while under the original Act the Commission's power to safeguard the public against unfair trade practices depended upon whether the objectionable acts or practices affected competition." Scientific Mfg. Co. v. Federal Trade Commission, 124 F.2d 640, 642-644 (3d Cir. 1941).

33 1960 Trade Cases ¶ 69,596 (N.D. Ind. 1960), *aff'd*, 285 F.2d 688 (7th Cir. 1961).

34 *Supra* note 2.

35 U. S. Department of Agriculture, *op. cit. supra* note 2, at 1.

36 *Id.* at 28. For another study of the differences between food prices at stamp and non-stamp stores, see HARING & YODER, 225-296. "The charge that adoption of

In 1958, the Securities and Exchange Commission issued a release[37] in which it expressed the view that trading stamps redeemable in cash or merchandise are not securities within the meaning of the Securities Act of 1933.

The Department of Commerce in 1956 issued a bulletin on trading stamps.[38] It was prepared, as stated, "primarily to assist the smaller businessman in weighing the advantages and disadvantages of adopting a stamp plan for his store." The bulletin discusses, *inter alia*, how trading stamp plans work, the scope of the trading stamp business, and the advantages and disadvantages of using this competitive device. Under the heading of "Which Plan Should You Choose?" the bulletin pointed out that if a businessman decides to use such a promotional tool he should, among other things, "have definite assurance of an exclusive franchise on a continuing basis for your kind of store in your trading area."

It is this "exclusive franchise" that should be examined in light of the federal antitrust laws.[39] However, it is appropriate to observe here that obviously the various agencies of the Federal Government which have expressed themselves to date see nothing illegal or otherwise offensive in trading stamp plans as such.

THE LEGALITY UNDER FEDERAL LAW OF EXCLUSIVE FRANCHISES AS USED IN THE TRADING STAMP INDUSTRY

Most trading stamp plans provide for giving an exclusive license for a particular area to one of each type of retailer. A stamp company

stamps will raise the level of prices in a store or even in a community appears to be completely unsubstantiated." HARING & YODER, 225.

In the course of its report, the Department of Agriculture pointed out, *inter alia*, that "the legal status of trading stamps is primarily in the hands of the States" (p. 15); that "with few exceptions, the courts have held that trading stamps represent a discount and therefore do not violate the retail price maintenance laws," which include fair trade acts, as well as unfair sales and motor fuel acts (p. 12); and that, pertaining to "the gift enterprise statutes that exist in many States," most of the decisions "have been favorable to trading stamps, on the grounds that trading stamp plans are not subjected to an element of chance or lot and therefore cannot be classified under the gift enterprise statutes (p. 13)."

The chief exception to this last statement with respect to gift enterprise statutes, as pointed out in the report (p. 13), is the statute in the District of Columbia, which, as stated, "goes beyond most laws of this nature" and which has been interpreted as barring the use of trading stamps there. This was true in 1958; however, in 1961 Congress repealed this law, thus removing all prohibitions against the use of trading stamps in the District of Columbia. P.L. 87-267, 75 Stat. 565, approved Sept. 21, 1961.

37 Securities Act of 1933, Release No. 3890, Jan. 21, 1958.

38 Summary of Information on Trading Stamps, Business Service Bulletin, BSB-182, Sept. 1956.

39 15 U.S.C.A. §§ 1-27, 45(a).

will group retail merchants into classes according to the principal type of business done, such as grocery stores, drug stores, and laundries. One retailer of each class in a defined market area is licensed to distribute to its customers the stamps of the licensing stamp company. The company agrees, formally or informally, that it will not license or permit any other competing retailer of that class to issue its stamps in the specified area. To the extent, of course, that different types of retailer-licensees overlap in the kinds of merchandise sold, such as, for example, cosmetics, they are competitors of each other, although they do not compete as to their primary lines of business. It has been pointed out that this "exclusive franchise for each kind of retailer in a market is basic to all types of stamp plans"; that this feature "is essential because the trading stamp's greatest asset is its ability to direct consumer demand to a particular store."[40]

A competitor in the particular market may, of course, "offer a different stamp,[41] lower prices,[42] increase services, have 'prize drawings,' or use other devices to counteract stamp-store competition."[43]

In considering exclusive franchises, it is important to bear in mind that they are a form of *exclusive representation*, which is to be distinguished from *exclusive dealing*. In exclusive dealing, the *buyer* enters into an arrangement by which he agrees to handle the product of one *seller* only. In exclusive representation, the *seller* enters into an arrangement by which he agrees to sell to only one *buyer* in a particular area or, as in trading stamps, to a single buyer engaged in a particular type of business in a particular area. "Exclusive dealing" agreements, so far as is known, are not generally used in the trading stamp industry and, accordingly, are not within the scope of this discussion.

Most, if not all, of the case law dealing with exclusive distribution rights involves the sale or distribution of a commodity and with the impact on competition in the business of selling that commodity. The trading stamp business does not involve the sale by stamp companies of a commodity for resale by retailers; the transaction

40 HARING & YODER, 22. See *supra* note 1 at 22, where the authors refer to two stamp plans that are offered to "each and every store in a community." It is pointed out that "obviously, the customer is not tied to a particular store, brand, or chain by this policy. This is competitive retaliation to minimize the patronage pull of regular trading stamps. From the point of view of this [the authors'] presentation, . . . [such stamps] are 'stamps' but not bona fide 'trading stamps' . . ."

41 In mid-1957, there were approximately 200 trading stamp companies. *Supra* note 5 and accompanying text.

42 "Nonstamp stores regularly use price reductions and specials to combat stamp-store competition." HARING & YODER, 304.

43 HARING & YODER, 22, *supra* note 1.

is in the nature of a sale to retail merchants of a promotional service[44] in aid of their business of selling goods and services.

Two different areas of commercial activity should be considered in appraising the legality of the franchise agreements used in the trading stamp industry.[45] One area is competition in the trading stamp business itself; the other is competition among the retailers in a particular line of business, such as in the retail sale of groceries.

The principle is well established that an individual seller has a right to select customers of its own choice and to refuse to sell to others, and the exercise of this right, without more, is not a violation of the antitrust laws. Exclusive franchise agreements between sellers and buyers, pursuant to which the seller selects a particular customer to handle its goods on an exclusive basis in a defined area, have been regarded as being *per se* legal so long as they are not used by one who is in a monopoly position, *i.e.*, where there is no effective competition at either the seller or buyer level.[46] Of course, this right to enter into exclusive selling arrangements cannot be exercised as part of a scheme to violate the antitrust laws,[47] *e.g.*, to fix prices or to boycott.

The Sherman Act

The value of any particular trading stamp to a retailer is measured in terms of the advantage he gains in attracting new customers, in retaining those he already has, or probably both. In the view of the trading stamp companies, it is important that licenses be confined to non-competing retailers in a given market area, "because the trading stamp's greatest asset is its ability to direct consumer demand to a particular store." This is not possible if the stamp plan is offered

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44 The tying arrangements proscribed by section 3 of the Clayton Act (15 U.S.C.A. § 14) relate only to "goods, wares, merchandise, machinery, supplies, or other commodities." This section, of course, relates solely to "exclusive dealing."

45 These franchise agreements probably should be characterized as "semi-exclusive"; although they are exclusive for the licensee's competitors in a market area, they are not exclusive for the non-competing retailers in the area.

46 Lorain Journal v. United States, 342 U.S. 143, 155 (1951); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 902-903 (Md. 1956), *aff'd,* 239 F.2d 176 (4th Cir. 1956).

"When an exclusive dealership 'is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrangement has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of per se legality' . . . ." Packard Motor Co., Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir. 1957).

47 15 U.S.C.A. §§ 1, 2, 45(a). As to § 45(a) (*i.e.*, § 5(a) of the Federal Trade Commission Act), see note 32, *supra.* Because of the facts and the nature of the question under discussion there is no provision of the Clayton Act (15 U.S.C.A. §§ 12-27) which is pertinent.

to "each and every store in a community." This conclusion is not affected by the fact that under certain circumstances a trading stamp company may see fit to offer its stamps to competing retailers.[48] It would thus seem clear that the use of the exclusive franchise by trading stamp companies "springs from business requirements" and not from any "purpose to monopolize" the trading stamp business.[49]

Section 2 of the Sherman Act[50] outlaws monopolization and attempts and conspiracies to monopolize any part of interstate commerce. From all the known facts, previously mentioned and discussed, it would seem clear that no problem as to the legality of the exclusive franchise used by the trading stamp companies would arise under this section.[51] As the Supreme Court said in *Lorain Journal Co. v. United States:*[52]

> *In the absence of any purpose to create or maintain a monopoly,* the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. (Emphasis by the Court.)

Section 1 of the Sherman Act outlaws conspiracies and agreements in *unreasonable* restraint of trade.[53] Any conspiracy or agreement to suppress or eliminate price competition is *per se* an unreasonable restraint and, if the purpose or effect of exclusive selling agreements is to obtain this result, the agreements would be illegal under this section, without proof of any injury to competition.[54] The "semi-exclusive" franchise system in and of itself would not have any anti-competitive effect on the prices charged by the trading stamp companies for the use of their service or on the prices charged by the retailers for the goods or services sold by them. In neither area can it be said that the franchise, as such, has an unreasonable effect on price competition.

"Group boycotts, or concerted refusals by traders to deal with

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48 HARING & YODER, 22, *supra* note 1.

49 See Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 615 (1953).

50 15 U.S.C.A. § 2.

51 As a matter of fact, the exclusive franchise system would appear to be antithetical to an attempt to monopolize or to the achievement of a monopoly by a company which uses such a system of distribution. In limiting its sales to a single buyer within a particular area, such a company is deliberately leaving to its competitors the balance of the market.

52 342 U.S. 143, 155 (1951).

53 Standard Oil Company v. United States, 221 U.S. 1 (1911). See Report of the Attorney General's National Committee to Study the Antitrust Laws, 5-10 (1955).

54 United States v. Parke, Davis and Co., 362 U.S. 29 (1960); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

other traders," are *per se* illegal. Such a boycott, however, is to be distinguished from the situation where a manufacturer and a dealer agree to an exclusive distributorship,[55] the legality of which has been upheld in numerous decisions.[56] In the *Packard Motor Car* case,[57] for example, it was held as a matter of law that an agreement establishing an exclusive distributorship for one brand of automobile was *per se* legal, even though the effect was to eliminate other area dealers in the same product—"it is the essential nature of the arrangement."[58]

A fortiori, the "semi-exclusive" franchises used by the trading stamp companies are equally valid. In the use of the franchise system, the trading stamp companies are not following any pattern or practice of refusing to deal with any particular merchants or group of merchants; there are no "concerted refusals by traders to deal with other traders," to use the language of the Supreme Court.[59] The licensees of a particular company are not substantial competitors by the very nature of the exclusive licensing system used, and no licensee of any company would have any interest in whether any other licensee of the same company is granted an exclusive franchise for a given market area. The most that can be said is that each exclusive licensee

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55 Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959).

56 Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957); Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir. 1953); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (Md. 1956), *aff'd*, 239 F.2d 176 (4th Cir. 1956); United States v. Bausch & Lomb Optical Co., 45 F. Supp. 397, 398-399 (S.D.N.Y. 1942), *aff'd on this point by an equally divided Court*, 321 U.S. 707, 718-719 (1944). (In this connection, it should be noted that tied to the exclusive sales agreement between Bausch & Lomb and its sole customer of the product involved was the agreement by the manufacturer not to compete with its customer in the marketing of the product. See 321 U.S. 718-719.)

For a discussion of this issue and the numerous pertinent cases, see Robinson, "Providing For Orderly Marketing of Goods," 15 A.B.A. Section of Antitrust Law 282, 283-290 (August 1959); also, for an earlier discussion of the issue, see Rifkind, "Division of Territories," in How To Comply With The Antitrust Laws 127, 135-137 (Van Cise & Dunn, editors, Commerce Clearing House, 1954).

57 Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957).

58 In United States v. White Motor Company, 194 F. Supp. 562, 578 (N.D. Ohio, 1961), the court pointed out that "agreements by a manufacturer with its distributors or dealers that the manufacturer will not sell to any others or to others within their respective 'exclusive territories' . . . have been upheld as reasonable when ancillary to the sale of goods for resale . . . ." Such agreements were distinguished from those whereby the distributors and dealers agree with the manufacturer "that they will not sell to purchasers located outside their respective assigned 'exclusive territories.'" This latter type of agreement is not involved here, as a stamp licensee is free to sell to any and all customers, regardless of where they are located, and to issue trading stamps in connection with such sales.

59 Klor's v. Broadway-Hale Stores, *supra* note 55.

does not want his competitors in his territory to be licensed at all by his stamp company, but in this he is no different than the holder of any other exclusive franchise. Thus the legality of his contract is as firm as the legality of the contracts involved in the exclusive distributorship cases already mentioned.[60]

The criteria that have been developed by the courts under the Sherman Act with respect to exclusive selling arrangements can be rather simply stated. A seller having a monopoly may not restrict its sales to one or a few favored customers.[61] Absent such a monopoly, the rule as to exclusive selling is "virtually one of *per se* legality" and "the arrangement has invariably been upheld as a reasonable restraint of trade."[62] However, if the exclusive selling arrangement, as carried out in a given situation, is merely serving as an instrument for unduly restraining trade, it would run afoul of the Sherman Act.[63]

As has been pointed out, in regard to exclusive distributing arrangements, "it can be said with some certainty that the antitrust laws do not stand in the way of a normal and reasonable restriction on competition. The rule of reason operates here in full sway."[64]

The Federal Trade Commission Act

Section 5(a) of the Federal Trade Commission Act outlaws "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."[65]

As used in the act, "unfair methods of competition" are not confined to those that were illegal at common law or proscribed by the Sherman Act. The concept is a flexible one, "to be defined with particularity by the myriad of cases from the field of business." Moreover, the Federal Trade Commission Act "was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . , as well as to condemn as 'unfair method of competition' existing violations of them."[66] In 1920, in the *Gratz* case, the Supreme Court had pointed out that the concept was "clearly inapplicable to practices never heretofore regarded as opposed to

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60 *Supra* note 56.

61 Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331, 335 (2d Cir. 1953); Robinson, *op. cit. supra* note 56, at 285-286.

62 Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420 (D.C. Cir. 1957); Robinson, *op. cit. supra* note 56, at 286.

63 Bascom Launder Corp. v. Telecoin Corp., *supra* note 61, at 335.

64 Robinson, *op. cit. supra* note 56, at 290.

65 15 U.S.C.A. § 45(a). See, in this connection, *supra* note 32.

66 Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 394-395 (1953); see note 32, *supra*.

good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."[67] Included among the practices which have been held to be violations of this section are deceptive labeling or representations,[68] the use of a lottery device in selling,[69] and the use of exclusive dealing contracts in violation of Section 3 of the Clayton Act.[70]

There is no likelihood that the franchise system used by the trading stamp companies would be found to come within the ambit of such violations as these. The Commission's release of October 3, 1957, is certainly to this effect, to say the least.[71]

The practice of an individual manufacturer in refusing to deal, or in dealing with certain buyers only, has been held to be a violation of this section when its purpose and intent were to control resale prices and where the accompanying activities of the seller and the favored customers had a "dangerous tendency unduly to hinder competition or to create monopoly" and enabled the manufacturer "to prevent competition . . . [in the resale of its products] by preventing all who do not sell at resale prices fixed by it from obtaining its goods."[72]

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67 Federal Trade Commission v. Gratz, 253 U.S. 421, 427-428 (1920).

68 Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483 (1922).

69 Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304 (1934).

70 Carter Carburetor Corp. v. Federal Trade Commission, 112 F.2d 722 (8th Cir. 1940). As already mentioned, the provisions of the Clayton Act are not pertinent to this discussion. See *supra* note 47.

71 *Supra* notes 31, 32, and accompanying text.

72 Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 454, 455 (1922).

In the recent case of Snap-On Tools Corporation, FTC Docket No. 7116, decided Nov. 1, 1961, the company distributed most of its products through a system of franchised dealers, each of whom was required to agree that it would not sell outside its assigned territory, would adhere to resale prices fixed by the company and, in the event of the termination of the franchise agreement, would refrain for one year from carrying on a similar business within the state or states in which it had been operating. In some instances, the company imposed restrictions as to the customers to whom a dealer could sell. The Commission's view was "that all of the practices complained of should be considered as related and component parts of an entire course of dealing" and it stated that its inquiry was "not whether a particular restraint upon an individual distributor is illegal per se, but rather whether all of the restraints imposed upon all of respondent's dealers suppressed competition in the distribution of its products." The Commission, in ordering these practices stopped, did not interfere with the company's system of franchised dealers as such and pointed out that the exclusive franchises involved in the Schwing and Webster cases (*supra* note 56) were an entirely different situation "where the manufacturer agreed to sell to no other dealer in a designated area. No restraint upon the dealer was involved."

The purpose of the Sherman Act (and the Clayton Act) is not to protect the individual traders engaged in commerce against injury, but is rather to protect the public interest by banning activities which have the necessary result of unreasonably restraining trade. "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."[73] Another way of expressing this principle is that the conduct charged to be illegal must be "reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."[74]

> [However], if the necessary effect of a combination to engage in or conduct interstate . . . commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this [antitrust] law.[75]

Decisions relating to the application of Section 5(a) of the Federal Trade Commission Act to activities involving restraints of trade are not substantially different. Not every restraint of trade is an unfair method of competition. When the particular practice under consideration is not *per se* illegal under the antitrust laws, and there is no specific purpose or intent to accomplish a result banned by them, it is necessary to determine whether the practice would necessarily result, or "when full blown" would so result, in an undue and unreasonable restraint of trade, or monopolization, prohibited by the Sherman Act.[76]

The purpose of the Federal Trade Commission Act (and the Sherman Act) is to preserve active competition in an industry and to

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73 Anheuser-Busch v. Federal Trade Commission, 289 F.2d 835, 840 (1961).

When acts are found to have the prohibited result, it is unnecessary to find a specific intent to accomplish that purpose. United States v. Griffith, 334 U.S. 100, 105-106 (1948).

74 Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 903 (Md. 1956), *aff'd*, 239 F.2d 176 (4th Cir. 1956). See Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959).

75 Brosious v. Pepsi-Cola Co., 155 F.2d 99, 102 (3d Cir. 1946).

76 Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463 (1923), with respect to which, see Dictograph Products v. Federal Trade Commission, 217 F.2d 821, 828 (2d Cir. 1954).

The fact that a given method of competition may make it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful or unfair. Federal Trade Commission v. Curtis Pub. Co., 260 U.S. 568, 582 (1923); Federal Trade Commission v. Paramount Famous-Lasky Corp., 57 F.2d 152, 157 (2d Cir. 1932).

encourage, not to prevent or discourage, individual competitors actively to seek competitive advantages. Competition has been defined as a "conflict for advantage" and the "play of the contending forces ordinarily engendered by an honest desire for gain," and the Commission has no authority "to interfere with ordinary business methods" chosen by competitors in striving for such advantage or "to prescribe arbitrary standards" or "to compel competitors to a common level."[77]

As regards monopoly, the general rule is to the effect that, if a seller has a monopoly in any line of commerce, he cannot lawfully confer a part of that monopoly on a buyer through an exclusive selling arrangement.[78] Although every producer has "a natural and complete monopoly" of the particular product it makes, this is not the kind of monopoly power condemned by the antitrust laws; the proscribed monopoly has to do with all the products which constitute a line of commerce.[79]

> [The] power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power must be appraised in terms of the competitive market for the product. Determination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.[80]

This principle has been applied to exclusive selling arrangements, or refusals to sell, by a producer of washing machines,[81] optical goods,[82] automobiles,[83] and by distributors of motion picture films.[84] In each of these cases, it was held that where the seller did not have monopoly power over the kind of products involved, its practice of selling exclusively to certain buyers and in refusing to sell to others was not illegal.[85]

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77 Federal Trade Commission v. Sinclair Refining Co., 261 U.S. 463, 475-476 (1923).

78 Robinson, *op. cit. supra* note 56, at 285-287.

79 *Id.* at 287; Schwing Motor Co. v. Hudson Sales Corp., *supra* note 56.

80 United States v. E. I. du Pont de Nemours and Co., 351 U.S. 377, 393 (1956).

81 Bascom Launder Corp. v. Telecoin Corp., 204 F.2d 331 (2d Cir. 1953).

82 United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398-399 (S.D.N.Y. 1942), *aff'd on this point by an equally divided Court*, 321 U.S. 707, 718-719 (1944). See *supra* note 56.

83 Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (Md. 1956), *aff'd*, 239 F.2d 176 (4th Cir. 1956).

84 G & P Amusement Co. v. Regent Theatre Co., 107 F. Supp. 453 (N.D. Ohio, 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954); Federal Trade Commission v. Paramount Famous-Lasky Corp., 57 F.2d 152 (2d Cir. 1932).

85 See *supra* notes 56, 57, 58, and accompanying text. *But see,* Hershey Chocolate

The Trading Stamp Franchise

The exclusive franchise system as used in the trading stamp industry has no effect or tendency of precluding any stamp company from access to the market, or any part of it. By adopting the system, a company limits the number of retailers with whom it deals, thereby leaving all competing non-licensed retailers available to its competitors. Indeed, once a stamp company enters an area on an exclusive basis, the retailers competing with its licensees may well be stimulated to "take on" competing stamps. Moreover, the exclusive licensee is no more precluded from using other competing stamps than he would be if his license were non-exclusive. In either case, the decision by a retailer as to whether he should use more than one stamp service would be a business one and not one governed by the presence or absence of the exclusivity feature of his license. Thus, the exclusive *dealing* cases, as already pointed out, have no relevance.

This exclusive aspect of a license from a particular stamp company might well be considered by a retailer to have such value to him that he would prefer to use the stamps of that company rather than those of another. This result, however, would not cause the franchise system to run afoul of the antitrust laws. The exclusive distributorship cases, previously discussed, make this clear. There would appear to be active competition among the numerous trading stamp companies in the country.[86] The exclusive license used by most of them has not had any discernible effect of reducing this competition. Furthermore, there is no restraint on competition in the distribution of trading stamps by merchants at the retail level, because there is no trade and commerce in trading stamps at that level and, consequently, there is no such competition that could be affected. Retailers do not sell trading stamps any more than they sell advertising in newspapers; they simply use them as merchandising aids.

Conceivably, however, it might be argued that there is some kind of injury to the public by conferring upon certain retailers a "monopoly" in the distribution of a particular trading stamp in a given area. There are at least two answers to any such possible argument. One is that no retailer is given a "monopoly"[87] in any area. The trading

Corp. v. Federal Trade Commission, 121 F.2d 968 (3d Cir. 1941). There the two leading makers of chocolate bars made separate exclusive selling arrangements with the three largest operators of vending machines, thus eliminating sales to many other operators. It was held that these exclusive arrangements were an unfair method of competition. The case is probably distinguishable from the others on the ground that the court considered the arrangements to constitute a group boycott, thus bringing it within the rule of the Klor's case, *supra* note 55.

86 See HARING & YODER, 4-9, 19-20; *infra* note 87.

87 The basic question is posed as to whether a stamp company can have a monopoly

stamp company not only reserves the right but actively seeks to license other non-competing retailers in the market area. Inability of the public to secure a particular trading stamp from twenty-five rather than five retailers in any given area does not create a situation coming within the ambit of the antitrust laws.

Secondly, the many exclusive franchise cases decided by the courts are in point. They have upheld such franchises as being entirely legal. Certainly, if the giving of an exclusive license by an automobile manufacturer to a dealer for a defined area is not in violation of the antitrust laws, the granting of a "semi-exclusive" license to a retailer in a given area by a trading stamp company is equally valid. In neither case is there any injury to the public.

But what about the competition between retailers? Does the exclusive license affect that competition in such fashion as to run afoul of the antitrust laws? Any theory of illegality would seemingly have to be based on the alleged fact that, because of the use of "semi-exclusive" franchises, a merchant might be unable to secure a trading stamp having a value, in terms of consumer acceptance or appeal, equivalent to the stamp or stamps used by his competitors. This might or might not handicap him in his ability to compete. With all the other merchandising aids available to him, such as lower prices, increased services and prize drawings, for example,[88] any assumption of a resulting handicap is highly speculative at best. However, even if one assumes a competitive handicap in such a situation, this would

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of trading stamps within the rationale of the Du Pont case, *supra* note 80. Does "the line of commerce" include not only trading stamps but also all other substitutable merchandising aids? "Monopolizing under Section 2 [of the Sherman Act] consists of monopoly in the economic sense—that is, power to fix prices or to exclude competition—plus a carefully limited ingredient of purpose to use or preserve such power." Report of the Attorney General's National Committee to Study the Antitrust Laws 43 (1955). If it be assumed that trading stamps are "a line of commerce"—a questionable assumption—and thus capable of being illegally monopolized, certain well-known facts would seem to indicate quite definitely that no stamp company has such a monopoly. There are approximately 200 trading stamp companies doing business in the United States. In 1956, of 199 companies surveyed by the Department of Agriculture, 33 of them had revenues of over a million dollars each. Total revenues for the industry more than doubled from 1954 to 1956, due to growth within existing companies and because of the formation of new companies, which was rapid during this period. Also in 1956, about 70% of the trading stamp business was divided among the 10 largest companies. U. S. Department of Agriculture, *op. cit. supra* notes 2, at 2-3; see *supra,* note 5 and accompanying text.

The most that can be said as to each stamp company is that it has a "natural and complete monopoly" of its own particular stamp service, but this is not the kind of monopoly proscribed by the Sherman Act. See *supra* note 79 and accompanying text.

88 *Supra* notes 22, 40-43, and accompanying text.

not make the exclusive franchise illegal. The antitrust laws are "concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."[89] Concerning exclusive selling arrangements, the law does not "stand in the way of a normal and reasonable restriction on competition,"[90] and the cases make it clear that exclusive franchises do not violate that standard.[91] Indeed, in the usual situation where an automobile dealer, for example, is unable to obtain the desired automobile because his competitor has secured an exclusive franchise, he may well be unable to secure any substitute and thus be unable to continue in business. In the case of trading stamps, however, inability to obtain a desired stamp service in no way affects the retailer's ability to obtain the goods he sells and, in addition, there are many other merchandising aids available to him.

The decision in *Federal Trade Commission v. Motion Picture Advertising Service Co.*[92] is not applicable. The gravamen of the offense there was the effective denial to competitors of access to the greater part of a limited market by reason of the widespread use of exclusive *dealing* contracts by the four leading producers, of which the company was one. The franchise agreements used in the trading stamp industry are not exclusive *dealing* contracts and thus do not foreclose any part of the market to the competitors of any stamp company nor do they foreclose to any retailer any portion of his market. The most that can be said is that the effect of the use of such a system by one or more stamp companies in a given market area is

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89 *Supra* note 73 and accompanying text.

90 *Supra* note 64 and accompanying text.

91 *Supra* note 56.

92 Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); *supra* note 66. This case may well be said to represent the "high water mark" in interpreting the scope of the Sherman Act and of section 5(a) of the Federal Trade Commission Act with respect to the issue there involved. There it was held that, because respondent and three other companies not parties to the proceeding had "tied up" approximately 75% of the limited theater outlets for advertising films by the use of exclusive dealing contracts, respondent's contracts were in violation of the Sherman Act and hence were an "unfair method of competition" within the meaning of Section 5(a) of the Federal Trade Commission Act. Such an "aggregate" rule had never before been applied in this context, in the absence of a conspiracy or concerted action (see opinion of the dissenting Justices), and no subsequent case is known where this has been done. In any event, such a rule would seem to have relevance only to exclusive dealing arrangments, where the effect is to foreclose a market, or a major part of it, to competitors of the seller.

It is of interest to note that the Supreme Court and the Federal Trade Commission did not prohibit the company's use of exclusive dealing contracts; the prohibition was only that each contract must not be for a longer term than one year.

to make it impossible for competitors of the licensees to obtain any of the stamps used by those having the exclusive licenses. This may hurt them in the competitive struggle if the desired stamps are the popular ones but, as already pointed out, it does not make the franchise system illegal. There is nothing in the *Motion Picture Advertising* case to the contrary.

No decision has ever intimated that the exclusive selling arrangements of a leading manufacturer or distributor would be illegal if its important competitors were using the same kind of system, with the result that a dealer who could not secure a franchise from any of these sellers was thereby deprived of the opportunity to buy and resell the desired popular product and was thus hurt competitively. All the cases upholding the legality of exclusive distributorships are in point. *A fortiori*, inability of a retailer to obtain the use of any one of a number of popular trading stamps, because he is not one of the exclusive licensees, does not make the franchise system an unfair method of competition or otherwise illegal.

Conclusion

Trading stamps are a competitive tool of widespread use. As such they have generated much inevitable controversy. The general charge against them is that they are "unfair competition." Yet they are only one of a number of widely-used merchandising aids and there is no basis in the federal law for branding their use an "unfair method of competition." In all the states but one trading stamps are used as a legitimate and fair method of competition.[93]

As already mentioned, the Congress in the summer of 1961 repealed the old gift enterprise law of the District of Columbia, which had been interpreted to forbid the use of trading stamps, among other things. In its report[94] recommending repeal, the Senate Committee on the District of Columbia said:

> There seemed to be two arguments advanced against the use of trading stamps. The first argument was to the effect that trading stamps are an added cost for the retailer which must be passed on to the consumer. It was the feeling of the committee that this charge, if true, would have equal application to all of the other promotional devices . . .
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> The second objection to trading stamps was that the practice of trading stamp companies of granting exclusive franchises to a limited number of retailers constitutes an unfair business practice since it deprives some retailers of an opportunity to use the trading stamps of a particular company or companies.

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93 See *supra* note 30.

94 *Supra* note 30.

> The exclusive franchise system is completely legal and is not unique to the trading stamp industry. As a system of distribution it is commonly used by automobile manufacturers, farm equipment manufacturers, clothing companies, and small and large appliance manufacturers, to name but a few of the many industries employing the system.
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> . . . .
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> With so many trading stamp companies in the market, a retailer in the District of Columbia who desires a trading stamp plan, should be able to obtain one. The fact that the exclusive franchise system of a company might prevent a retailer from obtaining a particular stamp plan, is no reason to single out this sales promotion activity for special legislative treatment.

This statement and the subsequent action of the Congress in passing the repeal bill would seem accurately to reflect the law with respect to the exclusive franchise and its use by trading stamp companies.