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REGISTRATION AND PROTECTION OF TRADEMARKS

GOVERNMENT

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HEARINGS  
BEFORE THE  
SUBCOMMITTEE ON  
PATENTS, TRADEMARKS, AND COPYRIGHTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
EIGHTY-SEVENTH CONGRESS

FIRST SESSION

PURSUANT TO S. RES. 55

ON

S. 1396

JUNE 20 AND 21, 1961

Printed for the use of the Committee on the Judiciary



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# REGISTRATION AND PROTECTION OF TRADEMARKS

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TUESDAY, JUNE 20, 1961

U.S. SENATE, SUBCOMMITTEE ON PATENTS,  
TRADEMARKS, AND COPYRIGHTS OF THE  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 10:15 o'clock a.m., in room 3302, New Senate Office Building, Senator Philip A. Hart presiding.

Present: Senators Hart (presiding) and Cotton.

Staff members present: George S. Green, professional staff member, Committee on the Judiciary.

Senator HART. The committee will be in order.

The Subcommittee on Patents and Trademarks is meeting pursuant to a notice of a hearing which was filed in the Senate on June 7. The notice will be inserted at this point in the record.

(The document referred to follows:)

[Congressional Record, June 7, 1961]

## NOTICE OF PUBLIC HEARINGS ON S. 1396

Mr. McCLELLAN. Mr. President, as chairman of the standing Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, I wish to announce that the subcommittee has scheduled public hearings on S. 1396, dealing with trademarks, to commence on June 20, 1961.

The hearings, set for 10 a.m. are to be held in room 2228, New Senate Office Building.

Anyone wishing to testify or file a statement for the record should communicate immediately with the office of the Senate Patents, Trademarks, and Copyrights Subcommittee, room 349A, Senate Office Building, Washington, D.C., telephone Capitol 4-3121 or Government code 180, extension 2268.

The subcommittee consists of the senior Senator from South Carolina, Mr. Johnston; the junior Senator from Michigan, Mr. Hart; the senior Senator from Tennessee, Mr. Kefauver; the senior Senator from Wisconsin, Mr. Wiley; the junior Senator from New Hampshire, Mr. Cotton; and myself, as chairman.

Senator HART. We are here to consider the bill introduced by Senator McClellan, S. 1396, a bill which applies to trademarks.

I had been informed that there would be a number of witnesses who would want to be heard, both in support of and in opposition to the bill.

The subcommittee does desire to make as full and complete a record as is possible, and wants to allow all the witnesses who wish to testify to be heard. However, as acting chairman in the absence of Senator McClellan, I would like to suggest that, as so many of you know, the time available for hearings at this stage of the session is at a semi-premium, and I would ask wherever possible that we not duplicate testimony. Each witness may present to the committee testimony that



deals with different phases of the legislation at length, but if you find that you have prepared a document which is repetitious of the prior testimony, I would appreciate it if you would omit that.

If time does run out on us, those who cannot be heard will have inserted in full in the record their statements. We have asked that, where possible, statements be submitted to the committee, and all of these will be inserted in full in the record, together with any oral highlighting that a witness may elect to add.

We have allotted 2 days for the presentation of views on this legislation, and I do hope that all will be heard. I think I can promise you that all will be heard.

Senator COTTON and I—I shouldn't speak for Senator Cotton.

I shall acknowledge publicly what shall soon be very evident. I did get through law school, but I was never exposed to the patents and trademarks. So, at least for me, go slow.

Senator CORRON. Well, you may reinsert my name in that statement. I started from scratch on this whole subject. I assume, Mr. Chairman, that those witnesses who desire to do so may insert their full statements in the record and then give us an informal oral résumé, if they choose, but that is not required of them. I mean they may do so if they care to do it that way.

Senator HART. Indeed, yes.

Senator COTTON. If that is done I want to assure them that I will study their testimony most carefully, and I suppose by today and tomorrow we will hold most of our hearings before noon.

Senator HART. Indeed, yes. And I am not at all sure we will be permitted to sit in any event. We shall ask permission if you have no objection.

Senator COTTON. Not at all. Thank you, Mr. Chairman.

Mr. GREEN. Mr. Chairman, I might suggest at this time that a copy of S. 1396 be made a part of the record.

Senator HART. Without objection, that will be done.

(The bill referred to follows:)

[S. 1396, 87th Cong., 1st sess.]

A BILL To amend the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946, as amended

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 5 of the Act is deleted and there is inserted in lieu thereof the following:

"Sec. 5. (a) (1) Subject to the provisions of this section, persons other than the registrant of a registered mark or the applicant for registration who use such mark on or in connection with goods or services, the nature and quality of which are controlled by the registrant, may be registered as registered users of said mark for any or all of such goods or services: *Provided*, That wholesalers, retailers, agents, or others who resell the registrant's goods in the original package, or who merely repackaging such goods, or who use a registrant's mark primarily to identify and distinguish goods manufactured or sold by the registrant may not be so registered.

"(2) The term 'permitted use' means use of a mark by a registered user in accordance with the request for registration of such registered user approved by the Commissioner as meeting the requirements of subsection (b) of this section.

"(b) Concurrently with, or at any time after, the filing of an application in accordance with section 1 of this Act, a request for registration of a person as a registered user may be filed in the Patent Office by such person and the registrant or applicant for registration of the mark. Such request, accompanied by the required fee, shall be in writing and verified, and shall set forth—



- "(1) the names and addresses of the persons filing the request;
- "(2) the relationship between the persons filing the request;
- "(3) the mark, identified by registration number, if any, otherwise by application number;
- "(4) the goods or services for which registration is requested;
- "(5) the method of control by the registrant or applicant for registration of the mark over the nature and quality of the goods or services on or in connection with which the permitted use is to take place;
- "(6) the duration of the permitted use; and
- "(7) any conditions imposed by the registrant or applicant for registration of the mark with respect to the characteristics of the goods or services, or the mode or place of the permitted use.

"The Commissioner may require such other and further information as may be necessary to determine registrability as a registered user.

"(c) Upon a proper showing made by any person filing a request hereunder, the Commissioner shall take appropriate steps to insure that any document, information, or evidence furnished for the purpose of determining registrability as a registered user is not disclosed to any other person except by order of a court of competent jurisdiction.

"(d) If the Commissioner is satisfied that there has been compliance with the provisions of this subsection and that, in all the circumstances, the permitted use of the mark is not likely to cause confusion or mistake or deception, he shall authorize registration of the user as a registered user.

"(e) Upon authorization of registration, the user shall be registered forthwith if the mark is registered and concurrently with the registration of the mark if it has not theretofore been registered. Notice of such registration as a registered user shall be given in writing to the registrant and the registered user, and such registration shall be published in the Official Gazette with such particulars as the Commissioner considers proper.

"(f) The registration of a person as a registered user shall, upon payment of the required fee, if any, be—

"(1) modified or canceled by the Commissioner upon petition of the registrant of the mark and of the registered user;

"(2) modified or canceled by the Commissioner upon petition and a showing by the registrant of the mark or by the registered user, or both, that the registration of the registered user no longer reflects the facts of their relationship;

"(3) canceled by the Commissioner on his own motion in respect of goods or services for which the mark is no longer registered.

"(g) (1) Any person who believes that he is damaged by the registration of a registered user may, upon payment of the prescribed fee, apply to cancel such registration by filing a verified petition in the Patent Office; and the Commissioner may cancel such registration if it is finally determined by the Trademark Trial and Appeal Board or of the United States Court of Customs and Patent Appeals or by a court of competent jurisdiction, that—

"(i) the registered user has used the mark otherwise than in accordance with the terms of the registration, or in such manner as to be likely to cause confusion or mistake or deception;

"(ii) the registrant or the registered user, or both, misrepresented or failed to disclose some material fact which, if accurately represented or disclosed, would have caused refusal of the registration;

"(iii) the circumstances have materially changed since the date of such registration, and such registration does not reflect the facts as of the filing date of the petition filed under this subsection; or

"(iv) the registration of the registered user is inconsistent with superior trademark or registered user rights of the petitioner seeking cancellation;

"(2) No power shall be exercised under this subsection adversely to any registrant or applicant for registration, or registered user or proposed registered user, without giving persons affected thereby an opportunity to be heard.

"(h) Notice of modification or cancellation of a registration of a registered user shall be given by appropriate publication in the Official Gazette.

"(i) Unless otherwise provided for in any agreement between the parties, a registered user of a mark may give written notice to the registrant thereof to institute proceedings for infringement of said mark and, if the registrant fails or refuses to do so within three months after receipt of such notice, such registered user may institute such proceedings in his own name, making the



registrant a defendant. A registrant so added as defendant shall not be liable for any costs unless he appears in the proceedings.

"(j) The permitted use of a mark by a registered user shall be deemed to be use by the registrant or applicant for registration for all purposes for which such use is material under this Act or at common law; and nothing in this section shall be construed to confer on a registered user any right of ownership in the mark. The rights conferred by this section on a registered user may not be transferred.

"(k) The registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark."

SEC. 2. Section 21 of the Act is amended by inserting after the word "mark" the words "party to a request for registration as a registered user", and by inserting after the term "cancellation proceeding" the words "party to an application to cancel a registration of a registered user".

SEC. 3. Section 31 of the Act is amended by inserting after "\$25", second occurrence, the following: "on filing each request for registration as a registered user, \$35; on filing a petition to modify a registration of a registered user, \$15; on filing a petition to cancel a registration of a registered user by a person other than the registrant or such registered user, \$25".

SEC. 4. Section 32, subsection (1) of the Act is amended by inserting after the word "registrant", second occurrence, the following: "(or a registered user, under the terms of subsection (j) of section 5)".

SEC. 5. Section 34 of the Act is amended by inserting after the term "registrant of a mark" in the first paragraph thereof the term "or of a registered user".

SEC. 6. Section 35 of the Act is amended by inserting after the term "registrant of a mark" the term "or of a registered user".

SEC. 7. Section 36 of the Act is amended by inserting after the term "registrant of a mark" the term "or of a registered user".

SEC. 8. Section 37 of the Act is amended by inserting after the words "registered mark" the words "or the registration of a registered user"; and by inserting after the words "restore canceled registrations" the words "cancel or restore the registrations of registered users".

SEC. 9. Section 45 of the Act is amended by striking therefrom the seventh definition, being the definition of "related company."

SEC. 10. This Act shall enter into force and take effect six months from its enactment.

Senator COTTON. I assume that the first witness intends to cover this, but I think we ought to have before us this section 5 of the present act. We ought to have in place before us in some form the section 5 of the present act.

Senator HART. The staff at the moment is obtaining the code, and if the reporter will leave room for the insertion at this point of section 5 as presently enacted.

The first witness, now a trademarks consultant, is a most distinguished lady and an outstanding person in this field, Daphne Leeds.

If Mrs. Leeds would come forward.

Happily, Senator, I think we are in the hands of an expert here. We can let her tell us about section 5, what it is and what she thinks it should be.

#### STATEMENT OF DAPHNE LEEDS, TRADEMARKS CONSULTANT, WASHINGTON, D.C.

Mrs. LEEDS. Thank you very much, Mr. Chairman.

At the outset I might say I have sat in on hearings where our chairman has presided on patent matters, and I don't agree that he is without knowledge in this field. I don't know that he has sat in trademarks matters before, but I have great confidence in his ability,



as well as Senator Cotton's, to understand the simplicity of this particular phase of the law.

Senator COTTON. One sure thing, you have never been in any hearings on the subjects that I have been present on, and I am the most recent member of the Judiciary Committee. So you will devote your confidence to the chairman. I will start from scratch.

Mrs. LEEDS. I will point out, Mr. Chairman, on page 5 of my prepared statement there is quoted the present section 5 of the statute.

Senator HART. In full?

Mrs. LEEDS. Yes.

Senator HART. Then, if there is no objection, the record will stand with the inclusion in your prepared statement of the basic section.

Mrs. LEEDS. I have a prepared statement which I would like to put in the record, but I am not going to read it because it is quite lengthy. However, I do want to summarize it, and I may take a little more time than most of the other witnesses for the reason that I expect to summarize what is in this bill so that the comments of the witnesses who follow me will be directed, their remarks will be directed to something about which you had a little bit of information from me.

(Mrs. Leeds' statement follows:)

#### STATEMENT OF DAPHNE LEEDS

My name is Daphne Leeds. I presently am a trademarks consultant, having practiced law in the fields of trademarks and unfair competition for many years prior to 1953. From 1953 to the end of 1959 I served as Assistant Commissioner of Patents where I had responsibility for administration of the registration provisions of the Trademark Act of 1946. This act resulted from 8 years of study, hearings, and reports from congressional committees; and during that period I served on a drafting committee which coordinated the results of the studies and recommendations of the congressional committees and numerous bar and industry associations. I testified before congressional committees a number of times as a proponent of the legislation; and following enactment I wrote a book on the intent and meaning of the statute. I also wrote, on commission from the publisher, a commentary on the act which is published in title 15 of the United States Code Annotated; and I have contributed many trademark articles to legal periodicals through the years.

Today I appear in support of S. 1396 as a representative of Sealy, Inc., Serta Associates, and Restonic Corp., each of whose licensees are manufacturers of mattresses and related bedding equipment. My interest in the legislation, however, is a public interest as well.

The bill before the committee for consideration concerns the licensing of trademarks. Trademarks—or brand names—are badges of responsibility, indicating that the trademark owner vouches for the products sold under such marks. If the trademark owner permits others to use his mark on goods which they manufacture, the trademark owner cannot escape responsibility for such products on the ground that the person who actually made the goods is solely responsible. He must control the nature and quality of the goods sold under the mark the same as if they were made by him. The reason for this is clear—the trademark owner claims rights in the trademark as a result of such use by others, and where he claims a right from use of the mark on the goods, he must assume complete responsibility for the goods identified by the mark. Before I discuss the specific provisions of the bill, a bit of the history of trademark licensing might put the objectives of the proposed legislation in better perspective.

For many years the courts of this country frowned upon trademark licensing, that is, permitting a person other than the owner of the mark—or brand name—to use the mark on commodities which were not in fact manufactured by, or presented to the public under the name of, the owner of the mark. (Here, let me state that when I refer to the manufacture of commodities or products, I also mean to include the performance of services.) The courts reasoned that the function of a trademark is to indicate a single source of the product bearing the mark, and to permit its use by more than one person was not consistent with that



function. These decisions of the courts stemmed from the common law, much as it had developed in Great Britain where similar conclusions had been reached, and they date from a time when business was more or less local in character.

The expansion of industry in later years, involving the development of nationwide markets, mass distribution systems, and mass media of communications, saw a gradually changing approach by the courts. They ceased to hold to the theory that the only function of a trademark is to indicate a single source, and they recognize that trademarks perform an additional function—that of indicating a consistent quality of product identified by the mark; that is, a kind of guarantee to the public that all goods bearing a given mark are of like quality and characteristics. The result of this changed approach was to view the trademark as a useful competitive tool for expanding the market and creating a demand for branded commodities in areas which the trademark owner could not reach because of limitations of finances, plant facilities, and the like. In more recent times, trademarks came to be looked upon as a means by which small businesses might, by banding together and producing in accordance with an established and enforced set of standards, by using a single mark, and by employing national advertising and promotion, provide competition on a national scale with nationally integrated companies. In the prototype situation, the trademark owner, or licensor, does the product research and development, adopts the mark, provides national advertising and merchandise promotion programs, generally recommends sound and tested business practices, and licenses established local businesses to make the product under his quality control and to sell it under the trademark in a specified territory.

In our modern, mass-market economy, trademark licensing, or "franchising," plays an important role, especially for small business. It enables the trademark owner, by utilizing the facilities of his licensees, to penetrate markets for his goods and services that would be otherwise beyond his reach financially and geographically and thereby to offer competition to the large national companies. It enables the individual licensees to increase their markets and their efficiency by availing themselves of the trademark owner's national advertising and promotion, product research and development, quality control, and tested business methods and practices—all of which would be otherwise beyond their individual financial, facility, and manpower resources. It enables the public to have a wider choice of quality products and to benefit from the competitive potential resulting from product development, and from the general economic improvement resulting from more jobs for more people in more local businesses.

The courts have, during the past 30 years or so found no fault with such arrangements, provided the licensees, or permitted users of the mark, maintained the quality standards established by the licensor, or owner of the mark, so that there was no deception of the public.

This was the state of the law when Congress enacted the Trademark Act of 1946, and it formed the basis for including in the act section 5 which states: "Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public." The term "related company" was defined in the act as "any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used." The chief objective of the provision, according to the legislative history of the section, was to codify the "court-expressed" law.

The statutory provisions are broad and general in their terms, and this, as lawyers know, has advantages because it takes care of more contingencies than carefully circumscribed provisions, but the provisions have created misunderstandings and have served to weaken our system of reliance on brand names in making purchases. The statutory provisions were, as I have said, intended to state the law of trademark licensing as it had been developed by the courts. They were not intended to establish or approve a system of licensing without quality control of the product such as exists in many European and South American countries. Yet my experience, both as an administrator of the law and as a practicing lawyer, has convinced me that there is a considerable amount of trademark licensing taking place today where there is no semblance of quality control exercised by the licensor; indeed, in some instances there are not even any established standards and specifications. Failure to exercise control over



standards and quality results in deception of the public, and the entire trademark concept as we have come to know it in this country is undermined.

Enactment of S. 1396 will, I believe, go far to correct the present uncertainties, and by providing for public disclosure of the facts will go far in establishing renewed confidence in brand-name buying. The provisions of the bill are not altogether new to American businessmen. They are patterned after a similar procedure set forth in the British act which has been in effect since 1938 and in the Canadian act which was passed in 1953, but they are carefully tailored to the requirements of our competitive economy. This bill will provide a public record of the licensor-licensee relationship and of the identity of the user of a mark in any given area. It will provide greater certainty as to the respective rights and responsibilities of licensors and licensees. And it will regularize trademark licensing and add dignity to the licensor-licensee relationship.

Basically, there are three types of licensor-licensee relationship. In the first type, the licensor manufactures goods in one area, but is unable, for financial or other reasons, to expand, and he authorizes one or more firms to use his trademark on goods made under his quality control and sold under the mark within other defined areas. In the second type, the licensor neither manufactures goods nor performs services, but he develops a product, selects a trademark, establishes standards of quality and specifications for production or performance, plans national or regional promotional campaigns and develops business methods, and then authorizes one or more firms to make the product under his quality control and sell it under the mark within defined areas. In the third type, a group of manufacturers of a given product pools their financial resources to develop a national market in competition with national companies and organizes a company for the purpose of selecting the trademark, carrying on product research and development, and providing national advertising and merchandise promotion under the mark, and such company then licenses each member of the group to make the product under the licensor's quality control and sell it under the mark within defined areas.

The Department of Justice has questioned the right of manufacturers to pool their resources and delineate the area within which each licensee will sell under the trademark. I am not an antitrust authority, but I must confess that I personally fail to see the justification for the Department's position; however, Mr. Timberg who is generally recognized as an authority in antitrust matters will testify at length on this facet of the proposed legislation, and I shall therefore not take the committee's time.

The bill also would serve to clear up a considerable amount of misunderstanding and controversy which has developed under the present section 5 of the statute. Several categories of these misunderstandings came to my attention while I served as Assistant Commissioner of Patents, and they indicated that the practice of entering into agreements which provide for "paper control" of persons who do not stand in the position of "licensees" is widespread and should be corrected. Moreover, it is not uncommon for some wholesalers and retailers to consider themselves "licensees" simply because they resell a product with the manufacturer's mark on it. Indeed, some manufacturers have so misunderstood the law that they enter into trademark "license" agreements with their wholesalers or sales agents. That this is a perversion of the trademark concept is an understatement. A trademark identifies and distinguishes the goods of the person who makes them (or the person for whom they are specifically made.) Such persons advertise the mark and urge the public to buy their products under the mark; and to hold that wholesalers and retailers who handle the products of such persons in the course of trade require a "license" to resell the products with the trademark thereon demonstrates a lack of understanding of the function of a trademark. S. 1396 would make it clear that wholesalers and retailers who resell the registrant's (or trademark owner's) goods in the original package or who merely repackaging them will not be registered as registered users, or "licensees."

Another area of misunderstanding and controversy involves those situations where a trademark of the manufacturer of a product is used in a dealer's trade name, such as in the names of automobile dealers. Here again, there is no genuine trademark licensor-licensee relationship, since the dealer does not use the automobile trademark to identify and distinguish his own products—he uses it to advise the public that he sells a particular brand or brands of automobile, and the trademark actually identifies and distinguishes the product of the manufacturer of the automobiles which he resells on behalf of the manu-



facturer. There may be those who will say that the auto manufacturer controls the quality of the services performed by these dealers; but I am certain that the members of this committee know that there is no single standard of service performed by such dealers, and that the auto trademarks do not identify and distinguish a specific standard of service rendered by all dealers selling a given brand of car. Is the automobile manufacturer responsible for all of the poor mechanical services performed by its dealers on autos of its manufacture? I do not think so, and I do not think the automobile manufacturer would be willing to accept the responsibility—yet if the licensor-licensee relationship exists, the manufacturer is responsible.

Similarly, there are those situations where the trademark identifies a product manufactured by the trademark owner, and the product is prepared for sale to consumers by others who stand in the position of wholesalers or retailers. An example is the soft drink industry—and there are others—where the sirup is manufactured by the trademark owner and sold to bottlers and soda fountain operators who add carbonated water in accordance with the instructions of the manufacturer. Here, again, the bottlers and soda fountain operators do not use the trademark to identify and distinguish their own product; they use it to identify and distinguish the sirup manufacturer's product which they are reselling in consumable form. Although a proper licensor-licensee arrangement might exist in this industry, what I have just described is not such an arrangement. It would result if each of the bottlers actually manufactured the sirup under the quality control of the trademark owner.

Still another area of misunderstanding has arisen in those situations where the trademark identifies a product manufactured by the trademark owner, and the product is used in a finished item. An example is in the textile industry—and there are others—where a fabric is manufactured under a given trademark and sold to clothing manufacturers who make the fabric into finished garments. Oftentimes the fabric manufacturer furnishes labels or hang tags, with the fabric trademark thereon, to be used in connection with the sale of the garments; but, when the fabric trademark is so used on the garment manufacturer's product, it still identifies only the fabric and not the garment. Ordinarily, such situations do not provide a genuine licensor-licensee arrangement, and the fabric manufacturer is not really responsible for poor workmanship in the garment—unless, of course, he does exercise quality control over the garment manufacturer.

S. 1396 would eliminate such misunderstanding and controversy by providing in the proviso to section 5(a) (1) that persons who use a registrant's (or trademark owner's) mark primarily to identify and distinguish goods manufactured or sold by the registrant may not be registered as registered users—or "licensees." This is a much needed clarification of the law.

Specifically, the bill would provide for registration in the Patent Office as registered users of all licensees of trademarks upon joint request of the licensor and licensee. The verified request for registration would set forth the names and addresses of the licensor and licensee filing it; a description of the relationship between such persons; an identification of the trademark involved; an identification of the goods or services on or in connection with which the licensee uses the mark; a description of the method of control by the licensor over the nature and quality of the goods or services on or in connection with which the licensee uses the marks; the duration or term of the license; and a description of any conditions imposed by the licensor with respect to the characteristics of the goods or services or the mode or place of the use of the mark by the licensee (sec. 5(b)). If the Commissioner deems the information so filed to be incomplete, he may require such other information as may be necessary to determine registrability as a registered user (sec. 5(b)); and upon a proper showing made by the licensor or licensee, appropriate steps shall be taken by the Commissioner to insure that any document or information so furnished is not disclosed to any other person except on court order (sec. 5(c)).

When the Commissioner is satisfied that the request complies with the statutory requirements and determines that use of the mark by the licensee is not likely to confuse or deceive the public, he shall authorize registration of the licensee as a registered user (sec. 5(d)). Notice of such registration will be given in writing to the licensor and licensee and notice will be published in the Official Gazette with such particulars as the Commissioner considers proper (sec. 5(e)).

Registration of the licensee as a registered user may be modified or canceled on petition of the licensor and licensee or upon a showing by either that such registration no longer reflects the facts of the relationship. Such registration



may be canceled by the Commissioner on his own motion if the mark is no longer registered for the goods or services set forth in the registered user registration (sec. 5(f)).

The bill provides for the filing of a petition for cancellation by any person who believes that he is damaged by a registered-user registration, and if it is found by the Trademark Trial and Appeal Board, or by the Court of Customs and Patent Appeals on appeal from the Board, or by a court of competent jurisdiction, that the mark has been used otherwise than in accordance with the terms of the registered-user registration or in such manner as to confuse or deceive the public; or that the licensor or licensee, or both, misrepresented or failed to disclose a material fact which, if accurately represented or disclosed, would have caused refusal of the registration; or that the registration does not reflect the facts; or that the registration is inconsistent with superior trademark rights or licensee rights of the petitioner seeking cancellation, the registered-user registration will be canceled (sec. 5(g)(1)). The bill prevents the Commissioner from taking any action in connection with modifying or canceling a registered-user registration without notifying all persons affected thereby and giving them an opportunity to be heard (sec. 5(g)(2)); and it provides for giving notice of all such modifications and cancellations by publication in the Official Gazette (sec. 5(h)).

In order that a licensee might adequately protect his market and his business goodwill in his area of use of the trademark, the bill would permit the registered user to give notice to his licensor of infringement of the mark in his area, and request that such licensor institute infringement proceedings; and if the registrant fails or refuses to do so within 3 months, the licensee-registered user may institute infringement proceedings in his own name, making the licensor a defendant. In such cases, the licensor will not be liable for any costs unless he appears in the case (sec. 5(i)).

The bill makes it clear that use of a mark by the licensee shall be deemed to be use by the licensor for all material purposes; and it also makes it clear that the licensee-registered user acquires no ownership rights in the mark as a result of his licensed use—nor may he transfer his rights as a registered user to another (sec. 5(j)).

Subsection (k) of the bill authorizes the licensor, irrespective of the type of licensor-licensee arrangement, to prescribe conditions and restrictions as to mode and place of use of the mark by each licensee-registered user. In other words, the licensor may prescribe conditions and restrictions upon his licensees as to how his mark may be used and where it may be used.

The balance of the bill would make changes which will conform other sections of the act to the provisions of the bill and establishes the fee for filing.

An effective date of 6 months after enactment is set forth in section 10.

This committee may be told by some opponents of the bill that the registered-user concept introduces a "foreign" concept into our law, but I would point out that the concept stems from the same country which gave us our concept of common law.

The committee may also be told that the present broad and general language of the act is preferable to a requirement for disclosure of the facts of a licensor-licensee relationship, but I would point out that where the licensor asserts rights in his trademark as a result of the use by the licensee, and the licensee obtains substantial privileges there is no valid reason why they should not make a public record of the facts. No trademark owner should be permitted to assert rights under his mark without assuming a corresponding responsibility—a responsibility for the product sold under the mark, and a record of the facts concerning such responsibility is clearly in the public interest.

There may be some who complain that the procedure is too costly, but I would point out that the additional cost of registering under this bill by each of the licensees of a trademark would amount to little when consideration is given to the advantages of increased sales, national advertising, quality control and the other services rendered by the licensor. If the license is worth anything to the licensee, the cost of registering is low, and if it is not worth anything, why would a licensee enter into it?

There may be some who will tell this committee that this is a compulsory registration bill; but I would point out that there is nothing compulsory about it. If the trademark owner does not wish to register his mark, he does not have to do so, either under the present statute or under this bill. The incentives for registration, however, have been demonstrated to be such that the business community has availed itself and will no doubt continue to avail itself,



of the benefits of registration of its trademarks. But if he does wish to register his mark, and if registrable rights are claimed as a result of use of the mark by others, then the trademark owner should, it seems to me, disclose the facts. This bill provides a procedure and an incentive for doing so.

It may be that some will question the effect of the bill upon existing rights. I do not believe that it will disturb existing rights, and I would hope that this committee would so find. In any event, there is no intention of adversely affecting any existing rights acquired either at common law or under the Trademark Act of 1946.

I do not share the concern expressed by some that this bill represents another incursion by the Federal Government into private business. When a trademark owner seeks registration of his mark, he seeks recognition by the Federal Government of his exclusive right to use that mark on the goods on which he has used it, and I am convinced that when others than the person seeking registration of the mark are in fact using it, even though on the owner's behalf, then the recognition of trademark rights by the Government should be available only when the facts are disclosed.

In the interest of strengthening our trademark concept and creating renewed confidence in brand name buying, in the interest of clarifying the rights and responsibilities of the licensor and his licensees, and in the interest of strengthening the means whereby small businesses may provide regional and national competition with national companies, I urge that this committee give favorable consideration to S. 1396.

Senator HART. May I intrude on your modesty and ask you to state for the record your background? All of us are familiar with it, but I believe we might have it in the record.

Mrs. LEEDS. Thank you. I always feel very immodest when I do this.

I presently am a trademarks consultant. I practiced law in this field for many years prior to 1953, and in 1953 I was appointed Assistant Commissioner of Patents, where I was charged with the administration of the registration provisions of the trademark law of the United States.

I served until December 15, 1959 in that capacity. I was one of the draftsmen of the Trademark Act of 1946. I served on numerous committees. I served on a drafting committee which coordinated the views of industry and bar associations and of congressional committees in the drafting of the legislation which finally culminated in the present trademark law.

Following that I wrote a book on the subject which is entitled the New Trademark Manual in which I attempted to set out what Congress intended by passing the bill. And then I was also commissioned by the publishers of the United States Code Annotated, to write the commentary on the law, which appears in title 15 preceding the statute.

I have written many legal articles on trademarks. I have lectured at numerous law schools on the subject as guest lecturer, and I am appearing here today, I hope, to correct something which I feel has been misused in the present law.

I am appearing today on behalf of Sealy, Inc., Serta Associates, and Restonic Corp., each of whose licensees, Mr. Chairman, are manufacturers of mattresses and other bedding equipment. However, my interest in this legislation is broader than merely the representation of these people because it involves what I consider a great public interest. This bill concerns the licensing of trademarks. Trademarks, as you know, are brand names or brand symbols. They are, in fact, badges of responsibility in the marketplace indicating that the trademark owner, the one whose mark it is, vouches for the quality of the product sold under the mark. And if the trademark owner permits others



to use his mark on goods which they manufacture, then the trademark owner still cannot escape responsibility for such products on the ground that the person who actually made them is solely responsible, because by permitting his mark to be placed on them he vouches for the quality of those goods.

Senator COTTON. Pardon me. I don't want to interrupt you but I want to make sure I understand. Are you discussing the present law or the bill?

Mrs. LEEDS. I am discussing the present law with regard to this——

Senator COTTON. This responsibility you have just outlined is now in the law?

Mrs. LEEDS. Well, it has grown up in the common law, yes, sir, and the present section 5 was intended to be a codification of the common law.

Senator COTTON. Thank you.

Mrs. LEEDS. For a long time in this country the courts refused to recognize the validity of trademark licensing; that is, permitting someone other than the owner of the mark to use it. This was based on the theory that the trademark represented a single source of the product, and if there was more than one source then, ipso facto, the trademark was invalid; it was not performing its function of designating a single source. But as commerce grew the theory of the courts expanded and they came to the conclusion that, in order to expand in the markets which the trademark owner was not able to reach either financially or facilitieswise, the trademark took on a new function, that function being to indicate a consistent quality of product no matter where the goods were found in the marketplace, that they should be of the same quality.

The public started relying on trademarks for this purpose, too, and, as you know, nationwide business came into being in this century. Mass distribution systems and mass media of communications came into being. And this helped the courts to change their approach to trademarks and to what their function is.

A trademark today is considered by the courts to be a kind of guarantee to the public that all goods bearing the mark are of like quality and characteristics.

Now this is not to say it is a legal warranty because it is not, but the public does rely on it as being the same thing which they bought before under the same mark. The trademark today is viewed as a useful competitive tool for expanding markets and creating a demand for branded commodities in areas which the trademark owner could not possibly reach because of his limitations of finance or facilities or manpower.

In the prototype situation today the trademark owner or the licensor does product research and development, selects the mark, provides national advertising and merchandising promotion programs, and generally recommends sound and tested business practices, and then he licenses established local businesses to make the product under his quality control and to sell it under the trademark in a specified territory.

In our modern mass market economy trademark licensing or franchising, as it has come to be known in the trade, plays an important role especially for small business. It enables the trademark owner,



by utilizing the facilities of his licensees, to penetrate markets for his goods and services that would be otherwise beyond his reach. And it enables the small businesses thus to offer competition with the large national companies. It enables the individual licensees to increase their markets and to increase their efficiency by availing themselves of the trademark owner's national advertising and promotion, product research and development, quality control and tested business methods and practices, all of which would be otherwise beyond the reach, individually, of the licensees.

Then, most importantly, it enables the public to have a wider choice of quality products and to benefit from the competitive potential resulting from product development and from the general economic improvement resulting in more jobs for more people in more local businesses.

The courts have, during the past 30 years or so, found no fault with this kind of arrangement at all, provided the licensees—and this is an important proviso—provided the licensees or the permitted users of the mark maintain the quality standards established by the licensor, the trademark owner, so that there is no deception of the public. This was the state of the law when Congress enacted the Trademark Act of 1946, and it formed a basis for including in that act section 5 which states, and I shall quote:

Where a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided such mark is not used in such manner as to deceive the public.

Then the term "related company" is defined in section 45 of the present act as "any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used."

The chief objective of the provision, according to the legislative history of the section, was to codify the court-expressed law, the law which had grown up under the common law. The statutory provisions are very broad and general, and you Senators, as lawyers, know that this is oftentimes preferable to a more circumscribed language. However, it is oftentimes accompanied by difficulties, and I would like to outline some of the misunderstandings which have arisen under the present section 5 and which have served, in my opinion, to weaken our system of reliance on brand names in making purchases.

The statutory provisions were not intended to establish or to approve a system of licensing without quality control. This kind of system does exist in many European countries and in South American countries where your rights stem from registration of the mark and you can sort of have a patent on the trademark and you can license it freely. You don't have to control any of the products that are sold under it. But my experience, both as an administrator of the law and as a practicing lawyer, has convinced me that there is a considerable amount of trademark licensing taking place today where there is no semblance of quality control exercised by the licensor. Indeed, in some instances there are not even established standards and specifications.



Furthermore, the law has been misconstrued so that certain people are considered to be licensees when they, in fact, have nothing to do with the making of the product. I will delineate those for you a little later.

Enactment of S. 1396 will, I think, go far to correct present uncertainties, and by providing for public disclosure of the facts will go far in establishing renewed confidence in brand-name buying. The provisions of this bill are not altogether new to American businessmen, particularly if they are doing business in Canada or any of the United Kingdom countries because the provisions of this bill are patterned after the British law which has been in effect since 1938 and the Canadian law which has been in effect since 1953.

Basically there are three types of licensor-licensee relationships, and I would like to outline these for you. In the first type, the licensor is manufacturing goods in a given area, but he cannot expand into other areas because he is not financially able to do so. So he authorizes one or more firms in other areas to use his trademark on goods which are made under his control as to quality, and they are sold under his mark in these other areas.

Now that is one type where the trademark owner actually is the manufacturer in one part of the country.

In the second type the licensor neither manufactures goods nor performs services, but he develops a product and selects a trademark, establishes standards of quality and specifications for production, plans the national or regional promotional campaign and advertising and develops business methods, and then he authorizes one or more firms to make the product under his quality control and sell it under the mark within defined areas of the United States.

Now this is where the manufacturer doesn't make anything, but he merely directs the making by a group of manufacturers.

In the third type a group of manufacturers already established, a group of manufacturers of a given product pool their financial resources to develop a national market in competition with national companies, and they organize a company for the purpose of selecting the trademark and carrying on the product research and development and providing national advertising and merchandising promotion in the same way, and then having formed this, as I call it, "umbrella corporation" which controls the product itself, which does the national advertising and so forth, that corporation then licenses each of the participating companies to use the mark on the goods which are so manufactured under the control of the umbrella organization.

The Justice Department has questioned the right of such corporation to delineate areas within which each licensee will sell under its mark. In other words, the Department questions whether or not the territory of sale may be prescribed.

I am not an antitrust authority. I am not even an antitrust lawyer. I personally fail to see the justification of their position, but I am not going to take the committee's time because Mr. Timberg, who will follow me as a witness, who is an antitrust authority, will explain that phase of the legislation to you.

Now I mentioned earlier that there was a considerable amount of misunderstanding which has developed under the present section 5 primarily, I believe, because of its breadth and because it is not certain



in its terms. It represents a statement of fact rather than the creation of rights.

While I was Assistant Commissioner of Patents I learned through cases which came before me that there is a good deal of paper control of concerns who consider themselves to be licensees. This is a widespread practice which I think should be corrected.

It is not uncommon, for example, for wholesalers and retailers sometimes to consider themselves licensees simply because they sell a product with the trademark owner's name on it. Some manufacturers have even entered into licensee agreements with their wholesalers. But this is a perversion of the trademark concept because the trademark identifies a product of the manufacturers and distinguishes it from like goods of others.

These trademark owners advertise the mark and urge the public to buy the product with the mark on it, and it would seem a little more than ludicrous to say that the merchant can't sell the product with the mark on it unless he is licensed to sell it. If he has bought it he can resell it obviously.

S. 1396 would make it clear in section 5(a)(1), in the proviso, that wholesalers or retailers who resell the registrant's goods in the original package or who merely repackaging them will not be registered as registered users. They will not be considered licensees under this bill.

Senator COTTON. What do you mean by repackaging? It sounds obvious, but it is not quite. I can understand where a retailer who bought a product from the manufacturer who was a licensee and sold it in its original form, I can readily understand why that would be most certainly legitimate. But I am wondering what that repackaging is.

Mrs. LEEDS. Oftentimes, Senator, products are purchased in bulk and they are purchased under the trademark and then they are repackaged with the permission of the trademark owner under that mark. But it still is the trademark owner's product. It is not a product made by a licensee.

Mr. GREEN. That would be in the case of a retailer, would it not, getting goods from an actual manufacturer having the trademark?

Mrs. LEEDS. Yes. He would buy the product under the trademark and then would sell it under the trademark, but packaged from the bulk in which he bought it. In other words, let us take coffee, for example. Suppose that a company buys coffee in bulk and then packages it in bags with the trademark on it. It is still the producer's product. It hasn't been changed. And that is what is meant by this section, this proviso.

Does that answer your question, sir?

Senator COTTON. Thank you.

Mrs. LEEDS. Another area of misunderstanding involves those situations where a trademark of the manufacturer of a product is used in a dealer's trade name, and the first example that comes to mind is the automobile dealer. Here again there is no genuine trademark licensee-licensor relationship. There may be a license relationship, but it is not a license of the trademark because the dealer doesn't use the trademark, the automobile trademark, to identify his product. He uses it to identify the manufacturer's product. He uses it to advise the public that he sells the particular kind of automobile,



particular make, and the trademark actually identifies and distinguishes that make of automobile.

Now there may be those who will say that the automobile manufacturer controls the services which are performed by these dealers. I suspect that the members of this committee know as well as I do that there really is no single standard of service among automobile dealers, and the automobile trademarks do not identify and distinguish a specific standard of service rendered by all dealers selling a given brand of car.

Is the automobile manufacturer responsible for all of the poor mechanical services performed by its dealers on autos of his manufacture? I don't think so, and I don't think the automobile manufacturer would be willing to accept that responsibility.

But if the trademark license agreement exists, a real trademark licensee-licensor relationship exists, then the manufacturer is in fact responsible for the quality of that poor service.

Mr. GREEN. Would that be true under the present law?

Mrs. LEEDS. Yes.

Mr. GREEN. Then how would S. 1396 change it?

Mrs. LEEDS. S. 1396 in the proviso would eliminate these people as licensees and would say that if the mark is used primarily for the purpose of identifying the product of the manufacturer, then the licensor-licensee relationship does not exist.

Mr. GREEN. In other words, it would not extend to service.

Mrs. LEEDS. That is correct.

Mr. GREEN. Simply an agreement identifying the trademark of the manufacturer.

Mrs. LEEDS. That is right.

Of course, if there is in fact a trademark license agreement under the terms of which the automobile manufacturer seeks to control the quality of the services of its dealers, the services performed, then the manufacturer is morally responsible for the services, and if that relationship exists, then they could come in and register as registered users on a showing of the existence of those facts.

But, as I say, I wonder whether there is a single standard of service among automobile dealers.

Senator HART. If today under present law there was a Green Buick company—Green being the name of the dealer—there would not be an assertion of licensee status by Green Buick absent some express agreement between Buick motors and Green, or would there? Have you had Greens come in to you and seek to register?

Mrs. LEEDS. As a matter of fact; yes. On used cars, for example, where they came in and sought to register for what their dealers were selling, asserting the existence of a licensor-licensee relationship. This would merely clarify it to make it clear that if there is in fact such an agreement it should be registered so that everybody knows where the quality responsibility lies. That is the purpose of this—not to permit the trademark owner, the automobile manufacturer, for example, to impose on the dealers conditions when the licensee actually does not gain anything through the acceptance of quality control and responsibility by the manufacturer.

Senator HART. Would this proposed legislation limit the right of the manufacturer to establish conditions for the dealers?



Mrs. LEEDS. It would not limit him in establishing the conditions, but it would make provision for him to make those public, make them public by registering what the relationship is.

Senator HART. Would it then require every manufacturer-dealer franchise to be registered?

Mrs. LEEDS. It would—it doesn't require them to, but if the trademark right is being asserted for registration purposes by the licensor, then he gains his rights only as a result of what someone else is doing, and therefore he would have to divulge the facts; yes.

Senator COTTON. I am afraid you are losing me right at this point. Furthermore, I think you ran a grave risk in using the illustration of automobiles with the chairman here representing the State of Michigan.

Mrs. LEEDS. I thought of that.

Senator COTTON. You are likely to be in trouble right off.

Senator HART. I am liable to be in trouble right off.

Senator COTTON. But from the strictly layman point of view, because I know as little about automobile relationships as I do about trademark law, if the Buick company has a Buick dealer, the Green automobile company sells Buicks, they are selling new Buicks. Obviously there is no need of any registration by them. They are receiving from the manufacturer his own product under a known name and simply reselling it.

Mrs. LEEDS. That is correct.

Senator COTTON. But is it my understanding that you said something about the attempts of sellers of used cars to register? What is the purpose of that? A 4-year-old Buick that has been through 3 or 4 people's hands, they want it to appear that the Buick manufacturers are guaranteeing the quality of that car? Or what is the purpose?

Mrs. LEEDS. Not necessarily a Buick car, Senator.

Here is the kind of situation which has existed. I don't remember which manufacturer it was. Let us say it was General Motors, and I believe it was, who came in to register "OK" for used cars.

Now General Motors doesn't sell used cars. Oh, they might sell a few of their demonstrator cars which they have retained title to, but they are not in the used-car business. Their dealers, however, are. And they came in to register this mark for used cars which their dealers were selling.

Senator COTTON. So their dealer could claim to the public that this used car he was selling, he could imply it had been examined and conditioned OK by the manufacturer?

Mrs. LEEDS. By the manufacturer whom he represents, yes.

Senator COTTON. And under the present section 5 in the law, could they get away with that?

Mrs. LEEDS. Yes.

Senator COTTON. And that is one of the things, a sample of one of the things this bill is to correct.

Mrs. LEEDS. Yes, we hope it will correct it.

Senator COTTON. Thank you.

Senator HART. Now to pursue that just a minute—I wish you had used a different example, too.

It has never been my impression, driving past a used car lot, when I saw that OK symbol that there was any relationship between that lot and the cars thereon and General Motors.



Mrs. LEEDS. It has also been my impression, too.

Senator HART. But do I understand that General Motors sought to register OK?

Mrs. LEEDS. Yes.

Mr. GREEN. Was it actually registered?

Mrs. LEEDS. Yes.

Senator COTTON. Does this trademark act have to do with food sold in restaurants?

Mrs. LEEDS. Yes and no. It has to do with food sold in restaurants which are doing an interstate business.

Senator COTTON. Just for my own clarification, let me give you an example, and I want to try to do it in such a way that I do not identify, though perhaps someone might suspect, the restaurant I have in mind.

When I was practicing law it became my job to incorporate a certain restaurant. I discovered at that time that this restaurant was an entirely independent restaurant in its ownership. But, by the payment of a fee, it carried the name of a nationally known, what the public would regard as a chain of restaurants. It paid so much to carry the name. And under the agreement to carry the name the restaurant was to be subjected to periodic inspections by the national, the nationwide outfit to see if they were performing in the matters of sanitation, cleanliness, and otherwise conforming to the requirements.

They were required to buy certain foods from that national organization. They had the option of buying other foods, but many of the foods they didn't need to buy from the national organization. They could go out and buy it locally or buy it anywhere they wanted to, and actually it was a completely independent restaurant only subject to periodic inspection and only required to purchase a small proportion of its food from a national hookup. And, yet, it does business as a member of this chain of restaurants, and until I incorporated that restaurant I supposed that it was a chain of restaurants that is everywhere, run by the same general management.

Now where does that fit into this picture?

Mrs. LEEDS. Under the present law, Senator, that is one of the situations which is common to the franchising operations in this country, and under the present law the licensor, the national umbrella organization that permits the use of its name is responsible for controlling the quality of service and quality of food served in that restaurant if there is a genuine license relationship, and I would assume that there would be.

What you have described sounds rather typical. Under this bill the thing which would happen would be that the national organization and each of its independent operators of restaurants would come in and disclose the facts of their relationship for purposes of registering as a registered user of that national chain's name so that the public would at all times have access to the true facts of the relationship as to who was responsible for what.

Senator COTTON. If I got ptomaine poisoning in that restaurant could I sue the national organization?

Mrs. LEEDS. You could.

Senator COTTON. Can I now?

Mrs. LEEDS. Yes.

Senator COTTON. Thank you.



Senator HART. Could I sue General Motors if I got a clinker off that OK used car lot?

Mrs. LEEDS. Yes.

Senator HART. I could?

Mrs. LEEDS. If there is that relationship which they have asserted there is, they are responsible for their quality. They control it, they say.

Senator HART. What about faulty servicing of a car in a dealer's repair shop? Is there now, when Green Buick—some Green Buicks have sought to register. Is that right? And have registered?

Mrs. LEEDS. No. It is the other way around. It is the manufacturing company that seeks registration.

Senator HART. And, as far as you know, no auto manufacturer has sought to register Green Buick, or have they?

Mrs. LEEDS. For service or for selling the product?

Senator HART. I don't know how to answer that.

Mrs. LEEDS. Green Buick, you see, Senator, is a trade name. It is a commercial name rather than a trademark. It is used on any product. It is the business name. And I can't say that this is true, but my recollection is that it is true that some of the automobile manufacturers have registered their trademarks such as Buick, Chevrolet, Cadillac for the services performed by their dealers. That is the mechanical services and so forth.

Now if they have asserted that they own a trademark as a result of the services performed by their dealers, then the manufacturer is responsible for poor service. In other words, they can't claim trademark rights and escape responsibility for quality.

Senator COTTON. Well, if I drive my car to Washington—if I drive a Chevrolet and something goes wrong with it and I want to get it repaired and have no knowledge of any garages here; so I take it to an accredited Chevrolet garage. I use that word "accredited." I am throwing that in. It is a Chevrolet sales garage, and they sell Chevrolets. So I assume, reasonably, that that is the best place to have Chevrolets worked on. Under the present situation, are they accredited for repairs or are they just accredited—they sell Chevrolets, and I and the public go to them simply because the public decides and I decide in my own mind that I have got to gamble anyway and I had better gamble with an outfit accustomed to working on that type of car.

Mrs. LEEDS. I can't answer that question specifically because I don't know whether they claim they are accredited, that they are licensed for this service. I don't know whether that is true or not. But if they do claim it, then the manufacturer of the automobiles is responsible for the quality of service performed.

Senator HART. Whether or not there is a registered entry?

Mrs. LEEDS. That is correct.

Senator HART. A trademark?

Mrs. LEEDS. That is correct.

But all this bill would do would be to say that if they are asserting that they have rights as a result of what their licensees do, then they should let the public know that they are also responsible by registering as registered users.

Mr. GREEN. That is on the basis of the manufacturers.



Mrs. LEEDS. Yes, only the manufacturer.

Mr. GREEN. What is the situation, Mrs. Leeds, with regard to statements made by dealers that their repairmen are factory trained, such as Chevrolet or as the case may be? What relationship rises out of the acquiescence of the sales manufacturer in allowing the dealers to make a statement that in their shops their mechanics have been factory trained?

Mrs. LEEDS. I don't think that places any responsibility on the manufacturer. That in and of itself would not. They could still be factory trained and not have learned their lessons too well. And the mere assertion that they are factory trained does not create any responsibility on the factory.

Mr. GREEN. Well, wouldn't that be calculated somewhat to perhaps deceive the public in the sense that they are dealing with people that have been trained and know their business from the manufacturer's standpoint?

Mrs. LEEDS. All they are saying is that they have been trained, and then we must assume, I think, that they have been trained just as we assume when someone graduates from a certain university that he is educated. But it doesn't always work out that way.

Senator COTTON. I don't want to prolong the time, but I see a sign, "Accredited Chevrolet Sales and Service" over a garage. Does that sign mean anything? And if it is simply put up there by the local dealer and he claims he is accredited for not only the sales and service but actually there is no licensee relationship, then he is engaged in a misrepresentation, isn't he?

Mrs. LEEDS. I think so.

Senator COTTON. Under the present law and under this bill?

Mrs. LEEDS. Yes.

Senator COTTON. But if, on the other hand, there is some licensee relationship which affects not only sales but service, then the Chevrolet Co. is responsible for the proficiency of the service he renders me?

Mrs. LEEDS. That is right.

Senator COTTON. And the only difference is that under the present law there is no way that the public can find out whether that is true or not.

Mrs. LEEDS. Correct.

Senator COTTON. But under the bill that is proposed, the public can find out whether they are getting service that is—I believe you didn't want to use the word "guaranteed."

Mrs. LEEDS. Well, that is all right. It is not a legal warranty. But the manufacturer would be responsible for the quality of it.

Senator COTTON. If this bill is passed, then I can find out by what?

Mrs. LEEDS. Checking the Patent Office.

Senator COTTON. By what?

Mrs. LEEDS. Checking in the Patent Office to see who the registered user is.

Senator COTTON. I see. Thank you.

Mrs. LEEDS. Now there is another situation where the trademark identifies the product manufactured by the trademark owner and the product is prepared for sale to consumers by others who stand in the position of wholesalers and retailers.



Now the prototype of this is the example of the soft drink industry. Of course, there are two kinds of operations there, but in the typical situation the manufacturer, the trademark owner manufactures the syrup, the finished syrup which it sells to bottlers and to soda fountain operators. The bottlers and the soda fountain operators prepare this in accordance with instructions from the manufacturer for sale to the consumer. They, in other words, mix water with it, carbonated water, and sell it to the consumer. The bottlers and soda fountain operators do not use the trademark to identify their own product. They use the trademark to identify the syrup which is the ingredient which makes it the product which is sold under the mark. They use it to identify and distinguish the syrup manufacturer's product which they are reselling in consumable form. They have merely bought the syrup and have processed it, prepared it for sale in consumable form.

Now a proper licensor-licensee relationship might exist in this industry, and does in some instances, but it does not where the syrup is manufactured and sold to soda fountain operators and bottling operators. It would result, if each of the bottlers manufactured its own syrup under the quality control of an umbrella company, in other words in one of the types that I described earlier.

If there is a trademark owner who doesn't do anything except control the production by other people, then there must be a licensor-licensee relationship where the quality control is exercised by that trademark owner.

Still another area of misunderstanding has arisen in those situations where the trademark identifies a product manufactured by the trademark owner and the product is used in a finished item. An example is in the textile industry where a fabric is manufactured under a given trademark and sold to clothing manufacturers who make the fabric into finished garments.

Oftentimes the fabric manufacturer furnishes labels or tags with the fabric trademark on them to be used in connection with the sale of the finished item.

Now you Senators have seen this often. Your overcoats probably have a label in them. Maybe it is Forstmann. But you know that that doesn't identify the overcoat. It doesn't identify the source of the overcoat. It identifies the fabric that the coat is made of.

When the fabric trademark is used on the garment manufacturer's product, it still identifies only the fabric and not the garment. Ordinarily such situations do not provide a genuine licensor-licensee arrangement, and the fabric manufacturer is ordinarily not responsible for the quality of the workmanship in the garment unless, of course, he does exercise quality control over the garment manufacturer. And if he does that, and if he claims that he owns trademark rights in his fabric as a result of the garment manufacturer's use of the mark in this way, then he is responsible for the quality of workmanship of the garment. And here again this bill would provide public information of the facts.

S. 1396 would eliminate the misunderstanding which I have outlined here by providing in the proviso to section 5(a)(1) that persons who use a registrant's or trademark owner's mark primarily to identify and distinguish goods manufactured and sold by the regis-



trant may not be registered as registered users or licensees. Those who are claiming rights from controlling quality, however, should not be able to escape responsibility for such quality, and they should come in and register their users.

Now let us go specifically to the provisions of the bill. The bill would provide for registration in the Patent Office as registered users of all licensees of trademarks upon joint request of the licensor and licensee.

The verified request for registration would set forth the names and addresses of the licensor and licensee filing it; a description of the relationship between such persons; an identification of the trademark involved; an identification of the goods or services on or in connection with which the licensee uses the mark; a description of the method of control by the licensor over the nature and quality of the goods or services on or in connection with which the licensee uses the marks; the duration or term of the license; and a description of any conditions imposed by the licensor with respect to the characteristics of the goods or services or the mode or place of the use of the mark by the licensee.

After this is all filed, if the Commissioner finds that it is incomplete, that it doesn't give him all the information he needs, he can require such other information as he may find necessary, and if this is confidential, on a proper showing he will not disclose it except on a court order.

When the Commissioner is satisfied that the request complies with the statutory requirements and he determines that use of the mark by a licensee is not really going to confuse or deceive the public, he will authorize registration of the licensee as a registered user. Notice of such registration will be given in writing to the licensor and licensee and then it will be published in the Official Gazette, the official publication of Patent Office registrations. Upon a showing by either the licensor or licensee that the registration no longer reflects the facts of the relationship, such registration may be canceled by the Commissioner; and it may be canceled on his own motion if the mark is no longer registered for the goods or services set forth in the registered-user registration because there would be no provision for him to keep on the register the registered users of a mark which is not registered.

The bill provides for the filing of a petition to cancel by anybody who believes that he is damaged by the registered use registration; and if it is found by the Trademark Trial and Appeal Board or by the Court of Customs and Patent Appeals that the mark has been used otherwise than in accordance with the registered-user registration, or in such manner as to deceive the public, or that material facts have been represented or, rather, misrepresented, or not disclosed or that the registration does not reflect the facts, or the registration is inconsistent with the rights of the person filing cancellation petition, the registered user registration will be canceled.

The bill provides for the Commissioner giving notice to all people who will be affected by any action in connection with the registered-user registration, and it provides for giving notice of all modifications and cancellations.

In order that a licensee might adequately protect his market and his business good will in his area, the area in which he is using the mark, the bill would permit him to give notice to his licensor of



infringement of the mark in his area and request that such licensor institute infringement proceedings, and if the licensor or the trademark user does not institute such proceeding within a period of 3 months after the notice, then the licensee registered user might himself file suit to protect his market and his good will, making the licensor a defendant.

In these cases the licensor will not be liable for any costs unless he appears in the case.

The bill makes it clear that use of a mark by the licensee shall be deemed to be used by the licensor for all material purposes, and it also makes it clear that the registered user requires no ownership rights in the mark as a result of his franchised or licensed use, and he may not transfer his rights as a registered user to another.

Subsection (k) of the bill authorizes the licensor, irrespective of the type of arrangement, to prescribe conditions and restrictions as to mode and place of use of the mark by each licensee registered user. In other words, the licensor may prescribe conditions and restrictions upon his licensees as to how and where his mark may be used.

The balance of the bill would make changes which will conform other sections of the present act to the provisions of the bill and establishes the fee for filing.

An effective date of 6 months after enactment is set forth.

Now this committee may be told by some opponents of the bill that the registered user concept introduces a foreign concept into our law. But I would point out that the concept stems from the same country that gave us our common law. The committee may also be told that the present broad and general language of the act is preferable to a requirement for disclosure of the facts of a licensor-licensee relationship, but I would point out that where the licensor asserts rights in his trademark as a result of the use by the licensee and where the licensee obtains substantial privileges there is no valid reason why they should not make a public record of the facts. No trademark owner should be permitted to assert rights under his mark without assuming a corresponding responsibility, a responsibility for the quality of product sold under his mark, and a record of the facts concerning such responsibility is clearly in the public interest.

Now there may be some who complain that that procedure is too costly, but I don't believe that that will stand up when the additional cost of registering under this bill by each of the licensees would amount to very little when we give consideration to the advantages of increased sales, national advertising, quality control and the other services which normally are registered by the licensor. And I would ask the question if the license is not worth that, the cost of registering, then why would a licensee enter into it.

There may be some who would say this is a compulsory registration bill, but it is not because there is no law today which requires anyone to register his trademark.

Senator COTTON. May I interrupt you?

Mrs. LEEDS. Yes.

Senator COTTON. This is optional. They may register. They don't have to.

Mrs. LEEDS. That is correct.

Senator COTTON. If there is a licensor-licensee relationship and they



do not see fit to register, then they incur certain risks; do they not?

Mrs. LEEDS. That is right.

Senator COTTON. And those risks are precisely what?

Mrs. LEEDS. It is hard at this point to say, Senator, because I don't know what the risks might be. The risks might well be that they would not be entitled to territorial division, for example, because this bill makes specific provision for that. I don't know what the situation might be, but I do believe that whenever anyone comes in to register his mark based on the use by others, solely on the use by others, that the Commissioner should require information as to what the relationship is between the applicant and the others.

Senator COTTON. This purely reselling of a manufactured product is not contemplated either in the present law or this bill in any sense; is it?

Mrs. LEEDS. No.

Senator COTTON. It is entirely outside of that?

Mrs. LEEDS. Yes.

Senator COTTON. In other words, there is no need—I don't want to abuse the State of Michigan, but if I am simply the Buick agent in a certain town and I am receiving new Buicks and reselling them, neither the present section 5 nor this bill has any bearing on that relationship.

Mrs. LEEDS. That is right. There shouldn't be, Senator, unless there is something in the way of control which I don't know about.

Senator COTTON. Well, I was coming to that. My next question was going to be this:

If there is territorial control, if the Buick company wants to give me the entire franchise to sell Buicks in a certain county and no other dealer is going to be allowed to sell cars in that county, will that make it necessary under this law for some registration?

Mrs. LEEDS. I don't see how that could be registered under this bill because that would be prohibited registration under the proviso of section 5 (a) (1) because there the Buick dealer is merely using the trademark to identify the manufacturer's product and not his own product. And they could not register as registered users under this bill.

Senator COTTON. Or under the present law.

Mrs. LEEDS. Well, under the present law there isn't any provision for them to register because the licensee cannot register anywhere under the present law.

Senator COTTON. Well, I happen to be a member of the Commerce Committee in the Senate, and I know we have had at various times in the past this question come up as between dealers and automobile manufacturers about the limitation of territory.

Mrs. LEEDS. Yes.

Senator COTTON. How far the automobile manufacturer can go in protecting the rights of one of its dealers, exclusive rights to sell to customers in a certain territory.

Now this bill has no effect on that problem one way or the other.

Mrs. LEEDS. No, sir.

Senator COTTON. It isn't involved at all.

Mrs. LEEDS. No, sir.

Senator COTTON. And just one other quick question, as I might have to be out briefly.



You have referred to one of the virtues of this bill as the disclosure and the information to the public of what is contemplated. On page 3, subsection (c) :

Upon a proper showing made by any person filing a request hereunder, the Commissioner shall take appropriate steps to insure that any document, information or evidence furnished for the purpose of determining registrability as a registered user is not disclosed to any other person except by order of a court of competent jurisdiction.

Mrs. LEEDS. That is in a situation not where the facts have been disclosed, which are required in subsections, in subparagraphs 1, 2, 3, 4, 5, 6, and 7, but if the Commissioner needs additional information and something is submitted which includes prices, and so forth.

Senator COTTON. A formula.

Mrs. LEEDS. Yes.

Well, I don't think that that would be helpful to the Commissioner, really. But whenever anything of a confidential nature is submitted to the Commissioner to convince him of the registrability, then that, of course, would be not disclosed.

Senator COTTON. In other words, legitimate trade secrets.

Mrs. LEEDS. That is right, yes.

Senator COTTON. Thank you.

Mrs. LEEDS. Now it may be that some will question the effect of the bill upon existing rights, but I don't believe that this bill will disturb any existing rights, and I would hope that this committee would so find. In any event, there is no intention of adversely affecting any existing rights acquired either at common law or under the present act.

Then, finally, I don't share the concern expressed by some that this bill represents another incursion by the Federal Government into private business.

When a trademark owner seeks registration of his mark, he seeks recognition before the Federal Government of his exclusive right to use that mark on the goods on which he has used it, and I am convinced that when others than the person seeking registration of the mark are in fact using it even though on the owner's behalf, the trademark owner's, then the recognition of trademark rights by the Government should be available only when the facts are disclosed.

I urge that this committee give favorable consideration to S. 1396.

Senator HART. I know I speak for Senator Cotton, who is pressed for time, that most of the information heretofore given to the committee is very valuable and very understandable.

Mrs. LEEDS. Thank you.

Senator HART. Mr. Green?

Mr. GREEN. I just have one question.

On the bottom of page 14 where you make a statement, "I would point out that where the licensor asserts rights in his trademark as a result of the use by the licensee, and the licensee obtains substantial privileges," and so forth, what would be an example for the benefit of the committee of assertion of licensor rights? What is meant by those words "where the licensor asserts rights"?

Mrs. LEEDS. When he files an application to register, it is asserting that he owns it and has the exclusive right to use it.

Mr. GREEN. It has nothing to do with the actual sales or anything of that sort?



Mrs. LEEDS. No.

Senator HART. Thank you, Mrs. Leeds.

Mrs. LEEDS. Thank you, Senator.

Senator HART. Our next witness is Mr. Sigmund Timberg.

Mr. Timberg, I think for the record we should know, since this is a bureaucratic Government, we should have a description of your relationship to it, that on occasion the subcommittee has engaged you as a trademark specialist.

**STATEMENT OF SIGMUND TIMBERG, ATTORNEY AT LAW,  
WASHINGTON, D.C.**

Mr. TIMBERG. Senator, I have not been engaged by the subcommittee as a trademark specialist, because I am not a trademark specialist in anything like the sense of the person who preceded me. I have been engaged to prepare some materials in connection with international patent licenses. This is one of the research projects that the committee has been putting out now for several years, and the last bit of work I did for the committee was in February.

I have been engaged as a consultant to the Senate Patent, Trademark, and Copyright Subcommittee for the purposes of turning out a research study on the effect of international patent licenses not only in relation to the antitrust laws but also as to their general economic effects.

Senator HART. And explicitly in the area we are now studying and in the area affected by the bill, S. 1396?

Mr. TIMBERG. There has been absolutely nothing that I have done for the committee that has in any way trenched on legislation on trademarks. It has been specifically limited to the field of patents.

Senator HART. I thank you. I think you made that clear.

Mr. TIMBERG. Yes; I want to make it clear, and also that my actual work relationship had ceased.

I am Sigmund Timberg, a practicing attorney in Washington, D.C., specializing in antitrust and trade-regulation matters.

From 1944 to 1952 I was a special assistant to the Attorney General, and for most of that time Chief of the Judgments and Judgment Enforcement Section of the Antitrust Division of the Justice Department. In those connections I took part in terminating a large number of patent and trademark license agreements which appeared to violate the Sherman Act.

Since reentering private practice I have continued to study and have published several articles on the functioning of patents, trademarks, and other forms of industrial property in our competitive economy, and have lectured on that subject at the Georgetown University Law School, the Practicing Law Institute, and many other legal and university groups.

I also have been retained by Sealy, Inc., Serta Associates, and Restonic Corp., which have a special interest in the passage of this bill before the committee, but shall try to address myself in the main to the general issues of public policy that are raised by the bill and not repeat any of the explanations of the bill that have been given earlier.

Two of the basic objectives of this country's antitrust policy have been to stem the increasing trend toward industrial concentration,



and to insure the survival of the small business potential of the country. The dangers of industrial concentration were vividly summarized by President Roosevelt in his April 29, 1938, message to the Congress, a short portion of which is worth quoting:

Among us today a concentration of private power without equal in history is growing.

This concentration is seriously impairing the economic effectiveness of private enterprise as a way of providing employment for labor and capital and as a way of assuring a more equitable distribution of income and earnings among the people of the Nation as a whole.

Business enterprise needs new vitality and the flexibility that comes from the diversified efforts, independent judgments and vibrant energies of thousands upon thousands of independent businessmen.

The individual must be encouraged to exercise his own judgment and to venture his own small savings, not in stock gambling but in new enterprise investment. Men will dare to compete against men but not against giants.

This statement furnished the inspiration for the investigation subsequently conducted by the Temporary National Economic Committee.

That investigation resulted in the extensive hearings and monographs which are a continuing tribute to ex-Senator O'Mahoney, the former chairman of this subcommittee and the chairman of the TNEC. Its words have evoked many proper echoes in the Supreme Court decisions of the past two decades, and in such landmark congressional enactments as the Celler-Kefauver Anti-Merger Act of 1950.

On the judicial side the classic statement of the legal and social case for small business is to be found in Judge Learned Hand's opinion in the *Alcoa case* (148 F. 2d 416 (1945)):

\* \* \* many people believe that possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors versed in the craft as no consumer can be will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them \* \* \*.

Referring to the antitrust laws, Judge Hand said:

Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

This statement of Judge Hand was supported by reference to the legislative history of the Sherman Act and some earlier Supreme Court antitrust cases. However, Judge Hand also mentioned sections 2(d) and 18 of the Surplus Property Act of 1944 and the Small Business Mobilization Act as indicative of a continuing congressional policy in favor of preserving the competitive position of small business concerns.

The most recent declaration of such a legislative policy is that contained in the Small Business Act of 1953 which reads as follows:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise \* \* \*.



These statements, Mr. Chairman, are a prelude to the witnesses who are going to follow me. They will attempt to document, through their own business experience, the fact that national advertising is important to the producer of any product having a mass consumer appeal. They will show that effective national advertising is beyond the financial means of the small, regional-based producer.

\$10,000 a page for national magazine advertisements, expensive national radio and TV time, the hiring of expert talent geared to the production of convincing displays and promotion, all these are financially prohibitive for a producer whose effective sales radius is necessarily confined to, let us say, 200 miles from his factory. Yet, for want of such promotional facilities, even the best manufactured product would fail to be adequately distributed.

How, then, the question arises, can the small regional producer compete with the large nationally integrated manufacturer who can afford these advertising and promotional aids?

The economic answer to this question lies in cooperation, in the individual small producers banding together, pooling their limited financial resources and purchasing the national advertising and promotional services that they require if they are to compete effectively.

They go beyond this. They get together to develop and test new products, as the testimony of the witness will show.

The legal key to this problem of the small businessman is to be found in the use of a common trademark, which can be exploited by the group through national advertising and which can be the basis for more effective local advertising.

S. 1396, the bill before the subcommittee, confirms the right of regional producers and small businesses to become licensees under a common trademark, regardless of whether that mark is owned by an outside, nonmanufacturing source, or owned by an outside manufacturing source that is able itself to penetrate only a limited part of the national market, or by a central licensing organization controlled by the licensees themselves. S. 1396, by confirming this right, confirms one of the few legal techniques that have contributed to the success or survival of small business and thereby to stemming the trend toward industrial concentration.

From the standpoint of the substantive law, this registered used bill only confirms what I conceive to be the existing law of trademark licensing. It does not adversely affect any rights or privileges available to businessmen under the common law of trademark licensing or under the Lanham Act. I want to emphasize that it is not part of the purpose of this bill to interfere with any vested rights. However, it restates the existing substantive law in much more direct and clear language than the sections it would replace, sections 5 and 45 of the Lanham Act, which I always regarded as somewhat of an obscure and backhanded way of stating the law.

From the standpoint of legal procedure and the enforcement of the common law prerequisites for an adequate trademark license, however, S. 1396 represents a great improvement over the existing Lanham Act provisions.

One of my early assignments in the Justice Department was to express to this subcommittee, when the Lanham Act was passed in 1946, the Department's concern that sections 5 and 45 of the act might be abused.



Mrs. Leeds' testimony bears out what has apparently taken place. Despite clearcut court decisions that a trademark license is not valid unless the licensor both prescribes and enforces quality controls, see *E. I. duPont de Nemours & Co. v. Celanese Corp. of America*, 167 F. 2d 484 (CCPA 1948); *Dawn Donut Co., Inc. v. Hart's Food Stores, Inc.*, 267 F. 2d 358 (CCA 2, 1959); *The Alligator Co. v. Robert Bruce, Inc.*, 176 F. Supp. 377 (E.D. Pa. 1959); *Doud v. Hodge*, 146 Supp. 887 (N.D. Ill., 1956), aff'd sub nom. *Morey v. Doud*, 354 U.S. 457 (1957), this requirement is widely evaded in practice. To issue trademark licenses without proper specifications and procedures for their inspection and policing is to barter and traffic in trademarks, which was one of the things that the Justice Department warned against, is completely alien to our common law philosophy of trademarks as indications of source of origin and operates to deceive the consumer. I am therefore glad to see S. 1396 build on the experience of the United Kingdom and other common law countries that share our aversion towards bartering and trafficking in trademarks.

Admittedly the Patent Office, Mr. Chairman, is not the appropriate agency for policing the mechanics of a trademark licensing arrangement. However, the bill contains strong guarantees that the requirements for valid trademark licensing in the public interest will be adhered to by the parties, for it requires that the details of the relationship between the licensor and licensee be made public, that the conditions of the license agreement be disclosed, and, above all, that the method of control which the licensor will exercise over the nature and quality of the goods produced or services rendered by the licensee be made a matter of public record.

It provides that the arrangements be reviewed by the Patent Commissioner to determine whether they will cause confusion, mistake, or deception to the public. And, if the basic requirements are not adhered to, public enforcement agencies such as the Federal Trade Commission will have a basis for proceeding against practices that deceive the public and therefore constitute unfair methods of competition.

I also approve the strong stand taken in section 5(a)(1) of the bill against the registrability as registered users of persons not directly connected with the production of the goods or the rendering of the services in question, because this also constitutes a flat declaration of legislative policy against a practice that would deceive the public.

Fear has been expressed that the provisions of this bill might become a cover for antitrust violations by large dominant corporations.

Viewing this problem purely theoretically, this is a possibility which is inherent in the present law of trademark licensing, which this bill does not change. If anything, the possibilities of antitrust evasion would be reduced by the publicity that the bill provides for trademark licensing arrangements.

From a practical standpoint, if one looks at the specific provisions of S. 1396, it is most improbable that this bill will in any way obstruct the legitimate antitrust policies of this country. The bill is not an amendment of the Sherman Act, and does not carve out any immunities from the antitrust laws.

Unlike the Miller-Tydings Act and some other proposals currently before the Congress, this bill does not condone or even refer to any form of horizontal or vertical price fixing.



I have also indicated, and the witnesses who follow me will try to do likewise, the reasons why the bill will help to counteract the trend to monopoly in this country.

The only provision of the bill that might raise an antitrust problem is section 5(k), which confirms the right of the trademark owner to prescribe conditions and restrictions as to the place of use of the licensed mark. This is something which my understanding of the trademark law tells me is the right of any trademark owner, but this bill would make it clear that a trademark licensing organization can fix definite areas in the United States within which its respective licensees would have the exclusive right to sell the trademarked goods or render the trademarked services. In private litigation the designation of such exclusive areas has been held not to conflict with the public interest (see *Huber Baking Company v. Stroehmann Borthers Co.*, 253 F. 2d 945 (CCA 2, 1958), cf. *Bascom Launder Corp. v. Telecoin Corp.*, 204 F. 2d 331 (CCA 2, 1953), certiorari denied, 345 U.S. 994 (1953); *Brosious v. Pepsi-Cola Co.*, 155 F. 2d 99 (CCA 3, 1946).)

Even in the absence of a trademark license, the Federal Trade Commission in its most recent expression of opinion has refused to condemn exclusive territorial arrangements which do not impede competition. I quote from the statement of the hearing examiner in a recent Federal Trade Commission case (matter of Snap-On Tools Corp., docket No. 7116) because it summarizes some of the conditions that the industry witnesses who will follow me will illustrate in their own testimony.

6. Fundamental to consideration of this issue is the fact that competition in the sale and distribution of tools and equipment such as are here involved is very keen. There are many sellers in the field; the industry is highly competitive.

This is true of the mattress industry for which the witnesses following me are going to speak.

The only possible adverse effect of respondent's exclusive territory policy upon competition is that prospective purchasers are unable to play off one Snap-On dealer against another in the hope of obtaining a lower price. This would seem to be of little practical consequence in view of the fact that there are any number of sources available from which the purchaser can supply his needs.

7. As the examiner understands the authorities, the maintenance of exclusive territories by a seller certainly is not unlawful per se. On the contrary, the practice is unlawful only if it forms a part of a general plan or scheme which is unlawful. No such plan is involved here.

And then the examiner found no antitrust violation in that case.

The view of exclusive territorial designations taken by the Federal Trade Commission and by the courts in private litigation is as I understand it, not shared by the Justice Department. The Department's position, as I understand it, is that any pattern of exclusive territorial designation, even if, let us say, only 1 percent of an industry shared by 30 or 50 licensees is involved, is per se illegal under the Sherman Act and cannot be redeemed by any showing that the arrangements promote rather than restrain competition.

This is the view advanced by the Justice Department in the cases it has brought against the three mattress licensing groups represented by Mrs. Leeds and myself and against the Spring Air group that you will also hear from.



To the extent that section 5(k) indicates that trademark owners may prescribe exclusive trade areas, it would, I believe, conflict with the Justice Department position.

This is a technical area of the law, and in appraising it it is necessary to put first things first. The *per se* rules of antitrust violation, including the alleged rule that any territorial allocation, regardless of how small a portion of the market is covered, is a violation of the Sherman Act, are judge-made rules of convenience, designed to limit the mass of evidence that might swamp a trial court in cases where the legislative mandate is so clear as to render that evidence relatively inconsequential.

In the main these *per se* rules of antitrust violations are intended to assist in effectuating and streamlining the congressional policy against monopoly and in favor of competition. However, they must be regarded as subordinate to the congressional policies they are intended to implement. To equate them with those congressional policies is to put the administrative cart before the policy horse.

This is not to say that *per se* rules of antitrust violation are not in many circumstances proper means for effectuating the overall legislative purpose. Thus, in many international cartel cases, some of which were settled by consent judgment, the territorial allocations of world markets involved have been so comprehensive as to justify the inference of a *per se* antitrust violation. Even in such situations however—and there are few litigated cases on the subject—the cases indicate that the court entertains considerable evidence concerning the effect of the arrangement on competition and is chary of designating it as a *per se* violation.

I am happy to supply cases which bear this interpretation of mine out, but, in view of the fact that I am not engaging in any legal argument to the committee but pointing attention to the policy considerations that merit the consideration of the Congress, I have not included them in my statement.

From the standpoint of the congressional antitrust policy, the pertinent economic facts about trademark licensing and national cooperative advertising merit serious consideration. The industry witnesses who will testify later will show that exclusive territorial areas are of the essence of the trademark licensing arrangements that they have evolved in their self-protection.

The assignment of exclusive territories does not give the licensees any immunity from competition. There are hundreds of bedding firms in the industry and 25 active competitors in a typical area. Accordingly, the prices obtained by the respective licensees from department stores and other customers vary despite the fact that the use of common standards and specifications would presumably tend in the direction of uniform costs. This is borne out by the fact that the Government's complaints do not charge any of the four groups of licensees with agreeing to fix their own wholesale prices; that is, the manufacturer's price to the department store or other outlets.

Mr. GREEN. The manufacturer may fix a standard price by which he sells to the licensee. Is that correct?

Mr. TIMBERG. Each individual manufacturer is perfectly free to set the price at which he sells to his own distributor.

Let me explain that in this particular setup the licensor is not himself a manufacturer.



Mr. GREEN. Let us take the case where he is. For example, the situation that Mrs. Leeds referred to for bulk and repackaging.

Now in cases of that type may the manufacturer set under his trademark the amount that the packaged goods will be resold for?

Mr. TIMBERG. Unless he proceeds in conformity with the Miller-Tydings Act and the local State law that permits a certain amount of resale price maintenance for trademarked commodities, he may not. And this bill would not give him any right to do so. This is entirely outside of the area of the bill.

Mr. GREEN. They would not be the so-called fair trade items?

Mr. TIMBERG. This bill has nothing to do with a fair trade item. It makes no reference to price at any point. Section 5 (k), which is the provision which I have been discussing, is a provision that is limited to territorial designations. It gives the registrant of the mark, which in our case is the central licensing organization controlled by the individual licensees, the right to prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark.

This does not convey any authority to fix prices. It does convey an authority to designate the area within which the licensee will be exclusively responsible for manufacturing the product.

Mr. GREEN. If I understand you correctly, then, in the case of the group of small individuals who decide to get together and establish a common trademark for distribution and sale of certain goods, if they should, in their agreement with each other, attempt to fix a price for which those particular goods would be sold by themselves in various regions throughout the country, this bill would have no effect on that situation at all.

Mr. TIMBERG. This bill would have no effect on that situation.

Mr. GREEN. And, if that should be the case, they would be liable to any violation under the antitrust law.

Mr. TIMBERG. They would indeed. As a matter of fact, there could be situations in which you would have territorial allocations, and this is something I am going to come to in just a moment, which would be violative of the antitrust laws, and this bill would not affect those either. But certainly, as far as prices, wholesale prices, manufacturers' and licensees' prices are concerned, this bill has no effect on them.

Now, the Government's complaints charge the bedding groups with conspiring to fix the resale prices of their customers, a charge which the groups deny. In common with, and in order to meet the competition of, their national competitors, the members of the group advertise their products at a suggested retail price to the consumer, but there is nothing illegal about this unless it involves a Sherman Act conspiracy to fix prices.

Once again I may say that this bill has no relationship to suggested resale prices.

Mr. GREEN. There is a question there that I would like to ask, Mr. Timberg.

I understand—correct me if I am wrong—that there is presently pending an antitrust suit against certain of these manufacturers or licensees as the case might be.

Mr. TIMBERG. All four of the groups.



Mr. GREEN. And does this bill in any way have any effect upon any possible decision that might be made by the court in regard to the antitrust suits?

Mr. TIMBERG. I do not believe so. I think this bill would stand, if passed, as a declaration of legislative policy in favor of small business, and, to that extent, might have some bearing as to how the court interprets the question of antitrust law. But, as for this bill saying that the defendants are clear of antitrust violation, I do not believe this bill would have that consequence.

What it would do would be that it would enable them to prove to the court whether or not their arrangements restrained competition. They would still have to demonstrate to the court that the territorial allocation arrangements did not restrain competition in the mattress industry.

Senator HART. What specific section of the bill would give them a defense that you have just explained that they do not now have?

Mr. TIMBERG. I believe they have these defenses under the existing Sherman Act. This bill would not add to those defenses, but it would indicate that there might be a situation in which, let us say, where one percent of the industry is involved and there are 30 to 50 licensees, there might be a situation in which a valid trademark license could be issued that would limit the licensees to sales in certain areas. That is my view of what the Sherman Act presently provides.

I am only pointing out that section 5(k) of this law, which amends the Trademark Act, is consistent with that view; but I do not believe that the bill confers upon the licensees any defenses that they don't already have and are not already maintaining in the district courts.

Senator HART. Is it your view that if S. 1396 had been the law at the time the Justice Department filed its suit that there would be no suit filed?

Mr. TIMBERG. I am afraid that I can't speak for the Justice Department on this issue. I think that the Justice Department, the way private attorneys do, does pay attention to what the Congress believes to be proper policy in the field of antitrust and small business.

I cannot say whether the suit would or would not be filed. They will have to speak for themselves on that.

Senator HART. Let me ask it this way—

Mr. TIMBERG. But that is as far as I can go. It is difficult. This is a technical area, and I hate to speak for the Justice Department on litigation that is within their own control.

I think that section 5(k) would be an indication to the Justice Department that not in all circumstances did the Congress believe that territorially exclusive licenses would constitute a per se violation of the Sherman Act.

To the extent that the Justice Department believes that in all circumstances a territorial allocation constitutes a per se violation of the Sherman Act, this might have some effect on the Department, on whether they would bring the cases; yes.

Mr. GREEN. To that extent would the passage of this bill be an aid to the defense of the new pending suit?

Mr. TIMBERG. It might.

Mr. GREEN. In your opinion it might?

Mr. TIMBERG. It might; yes. If it affects the Department of Justice attitude originally, it might be an aid to the defense.



Mr. GREEN. Let us put it this way, leaving out the Department of Justice. Would it have any effect, do you suppose, on the decision of the court as far as the judgment would be concerned?

Mr. TIMBERG. It might, but that is not—

Senator HART. Let me ask this, and at the risk of oversimplifying terribly—

Mr. TIMBERG. I want to point out that the defendants in this case have already challenged this view of the Department of Justice, and that the court will reach its decision on whether it thinks the defendants are right or whether the Department of Justice is right. So that issue is already before the court.

Senator HART. Explicitly what is the charge in the pending suit to which 5(k)—

Mr. TIMBERG. The charge is that these licensees have combined among themselves to allocate exclusive territories in which they alone will sell the trademarked goods. It is limited to the charge—I'm sorry. That is the specific charge in the case.

Mr. GREEN. To carve up the territory; that the territory has been carved up?

Mr. TIMBERG. The territories have been carved up, if that is what you want to say.

As a matter of actual history, these licensees were already in their territories and they were independent small businesses. Then, when they got into the central organization, they had to agree for practical reasons on what territories they would continue to serve. But the Department charges a territorial allocation. That is right.

Senator HART. Does not 5(k), to the extent that legislative language is blunt and simple, say that such allocation is permitted?

Mr. TIMBERG. No, sir.

Well, Mr. Chairman, it doesn't say that such allocations are permitted. It says that such allocations are not per se violations of the Sherman Act. In other words, you might very well have a situation comparable to the type of situation that you had in the *Addyston* and the *National Lead* cases, where the parties to the arrangement dominated their industry and where there would be a real restraint of trade.

In this particular industry, in any particular market, you will find 20 to 25 competitors trying to sell mattresses. If, for example, these arrangements covered 80 or 90 percent of the industry, you would have a different situation. And that is what I mean by saying that section 5(k) was not intended to amend the Sherman Act.

You can assume, as far as section 5(k) is concerned, that it is an amendment of the Lanham Trademark Act and that it does not amend the Lanham Trademark Act in such a way as to permit a violation of the Sherman Act.

All section 5(k) says is that the mere fact that you have a territorial allocation does not establish a case of Sherman Act violation; it does not say that the Government may not establish such a case. I don't see how any amendment of the Lanham Act of this nature could repeal the Sherman Act. Certainly, it was never any part of our intention to repeal the Sherman Act.

Mr. Chairman, am I making the point clear, that this is only an amendment of the Lanham Act? It tells a group of cooperating licensees that they may do what a single licensee might do as far as



trademark law is concerned. It does not necessarily tell them that they may use territorial allocations to violate the Sherman Act. It does say that the mere fact that you have engaged in a territorial allocation, particularly if it covers only a small portion of the market and particularly if you can show that it promotes competition, is not automatically to be regarded as a violation of the Sherman Act, but it certainly does not repeal the Sherman Act or carve out any exceptions from it or amend it.

Certainly, any language which would make that clear would be acceptable to us and would meet our problem.

Senator HART. At that point, the problem you advise us you seek to meet is not an escape from the consequences of the pending litigation, but, rather, to permit a marketing practice which you believe to be sound.

Mr. TIMBERG. To be valid; that is right; and which has been persisted in, Mr. Chairman, for three decades by people who thought honestly that they were doing everything that they were entitled to do and who saw their large neighbors engaging in similar trademark-licensing arrangements.

As a matter of fact, some of their competitors don't even need to engage in trademark-licensing arrangements, because they have their own distribution channels. And all that they are asking for is a chance to demonstrate the validity of their practice.

A prime consideration is that, in the circumstances of the bedding industry, continuity of customer relations has, as in the Federal Trade Commission opinion from which I quoted earlier, a procompetitive effect.

More important, no business will invest money in a cooperative advertising venture if that venture can be used by other persons to undermine the goodwill and business position which that business has already achieved.

With the collapse of the cooperative trademark licensing arrangements will come the merging or the elimination of the individual regional producers who have been relying on those arrangements to provide effective competition against their large, nationally integrated competitors.

The liquidation of small business and the acceleration of the merger movement is a state of affairs which I do not believe any one of us would want to see develop. In otherwise competitive situations it seems to me wholly consistent with the policy of the Sherman Act and of the Small Business Act of 1953 to tolerate the slight limitation of competition in the sale of a single brand of a commodity which is necessary to promote more effective competition for the commodity as a class. Particularly is this so if the alternative is the total obliteration of individual enterprises. Only by permitting small and large firms equal access to the facility of trademark licensing can the economic and legal equality of those firms be maintained and their survival assured.

I want to briefly revert to the apprehension that large corporations which have a dominant position in their respective industries might use trademark licenses as a basis for allocating exclusive territories within the United States. I, at this point, know of no antitrust case based on such a situation involving trademark licenses. If there were



any possibility of this taking place, I think I have already pointed out that it could have developed under the common law of trademark licensing and under the Lanham Act even more readily than under S. 1396.

However, I think it extremely improbable that there will be such cases in the future. Knowing the great pressures that there are upon dominant national corporations to constantly expand their sales and market position and keep their extensive national distributor organizations busy, it is hard for me to believe that any such corporation would agree to limit itself to a geographic section of the national market and sacrifice the rest of that market.

It is equally inconceivable that a giant national corporation, which prides itself on its large-scale investment in research and development, would subject itself to quality control by a competitor or third person and the consequent dissemination of its unique know-how, or admit to the public that it was subject to such quality controls.

Moreover, it is also hard to believe that national corporations which engage in such vast expenditures for advertising and promotion would agree to build up the goodwill of a third party, which is what accepting a license under someone else's trademark means.

Finally, as I have pointed out, if these practical considerations do not make the whole matter academic, the fear of antitrust consequences would, in my opinion, keep industry-dominant firms from entering into territorial allocations with their competitors.

As I have pointed out, section 5(k) confirms the right of a trademark owner to assign exclusive territories to his licensees, but it does not confirm his right to do so in violation of the antitrust laws. Trademark rights, like most other rights, are subject to the overriding policy of the Sherman Act.

In substance, Mr. Chairman, the supporters of this legislation are addressing themselves to issues of legislative policy. They are not asking the Congress to take sides in the pending litigation or to pass upon any legal issue. In the final analysis, the bill is an amendment to the Lanham Trademark Act and involves the following policies which should become part of the trademark law of this country:

1. That the respective rights and obligations of trademark owners and their licensees be clearly defined for the benefit of the business community and general public.

2. That persons who do not have an appropriate connection with the trademarked product should not confuse or deceive the public by holding themselves out as licensees.

3. That persons who do not have the proper relationship to the trademark owner, or do not conform to specifications and standards prescribed by the trademark owner, should not confuse or deceive the public by holding themselves out as licensees.

4. That the best way of preventing licensors and licensees from abusing their legal rights and privileges and from confusing or deceiving the public is to require the public disclosure of the relevant facts; establish a public registration system for licensees; and confer upon the Patent Commissioner the right to refuse registration to licensees in the event that the facts disclosed show the likelihood of public confusion or deception.



In the course of advancing these fundamental objectives of trademark law, S. 1396, the registered user bill, will also be promoting the accepted antitrust objectives of maintaining a system of dynamic and creative small business enterprise, mitigating the trend toward undue industrial concentration and fostering effective competition.

For these reasons I support the enactment of S. 1396 into law, and I hope the committee will give it favorable consideration.

If it were in order, Mr. Chairman, and if there are no questions with respect to my statement, I wonder whether I might have permission to introduce into the record—not read—a statement by one of the four corporations represented by us who do not plan to present any witnesses.

The Restonic Corp. has a statement submitted by Mr. Dickinson, its vice president. And I was wondering whether it would be appropriate to enter it into the record.

Senator HART. Mr. Green, have you any questions?

Mr. GREEN. I just have one question.

In the formation of these agreements among the small independent manufacturers does an agreement of that type result in a lessening of competition between those particular individual manufacturers?

Mr. TIMBERG. I think to the extent that the agreement has a territorial provision and means that one of—that a licensee located in Chicago, for example, cannot make a sale in Milwaukee, where there is another licensee, it lessens the competition of those two licensees, I suppose.

If, despite the freight factor, if it were possible for two licensees to sell in a common area, and one of the licensees was kept out of the area, I think that it would lessen the competition between those two licensees in, let us say, the Serta or the Sealy mattress. But it would not lessen competition in the sense in which the Sherman Act is interested in competition, for three reasons.

First, there would be at least, as I pointed out, 25 other brand names that would be distributed in that area. Secondly, it would lessen competition only to the extent that the common brand is being used, because the two licensees would still be free to sell any products that they manufacture under their own private name brands. They would still be free to sell those in competition. However, the major reason why the arrangement would still promote competition is that this is the only basis upon which the licensees can afford competition to large national enterprises, Simmons and Englander specifically—the witnesses will mention them later—who advertise over the entire area. And what this has done has been to beef up these small regional manufacturers who might otherwise have gone by the wayside—and some of them have—or might otherwise be acquired and merged into other corporations.

The effect of this arrangement has been that these enterprises preserve their own individuality. They are in charge of their own manufacturing, their own development operations; they do a lot of local advertising of their own; they take care of their own distribution. But they are able, with respect to the item that is produced under the common brand, to promote more effective competition for the national concerns. So that, when you add the whole thing up, it is my view that the trademark licensing arrangements together with their terri-



torial exclusive arrangements results in more rather than less competition.

I think this is a view that is implicitly recognized in the Federal Trade Commission opinion that I quoted.

Mr. GREEN. In other words, what you are saying is that the slight limitation of competition between the individual small manufacturers is more than offset by their ability to be able to compete with the big national outfits.

Mr. TIMBERG. If it isn't completely offset by the amount of local competition that they find themselves confronted with, anyway, yes, sir. If it were permissible to put in—

Senator HART. The statement will be received at this point in the record.

(The statement of Herbert Dickinson follows:)

#### STATEMENT FOR RESTONIC CORP. AND ITS LICENSEES

My name is Herbert E. Dickinson. I am vice president of Restonic Corp. and have been affiliated with that company since December 1, 1944. Previously thereto I was engaged in the bedding manufacturing business as far back as the year 1921. From January 1, 1942, to December 1, 1944, I was with the War Production Board in Washington, finally holding the position of chief of the furniture and bedding section of the durable goods division. My experience in the bedding manufacturing business and in servicing such manufacturers through a central organization has been extensive.

Restonic Corp. presently consists of 18 licensee members in the United States. The individual licensee member's annual volume of mattresses and box springs varies from approximately \$250,000 to \$1,300,000, there being about three licensee members doing over a million dollars, three under \$250,000, and the balance, from \$250,000 to \$600,000. During 1960 the total volume of the group members was approximately \$6,500,000 in mattresses and box springs, approximately 50 percent of which represents Restonic trademarked bedding. At present Restonic licensees cover all of the United States with the exception of the west coast area.

Restonic Corp. was organized in 1938 by a group of bedding manufacturers who held licenses to manufacture bedding under certain U.S. patents issued to Max Marsack and Sam Marsack, of Milwaukee, Wis. These manufacturers had been paying royalties to individuals and it was found that great advantages could be gained through the organizing of these manufacturers into a group with a central office and the adoption of a common trademark by which the bedding manufactured under these patents could be offered to the public under a tradename through a combined national advertising program.

A corporation called Triple Cushion Corp. was then organized and each of the licensees of the Marsack patents was eligible to membership therein. The corporation was organized as a nonprofit corporation. Each of the licensees was required to subscribe to 15 shares of stock at \$10 per share. The bylaws provided that upon the withdrawal for any reason of any of the licensees their stock would be redeemed.

The name of Triple Cushion Corp. was subsequently changed to Restonic Corp. A central office at 666 Lake Shore Drive, Chicago, Ill., was then opened and an executive was hired.

The costs of running Restonic Corp. and its national advertising programs, including other services which were to be rendered by the central organization to the licensees, was to be borne ratably by the licensees according to the exclusive territory assigned to them and the number of mattresses manufactured under the Restonic labels.

The budget of expenses for the organization included the approximate expense layouts for the national advertising and the various services. The annual budget during the past few years for the national advertising program, the incidental expenses, and the other services afforded the licensees, has run on the average of approximately \$175,000. The biggest item in the budget is for advertising in nationally circulated periodicals and preparation of advertising displays and materials for the licensees. This item absorbs approximately two-thirds of the contributions by the licensee members.



Restonic's budget for national advertising and other services is of such an amount that it would be impractical and uneconomical for the small manufacturer to spend the money required for the functions performed by the licensing organization because the smaller manufacturer operates only in a small area and it would be a waste of money for him to advertise nationally and produce the small quantities required of advertising materials, in fact it would not be financially possible for him to spend the money required for this purpose.

Under Restonic's plan the licensee manufacturer retains complete control over his own manufacturing and distribution, the only requirement of the licensing organization being that he manufacture according to specifications on the trademarked products.

Since such group activity is the essential factor in providing a nationally recognized and advertised product for the small manufacturer member, it is extremely important that the licensee's sales of trademarked products must be limited to a definite exclusive territory. This is true because he must be encouraged to further the advertising program of the group by local advertising and sales promotion of the national trademarked product and develop a demand within his normal trading area. Since he incurs the expenses of the local advertising and sales promotion, he must be given every opportunity to capitalize on such expenditures.

In actual practice the exclusive territories which have been assigned by Restonic did not exceed an area around the manufacturer's plant having in mind the capacity of such manufacturer to service such territory. It can readily be understood that without exclusive territories there is no point in a manufacturer licensee incurring either the licensing fees to his group or advertising and promotional expenses in his own locale. It would be senseless for him to expend large sums of money in the development of the goodwill in the trademark and have someone else come into his territory and usurp such goodwill.

In May, 1960, there was an indication, following a grand jury hearing at Chicago, that a civil action would be commenced against Restonic Corp. under the Sherman antitrust law. The company authorized its attorney, Mr. A. L. Skolnik, of Milwaukee, Wis., to contact the Department of Justice in relation thereto, and after conferences and negotiations the company entered into a consent decree with the Government on May 27, 1960, restraining it generally among other things from allocating, dividing, or apportioning territories, markets, or customers for the sale of such products. The decree also provided that each Restonic licensee must file with the court its consent to be bound by the decree as a condition to its right to continue as a licensee.

At the time of entering into this consent decree it was believed by the directors of the company that although it and its licensees were not, in violation of the Sherman antitrust law in letter or spirit, the cost of engaging in litigation with the Government was way beyond the ability of its licensee members to incur and that it would be better to enter into a consent decree and attempt to live thereunder. Subsequent events, especially in certain areas of the United States where the licensees were close in territory, forcibly indicated that the licensing group's existence was doomed and Restonic Corp. had great difficulty in procuring from its licensees their individual consents to the decree.

Because of this, a special meeting of the board of directors of Restonic Corp. was held on June 30, 1960, and it was resolved that, if by July 15, 1960, a substantially greater number of consents from licensee members to the consent decree was not received than had been received up to that time, that counsel for the company and Mr. Dickinson were to contact the Department of Justice and attempt to procure its consent to vacate the decree of injunction in order to afford the licensee members of the company, and the company, an opportunity to defend against the charges set forth in the Government's complaint.

On July 18, 1960, Mr. A. L. Skolnik, counsel for the company, sent to Robert Bicks, Esq., Assistant Attorney General, Department of Justice, Washington, D.C., a letter, stating that Restonic was compelled to ask for its day in court, or for an appointment to discuss vacating the consent decree.

Subsequently, Mr. Skolnik and Mr. Dickinson arranged for a conference at Washington in respect to the matter and pleaded with the representatives from the Department of Justice to vacate such consent decree and give Restonic and



its licensees the opportunity to defend the action. The representatives of the Department of Justice refused to do so.

Since that time, it has become increasingly evident that there is no benefit to the licensees if they cannot have exclusive territory within which to develop goodwill in the trademarked product. Eleven of Restonic's 18 licensees are already in conflict in 6 areas out of the areas in which Restonic merchandise is sold. Presently, because of the proposed legislation now before the Congress, the licensees have stood by the organization in the hope that some remedy will be afforded them against the competition which is bound to destroy, for them, the ability to compete in their local market with a nationally advertised brand article against the large independent manufacturers.

Mr. TIMBERG. Might I just indicate two things about the statement. I don't intend to read it, but I would like to point out that the Restonic Corp. consists of 18 licensee members in the United States, and I would like to direct the committee's attention to the small volume of business that they do.

They do a total volume of business varying from \$250,000 annually to \$1,300,000. There are only three of the licensee members that do a business of over \$1 million. Their total sales of mattresses and box springs, of this entire group of 18 in 1960, was \$6.5 million; and only half of that represents what they sold under the Restonic trademark, their nationally advertised mark. The other 50 percent represents their own production under their own private marks. But they must carry a complete line; they must have both the nationally advertised mark and the local mark.

I also want to point out for the information of the committee, since it has asked about the litigation, that this is a group which has signed a consent decree. It is not currently involved in the litigation. However, the consequences before it of having to give up territorial allocations is such that they have asked the Department of Justice to be relieved from the obligation of being under the decree, and have asked for the privilege of defending the proceeding, because they feel that carrying out a requirement that they give up their territorial exclusive arrangements will result in the demise of their organization.

Eleven of the 18 licensees are already in conflict over this. The Department of Justice has not given the permission for these people to be relieved from the operation of the decree. I thought it only fair, in view of the fact that there is litigation involved, that the committee should be appraised of all of the circumstances of the litigation. If it is permissible, Mr. Chairman, I would like to hand in Mr. Dickinson's statement which I have tried to summarize briefly.

Senator HART. It has been made a part of the record.

Thank you very much, Mr. Timberg.

Mr. TIMBERG. Thank you, Mr. Chairman.

Mr. GREEN. Mr. Chairman, I might state for the record at this point that the Department of Justice is preparing its report, but the committee as yet has not received it.

Senator HART. I understood that the Department's position had been asked for.

I will indicate now that the position of the Department will be made a part of the record.

Senator HART. The next witness is Mr. Walter Schob.



**STATEMENT OF WALTER J. SCHOB, PRESIDENT, HONORBILT PRODUCTS, INC., PHILADELPHIA, PA.; ACCOMPANIED BY ALAN J. ALTHEIMER, ATTORNEY, CHICAGO, ILL.**

Mr. ALTHEIMER. Mr. Chairman, may I introduce myself first.

My name is Alan J. Altheimer. I am from Chicago. I am legal counsel for the Serta Associates, Inc., and I am here to give any assistance to Mr. Schob that he might wish.

Mr. SCHOB. My name is Walter Schob of the city of Philadelphia, and I have been employed by Honorbilt Products, Inc., of that city since 1928, and I have been president of the company since 1936.

My company, Honorbilt, has been a member of Serta Associates, Inc., since the very beginning, having been a charter member of the corporation, and therefore I have been affiliated in one way or another with Serta since January 30, 1937, when I was first elected a director. At present I am president of Serta and have been since 1959.

The bedding industry, as I first knew it in 1928, consisted of one large company which had complete national distribution both in manufacturing and warehousing, and some 1,000 small and medium size companies catering almost entirely to a purely local business.

If we were to peruse the pages of the Saturday Evening Post, the Ladies' Home Journal, Good Housekeeping Magazine, and other magazines of the year 1928, looking for mattress advertising, we would have found only one name. Nobody else had the distribution or the size to make national advertising practical.

For all the many small concerns, waste circulations and excessive cost made national advertising completely out of the question. And by waste circulation I mean circulation of advertising in areas where the product was not available to the consumer.

You can imagine, gentlemen, only one brand of cigarette being advertised, or one and only one brand of automobile being nationally advertised.

This strange phenomenon of the makeup of the bedding industry came to the attention of a professor, W. R. Robinson of California, when he read a term paper by one of his students. This student had, with the help of a local San Francisco mattress manufacturer, written his thesis on the subject "The Mattress Industry."

Impressed with the imbalance of the size of firms in the industry, this professor contacted the manufacturer, verified the facts, and then inquired as to the possibility of a merger of strategically located small factories in the United States in order to create a basis for more effective competition with the larger competitor.

At the NABM convention in 1928 this professor arranged for a group of manufacturers to meet. Tentative plans for a merger were formulated which later went so far as cross inventories being taken in many of the plants.

Two things kept the merger from becoming a reality. First, the stock market crash of 1929 made the floating of a new public issue unfeasible. Second, a number of the owners of the factories involved preferred to retain their localized personalities and local ownership.

However, the meetings which had been held clearly indicated merit in the idea, and from them evolved the plan of forming a corporation for the purpose of competing more effectively in the bedding industry.



After further discussion it was decided that a new corporation should be formed which would have a number of interrelated functions. The corporation was to develop a fine line of mattresses and establish standards and specifications for their manufacture. It would then select a trademark for its mattresses, which it would promote on a national basis.

Existing manufacturers would then be licensed to manufacture the trademarked mattresses in accordance with the specifications developed and sell them in mutually exclusive territories.

In accordance with the plan, a number of manufacturers organized a corporation known as Sleeper Products, Inc., in 1931. Research was done by the corporation on developing a fine line of mattresses and soon specifications were developed for the first smooth-top innerspring mattress ever marketed and a line of other fine mattresses.

The corporation acquired and used the trademark "Sleeper" as a means of identifying and promoting its line of mattresses. Existing manufacturers were licensed to manufacture and sell the "Sleeper" line in distinct territories. Each manufacturer had to comply with the specifications developed by Sleeper Products, Inc., in the manufacture of the Sleeper line, and inspections were instituted by Sleeper, Inc., to insure that specifications and quality standards were complied with. Of course, the licensed manufacturers continued to manufacture and sell their own brands of mattresses. No territorial or other restrictions were placed on the manufacture or sale of these mattresses.

The big advantage of this type of organization was that it enabled the licensee manufacturers to pool their resources in order to advertise and promote a fine trademarked line on a national basis. None of them individually could afford the research, advertising, and other promotional devices.

Sleeper Products, Inc., changed its name to Serta Associates, Inc., in 1938 and began licensing its mattresses under the trademark Serta at that time.

Today, some 30 years later, the Serta operation is basically the same. True, we are a little larger. We have grown to 36 licensees in the United States, 4 in Canada.

Each one of these licensees contributes funds to Serta on an annual basis for use primarily in (a) national advertising, (b) local advertising, (c) maintenance of a central office, staff, and showroom, and (d) research and maintenance of standards. They are licensed to sell the Serta line in separate territories. The Serta line sold must conform to the specifications developed by Serta Associates, Inc.

The individual factories in Serta have benefited from the parent company in many ways. Chiefly, they found that they could compete with other nationally advertised brands. They could get expert advice on specifications and manufacturing techniques. Each licensee found that, collectively, national advertising, which was completely impossible in a single operation, had become feasible.

On the other hand, the consumer has also benefited. We can literally pick the brains of our 40 members, and through interchange of ideas and production methods we have been able to improve the product and to effect savings in manufacturing to help offset constantly increasing costs in labor and material.



I believe we can proudly point to the fact that our Perfect Sleeper mattress is a vastly improved product from the Perfect Sleeper which was first put on the market in 1931. The Serta office constantly conducts research and inspects the licensee factories for the dual purpose of improving its mattresses and assuring that specifications and quality standards are maintained.

We feel that through having the Serta organization we have been in a position to offer competition to help keep prices in the mattress industry at lower levels.

In our case, since being a member of Serta, my company, Honorbilt, has expended almost \$350,000 in national advertising through Serta.

Incidentally, through this same period Serta has expended approximately \$5 million on national advertising alone. We have spent an additional \$140,000 for our share of management, showroom and office expense. In addition to this, we have spent a large amount in our local market, advertising the Serta trademark and the Serta name.

I think it logically follows that no businessman would expend this kind of money unless he could get some exclusive benefit from the expenditures.

The territorial restriction of the Serta license made it possible for us to obtain this exclusive benefit flowing from the joint advertising. Without this protection we certainly would not engage in a joint advertising program inasmuch as other members would be able to trade on the good will created by the advertising funds of their neighbor. This would cause a retaliatory situation to ensue and the whole organization would break down.

If we take a look at the bedding industry as a whole we find it is bitterly competitive. We find that it has wholesale sales of about \$400 to \$500 million per year. There are perhaps 2,000 manufacturers, counting renovating shops, employing some 35,000 to 40,000 people. In the Philadelphia territory alone we are in daily competition for survival with over 20 local factories, 3 group operators and 2 nationally advertised lines.

The Simmons Co., the largest company in the field, does approximately \$110 million worth of bedding business at wholesale in a year, doing this volume in 13 plants and 61 warehouses, spending approximately \$1½ million for advertising nationally in 1960 on their mattresses alone.

In addition to this, they spend approximately another \$700,000 on related bedding items.

On the other hand, I believe 36 Serta plants in the United States do approximately \$27 million worth of sales of Serta merchandise or less than 7 percent of the entire industry. Our national advertising expenditures during 1960 were approximately one-quarter of a million dollars. The Englander Co., which is the largest integrated national company next to the Simmons Co., spent about \$350,000 in national advertising in 1960.

From the figures given here it would appear that Serta, even collectively, is still just a small segment of the industry and that, instead of restraining competition by licensing its companies to operate in restricted territories, it has in fact created competition.

To continue to create and to meet competition we must compete in the advertising marketplace in an attempt to create consumer consciousness and acceptance. Advertising in the bedding industry is



most effective when it is used to promote a brand name on a national basis.

The proposed bill adds one signal feature to the promotion of trademarked names which will give added protection to the public, the owner of the trademark, and the trademark licensees. That feature is that each trademark licensee register with the Patent Office his area of use of the mark and other relevant facts contained in his trademark license. The public thereby has full access to the facts of the license, and the licensors' and licensees' rights as to each other are publicly set forth in a manner which would dispel any confusion.

Thank you very much.

Senator HART. I assume before we conclude we will get an answer to the question of how many of these umbrella furniture manufacturers there are.

Mr. SCHOB. Yes, I believe I can answer it today.

Senator HART. If you know, yes.

Mr. SCHOB. You have Serta and Sealy and Restonic and the Spring Air group who are speaking here today. In addition to that, there are two very, very minor groups, the Bemco Co. and the Sylcon group, and I believe this represents all of the umbrella groups of the industry.

Senator HART. Do we know how many manufacturers not a member of one of the umbrella groups there are in business in the country?

It is pretty hard. You have got the equivalent of an alley shop. I am not talking about them.

Mr. SCHOB. Yes, I think I could do a little figuring and come up with an approximate answer. I can get those figures from the National Bedding Association.

Senator HART. Perhaps for accuracy's sake we should ask that as accurate a summary as possible of the business be provided for the record.

Mr. SCHOB. Yes.

Senator HART. Any questions?

Mr. GREEN. Yes, Mr. Chairman.

Senator HART. I should indicate also that the Senate convened, but the subcommittee has received consent of the Senate to sit.

Mr. GREEN. Mr. Schob, your statement on the advancement that you have made in the mattress business under the trademark "Serta" and so forth, that has all been done, however, under existing law, has it not?

Mr. SCHOB. Yes, we have done it under existing law; that is correct.

Mr. GREEN. So that under the present law it now exists, you have been able to make this growth in competition with the big companies that you set forth in your statement.

How does the present legislation in any way change that situation?

Mr. SCHOB. Well, the present legislation would codify our method of operation which we believe is perfectly legal, defending our position on it.

Mr. GREEN. I am referring now to the territorial, the exclusive right of territorial allocations, the right to use a particular territory for the manufacturer.



Mr. SCHOB. That is right. Using trademark in our exclusive territory.

Mr. GREEN. I think that is all.

Senator HART. Would Mr. Altheimer care to make any comment?

Mr. ALTHEIMER. No, thank you, not at this time, Senator.

Senator HART. Thank you, sir.

Thank you, Mr. Schob.

Mr. Cooney?

**STATEMENT OF JOHN P. COONEY, PRESIDENT, AUGUSTA BEDDING CO., AUGUSTA, GA., ACCOMPANIED BY ALAN J. ALTHEIMER, ATTORNEY, CHICAGO, ILL.**

Mr. ALTHEIMER. Senator, Mr. Cooney is also a member of the Serta group, and I would appreciate the privilege of remaining at his side.

Senator HART. Indeed, yes.

Mr. COONEY. I am going to read my prepared statement but I am going to eliminate part of it for the sake of brevity and to avoid repetition.

Senator HART. The statement will be printed at this point in full in the record.

(The prepared statement of John P. Cooney is as follows:)

**STATEMENT OF JOHN P. COONEY**

My name is John P. Cooney. I am president of the Augusta Bedding Co. of 930 Eighth Avenue, Augusta, Ga., a job I have held since January 1, 1938.

The Augusta Bedding Co. is an old firm in this industry. While its present charter dates back to only November 15, 1915, it was preceded by the Augusta Mattress and Manufacturing Co. chartered on September 19, 1902. This corporation followed a partnership formed in 1897 or 1898.

From about 1910 until the middle twenties I have been told that the Augusta Bedding Co. was an important factor in the distribution of bedding in the territory which they served. During that time, however, the company did no advertising and, so far as I can learn, made no attempt to establish their brands or trademarks in the minds of the consumer or the retailer. Then along in the middle twenties, the large national concerns embarked upon a strong program of national advertising of brand names. Firms such as the Simmons Co. and the Englander Co., who were national distributors, as well as several of the larger territorial factories, started advertising and promotional programs by means of which they were able to increase their businesses tremendously at the expense of the small manufacturer. In the face of this brand competition the volume of business done by the Augusta Bedding Co. slowly declined and such business as was being done was almost entirely on cheap and low end merchandise. The operation was not profitable.

I became connected with the Augusta Bedding Co. in the summer of 1934. My title was sales manager but in reality I was the company's only sales representative. Almost immediately we started a study of the territory, its potential volume, the customers the Augusta Bedding Co. then had as well as the number and types of prospective customers in the territory. The number of other bedding manufacturers soliciting business from the retailer was also taken into consideration and although I do not recall exactly the number of such factories active in the territory in 1934, I do not think that there are any fewer in 1961 than there were then. We now have 25 well-established and active competitors in our territory. This figure does not take into consideration the renovators and those factories which sell direct to the consumer. These you will find in almost every population center of any size.

After a lot of discussion it was agreed upon that there were four different paths we might consider in order to establish a successful and profitable bedding business in Augusta, Ga., under the competitive situation which existed at that time. I have observed through the years that each of these four methods of operating



a mattress factory have been successful in some instances and unsuccessful in others. They are as follows:

1. We could establish a national brand of our own by doing a lot of national advertising, establishing warehouses, building branch factories and organizing a national sales force. Of course, this was too ridiculous even to think about for financial reasons alone.

2. We could attempt to establish a strong regional brand throughout the southeast. This would require the preparation and production of window display material, newspaper mats, billboards and radio transcriptions as well as a direct mail campaign. This would not only require a large amount of money initially but would mean that such a campaign would have to be continued year after year. This was considered thoroughly but it also would be an impossible task for a small company with a capital stock of only \$38,100.

3. We could establish a business whose product would not be known for its quality but just for its price—to make no attempt to build up a trademark, or to try in any way to build acceptance in the minds of the consumer of our product. This could be done by passing on to all of our suppliers the information that we would always be in the market for any seconds or off merchandise they should happen to produce, by buying any closeout material which was offered to us at a distress price, by paying the bare minimum wage to our employees, by forgetting there was any such thing as a fringe benefit, by cutting corners on all specifications, by using fictitious price labels, and by telling all of our prospective customers that, "This is just about as good and a whole lot cheaper." We did not follow this path because this was not the type of business we wished to operate.

4. We could apply for a franchise in Serta Associates, Inc., which was then known as Sleeper, Inc., and thereby join a group of small manufacturers banded together for the purpose of more effectively competing with the large companies who, up to that time, had dominated the mattress business. We felt that from Serta we would derive many benefits among which were:

- (a) We would be enabled to sell a nationally advertised article and thus compete with the large companies who had already established such a policy.

- (b) Serta would be able to employ experienced personnel to assist us in setting up specifications and in the construction of a quality product. We would have available the services of testing laboratories and research organizations we could not afford as a single individual plant. We would have the benefit of experimental work done in numerous factories besides that which was done in our own shop.

- (c) Due to the fact that Serta would be able to employ a large advertising agency we would have the advantage of their advice and counsel in solving our local advertising problems.

None of these things could we do as one local bedding manufacturer.

That our decision was a wise one I believe will be borne out by the history of our company for the past 26 years. We have built a successful and ethical business and at the same time have been fair to the consumer, to our customers, the retail furniture dealer, to our employees, and to our stockholders.

I do not feel that we could have accomplished this without our Serta franchise, and if this franchise is to continue to have any value at all it is necessary that territorial restrictions be incorporated in it. I conservatively estimate that since 1934 we have spent a minimum of \$500,000 in promoting the sale of our products under the Serta trademark in the territory which we serve, which comprises the States of South Carolina and Georgia. A large portion of this has been our contribution to Serta Associates, Inc., which is used primarily for national advertising, for research, and for maintaining standards of the trademarked products as well as the maintenance of a national office, showroom, and staff. Another large portion of it has been devoted to advertising in newspapers, on billboards, on radio, on TV in our local territory, both under our own signature as well as that done on a cooperative basis with our dealers under their names. There are also window displays involved, direct mailing pieces, catalogs, and many other items too numerous to mention. Without some restrictions on the territory we serve we would not engage in a joint advertising program with other Serta members for we know that business stresses would soon cause a breakdown in any cooperative action. It would surely be against all business principles to expect us to spend our money developing a market in say, Greenville, S.C., unless there were some restrictions so that we knew that we alone could continue to serve this area under the Serta trademark.



Such territorial restrictions do not involve price fixing in any way. Our prices are established at levels which will be competitive in our area. Being a small factory we must be competitive in both quality and price in order to survive. Our competitors are numerous. Offhand I can mention 25 such plants who actively solicit business in our highly competitive market of Georgia and South Carolina. They are as follows:

Simmons Co., Atlanta, Ga.  
 Southern Spring Bed Co., Atlanta, Ga.  
 Empire Mattress Co., Atlanta, Ga.  
 Englander Co., Atlanta, Ga.  
 Fulton Metal Bed Manufacturing Co., Atlanta, Ga.  
 Central Bedding Co., Macon, Ga.  
 Cooper Mattress Co., Columbus, Ga.  
 Riverside Bedding Co., Moultrie, Ga.  
 Hendrix Mattress Co., Savannah, Ga.  
 Georgia Mattress Co., Savannah, Ga.  
 Ga. School for the Blind, Bainbridge, Ga.  
 Orders Mattress Co., Greenville, S.C.  
 J. M. Graham & Sons, Columbia, S.C.  
 New Charleston Mills, Charleston, S.C.  
 Charleston Mattress Co., Charleston, S.C.  
 Cameron Bedding & Manufacturing Co., Cameron, S.C.  
 Mebane Co., Mebane, N.C.  
 Peerless Mattress Co., Lexington, N.C.  
 Jackson Mattress Co., Fayetteville, N.C.  
 Queen City Mattress Co., Charlotte, N.C.  
 Jamison Co., Albany, Ga.  
 Sealy Mattress Co., Orlando, Fla.  
 E. B. Malone Co., Jacksonville, Fla.  
 Perfection Mattress & Spring Co., Birmingham, Ala.  
 Stearns & Foster Co., Cincinnati, Ohio.

Our prices at a wholesale level are pretty well determined by the competition of these 25 active and aggressive competitors and we, in turn, like to think that our competition plays some part in fixing theirs.

Of course, the territorial restrictions applicable to the Serta trademarked items do not apply to any merchandise we manufacture and sell under our own labels. It so happens in our case that it is not profitable, in most instances, because of freight and other factors, for us to solicit business from the retailers outside of the territory covered by our Serta franchise. In some instances, however, we do overlap other franchise holders' territories. When this happens, we offer merchandise under our own labels at a competitive price.

We do actively solicit contract and institutional business outside of our Serta territory. We can do this because the quantities involved are large enough for us to lower our factory and delivery costs as deliveries can be made in solid trailer loads to one destination. As a concrete example of what I mean we have just been awarded a contract of around \$30,000 in North Carolina. This merchandise will be delivered with our own Augusta Bedding Co. labels and not Serta labels. In obtaining this nice business we were in active competition with our good friends and associates in Serta who hold the Serta franchise for that State. I also might add that at the present time we have out two other bids on this type of business outside of our Serta territory.

There is no doubt in my mind that without territorial restrictions Serta would dissolve. We have found it very necessary in order to maintain our volume that we do a large amount of advertising both locally and nationally. Without a territorial restriction, it would not be logical for us to spend any appreciable amount of money advertising a product when one of our competitors from another territory could ship his goods into our territory and thereby trade on the good will that our company has created for Serta through the past 26 years. Since Serta specifications are standardized his merchandise would be substantially the same as ours. Therefore the more effective our advertising had been, the easier it would be for him to sell in our territory. We object to spending money on advertising and promotion of a trademark that can be used by our competitors in the same area. It is as simple as that.

Due to the fact that our national competitors, by the expenditure of millions of dollars throughout the years, have established retail prices on particularly their quality products, the price has become a means of identification in the minds



of the consumers. For example, the retail price today of \$79.50 has become pretty well established in the minds of the consumer as being the established price of a quality mattress. In order to obtain our share of this business it is necessary that we also identify our mattress by the use of a \$79.50 price as being competitive in quality with the various brands sold by the larger companies. With no suggested retail price on our product our sales would surely decline.

I do not feel that the territorial restrictions now contained in the Serta franchise or the suggested retail price used in our national ads in any way assure us of more than a fair share of the business being done in our territory. While I have no way of knowing the volume of our competitors in the territory, I would estimate that we manage to get anywhere from 5 to 7½ percent of the bedding business being done in the States of Georgia and South Carolina. I am frank to admit that this is a figure which we are very anxious to improve by any legitimate method available to us.

I am sure that there is no intention on the part of anyone to put 40 small businessmen out of business, but I firmly believe that this will be the result if we were not allowed to allocate sales territories. It will be impossible for us to operate the Augusta Bedding Co. along the lines we have operated it on for the past 26 years without our Serta franchise and without the privilege of setting territorial lines. The bill under consideration has the merit of making the area of sale by the licensee of the trademarked article and other important provisions of the license available to the public by means of registration in the Patent Office. The public can then be informed as to the origin of the trademark and the area of its use by any given licensee. The licensees and licensor will in turn be protected by having their rights as to each other made a matter of clear public record.

Of course, as any businessman would, I have given a whole lot of consideration as to what would happen to our company in the event such legislation is not passed. I have arrived at the conclusion that we have only two alternatives: The first of these would be to sell, or at least offer for sale, our company to one of our large national competitors who we think would find it to their advantage to have a factory in our location to serve the Georgia and South Carolina areas. The other alternative would be for us to change entirely our method of operation and decide that we would operate along the lines outlined earlier in this statement. That is, we would try to change our operation and manufacture private label merchandise, using any label our customer would demand with no attempt to build up a trademark of our own. To use fictitious price labels when demanded, to cut all corners possible in the buying of our supplies, by employing labor at the legal minimum rates, by reducing the rate of commission paid our salesmen, by eliminating any fringe benefits we could eliminate, and by shaving every overhead item involved in our costs. This will necessarily mean almost a complete change in our personnel because we do not have the sales force or the supervision in our plant who are familiar with this type of operation.

Of course, my sincere hope is that we will not be forced to even consider either of these alternatives.

Mr. COONEY. Thank you, sir.

My name is John P. Cooney. I am president of the Augusta Bedding Co. of 930 Eighth Avenue, Augusta, Ga.—a job I have held since January 1, 1938.

The Augusta Bedding Co. is an old firm in this industry. While its present charter dates back to only November 15, 1915, it was preceded by the Augusta Mattress and Manufacturing Co. chartered on September 19, 1902. This corporation followed a partnership formed in 1897 or 1898.

From about 1910 until the middle twenties I have been told that the Augusta Bedding Co. was an important factor in the distribution of bedding in the territory which they served. During that time, however, the company did no advertising and so far as I can learn, made no attempt to establish their brands or trademarks in the minds of the consumer or the retailer. Then along in the middle twenties, the large national concerns embarked upon a strong program of national advertising of brand names. Firms such as the Simmons Co., the Eng-



lander Co., who were national distributors, as well as several of the larger territorial factories started advertising and promotional programs by means of which they were able to increase their businesses tremendously at the expense of the small manufacturer. In the face of this brand competition the volume of business done by the Augusta Bedding Co. slowly declined and such business as was being done was almost entirely on cheap and low end merchandise. The operation was not profitable.

I became connected with the Augusta Bedding Co. in the summer of 1934. My title was sales manager, but in reality I was the company's only sales representative. Almost immediately we started a study of the territory, its potential volume, the customers the Augusta Bedding Co. then had, as well as the number and types of prospective customers in the territory. The number of other bedding manufacturers soliciting business from the retailer was also taken into consideration and, although I do not recall exactly the number of such factories active in the territory in 1934, I do not think that there are any fewer in 1961 than there were then. We now have 25 well-established and active competitors in our territory. This figure does not take into consideration the renovators and those factories which sell direct to the consumer. These you will find in almost every population center of any size.

After a lot of discussion, it was agreed upon that there were four different paths we might consider in order to establish a successful and profitable bedding business in Augusta, Ga., under the competitive situation which existed at that time. I have observed, through the years, that each of these four methods of operating a mattress factory have been successful in some instances and unsuccessful in others. They are as follows:

1. We could establish a national brand of our own by doing a lot of national advertising, establishing warehouses, building branch factories, and organizing a national sales force. Of course, this was too ridiculous even to think about for financial reasons alone.

2. We could attempt to establish a strong regional brand throughout the Southeast. This would require the preparation and production of window display material, newspaper mats, billboards, and radio transcriptions, as well as a direct mail campaign. This would not only require a large amount of money initially but would mean that such a campaign would have to be continued year after year. This was considered thoroughly but it also would be an impossible task for a small company with a capital stock of only \$38,100.

3. We could establish a business whose product would not be known for its quality but just for its price—to make no attempt to build up a trademark—or to try in any way to build acceptance in the minds of the consumer of our product. This could be done by passing on to all of our suppliers the information that we would always be in the market for any seconds or off merchandise they should happen to produce—by buying any closeout material which was offered to us at a distress price—by paying the bare minimum wage to our employees—by forgetting there was any such thing as a fringe benefit—by cutting corners on all specifications—by using fictitious price labels, and by telling all of our prospective customers that, "This is just about as good and a whole lot cheaper." We did not follow this path because this was not the type of business we wished to operate.



4. We could apply for a franchise in Serta Associates, Inc., which was then known as Sleeper, Inc., and thereby join a group of small manufacturers banded together for the purpose of more effectively competing with the large companies who, up to that time, had dominated the mattress business. We felt that from Serta we would derive many benefits among which were:

(a) We would be enabled to sell a nationally advertised article and thus compete with the large companies who had already established such a policy.

(b) Serta would be able to employ experienced personnel to assist us in setting up specifications and in the construction of a quality product. We would have available the services of testing laboratories and research organizations we could not afford as a single, individual plant. We would have the benefit of experimental work done in numerous factories besides that which was done in our own shop.

(c) Due to the fact that Serta would be able to employ a large advertising agency, we would have the advantage of their advice and counsel in solving our local advertising problems. None of these things could we do as one local bedding manufacturer.

That our decision was a wise one I believe will be borne out by the history of our company for the past 26 years. We have built a successful and ethical business and at the same time have been fair to the consumer, to our customers—the retail furniture dealer—to our employees, and to our stockholders.

I do not feel that we could have accomplished this without our Serta franchise, and if this franchise is to continue to have any value at all it is necessary that territorial restrictions be incorporated in it. I conservatively estimate that since 1934 we have spent a minimum of \$500,000 in promoting the sale of our products under the Serta trademark in the territory which we serve, which comprises the States of South Carolina and Georgia. A large portion of this has been our contribution to Serta Associates, Inc., which is used primarily for national advertising, for research, and for maintaining standards of the trademarked products, as well as the maintenance of a national office, showroom, and staff. Another large portion of it has been devoted to advertising in newspapers, on billboards, on radio, on TV in our local territory, both under our own signature as well as that done on a cooperative basis with our dealers under their names. There are also window displays involved, direct-mailing pieces, catalogs, and many other items too numerous to mention. Without some restrictions on the territory we serve, we would not engage in a joint advertising program with other Serta members, for we know that business stresses would soon cause a breakdown in any cooperative action. It would surely be against all business principles to expect us to spend our money developing a market in say, Greenville, S.C., unless there were some restrictions, or that we knew that we alone could continue to serve this area under the Serta trademark.

Such territorial restrictions do not involve price fixing in any way. Our prices are established at levels which will be competitive in our area. Being a small factory we must be competitive in both quality and price in order to survive. Our competitors are numerous. Off-hand, I can mention 25 such plants who actively solicit business in our highly competitive market of Georgia and South Carolina.



Our prices at a wholesale level are pretty well determined by the competition of these 25 active and aggressive competitors and we, in turn, like to think that our competition plays some part in fixing theirs.

Incidentally, it might be of interest that, of these 25 plants, 19 were in existence 26 years ago, and in that time I have only known 2 plants of any importance that have discontinued business.

Of course, the territorial restrictions applicable to the Serta trademarked items do not apply to any merchandise we manufacture and sell under our own labels. It so happens in our case that it is not profitable, in most instances, because of freight and other factors, for us to solicit business from the retailers outside of the territory covered by our Serta franchise. In some instances, however, we do overlap other franchise holders' territories. When this happens, we offer merchandise under our own labels at a competitive price.

There is no doubt in my mind that without territorial restrictions Serta would dissolve. We have found it very necessary in order to maintain our volume that we do a large amount of advertising both locally and nationally. Without a territorial restriction, it would not be logical for us to spend any appreciable amount of money advertising a product when one of our competitors from another territory could ship his goods into our territory and thereby trade on the goodwill that our company has created for Serta through the past 26 years. Since Serta specifications are standardized his merchandise would be substantially the same as ours. Therefore the more effective our advertising had been, the easier it would be for him to sell in our territory. We object to spending money on advertising and promotion of a trademark that can be used by our competitors in the same area. It is as simple as that.

Due to the fact that our national competitors, by the expenditure of millions of dollars throughout the years, have established retail prices on particularly their quality products, the price has become a means of identification in the minds of the consumers. For example, the retail price today of \$79.50 has become pretty well established in the minds of the consumer as being the established price of a quality mattress. In order to obtain our share of this business it is necessary that we also identify our mattress by the use of a \$79.50 price as being competitive in quality with the various brands sold by the larger companies. With no suggested retail price on our product our sales would surely decline.

I do not feel that the territorial restrictions now contained in the Serta franchise or the suggested retail price used in our national ads in any way assure us of more than a fair share of the business being done in our territory. While I have no way of knowing the volume of our competitors in the territory I would estimate that we manage to get anywhere from 5 to 7½ percent of the bedding business being done in the States of Georgia and South Carolina. I am frank to admit that this is a figure which we are very anxious to improve by any legitimate method available to us.

I am sure that there is no intention on the part of anyone to put 40 small businessmen out of business, but I firmly believe that this will be the result if we were not allowed to allocate sales territories. It will be impossible for us to operate the Augusta Bedding Co. along the



lines we have operated it on for the past 26 years without our Serta franchise and without the privilege of setting territorial lines.

Of course, as any businessman would, I have given a whole lot of consideration as to what would happen to our company in the event such legislation is not passed. I have arrived at the conclusion that we have only two alternatives. The first of these would be to sell, or at least offer for sale, our company to one of our large national competitors who we think would find it to their advantage to have a factory in our location to serve the Georgia and South Carolina areas. The other alternative would be for us to change entirely our method of operation and decide that we would operate along the lines outlined earlier in this statement.

That is, we would try to change our operation and manufacture private label merchandise, using any label our customer would demand with no attempt to build up a trademark of our own. To use fictitious price labels when demanded, to cut all corners possible in the buying of our supplies, by employing labor at the legal minimum rates, by reducing the rate of commission paid our salesmen, by eliminating any fringe benefits we could eliminate, and by shaving every overhead item involved in our costs. This will necessarily mean almost a complete change in our personnel because we do not have the sales force or the supervision in our plant who are familiar with this type of operation.

Of course, my sincere hope is that we will not be forced to even consider either of these alternatives.

Senator HART. Thank you very much.

I should acknowledge, in case you see General Bartlett, that I remember pleasantly my stay in Augusta.

Mr. COONEY. Thank you, Senator.

Mr. ALTHEIMER. Mr. Chairman, I think we can conclude the Serta presentation by my introducing Mr. Ferguson's statement. Mr. Ferguson is here. He is executive vice president of Serta, but most of the items in his statement have been covered by our two previous witnesses, and to save time, Mr. Ferguson has asked that I be permitted to put this in the record.

Senator HART. It will be received.

(The prepared statement of J. Allen Ferguson, executive vice president, Serta Associates, Inc., is as follows:)

#### STATEMENT OF J. ALLEN FERGUSON

My name is J. Allen Ferguson, executive vice president of Serta Associates, Inc. I have been associated with the bedding industry since 1940, first as a buyer in the parent office of Sears, Roebuck & Co., from 1940 to 1944; then, as vice president of Barcalo Manufacturing Co., Buffalo, N.Y., which among other products, manufactured bedding. I have been with Serta since 1949, starting as assistant manager and have held my present position since 1955.

About 1925 Simmons Co., which was then, and is now, the largest independent producer of mattresses and box springs and bedding in the United States, started a campaign of national advertising of a brand name at a suggested resale price. At this time the bedding industry was made up of several hundred small, individually owned, local mattress manufacturing companies, each selling their products in a very limited market for local consumption.

The Simmons Co., because of its national advertising and its national distribution, began to make a very sound impression upon the American public for quality and service, thereby capturing most of the local markets that the small, independent manufacturers had been serving on quality merchandise.



This created a situation whereby the local, small manufacturer was not able to compete with the large, national manufacturer, and therefore began increasingly to sell price merchandise of lower quality.

Mr. Schob has told the committee how the Serta group was established as a response to this market condition, and I will not repeat that history.

As the years progressed, additional members were added to this group, and some members dropped out of the group. A central office was established with a general manager and capable assistants to render the services required in advertising, merchandising, management, manufacturing, etc. Each member of Serta Associates, Inc., was granted the license to use the Serta trademark and to manufacture and sell merchandise under the Serta trademark according to determined specifications. Serta Associates, Inc., made inspections to assure that specifications were complied with.

Each Serta licensee, regardless of size, is an equal stockholder in the Serta Associates, Inc., corporation, governed by a board of directors elected by the stockholders.

The present Serta setup is still functioning, although in a somewhat larger manner, along the lines that it was originally established. Serta Associates, Inc., owns the trademark and licenses the trademark to some 40 licensees in the United States and Canada. Each of these licensees sells Serta trademarked merchandise within a designated, mutually exclusive territory in the United States and Canada. The licensees have always continued to manufacture and sell bedding under their own individual marks in addition to the Serta marks, and there are no restrictions on where this bedding may be sold.

In the meantime a considerable number of other individual companies and groups discovered that competition in the bedding industry could be increased by their adopting a common trademark and promoting it nationally, and the device has been used with greater frequency. The impact of national advertising of a known name upon the consumer need not be elaborated upon.

Under the Serta Associates, Inc., arrangement each licensee contributes funds to Serta each year for use in national advertising, local advertising, national office and showroom maintenance, and research and maintenance of standards. Thus each is able to promote and sell at local levels quality, branded merchandise at reasonable prices. From the beginning, Serta Associates, Inc., has in no way restricted the manufacture or sale of privately branded merchandise by its licensees in any part of the country where they wish to sell. However, freight rates and services demanded by the retailer make shipping beyond a limited area prohibitive in cost and unprofitable.

Since its organization, Serta has spent approximately \$5 million for national advertising of products bearing the Serta trademark and the local individual factories have spent an additional large amount for advertising of the Serta trademark at the local level. The local advertising is tied to the national by format and the use of the national name. The establishment of the name nationally makes the local advertising much more effective.

Under any group organization, unless a licensee is given territorial definition, he could not take advantage of the benefits derived from an association such as Serta Associates, Inc., and its nationally known brand name. He must have a definite area of sale in which only he can obtain the benefit of the funds spent by him for promotion and advertising. No businessman will expend large sums of money for promotion if another can capitalize on it to his detriment. Without the savings in development, advertising and promotion costs made possible by the group organization, the licensee would be forced to skimp on his manufacturing costs, which will reduce the quality of his merchandise lines. Even so, he would be gravely restricted in his effort to compete against nationally known and advertised brands.

I must call attention to one desirable facet of the proposed act which supplies something needed for some time, and that is that the area of use and the conditions of use of each trademark licensee will be made a matter of public record by registration in the Patent Office. In that manner the public will have full information as to the origin and use of a licensed trademark and thus individuals will no longer have to guess as to where to place the ultimate responsibility for the quality of the goods sold to it.

It is therefore imperative that this amendment to the Trademark Act be passed and made into law. The use of the trademark licensing device and national promotion of the trademark has been the main weapon for the increase of competition within the bedding industry.



Mr. ALTHEIMER. The other statement is from Mr. Herbert Wuest, of Cincinnati, Ohio, who is president of Adam Wuest, Inc., the franchise member of Serta Associates, Inc., for the Cincinnati territory.

This business was established in 1850 by his great grandfather and he is anxious that there be in the record a statement of his feelings about this matter.

Senator HART. That will be inserted in the record.

(The prepared statement of Mr. Herbert A. Wuest, president, Adam Wuest, Inc., Cincinnati, Ohio, is as follows:)

STATEMENT BY HERBERT A. WUEST

My name is Herbert A. Wuest. I live in Cincinnati, Ohio. I am president of Adam Wuest, Inc., the franchise member of Serta Associates, Inc., for the Cincinnati territory. The company was founded in 1850 by the great-grandfather of the present owners who are Elmer T. Wuest, my brother, and myself. Each of us has had over 40 years experience in this business, have not been engaged in any other business endeavor at any time and have been in active management of the firm for the last 30 years.

Some time during the period between 1920 and 1930 there entered into the mattress manufacturing field a national distributor and advertiser, the Simmons Co. Prior to that time the mattress industry was in the hands of individual local manufacturers who, like ourselves, distributed mattresses and box springs to their own individual local trading areas and such other areas as it was economically practical to ship to because of transportation costs.

When the Simmons Co. introduced the Beautyrest and other nationally advertised items, it became increasingly difficult for the local manufacturer to retain an important share of the local market because none, as individual manufacturers, were in a position financially to compete with the overpowering national advertising of the Simmons Co.

After Simmons Co. entered the national advertising field our firm introduced a mattress called the Slumber Ease with which we attempted to compete with Beautyrest, at both the dealer and the consumer level, in quality and price and to compete also in developing a consumer demand by strictly local advertising. This was a failure because local advertising to reach our entire market was too expensive for us to finance. Nor would it be remotely competitive with the national advertising of the Simmons Co. and of other national wholly owned manufacturers of similar type who have since entered the national advertising field.

It became very apparent that, if we were to retain our share of the market, it would be necessary for us to engage in some type of national advertising and merchandising effort to bring our products before the consuming public through the means of national media.

By joining Serta Associates, Inc., we were able to devise or have devised for us by them merchandise that would be competitive with national manufacturers and be in a position to present it to the consuming public in national media and still be within the limited financial means of the individual factories. Territories for distribution of Serta identified merchandise which were assigned to the individual factories were areas which were practically identical with the territories which they had been serving as local manufacturers.

Our own firm, for example, was able to distribute and merchandise nationally advertised Serta mattresses and box springs throughout the identical territory which we had been trying to serve previously with our own brands and, because of the help from the national advertising and merchandising, have been able to develop to a point where approximately 70 percent of all the mattresses and box springs we ship are under the Serta trademark.

Our distribution of merchandise outside of our Serta allocated territory has been in no way restrained since we became a member of Serta Associates, Inc., as we have and do ship, without the Serta trademark, merchandise comparable to Serta merchandise in price, service, and value to the consumer although somewhat different in specifications.

In today's domination of the industries of this country by large national advertisers and distributors it is necessary that, to survive over the long pull, national advertising be available to the small local manufacturer in order to help him build consumer preference, assurance to the consumer that the



quality is as represented and that the price at which it is advertised is assurance also that it is equal to or superior to competitive merchandise advertised by other national advertisers.

Senator HART. Before you leave, and I think it is a fair question addressed to you rather than to the manufacturers, is my impression correct now that—I will refer to a statement made in passing by Mr. Cooney, that S. 1396 reflects your best judgment as to practices which would be desirable in the public interest as they relate to trademarks. The idea, among other things, is that if this was the law, the public in dealing with shops and in purchasing commodities that show a trademark would have a better understanding of their rights against both the retail merchant and the manufacturer, that there would be available in public record the several relationships and conditions.

There would be an expressed assurance of quality control and uniformity. And additionally, there is the provision that territorial limitation is permitted to trademark licensees. Is this a correct statement, that there are many things in the bill, all of which you judge to be desirable, and in the public interest, but that the real meat and potatoes of the presentation is as Mr. Cooney puts it, "If this franchise is to continue to have any value at all, it is necessary that territorial restrictions be incorporated in it"?

Do I understand after this morning's exposure that this is really the problem here?

Mr. ALTHEIMER. That is a very fair statement, Mr. Chairman, and it is quite true. I doubt that any of the witnesses that we have presented or that will be presented would be particularly interested in the bill as presented without section 5(k) therein. That is absolutely correct.

We were seeking the best possible way to receive a legislative codification of what we conceive the law to be on the question of the allocation of trademarks to exclusive territorial assignments, and it was our conclusion that the best way to present this to the Congress would be through an amendment to the Lanham Act which we all agreed was very sorely needed in any event.

So, acting in cooperation with Mrs. Leeds and Mr. Timberg, we have prepared this bill which Senator McClellan so kindly agreed to sponsor. Without 5(k) the bill simply becomes a general trademark law amendment and, as Mr. Cooney and Mr. Schob have testified, it would clarify their position in relationship to Serta Associates, Inc., but it would not give them the protection that they feel Congress intended at all times; namely, to foster competition rather than to destroy it.

I am involved in the antitrust litigation in Chicago. My firm is representing Serta Associates, Inc. We are perfectly willing to defend the litigation on the ground that we are not in restraint of trade. We are not violating the Sherman Act.

What we are attempting to do is to avoid any argument by the Department of Justice before the court that every single solitary territorial allocation of an exclusive nature is void and illegal, per se. This, we say, is not the law and we feel that the Congress should give us the codification of that law so that we as small business people are not harassed and forced to defend this costly and long-drawn-out litigation which has been pending now for about a year and a half.

Senator HART. Your answer is helpful. Thank you.



Mr. ALTHEIMER. Thank you, sir.

Senator HART. Any questions?

Mr. GREEN. No questions.

Senator HART. Thank you very much.

It is now 5 minutes of 1. I think the wise course would be to recess for luncheon. Those of you not native to this community will discover that an hour permits only the very lightest of lunch, if any. This is not my problem, but I think I should explain that before suggesting that instead of resuming at 2 o'clock, we will resume at 2:30.

(Whereupon, at 12:55 o'clock the subcommittee recessed to reconvene at 2:30 o'clock the same day.)

#### AFTER RECESS

Senator HART. The committee will be in order.

If my notes are right, the first witness this afternoon is Mr. Robert L. Ezelle.

Mr. Stewart is accompanying you. Would you identify yourself first?

Mr. STEWART. I am Charles L. Stewart, Jr., and I am the attorney for Spring Air Co. Mr. Ezelle is one of several witnesses who will make statements here in connection with the interest of the Spring Air Co. and its member licensees in this pending legislation. I would like to present a statement of my own after the others are finished.

Senator HART. Very well.

Mr. Ezelle.

#### STATEMENT OF ROBERT L. EZELLE, JR., PRESIDENT, MISSISSIPPI BEDDING CO., JACKSON, MISS.

Mr. EZELLE. Mr. Chairman, may I take this opportunity to thank you for the privilege of appearing before you to discuss with you the necessity for enacting corrective legislation proposed in Senate bill 1396.

Senator HART. Mr. Ezelle, now that I have gotten you located, I can assure you that the chairman of the standing committee will make life miserable for me if I did not welcome you.

Mr. EZELLE. Thank you.

I am president of the Mississippi Bedding Co., which is a small manufacturing enterprise located in Jackson, Miss. This firm manufactures mattresses, box springs, and some dual-purpose furniture. We employ 30 people and sell throughout Mississippi and in approximately half of the State of Louisiana. In addition, I am also president for this year of the Spring Air Co., which owns various mattress and box spring trademarks. The Spring Air Co. has licensed, in a given area of the country, a number of mattress and box spring manufacturers to manufacture and sell these products under its trademark and in strict accordance with its specifications.

Thus, I would like to comment on this proposed bill from two points of view today. First, I would like to discuss it as a small manufacturer trying to compete in the marketplace with giants of the industry who manufacture, distribute, and advertise nationally.



Then, I would like to discuss it from the standpoint of a group operation, which is designed to help the small manufacturer compete with his giant competitors. The purpose of the bill is as follows:

(1) To clarify, make explicit, and implement the existing law in respect to trademark licensing;

(2) To permit the smaller and more localized enterprises of this country to enjoy the benefits of costly national trademark advertising and promotion on the same footing as their large national, integrated competitors; and

(3) To provide for the public registration of the facts essential to the validity and proper legal functioning of trademark licensing operations as a means of protecting the public from confusion, mistake, and deception.

To see how it affects plants such as ours, we would like to give you a little background on the bedding industry. Back in the early 1920's the bedding industry was primarily one of small local companies serving a limited area. Generally, these firms were family owned. However, when the innerspring mattress was introduced in the 1920's, Simmons, a large national metal furniture manufacturer, with facilities to sell and distribute on a national scale, brought out the Beautyrest innerspring mattress with a terrific national advertising campaign. They did an excellent merchandising job and practically eliminated the small independent as far as selling merchandise in a competitive price bracket with the national merchandise. In fact, one of our leading stores in Jackson told my father—I remember I was in high school at the time and my father came home very much upset because a good friend of his who was also a good customer had made a statement which he knew was true. He said, "If you want to sell the \$39.50 mattress," which in that day was the top number in the line, "you will have to job Simmons' Beautyrest. I know you make a better mattress, but the public only asks for the nationally advertised brand in that particular price bracket."

So it left us a small bracket to be working in.

When faced with a similar situation some industries have fallen to the giants and become dominated by several large firms with no small or medium sized firms furnishing real competition. However, the small and medium sized members of the mattress industry combated this development by forming into mattress groups, which enabled them by pooling financial resources to secure national advertising and compete with the national brands. For example, in the Spring Air group each manufacturer owns an equal amount of stock in the Spring Air Co.

The Spring Air Co., is governed by a board elected each year from the various independent manufacturing plants. The Spring Air Co., owns the trademark and nationally advertises the name. It also sets up specifications by which the product is manufactured. The plants pay an assessment to the Spring Air Co., each year, so that it can maintain an office and supply them with national advertising and merchandising tools. The plants each have a franchised area in which to sell its Spring Air products. In its own area it ties in with the national advertising program by doing local advertising.

For example, we continually spend over twice as much money advertising Spring Air in Mississippi and Louisiana as we send to the



national office for our share of the national advertising. Thus, over a period of years we have invested hundreds of thousands of dollars advertising the trade name "Spring Air" in our territory plus paying our share of the national assessment.

This group operation has enabled small companies such as ours to compete on an equal basis with the large national companies. We know it has enabled us to survive and to furnish these large national companies much more competition than would have existed otherwise. I would like to list a few reasons why small plants join groups and how these operations enable the small manufacturer to be more competitive with the large national manufacturer.

1. Members of the group get the benefit of costly national advertising, which they individually could not afford.

2. The quality of a sales campaign frequently depends on the caliber of the advertising agency. In a group he is assured of being able to afford one of the better agencies.

3. Point of sale material for dealers, sales training film, and other local advertising assistances furnished by the large national companies to retail dealers can be prepared at a much lower unit cost when handled by Spring Air than if each member plant were forced to develop this material and pay for its own.

4. Every Spring Air plant is capable of thinking of new product ideas, but no plant has the resources required to develop a new product from the idea to the commercial marketing stage. Through group organization we have been able to introduce a number of new products or improvements of existing products that no one local plant could have handled on its own.

5. Today people move from one section of the country to another with a great deal more frequency than in the past. It is thus much more essential now to have a product that they recognize and know when they move into your market.

If we as a group are to continue to furnish keen competition with the giants of our industry we must be free to compete under the same conditions that they, the giants, enjoy. We must be able to establish the quality of the item in the consumers' minds by a suggested price. The price in the advertisement helps identify the item and very definitely helps indicate the value of it to Mrs. Consumer. When the giants of an industry can identify the value of their products in terms of a suggested price, it is necessary for competing groups of manufacturers to have the same privilege. At present there is some question whether this right exists for manufacturing groups; however, I feel that being a registered user of the trademark as proposed in the bill would clear up this situation.

Also, in order to get a manufacturer to be willing to put the money and local effort needed to properly compete with the giants of our industry you must assure the manufacturer that he has proper control in his selling area. Today this right is questioned, and the law needs the clarifications it will have as outlined in this bill.

The groups came into being in order to furnish competition to other large nationally known brand names. In reality, we are not in competition with each other on Spring Air; we should be working together on it to make it more competitive with Beautyrest, Englander, Sealy, Serta, and other large national brand names. We are perfectly



free now and always have been to sell private brand merchandise in other territories. In fact, in most cases we do. I know of very few Spring Air plants where that does not take place.

The fact that we are a Spring Air manufacturer helps us to do this, because it enhances our reputation as a dependable manufacturer. Dealers know we could not hold a Spring Air franchise without having the facilities and reputation as a dependable manufacturer. Dealers know we could not hold a Spring Air franchise without having the facilities and reputation for quality workmanship. So the Spring Air name is also valuable to us in selling our private brand merchandise whether in our own or other territories.

However, if we are to effectively compete with the giants of the industry such as Simmons, it is necessary that we recognize the equity a plant builds up in the Spring Air name throughout its territory by its local sales effort. This local effort includes its local advertising, its sales coverage of retail stores, its reputation for backing up its merchandise by quick and proper handling of complaints, its ability to furnish quick delivery to the retail store, and so forth. I have stated earlier as an example that we yearly spend over twice as much of our own money advertising the name Spring Air in our local territory as we send to the Spring Air office. The giants of our industry also do this. They work through retail outlets on cooperative advertising to tie the national advertising into the local sales outlet. National advertising is an umbrella that furnishes name acceptance in Mrs. Consumer's mind; but in order for it to produce effective sales, Mrs. Consumer must know where to go locally in order to purchase the nationally advertised products.

This local advertising is usually done in cooperation between the manufacturer and the retail outlet. It not only ties into the national advertising campaign and points out where the item can be purchased, but it also recreates valuable name impression on Spring Air in our territory that is beneficial in consumer recognition and acceptance of the product. Thus, we find that to get the most benefit out of a territory, we have to help build the name locally. It is difficult to get a manufacturer to put a lot of money into a name over which he knows he has no control as to selling outlets or selling methods that may be used after he has built up the name and reputation locally.

No one will continue to spend money to build up goodwill when he has no assurance that a single sale by someone else will not destroy what he has been spending money to build up. Thus he neglects to spend local money to advertise and the name and reputation of our product slowly fade out of existence leaving the field to the giant national firms.

Actually, national advertising alone cannot do the job. Neither can you do it purely by local advertising. If you desire to compete with the national giant, you must offer what he offers, which is both national and local advertising and selling aids.

Another point to consider is that under the Robinson-Patman Act each retailer is supposed to be able to know that he can buy as cheaply as his competitor. For example, Simmons can assure every department store in New Orleans that every other department store in New Orleans pays the same price for the Beautyrest and gets the same cooperative advertising assistance and point of sale material. If any Spring Air manufacturer could sell all Spring Air products in what-



ever territory he desired, we could never give our dealers a similar assurance, which places us at still another competitive disadvantage as against Simmons.

I had mentioned earlier that this year I am president of the Spring Air Co. In closing that this statement I would like to give you a little information on the Spring Air group. The present company is organized under the laws of Illinois. All of its stock is owned by regional or local mattress manufacturers similar to our own company, the Mississippi Bedding Co. Each of us own 216 shares of Spring Air stock and in the normal course of things each stockholder company is called upon to permit its active officers to be elected to the board of directors of the Spring Air Co. There are six directors elected each year, but usually each is reelected twice before being replaced by someone from another stockholder company in or near the same section of the country.

There are 31 members of the Spring Air group at this time, located in 22 different States and licensed to sell Spring Air products in 45 States. They ranged in dollar volume of Spring Air sales in 1960 from around \$50,000 to a little over \$500,000 per member plant. Incidentally, this is sales of Spring Air alone and not the total sales of those companies. The total sales for the companies are considerably more than that.

The national total of Spring Air sales was \$7,919,093.

These plants are all in this group for one primary purpose, to compete more effectively with the giants of our industry who are able to offer the store and the public a national brand name. If they are not assured the privilege of competing on an equal basis, you will see the following results. The competition they furnish to the giants of our industry will cease. The mattress groups will die out. A large number of the member plants located in many States throughout the country will face the necessity of either closing or curtailing a large part of their operation, with the resultant added unemployment burden on a good number of cities throughout the country.

I wish to thank this committee for the opportunity to come here to tell my story and to conclude with a plea that Congress find a way to protect the small businessman, who cannot afford national advertising, against the loss of his existing business. Also he should be protected against the loss of opportunity to grow, which seems to be threatening all small businesses who sell products for the consumer market and particularly those of us in the mattress industries whose exclusive trademark licenses are our only protection. We hope this protection will be assured to us and we think it will benefit the whole country if the present bill is passed.

Senator HART. Mr. Fred Salisbury.

#### STATEMENT OF FRED SALISBURY, PRESIDENT OF THE SALISBURY CO.

Mr. SALISBURY. My name is Fred Salisbury of Minneapolis, Minn. I am president of the Salisbury Co., a small bedding manufacturing company in that city. In addition, I have at times served as an officer and as a director of The Spring Air Co.

Historically speaking, national advertising is a relatively new merchandising vehicle; an outgrowth of the tremendous strides this



country has made in the field of mass communications and perhaps one of the most powerful forces behind the rapid advance in the American standard of living. The Salisbury Co. serves an area in the Middle West comprised of roughly five States. During the first 50 years of our history most business was done from a catalog left with the proprietor of the furniture or general store by one of our salesmen who then covered their territory by railroad. By word of mouth of the satisfied customer, by catalog and by local newspaper we strove to create a product image around the Salisbury name that would be familiar to the housewife when she was in the market for bedding products.

Progress over the years has changed all this. The advent of an efficient Government postal system that made possible the rapid, economical mass circulation of printed matter and brought with it the concept of magazine advertising and almost at once expanded the local market to one of national scope.

If this new and effective media was to be utilized, however, two basic factors were necessary: one, a unique feature that would insure exclusive benefit to the advertiser and, two, the ability on the part of the advertiser to service the demand created in this far-flung market. To meet this situation the Salisbury Co., some 30 years ago, made the decision to invest its advertising dollars and efforts in a product, a name and a code of uniform specifications built around the then-patented Karr innerspring unit and shared by a number of other small manufacturers located throughout the length and breadth of the country.

During the life of this Karr patent we so operated, investing many hundreds of thousands of dollars in the copyrighted name of our Spring Air product to the exclusion of promoting the Salisbury product image in our local market which, because of our size and financial limitations, we could not logically advertise nationally.

Today, gentlemen, we are faced with the possibility of having to abandon this investment, along with the years of effort devoted to it and, more important, to forfeit the prestige of producing a nationally advertised product; a factor that has enabled us to offer our dealers a product with an advertising program behind it that could compete with other bedding brands enjoying this same advantage. (Should there be any question as to the importance of this so-called prestige, witness the recent bow of Sears, Roebuck & Co. into the field.)

Now let us take a look at how others in the bedding industry have responded to the opportunity to build customer acceptance through national advertising.

I have handed to the chairman the December 16, 1960 issue of the magazine, *Printers' Ink*, published in Orange, Conn. At page 12, this magazine gives the following information about 1960 expenditures and 1961 budgets for advertising for different companies in the bedding industry. I will add in Spring Air's figures, which were not mentioned in the article.

Senator HART. The article referred to is not too long. I think it would be appropriate to make it a part of the record.

Mr. SALISBURY. I will add the figures which are not in the article. The Simmons Co. budgeted \$1,500,000 for advertising their Beautyrest mattress and an additional \$900,000 to advertise their other bed-



ding products. They are reported having spent about the same amount in 1960.

Serta Associates in this article reported an anticipated expenditure of \$1 million in 1961 for national advertising with about \$900,000 having been spent in 1960.

Sealy, Inc. reported upwards of \$900,000 budgeted for 1961 national advertising, up \$300,000 from their expenditures in 1960.

The Englander Co. reported an anticipated expenditure of \$400,000 for 1961, over the \$335,000 which they spent in 1960.

The Spring Air Co. budgeted \$110,000 for national advertising in the year 1961, down from the figure of \$141,000 spent in 1960.

It is interesting to note that of the \$4,810,000 total spent by these five companies, nearly half the amount was spent by a single firm.

In the Spring Air group there are 30 separately owned companies, who together spend \$110,000 for Spring Air national advertising, averaging only \$3,666 apiece. Englander is one company. It spends more than 100 times as much for national advertising as each Spring Air member company. Simmons is one company. It spends about 660 times as much for national advertising as each Spring Air member company. Englander Co. gets the full benefit of every dollar it spends for advertising Englander products and so does the Simmons Co. Should not each individual member of the Spring Air group receive the full benefit of his expenditures made by them in their individual territories for national advertising?

I am informed that the average amount spent by the 30 small mattress manufacturers which had Spring Air licenses in 1958 for local advertising of Spring Air products was about \$13,500. The Spring Air national advertising budget in that year was about \$150,000. This makes a total of national and local advertising expenditures for Spring Air products of approximately \$550,000, which is approximately \$18,000 per Spring Air manufacturer.

My own company in Minneapolis spends about \$12,000 for Spring Air assessments to support our group national advertising effort and an additional \$30,000 for Spring Air advertising in local media, such as radio, television, newspapers, and billboards. Our Spring Air sales are usually about \$400,000 per year.

I am not qualified to argue about how the Sherman Act or any other law should be interpreted, but when I learned that the U.S. Department of Justice had decided to sue the Spring Air Co. for restraining competition because of the practice of mentioning retail prices in our national ads and the practice of promising each company like mine that it would be the only one authorized to sell Spring Air products in the market area where it did the advertising and for which it paid a share of the national advertising cost, I was shaken by the unfairness of it. It seemed to me that small companies like the ones in our group, who find it difficult to scrape up enough money among them to finance a very modest national advertising campaign each year, should not have to resist a powerful branch of the Government in order to get the benefit of such advertising as they can afford to do through pooling their resources.

Faced with the burdensome expense of this suit which could only be financed by diverting our already pitifully inadequate advertising



dollars for our defense, I wrote a letter to Hon. Hubert Humphrey, the senior U.S. Senator from Minnesota, calling his attention to the situation.

Knowing that Senator Humphrey's obligations as a Senator and particularly as majority whip would make it difficult for him to give much time to the matter, I also explained the facts and circumstances to our former U.S. Senator Edward J. Thye, long an understanding friend of small business. I asked him whether he thought my objections were reasonable and whether he thought it would be desirable to call the situation to the attention of Congress and request assistance in the form of a bill that would resolve whatever conflict there is between our way of competing with the big companies in our industry and the Justice Department's way of administering the antitrust laws.

Senator Thye has taken the problem very much to heart and has acted for all the Spring Air members in helping to work out the provisions of the "Registered User" bill, which is the subject of this hearing.

To us the main part of the bill is paragraph 5(k), because that expresses the right of the owner of a registered trademark to license it to companies like the Salisbury Co. subject to conditions as to the place of use by the registered user. As long as the Spring Air Co. has the right to keep other licensees from selling the goods which they make under its trademarks in the markets where the Salisbury Co. has spent over \$40,000 a year for many, many years, in advertising alone, and additional tens of thousands of dollars each year for sales and promotional expense, we will be able to maintain our position in competing against the giant integrated companies in our industry, because we will be able to get our message to the housewife through the medium of national magazine advertising.

It is highly unlikely, however, that we or any other member of our group would provide any vigorous competition for the integrated giant were we to find that our local Spring Air advertising was being used by a neighboring licensee to sell identical Spring Air products in the places where we, at our expense, had developed the market; particularly if this same "usurper" might be spending far less than we in relation to his markets.

Even if the law gave me a right to sell Spring Air mattresses in the cities where others bought and paid for newspaper, radio, television, and billboard advertising, my conscience would not allow me to do it. It seems to me that whoever has the foresight, confidence and energy to open up a market and develop it and sell goods there and give good service to the accounts and back up the warranty on the product, has earned the good name that he has built up, and neither I nor anyone else would be morally justified in sending a truckload of mattresses and box springs to a department store in his territory and thus capitalize on the reputation and efforts of the other producer.

I thank you, sir, for the privilege of presenting this statement.

Senator HART. Thank you very much. I am sure it will be helpful to the committee and the Congress. I know that Senator Humphrey has expressed that view.

(The article referred to follows:)



[From Printer's Ink, Dec. 16, 1960, p. 12]

### SEALY'S NEW MARKETING MOVES MAY STIR SLEEPY BEDDING FIELD

MATTRESS MAKERS, FALLING OFF THE PACE IN SALES, SHOW SIGNS OF A REAWAKENING BY MORE AGGRESSIVE ADVERTISING

At Sealy Inc., Chicago bedding manufacturer, this week there is preparing for a full-scale push to propel the company ahead in the industry.

The company has made several moves designed to do just this. Recently it switched its advertising from J. Walter Thompson, Chicago, to Earle Ludgin, of the same city. Within the past 2 weeks Carl Singer was promoted from executive vice president to president (after 14 months with the company); and Howard Haas moved from sales manager to director of marketing. And in the January 16 issue of *Life*, Sealy (for \$150,000) is running a four-color spread and a black-and-white gatefold.

Sealy spent about \$600,000 with JWT last year. It will spend upwards of \$900,000 with Ludgin in 1961. It's all part of counteracting a dip in the \$550-million industry—off 1 percent this year despite population gains and some increases in housing.

Sealy is going counter, too, to common industry practice by accenting its higher priced products. According to Haas, company marketing chief, about 80 percent of the mattress business has been in the \$40 price class. Sealy will push its quilted posturepedic, which sells for \$89.50 and is one of the top-priced bedding products offered.

Singer, Sealy president, says bluntly, "We are frankly out to capture the No. 1 spot among 247 U.S. bedding companies." He'll do it this way:

"First, we're going to do better product-planning and develop new products. We'll strengthen and widen our national merchandising campaign. We're also going to establish much closer liaison between our 32 plants and Chicago headquarters.

"Then we're going to really move in the field of contract and institutional selling—the business of selling sleep products to mass buyers like hotels—which should account for 10 percent of our total volume by 1962. We're going to do more of a job selling to national accounts, such as department store chains. And then we plan to enter foreign markets."

### COMPETITION GETS AGGRESSIVE

What about the competition?

The Simmons Co., New York, the industry leader with about 25 percent of the market, will spend some \$2,400,000 for advertising in 1961, about the same as this year.

About \$1.5 million is budgeted for the company's Beautyrest mattress campaign. The mattress, which John W. Hubbell, Simmons' vice president in charge of merchandising and advertising, calls his company's Cadillac, retails for \$79.50. McCann-Erickson Inc., and Young & Rubicam Inc., both New York, service the Simmons account. Simmons will concentrate its advertising in consumer magazines and a coop newspaper plan.

Serta Mattress Co., Chicago, which insists it is ahead of Sealy in the No. 2 position, will spend about \$1 million in national advertising in 1961 through Tatham-Laird, Inc., Chicago.

In 1960, Serta spent between \$850,000 and \$900,000; 5 years ago it spent only \$300,000. Serta's program includes magazines, radio, television spots and coop newspapers. A good portion of this will push Serta's higher priced merchandise, including its \$79.50 "Perfect Sleeper" mattress. The box spring sells for the same price.

The industry's fourth ranked manufacturer, Englander Co., also Chicago, is introducing its new "Tension-Ease Airlon" mattress with the strongest advertising schedule it contracted since it began national advertising in the 1940's, according to Burt Goodman, advertising manager. Airlon will retail at \$59.75. Through its agency, North Advertising, Inc., Chicago, Englander will boost its national advertising by 30 percent to about \$400,000 in 1961. The company is advertising its new Tension-Ease Airlon product as "Mr. Pink's amazing mattress," in recognition of the fact that Ira M. Pink, president, was so influential in bringing about the development of the mattress—one the company confidently expects will cause a real stir in the industry.



Will Sealy really upset Simmons as top dog among bedding makers? Will the move toward pushing higher priced merchandise pay off for the top contenders? These questions will take time to answer. But according to informed observers, a sleepy industry on all counts is suddenly having a promotional awakening. And the whole field should benefit.

Senator HART. Mr. Frank Collins.

#### STATEMENT OF FRANK COLLINS, SECRETARY, THE SPRING-AIR CO.

Mr. COLLINS. My name is Frank Collins, of Miami, Fla. I am general manager of the Hialeah, Fla., plant of E. B. Malone Co., and I am also secretary of the Spring-Air Co.

E. B. Malone Co. has the Spring-Air franchise for the southern part of Florida and for the northern part of the State. Operations in the southern territory are handled by our Hialeah plant and the northern territory is handled by our plant in Jacksonville, Fla. There is another Spring-Air territory in Florida around West Palm Beach, which is served by White Swan Bedding Co.

E. B. Malone Co. employs 70 people.

E. B. Malone Co. will send about \$14,000 to Chicago in 1961 as its share of Spring-Air's operating and advertising budgets, and in addition it spends from \$40,000 to \$67,500 per year for advertising Spring-Air products in the two territories. We sell from \$460,000 to \$700,000 in Spring-Air products per year, in the two territories.

Having a license to make and sell the nationally advertised line of Spring-Air mattresses has helped us to remain in business despite the keen competition of bigger companies who do more national advertising, and to keep the patronage of the better retailers in our area. Retailers are not interested in buying a product that does not have consumer acceptance by national advertising. Therefore we consider the money well spent.

If we did not have exclusive sales rights under the Spring-Air trademarks, the West Palm Beach licensee could take Spring-Air accounts anywhere in Florida away from us and get the advantage of our advertising and sales efforts which we pay for and have been building for over 30 years. In the northern area, the Spring-Air licensees in Georgia, Alabama, and Mississippi could do the same, and we would lose some of the benefit of the advertising we pay for in that area.

It is my understanding that the Spring-Air licensees in West Palm Beach and Macon, Ga., which are the ones closest to our markets, do relatively far less local advertising of Spring-Air products than we do. Therefore, they have less out-of-pocket expense and do not have to charge as much for each Spring-Air mattress as we do. If we would not have the right to be the only company selling Spring-Air products in the localities where the advertising we do is effective, neighboring plants could offer identical goods to our customers or to other retailers, and in a short time we would have to reduce our Spring-Air advertising to bring our costs into line with those of the neighboring plants.

In a case like that, the prudent thing to do would seem to be to spend advertising money on the Malon brand of mattresses, which we also manufacture and which no other company would have the legal right to sell in our market area, but if we did this, we would lose the benefit of the national advertising done by the Spring-Air group and we would also lose much of the goodwill and consumer acceptance for



Spring-Air products which we have spent so much money to develop through the years.

We understand that the bill which this committee is now studying contains a clause which recognizes the right of the Spring-Air Co. to give each of its licensees an exclusive license to use its trademarks in any stated place. This has always been the practice in the Spring-Air group, and we appeal to the Senate of the United States to make it clear that we can have the right to exclusive trademark licenses in the market areas in which we advertise the trademarked articles.

A small business concern such as our company, having spent a great number of years in developing a territory, should be protected by law against the loss of the fruits of all those years of work. If we were denied the right to be the only company selling Spring-Air products on our markets, we would have lost one of the main methods which would enable us to compete against the big corporations which are prevalent in our industry. We are willing to accept Federal regulation in the form of registration, as provided in this bill, if necessary, to assure us of the opportunity to compete in the future as we have in the past, and we feel it is very important to the future of our company that Congress should pass this law and protect small companies like ourselves against the dangers that now confront us.

Thank you very much for the privilege of appearing here and making this statement.

Senator HART. Mr. Collins, I have made a note this morning to inquire at some point as to the situation that applies when there are two or more licensees in one State as you pretty gravely described. Are we to understand that the practice which Spring Air follows is, that if a bedding retail store located near the area of West Palm Beach but not quite into the line designated the region of the third store, White Swan Bedding, if I were a purchaser just across the line from West Palm Beach, White Swan would not be permitted to sell to me; I would be required to buy, if I wanted a Spring Air, from you down at Hialeah?

Mr. COLLINS. If I thoroughly understand the question the territories are so set up that they are either divided at State lines or in this particular case they are divided by county lines. In other words, West Palm Beach is in Palm Beach County and if it was just over the line you would be in Broward County which is in my territory or my area. I would say yes, if I understand the question correctly.

Senator HART. Now that you get into geography, I am sure we do understand it. I am in the northern part of Broward County. I want to buy a White Swan. I cannot buy it from a man in West Palm Beach, I must buy it from you?

Mr. COLLINS. That is right. As far as Spring Air is concerned, if you were a dealer, you would have to buy Spring Air from me. You could buy a White Swan product just as we sell White Swan products in the area.

Senator HART. You, E. B. Malone and White Swan Bedding both, sell Spring Air and you, I take it, have a private brand.

Mr. COLLINS. Yes.

Senator HART. And White Swan has, too. I would be free to buy a private brand from either White Swan or yourself, yours from you and White Swan from White Swan, but I would not be allowed to buy a Spring Air from White Swan, is that right?



Mr. COLLINS. If you were a retailer in my territory, in Broward County, the Spring Air would come out of our plant, not from the White Swan plant. As far as our own private brands are concerned there is quite a bit of Malone merchandise sold in the White Swan territory and there is a certain amount of White Swan merchandise sold in the Malone territory.

Senator HART. Did I understand you to say that White Swan's market price of Spring Air is below you?

Mr. COLLINS. No, sir; I don't know really. The point I meant is that our expenditure in advertising is to the best of my knowledge considerably higher. It would be very possible that White Swan could without any advertising cost to them after all these years of our advertising in our territory, they could come into our area where we make all that expenditure and sell perhaps at a lower price than we do.

Senator HART. I am sure that could be true.

In point of fact, is your price for Spring Air the same price as White Swan?

Mr. COLLINS. I am not sure that I know. I believe that we are probably very similar in price but I am not sure I know exactly whether our prices are exactly the same. From year to year our prices change. At this particular moment I don't know.

Senator HART. Spring Air suggests a retail price?

Mr. COLLINS. Are you talking about retail price or wholesale price?

Senator HART. I am leading up to this. Spring Air suggests a retail price.

Mr. COLLINS. Yes.

Senator HART. And it would be suggested to the fellow in West Palm Beach and to you?

Mr. COLLINS. That is right although we have an odd set of circumstances. They seem to put their emphasis on the \$79.50 retail price of mattresses and I in turn feel in our market we should put emphasis on the \$89.50 mattress. So most of our advertising is in \$89.50 quality mattress where most of their advertising has been in the \$79.50 mattress.

Senator HART. You don't know if I shopped at West Palm Beach for the Spring Air mattress which is suggested to sell at \$79.50, I would be able to buy it for less than I could buy it from you, if I were permitted to buy from you?

Mr. STEWART. May I comment on that question, sir? At one time in about 1958, a questionnaire was sent out from my law firm to the various Spring Air plants requesting information as to what their wholesale prices were. The Spring Air Co. also did not know anything about what prices the various plants were charging so they authorized me to assemble the information. I got the information subject to the condition that we would not tell the plants what the other plants were charging. We collected price lists. As counsel we looked them all over and we found a wide disparity from one Spring Air plant to another including particular adjoining plants.

I can remember the generality but I cannot remember how it might apply to Malone and West Palm Beach. The generality was that on every item in the Spring Air line there was a wide range from plant to plant in the wholesale price. The higher the suggested retail price was, the greater the discrepancy was from one wholesale price to an-



other because you had more flexibility within a larger dollar amount. Overall we found that there was no one Spring Air plant that charged the same price for each of the items in the line as any other Spring Air plant. In other words, you would not find any two price lists for these six or eight mattresses that made up the Spring Air line from two different factories charging the same price for each item on the line.

Senator HART. So it would be true that so far as its effect on competition between neighboring retailers, one on one side of this county line and one on the other, that the retailer purchasing from the wholesaler in the West Palm Beach area, if he was obtaining it at a lower wholesale cost to the extent it was a factor in his operation, would it give him a competitive advantage over the adjacent retailer to buy from Hialeah?

Mr. STEWART. I think that question perhaps presupposes that the divisions between one territory and another go down the middle of the trading area so that you would have retailers on one side of the territory line in direct competition for a consumer's patronage with retailers on the other side of the line.

In experience I believe they have taken a market; that is, a metropolitan area, and other metropolitan areas as a group and brought them into the area served by one Spring Air plant. So it would rarely if ever be true that retailers who competed for the same housewife's patronage would be in the market assigned to different licensees of the Spring Air trademark.

Senator HART. I understood from Mr. Collins that it is the county line.

Mr. COLLINS. I was just thinking about Mr. Stewart's remark and I am trying to think of the county line. The one major city is Fort Lauderdale and the next real major city is West Palm Beach. I cannot quite visualize a customer for a mattress going from say the West Palm Beach trading area down to the Fort Lauderdale trading area. It is possible; but it is a fair amount of distance between those two markets. Some I am sure might shop for other things but not for anything like a mattress, that far from home.

Senator HART. I am sure if we were on the Antitrust and Monopoly Committee we would have economists drawing lines all over the lot.

Thank you very much.

Senator HART. Mr. Samuel I. Posner. I take it, Mr. Posner, you are going to speak from the only copy of your statement.

**STATEMENT OF SAMUEL POSNER, PRESIDENT, NATIONAL  
MATTRESS & FURNITURE CO., MUIRKIRK, MD.**

Mr. POSNER. Mr. Chairman, I think I am an afterthought in that I didn't know I was going to appear before this committee until about 11 o'clock last evening and I prepared these notes about 7:30 this morning. There are no other copies available. We will try to make them available.

My name is Samuel Posner and I am president of the National Mattress and Furniture Co. of Muirkirk, Md. In case you want to know where Muirkirk is, it is a whistletop between Beltsville and Laurel. We are centrally located between Baltimore and Washington, actually. We also trade as the Spring Air of Greater Washington.



I am a Johnny-come-lately to the industry and I differ from most of the members appearing in front of this committee today. I have only been in business for a period of 4 years. Our company was formed in April of 1956, and actually went into operation in August of that year.

Prior to the forming of this company I was employed as a salesman by the Englander Co. who maintained a manufacturing facility in the city of Baltimore, Md. My sales area or territory was the metropolitan area of Washington, D.C. My period of employment with Englander was from 1947 to 1956.

Throughout my years in that employment I always had the desire to perform and operate a company of my own. I held back for a number of years because I earned a fairly good income as a salesman and would lose this security on entering business on my own. More important, however, was the lack of capital and knowhow to compete against both large and small factories who have been able to build name recognition and corporate identity throughout the years both at national and local levels.

The problem of capital was temporarily solved, and I say temporarily because I have found that a growing company never has enough, by sale of debenture bonds and stock to friends. Knowhow was a problem which affected me more than capital at the outset. My experience was primarily limited to sales for the Englander Co. On this score I felt that a few of my problems could be alleviated by becoming a member of a national group. As a result I cased about for a group whose franchise was open in the territory I intended to cover. Fortunately Spring Air had such an opening and I hitched on to the wagon.

Benefits of joining became immediately apparent. In sales I was given an opportunity to present a brand name that was recognized by the dealers, if not by the public, in my area. I was representing a quality product with a long history and product in the background of mattresses, thus enabling me to compete productwise and namewise with manufacturers who had been serving the area both on the local and national levels for years. The group not only gave me identity but helped me plan my facility, officewise, productionwise, and machinerywise. It helped pave the way in purchasing. I am certain a number of suppliers would not even entertain the idea of supplying me with merchandise without the weight of a Spring Air franchise.

Finally, Spring Air provides me with a merchandising package such as national advertising, local newspaper mats, radio and TV commercial, point-of-sale display, sales training films that would be impossible for me to obtain as an independent with my limited capital.

As a matter of fact, it was exceedingly difficult for me to raise sufficient moneys to contribute my share to the group treasury, much less attempt to do all this on my own. However, I am happy to state that our company is holding its own and keeping its head above water. Our success has not been phenomenal in any sense of the word but I do feel a sense of accomplishment in being able to maintain our business during difficult times and against odds that appeared overwhelming at times.



Without the benefit of group participation I do not believe that our company could have maintained itself or had any growth potential at all. Two or three local companies who had been manufacturing mattresses for years had to give up the ghost and I feel that part of their downfall was due to the fact that they did not tie into a major group.

Having an exclusive franchise to sell Spring Air products in the area assigned has contributed to the success we have enjoyed in that through its national advertising program I have been able to compete with the national companies or groups who have received these benefits in the past. If it were necessary for me to compete with other manufacturers on Spring Air products in the area, I sincerely believe that the money, time, and effort that I have expended in advertising and building a product image who immediately become available to my competitor without investment or effort on his part.

This, gentlemen, has been my experience. I sincerely hope that this avenue of existence left to a small entrepreneur will not be closed. The manufacturer of mattresses is one of the few segments of manufacturing left open to small business. Let's find a way to keep that street from being blocked.

Thank you.

Senator HART. In the period that you were with Englander, which is one of the two large nationally operated but not umbrella type operations, is that correct?

Mr. POSNER. That is correct.

Senator HART. What was your impression as it affected you in the competition from the umbrella-type franchise?

Mr. POSNER. As a salesman for the Englander Co. we felt their competition quite keenly and that is why I was so interested in becoming a member of the group. I felt the groups actually had more to offer the consuming public in the way of a quality product and the recognized product than a wholly integrated company such as Englander. I honestly believe that when I formed this company.

Senator HART. I take it you would not have undertaken the venture on your own except as you were assured of the franchise which gave you the territory.

Mr. POSNER. I didn't even attempt to form the company until I had the franchise.

Mr. GREEN. Let us say mattresses under a different name?

Mr. POSNER. We became a pauper on that score and I will tell you why. We had no history of manufacturing local products under a local name. I felt it would be more advantageous for me to put all my eggs in the national basket and do all my selling on the Spring Air name as much as possible and that is exactly what we did.

Mr. GREEN. So you don't sell any local product?

Mr. POSNER. No, just Spring Air.

Senator HART. You do manufacture Spring Air?

Mr. POSNER. We do manufacture Spring Air, that is correct.

Senator HART. Mr. Stewart, I think you wanted to make a comment here.



STATEMENT OF CHARLES L. STEWART, JR., ATTORNEY,  
CHICAGO, ILL.

Mr. STEWART. I have a statement and then I think Mr. Thye would also like to address some words on the subject. We have been hearing from members of the Spring Air group and others. My statement relates to some of the broader implications and more or less on the same general plane as the first statements that were introduced.

The bill now being considered may enable many industries to develop greater diversity—diversity of products, diversity of size, and wealth of individual entrepreneurs and diversity of regional locations of independently owned producers, such as the mattress industry has today.

The growth of national advertising and national brands for products sold to consumers is a phenomenon which exists, and which is highly beneficial to free private enterprise, but it has had the effect of enlarging the sales of nationally advertised products and reducing the relative share of the sales of many local or regional producers of products which are equally good but not as well known.

This trend has put the smaller units in many industries in jeopardy. This is particularly true with respect to products which for one reason or another cannot economically be shipped nationwide because nationwide distribution is necessary in order to make national advertising pay. For example, mattresses and bottled beverages are priced quite low in relation to bulk and shipping weight.

Therefore, if a national brand is to be marketed without shipping costs becoming excessive, it must be produced in many different localities from which it can be shipped without excessive cost to all major consuming markets. Perishable goods such as bakery products, dairy products, and certain other foods must also be produced rather near the consuming market, but consumers like to have the confidence that magazine advertisements create in such products. Also, virtually all service businesses dealing with the general public present the same problem—the hotel and motel business, for example, is naturally a local business, but travelers enjoy the convenience of knowing that the same standards of service are available wherever a nationally known name is represented.

There are basically two ways in which nationally known services may exist in many locations and nationally known brands may exist in industries which are inherently of a local or regional nature because of shipping problems. One way is the development of a nationwide chain of manufacturers or service establishments under common ownership and control. The giant national chains of food stores, hotels, dairy plants, gasoline service stations owned by refining companies, breweries, mattress factories, and so forth, represent this first way of creating nationwide sources of nationally known products.

These chains may grow by merger and acquisition of formerly independent units, or they may grow by a large producer establishing new plants in cities throughout the country. Either way, the result is concentration of more and more sales in fewer hands, and concentration of both capital and management. This is what has been happening, but it is not the only way. The registered user bill recognizes a valuable alternative.



Federations of independent local units into groups for the purpose of national advertising is that alternative. This can be done by contracts alone, as in the case of most licensing arrangements, or by contracts and stockownership, as in the case of the bedding industry groups appearing here today, and other so-called cooperative chains. Such federations of independent concerns into licensee groups have the opposite result from concentration. They leave the ownership and control of each unit independent, and they allow each unit to grow with the increase in nationally known goods or services, instead of dwindling to nothing when the integrated national chains of stores or factories or breweries are created by their competitors. These federations of small business units can compete for the national market and the units can survive as local independents.

They delegate only so much power to the national headquarters, whether they own it or merely make contracts with it, as is necessary to provide national advertising campaigns and protect the public against deception by the claims of their national ads.

They are controlled by independent businessmen, investing their own savings, instead of by men subject to direction and control from a national headquarters. No matter how much autonomy a national corporation grants to its branch plant manager, he is not as free and independent as the owner of a company which has joined a national group of trademark licensees.

In the case of *United States v. Aluminum Co. of America* (148 F. 2d 416 (1945)), Judge Learned Hand spoke of—

an organization of industry in small units which can effectively compete with each other.

Mr. Justice William O. Douglas wrote in 1948, dissenting in the case of *United States v. Columbia Steel Company* (334 U.S. 495, at pp. 535-536):

Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on \* \* \* a few \* \* \*.

The purpose of the mattress manufacturing groups is to keep an organization of the bedding industry in relatively small units which can effectively compete with the big integrated corporations which have factories all over the country.

The effect of these trademark licensing arrangements is to keep industrial power decentralized—scattered into many hands—so that the many advantages of national advertising which are available to the large multiplant producers will also be available to the independent local or regional enterprise.

Mr. Ezelle, Mr. Collins, Mr. Salisbury, and Mr. Posner have told this committee how necessary it is to have only one producer of Spring Air mattresses using the Spring Air name and serving one market. I would like to point out that this is not just their opinion, alone.

Section 732 of the Restatement of Torts, published by the American Law Institute, states:

The interest in a trade-mark or trade name is protected \* \* \* with reference only to territory from which he \* \* \* may reasonably expect to receive custom in the business in which he uses his trademark or trade name \* \* \*.



The comment to section 732 states that—

the right to exclusive use of a trademark or trade name \* \* \* is created to avoid, or compensate for, harm caused by the marketing of one's goods or services as those of another \* \* \*.

In *Kidd v. Johnson* (100 U.S. 617), the Supreme Court said of the use of a trademark:

Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trademark would be of no service in distinguishing the whisky of the manufacturer in Cincinnati; and thus the company would lose all the benefit arising from the reputation the whisky there manufactured had acquired in the market.

What we are proposing here is a statute which will serve a great national policy by encouraging small business units to compete vigorously and fairly against large nationwide corporations in the race for the housewife's dollar, making full use of the effective tool of national advertising. To so compete, the small units must guarantee uniformly high quality and value, just as their large competitors do. To so compete, the small units must also have the same rights their national competitors have to assure each dealer that he will not be discriminated against when he buys Spring Air mattresses to sell in competition with other dealers selling Spring Air mattresses.

For this reason, also, the dealers in each area are entitled to rely upon the fact that the same manufacturer will sell Spring Air goods to all of them just as only one manufacturer sells Simmons, or Englander, or Burton-Dixie mattresses to them all on a fair and equal basis. Therefore, the owner of the Spring Air name must have the authority to say, in each license agreement, where the licensee factory shall sell products under the trademarks of the Spring Air Co.

I respectfully suggest that enactment of S. 1396 will make a major contribution to the national policy of maintaining a free enterprise economy which is open to small businesses as well as large, and is truly competitive in every respect.

I would also like to state that it is very important to all of these Spring Air licensees—and I am sure to units in many other industries who have not yet come up against the hard problems that confront the units in the mattress industry—have an expression from the highest policy level of the Government on this point.

At one conference before there was any litigation instituted by the Antitrust Division, I was conferring with a member of the staff of the Department, and I raised many of the same policy questions which have been stated in some of these statements presented here today, and was informed that in this individual's view the place for these points to be made was in Congress.

He said that this was—

a problem of legislative policy which we are not free to deal with in the administrative branch.

And on the basis of my agreement that this is true, what we are dealing with here is how the Nation's legislative code can be adapted to avoid irreconcilable conflict between the interests of these small but progressive and energetic units in the mattress industry and the overall policy of preventing undue restraint on any kind of commerce.



This is the function which only Congress can discharge. This is a function which we feel it is far more important to have considered as a legislative problem than as a judicial problem or as an administrative problem.

On that basis, all of the people concerned in the mattress industry who are supporting this bill have elected to do what is really a very unusual thing, and that is:

To come to the Halls of Congress, to this subcommittee, present their problem, and ask your earnest and helpful consideration, because they feel that their problem is one that they cannot solve without your assistance.

Senator HART. Mr. Stewart, I suppose I am the only one in the room here that has to ask this question. Let me get straight what appears to be a basic matter.

You are asking in this bill clarification so that it is assured that a manufacturer who is one of a group that has formed this umbrella operation, and who is manufacturing under the trademark obtained by the umbrella company, can be assured of territory protection from others selling the same brand item coming from a different manufactured source.

What is the law with respect to a manufacturer who has a trademark item? By carefully picking his outlets, I suppose he could assure it anyway, but is it permitted for an express territorial restraint to be imposed by that manufacturer on his wholesale customer?

Mr. STEWART. Sir, I am well enough acquainted with the law in the field to know that the answer is neither yes nor no, yet. It is being developed.

It is being developed by such diverse sources as the Federal district court in Ohio, by the Federal Trade Commission in the opinion that Mr. Timberg cited this morning in the *Snap-On Tools* case and by quite a number of consent decrees. Now, this is not lawmaking but this is an indication of how the forces conceive their bargaining power to stand in the light of existing law, and by quite a number of cases in which tests have been made by private parties, not by the Government, of the legality of exclusive dealerships.

For example, there is a *Packard Motor Car* case which arose, I believe, in Baltimore—or I am not sure in which city, but not too long ago—and I have in my briefcase a considerable legal memorandum on this subject which we could discuss at length, although I am sure it would take up far more time than you had in mind when you raised the question.

But the basic elements that seem to enter into the problem are these:

In the earliest days of the Sherman Act, one of the first big cases involving restraint of trade under section 1 of the act was the *Addyston Pipe and Steel* case. In that case it was stated that at common law there were certain types of restraint which were illegal unless justified because they were ancillary to a legal and legitimate primary purpose of the agreement in which the restraint was embodied.

Now, in that case, the *Addyston Pipe and Steel* case, there was an agreement to assign to each of the defendants a particular territory, and then they all agreed on what the price would be, and if they bid across territory lines on what was mostly public contracts, those trans-



actions that crossed territorial lines were subject to a penalty that had to be paid and so forth.

Well, the court found that this was a violation of the Sherman Act, but in Judge Taft's opinion, it was clearly spelled out that it was a violation because by the nature of such an agreement, which included the maintenance of high prices and granting to the producer in each territory a monopoly of the whole product line, that the allocation of territories unreasonably and unlawfully restrained trade.

That was one decision which involved a really tightly sewed-up industry, and it did not involve one brand sold in competition with many others as in the mattress situation we have been talking about today.

With many of the other brands, I think some of the witnesses referred to 25 competitors in the market, of whom some are multiplant, nationally integrated, giant producing corporations, and in between this extreme situation of our mattress facts, on the one hand, and the *Addyston Pipe* facts, on the other, you get this dealer situation, and the cases just go all over the lot.

Well, I should not say they go all over the lot. The cases have consistently upheld the legality of an exclusive territorial dealership, except that the Antitrust Division has established the policy and they have got one decision on their behalf now, on their side of the case, in the *White Motors* case, which was just decided about a month ago.

It is hard for me to predict which way the territorial dealership cases are going to go, but I do feel that whichever way those cases go, it is imperative for the policy of the law to be established that when it is ancillary to a trademark license, there be no restriction on the right to grant exclusive territories.

That is the interest that we find ourselves representing and speaking for this afternoon.

Senator HART. Every once in a while, I got the impression that one string of the bow was the argument that these manufacturers should be given the same right that the integrated company has.

But does the integrated company have a right to territorially limit its wholesale?

Mr. STEWART. I think that is a very salient point. Each of our plants has its choice as to how to distribute its products.

When I say "each of our plants," I am referring to independent businesses, separately incorporated or in partnerships, with their own capital investment.

Now, each of these members of the Spring Air group has the right to sell either directly to the furniture store or to a jobber.

By and large, that jobber level is eliminated in the mattress industry, because I suppose there just is not enough profit to support another level in view of the fact that your manufacturer is close to the consuming point anyhow, and this is a factor that is related to the bulk of the product and shipping costs.

But I think we have to keep in mind that the Simmons Co. is the counterpart here of the Salisbury Co., although Salisbury is very much smaller than Simmons. Those are the two to compare, rather than comparing the jobber who might buy from Simmons with the Salisbury Co.



But you say Salisbury is the manufacturer. It is the prime producer. It is the one from whose factory this product is produced and sold.

Now, I think, as a matter of fact, although I am not fully informed on this, that the Simmons Co. does probably do most of its selling direct, rather than through jobbers. In other words, when we say we want in this particular industry to equate the small licensee with the giant integrated corporation, we are dealing with a situation where there is no territorial dealership, because in each case, whether it is a local branch factory of Simmons or independently owned licensee of Spring Air, the manufacturing unit has a sales force, which sells directly to the retail dealer, and by contrast, your automobile or many of your other industrial situations, they have an intervening level, and it is in that level of the distributor that somebody has tried to limit territory.

But I am sure that it is clear from what everybody has said this afternoon and this morning that no question is involved here of the department store, who is our mattress factory's customer, or the furniture store down the street, having an exclusive territory for the sale of Spring Air mattresses. He just sells to whomever walks in the store, and he delivers to wherever they live, and there is no territorial limit there.

That would be the man in the position analogous to the automobile dealer. It would be that retail store on Main Street.

Senator HART. Thank you.

Mr. Green?

Mr. GREEN. We have been dealing, as you state, Mr. Stewart, with the bedding industry.

Mr. STEWART. Yes.

Mr. GREEN. How many other lines of industry do you know that use this same practice?

Mr. STEWART. I am sure there is no other one that is identical, because this has grown up, as the witnesses have testified, in response to a particular set of problems in this particular industry.

I would not be able to answer that from accurate knowledge—

Mr. GREEN. I am speaking of the drink people, for example, Coca-Cola, or the food chains, and things of that sort.

Those independents as, for example, Howard Johnson and so forth, do they use the same licensing agreement as the mattress people?

Mr. STEWART. I understand there is enough similarity that you could say that the same principles apply, although I have not read the contracts that I am now talking about, but I think that in order to have a franchise in a hotel or a restaurant or a motel, or something like that, that is a chain operation, you have to accept certain control as to cleanliness, as to uniforms of the employees, as to style of architecture sometimes for building, and a variety of other things.

However, I think it might be that some of these service establishments would have less need for a specific territorial limitation in that customers go to them instead of being like a mattress factory who sends his truck out to the dealer, you see.

But in the case of a hotel, when you get off the plane, you go to the hotel, and another hotel with the same name, if it were in a different city, would not be competitive, I mean would not have any need to distinguish between the area to be served by one or the other. Each



street address is unique. Each location differs from each other location.

But there are other situations, some of which have grown up in recent years. In fact, at an exposition in New York in, I believe it was January of this year, there was what they called a "Start Your Own Business Show," in which this franchising method of doing business was represented to the general public.

People from all over, who have methods of franchising, came in, put up their exhibits, and had the opportunity to deal with some of the folks who had capital and wanted to go into business on their own.

I could supply to the committee copies of pamphlets, articles, and other things of that nature describing the rapid growth in many different service businesses and some manufacturing businesses of this franchising method, which has enabled small business entrepreneurs to get started.

Mr. Posner's story on that, as he pointed out, is a little uncommon in the mattress industry where many of the present producers are the firms that have been in business for several generations.

But in many other businesses, one example would be probably that you all have heard of, the Midas mufflers, this is on a franchise basis around the country, and some of the dairy products that are specially licensed, like Eskimo Pie, and most of your soft-drink bottling arrangements, whether big ones or small ones, are set up on franchise arrangements.

I would say probably the economics of the particular business will govern whether or not it is necessary to have territorial clauses in the franchise agreement.

I tried to point out how, in the case of mattresses and similar businesses, where there is a heavy cost of shipping, you are going to have to have some territory defined within which you operate. But I think the economics of an individual business will vary, and, therefore, the relative need for this territorial protection will vary.

Of course, that is the only point we make. I mean we make the point that diversity is what we want. We want freedom. We do not want to have to abandon a means of competing, which we find necessary to effectively permit competition. So we are not seeking any kind of restriction here, but rather, we are seeking to have the restriction that is imposed by a too-narrow interpretation of the statute removed.

Senator HART. Might I say that this would be a good paragraph to take out for these professors who want to go into this lecture about the elusiveness of words to describe aspiration; how freedom means one thing and competition and restraint another.

Mr. STEWART. Thank you. I think Senator Thyne would like now to make a statement.

Senator HART. Senator, let me welcome you again. The Honorable Edward J. Thyne. I know perfectly well that the full committee would want very much to be here, sir. As an old hand, you know perfectly well why they are elsewhere.



**STATEMENT OF EDWARD J. THYE, FORMER U.S. SENATOR FROM MINNESOTA**

Mr. THYE. Senator Hart, I am indeed grateful that you are taking of your time to chairman this committee. I regret that the full committee is not here, that they may have heard the testimony given, and which has been given so very ably by all those who have preceded me.

Mr. Chairman, I just wish to first commend you for the time that you have spent here today, and I know that you will continue to spend until all the testimony is in, and, secondly, to say to you that a year ago I would have questioned whether anyone could ever have brought me to this side of the table at any hearing, because I have sat on that other side for quite a number of years.

But when Mr. Salisbury of the Salisbury Manufacturing Co. of Minneapolis called me and told me of some of their problems, knowing the Salisbury family over the years, I was privileged to become acquainted with them in many civic activities and public activities while I served as Governor, I felt that I should hear his problem.

And so I arranged to meet him.

He told me of the civil action that had been brought against the Spring-Air people and the many other associated mattress manufacturers, all small business. I became very much interested, and, having served here as a member of the Small Business Subcommittee of the Senate, having served as its chairman, and having served on the Government Operations Committee, whose committee room we are in today, and having listened to the monopoly stories from day to day, and having served on the John McClellan committee, when it was first organized, for a period of almost 2 years, I could not help but sense that the consumer was possibly in jeopardy here for this reason:

That if the civil action was carried into court, and that these companies were held to be in violation of a Federal statute, and if they were compelled to disintegrate, you would leave the field wide open to a very few, strong, national organizations that did not have to seek a franchise or a trademark or an association, because they were already manufacturing with warehouses established all over the Nation.

A mattress cannot be shipped parcel post. It cannot be thrown in a freight car to be shipped anywhere because it is perishable in this sense: That any other object could very easily penetrate its casing and destroy the content or the mattress jacket itself, and, therefore, I knew that unless this group of business associates could continue doing what they had started 30 years ago, that the housewife would only see one mattress advertised in the national papers, the national magazines, and most certainly on television, because it is costly.

No one of these small manufacturers could afford any such advertising.

Yes, they could advertise in their home community. But that would only be a very limited consumer opportunity to see.

Therefore, I asked for all of the information leading up to the so-called civil action filed, and when I read of it, and read therein, I said to Mr. Salisbury: "I will try to help you," and I came down last August during that special session.



We met with the various Members of Congress to acquaint them with the problem. I had no criticism of the Justice Department, because I have been an administrator myself, and, therefore, we have to live with the laws that are on the books. If the laws were so interpreted by the legal officials of that Department, they were compelled to administer. Therefore, if the law should be amended, you and I must examine it; I, as a public representative, and you, of course, in the body of Congress, where these questions are to be considered and acted on and legislated.

So when I was down here last fall, time did not permit us to accomplish anything before the adjournment came. I am sorry this is the 20th of June. We should have brought this question to you way last winter, when your time was not so in demand as it is at this time.

There is an appropriations bill on the floor this afternoon on which I know your mind is concerned with, and, therefore, the other members of the committee are likewise in some other committee hearing or they are over on the floor. But we must give consideration to this question because, if you fail to act, if the court should see fit to deny the continuance of this practice of these honorable people—and those that I have become acquainted with are some of the most honorable men that I know in the business world—why, the housewife is the one who is going to suffer because she is not going to know that Salisbury in Minneapolis makes just as good a mattress.

And I could name every one of the firms that have been before you here today as capable of manufacturing a mattress that is as good as anything on the market for possibly less money than some of the giants.

But if they cannot bring their story to the consumer, the buyer, other than just in a little, local community, you have just denied the housewife or the buyer knowledge of what there is on the market.

Therefore, I am so very, very appreciative that you are giving thought to this question here today, and that we may have your subcommittee's recommendation to the full committee at an early date, in order that we can get this question on to the Senate floor in an approved committee bill or a committee recommendation.

As I look at this question, it would not be so important, were it not for the fact that a dealer must have a small territory. Historically, that territory grew up for reasons that you could not ship any great distance, and at the same time have some assurance that if he spends \$50,000 in advertising, and that he has built up the consumer's interest and demand in that mattress, that some person does not see an opportunity of loading up a van with mattresses and coming up on to this market or into this market, because he knows it has been developed and that there is a consumer interest, and saying: "I am up here to pick up a load of other merchandise and I can really sell you this mattress at a sacrifice because I had the inventory and I had to make the trip anyway, and here it is."

Well, if he does that, and if it is practiced very often, then there is no object in this person belonging to the association, because his investment in the advertising is lost by the so-called invasion by someone that just saw an opportunity.

Therefore, in the mattress field, the territory grew up with the industry itself, and that has been my concern and that is the reason



why I am here, because if anybody told me 2 years ago that I would come back into a public service in this way, I would just say: "You have got another thought, or at least you had better give it another thought because I don't intend to."

But when I examined the problem that the consumer was faced with, and that all these fine manufacturers were confronted with, I said: "It is more your responsibility than anyone else because you have sat on committees; you know the importance of getting this question before the legislative Members, because you are the gentlemen who will have to deal with it in proper amendments to existing statutes in order that you may assist in untying their hands so that they can make an interpretation that would permit these companies to continue."

Mr. Chairman, again I wish to thank you.

Senator HART. Senator, I think I might just as well go on the record that the reason we are here, in large part, is because you had such a strong influence on the committee.

Mr. THYE. Sir, I thank you for that, but I will tell you very frankly that when I came to Senator McClellan and cited our problem and why I was down here in Washington, Senator McClellan very frankly said—and I will almost quote him—he said: "God bless you, Ed," he said, "I will introduce the bill, but I cannot conduct the hearing because," he said, "I am swamped with my own commitments, but," he said, "if you can find anyone to chairman it, I will instruct the committee staff to offer every assistance possible."

And when we went to your office, sir, and Mr. Timberg, Mrs. Leeds, and myself, you were one of the most gracious persons that we met, and your assurance that you would help us, and you certainly have carried out every promise that you made, and we are indeed grateful to you, sir.

Senator HART. You ought to reserve judgment until the verdict is in.

Mr. THYE. I am confident, sir, that the verdict cannot be other than favorable in view of the fact that there is so much at stake here so far as the consumer is concerned. Now, I realize what is involved, because it is like opening the fence rail just a part way.

You may find that you cannot hold it against some other that may want to force its way.

Now, that is the one problem that the Justice Department is going to be confronted with, and, therefore, I would not hesitate in saying that they might very well file an adverse report, because of the fear of the camel's nose or the foot-in-the-door aspect of this.

But I do believe that if there ever was a just reason to permit a group of small-business people to be associated—and that is the purpose of this act, is to allow them to become associated under a trade name and do business much in the same manner that an already existing manufacturer that has plants and factories geographically all over the Nation—so we will hope that your decision is favorable, sir.

Senator HART. Thank you, Senator.

Mr. Morris Kaplan of Sealy.

Mr. HAAS. I am Joseph Haas. I am legal counsel for Sealy, Inc., and the next two or three witnesses are from that organization.



**STATEMENT OF MORRIS A. KAPLAN, PRESIDENT, SEALY MATTRESS CO., CHICAGO, ILL.**

Mr. KAPLAN. My name is Morris A. Kaplan, and I am president of the Sealy Mattress Co. of Chicago, Ill. I have been in the bedding business ever since I finished an executive training program subsequent to my graduation from college. My active, full-time involvement in the industry started in the spring of 1937 and continues to this day.

Since 1939, my firm has been a licensee of Sealy, Inc., one of its 28 licensees in the United States. At the time my firm became a licensee it employed 30 persons, and it did an annual volume of \$300,000. Today we employ 150 persons, and presently our annual volume is approximately \$5,500,000. From the standpoint of annual sales under the Sealy trademarks, my company is the largest of the Sealy licensees.

Prior to becoming a licensee of Sealy, Inc., in 1939 we were a small, but relatively well financed, bedding factory operating in an industry dominated by a few competitors who were giants by comparison with a company our size. We found ourselves less and less able to compete with such manufacturers and able to secure only such business as they deemed undesirable, unprofitable, and uneconomical.

The consuming public so far as mattresses are concerned, and I believe the same is true of a great many other industries, is price conscious and oriented to selecting merchandise by brand names which they know and believe to represent quality merchandise. This requires two basic things, an advertising program to acquaint the public with the trademark, and a quality product resulting from constant research and development. Both advertising and research and development are expensive. Prior to our becoming a Sealy licensee we were financially unable to provide the necessary advertising identification and research and development of quality products; we were unable to establish a satisfactory quality control for lack of adequate testing facilities; and, in general, we were unable to offer merchandise of such constant value to our distributors and customers as to create any substantial kind of repeat business.

After we joined with other independent manufacturers in Sealy, Inc., we were able to rely upon Sealy for advertising and merchandise promotion; for research and development of finished products; for testing and reporting on raw materials; for establishing and recommending efficient factory procedures; for plant and finished product inspection; and for product quality control. And we can now afford all this because our payments to Sealy are based on the extent of our annual business and, by participating with the other licensees in these programs, the cost is not prohibitive. The result has been a sound growth of our business, with increasing employment of people, and the offering to the public of a greater choice of quality products at competitive prices.

To put it another way, we hope each year to be able to earn a net profit of 4 percent after taxes. In order to do this we currently require approximately 31 percent of our sales attributed to the cost of selling, which includes salesmen's salaries, commissions, and incentives, local advertising, catalogs, all clerical work necessary to maintain a marketing department, delivery costs to dealers, all general and ad-



ministrative expenses necessary to office operations, and all payments to Sealy, Inc., for research and development, national advertising, engineering and factory procedures, and marketing counsel. This leaves us with 61 percent of our sales dollar available to pay for materials, labor, and factory overhead. Over the past 5 years we have, within small variations, been able to allocate our costs.

A survey of the bedding industry will show that during the decade of the 1950's, a decade of prosperity, record-breaking home starts and a rapidly expanding population, scores of small, independent manufacturers have either liquidated, filed bankruptcy proceedings, sold out to large companies, or otherwise "gone by the board" because they found themselves unable to compete in a price-conscious, trademark-oriented economy. They have not been able to produce a standard quality product and create a market for it with the extremely heavy sales costs. A dozen or so of such manufacturers in my own marketing territory have closed their doors since the war.

One of the great advantages of the licensee type of operation is the great amount of individual initiative maintained and exercised by us in our business. We have complete and independent control of the various manufacturing processes, subject to the maintenance of standards and specifications established by our licensor, Sealy, and subject to Sealy's product-inspection procedures. By having the advantage of marketing and manufacturing procedures available from Sealy, we may avail ourselves of the best practices established in the field, but in the marketplace we are completely independent, able to negotiate with our distributors in a manner which makes us aggressive, creative, and competitive.

I favor the passage of S. 1396 which is under consideration by this committee. It would make provision for each of the Sealy licensees to register as a registered user of the Sealy trademarks and would make it possible at all times for each of us, as well as the public generally, to know at all times who is authorized to make products according to Sealy's standards and specifications, who is authorized to use the Sealy trademarks, and where each user of the trademarks is authorized to sell the products marked with the Sealy trademarks.

The bill would, I believe, provide the basis for a better relationship between the various licensees and between the licensees and Sealy, since the facts would be disclosed as a matter of public record.

The bill would also make it clear that a licensor may prescribe the territory within which each licensee may use the trademark. There is no question in my mind that in arrangements such as we have in the Sealy organization, the territorial limitation is a must. Markets are generally determined by ability to compete pricewise with others in the area, ability to service customers properly, ability to take advantage of local newspaper advertising in the light of circulation, and ability to increase sales within the area at a profit.

The territory of each of its independently owned and operated licensees takes these factors into consideration, and the healthy and sturdy condition of each of the licensees indicates the wisdom of the division. Since our payments to Sealy for national advertising in cooperation with all other Sealy licensees have as their purpose the stimulation of business in our area where we have become known to our distributors as the source of Sealy bedding, it would be manifestly



unfair and unjust if another Sealy licensee could invade our territory and trade on the business and product good will which we have built up. The result would be a complete breakdown of the licensing arrangement, since it would be stupid to cooperate in advertising expenditures to promote a brand name and then compete within the same territory.

As independent manufacturers, we are subject to all of the vicissitudes of competition of all other manufacturers operating within our territory. Our competition is keen with the prestige lines of other licensing groups and the large national companies, and with the lower-priced merchandise of those manufacturers and of local manufacturers in the area.

It is to be noted that the basic selling prices of our factory are forged by the competitive situation found in our marketing area, and are made up after comparing prices being quoted by competitors so that we might offer a price advantage. The prices of our national competitors have tremendous influence on the prices we get for our goods. Of course, cost of manufacture is a prime consideration, but these costs, used as the basis for sales prices, are subject to the direct influence of competitor's prices quoted to common customers in the area.

We are a going business today in an era of increasing concentration in our economy. It becomes more difficult each year for small business to compete with those companies which have nationwide distribution, and I am convinced that trademark licensing, with registration of the users along the lines of this bill for public information, wherein each licensee may develop his own territory without fear of Government complaint is the best—and perhaps the only—means for providing such competition. I am also convinced that unless this means for providing such competition is approved by Congress, the public will be faced with fewer and fewer quality products from which to choose in the markets and real price competition will disappear from the American bedding scene.

I take personal pride in our trademark. I feel that this bill, by requiring a registration of the pertinent fact or our licensee relationship with Sealy, Inc., would help us give credence to the public so it will give us the respect it earns in our highly oriented to brand conscious public.

As a businessman, now that our effective use of our trademark has been attacked, I feel the need to have the passage of S. 1396 so our Congress will clarify its oft-stated position to help small business, and I hope this committee will recommend its passage.

Senator HART. Thank you very much.

Mr. GREEN. No questions, Senator Hart.

Senator HART. I am forced to suggest a recess for, I would think, not more than 20 minutes.

(At this point, a short recess was taken.)

Senator HART. The committee will be in order.

I apologize to the witnesses who have been delayed. In addition to the appointment that I thought I could not avoid, a roll call intervened, plus the usual slowing down operations that all of us are familiar with.

Mr. Haas, I think that after hearing Mr. Kaplan, we were next to hear William H. Walzer.

Mr. HAAS. Yes, sir.



STATEMENT OF WILLIAM H. WALZER, SECRETARY, THE  
WATERBURY MATTRESS CO., OAKVILLE, CONN.

Mr. WALZER. My name is William H. Walzer, and I am secretary of the Waterbury Mattress Co. in Oakville, Conn. I have been in the bedding business for about 20 years, having spent all of that time in the family business. The firm was established by my granduncle in 1891 and was continued by my father, who took the business over in 1907. The business has been operated by my father, my two brothers, and myself.

We were invited to become a part of the Sealy organization late in 1948. This opportunity was welcome as our situation prior to joining Sealy was not a happy one. Our annual volume amounted to about \$350,000, and we were forced to do business on a very competitive basis, mostly on low-priced merchandise. We found it impossible to compete with highly advertised national brands, such as Simmons, and were forced to deal in low-priced merchandise because furniture dealers and the consuming public were very reluctant to buy unbranded, better quality merchandise.

Our organization consisted of some 25 employees. Finding that we did not have sufficient volume to produce efficiently, we attempted to promote our own brand name. This proved to be very expensive to do in our local area. We could not spend enough money to hire a good advertising agency in our efforts to advertise and promote our own brand, and so we made very little progress. Since we were not in a position to experiment or invest in research or development, our product had a very limited appeal.

We joined the Sealy organization in January of 1949. Our organization has grown since then to the point where we now employ about 80 people, and annually do about \$2.5 million of business. There is no relationship between the poor product which we formerly manufactured as the Waterbury Mattress Co. and the highly developed line of bedding which is our Sealy product today. The merchandise we produce, under Sealy's guidance and direction, is among the finest that is being produced anywhere in the world today, and in many instances it is the finest.

The Sealy brand and the Sealy franchise is probably the most valuable asset we have. The advertising and sales promotional help, made available to us by the Sealy group, puts us on a par with our largest national competitors.

Uniform specifications, policed by means of inspection of Sealy plants, and by purchases of Sealy bedding at retail by the Sealy group, has assured the maintenance of Sealy quality and standards. This high degree of quality and quality-control is recognized by the trade, and has been an important factor in our volume increase.

Our increased sales have enabled us to operate a highly efficient plant. We recently moved into a one-story operation of about 70,000 square feet, which we believe is as efficient and modern as any mattress plant in the country.

Our Sealy affiliation is the very heart and keystone of our business. Without it, we probably would, in time, again become the small, struggling company we were, making low-price merchandise, attempting to compete with the larger, well-advertised bedding producers in the



country. It is my opinion that the Sealy organization, and other bedding groups of its type, are a fine example of democracy in action. Here is an example of a group of small, independent businessmen who have banded together in a cooperative effort, in order to compete on more equal terms with their larger competitors. By the use of a common trademark, a common well-developed advertising and sales promotion policy, by cooperative research and development investments, we have been able to operate a successful business, provide employment, and furnish the consumer with a quality and durable product.

If some respects, cooperative efforts on the part of local independent businessmen, situated in various parts of the country, result in a stronger organization, than one, large, widespread corporation. Each of the plants, being locally owned, has the advantage of an owner-manager, with all its resulting supervision and incentive benefits. Each Sealy licensee has complete control of the operation of his own business, within the limits of Sealy's national merchandising and quality-control procedures. In this way we have the advantages of local, on-the-scene control, combined with the advantages of a national brand.

We deal in a very bulky commodity. The evolution of marketing and distribution patterns has resulted in mattress factories throughout the industry which serve relatively small areas. This is in contrast to wider distribution patterns in other industries. The high delivery cost of the finished product has necessitated this type of distribution pattern. Sealy territories generally are based on natural industry patterns, and in our particular case, the territory we are now servicing under our Sealy franchise is relatively the same one which we serviced prior to our Sealy affiliation. Distribution much beyond the limits of our present territory would not be economical.

We feel that if the Sealy type of cooperative structure is to continue, Sealy must be permitted to grant exclusive territorial franchises. We believe that if we, as members of Sealy, are forced to be working in the group with other manufacturers with whom we would be competing, that we would soon find that we would not have the harmonious, effective group we now know.

It doesn't seem possible to us that Sealy, or any other cooperative bedding group, can maintain the goodwill and confidence of its members, and can survive, if its member plants find themselves competing with each other.

The weakening, and eventual collapse, of licensing organizations in the bedding industry will, in our opinion, ultimately result in the elimination of small regional manufacturers like ourselves. It will further result in the additional domination of the market by the larger and more successful national corporations. We do not believe that the interests of the furniture trade, or the consumer, would be served by eliminating the groups from the bedding scene. The group operations have made a valuable contribution toward developing a better product and are, today, an important factor in the total industry picture. The weakening or the elimination of licensing organizations, because of their inability to grant exclusive-franchise territories, would not do the industry nor the public any good.

There is a large variation in price within Sealy, even though we may be selling the exact same product. This is due to variations in methods



of figuring costs, dissimilar labor costs, unequal productive facilities, and varying delivery conditions. Varying regional trade practices also have a bearing on Sealy's wholesale prices around the country.

Sealy licensees, competing with each other, would cause a chaotic condition within the group. The result would be an extremely weak operation with members who, instead of cooperating with each other, would find themselves distrusting each other. This end result is a complete undermining of the basic aims of a group effort. We feel very strongly that Sealy must have the right to grant exclusive territories if it is to continue to operate.

I sincerely hope that this committee will recommend passage of S. 1396.

Senator HART. Thank you, Mr. Walzer. I think I ought to put my finger on a clause, I guess it is, which, taken out of context, could be played back to you to the disadvantage of the case you are making.

Early in your statement you describe your situation before joining the Sealy organization as one where:

"We were forced to do business on a very competitive basis."

Like the family farmer at home, most voices around here accept that to be an ideal state of affairs. We should read that as descriptive of the kind of competition which you later enumerate: the lower quality, inadequate advertising, and so on. I think I should raise the point, rather than having it raised later.

Mr. GREEN. I have no questions, Senator Hart.

Senator HART. Thank you.

Now, Mr. Morton H. Yulman.

#### **STATEMENT OF MORTON H. YULMAN, PRESIDENT, EMPIRE STATE BEDDING CO., SCHENECTADY, N.Y.**

Mr. YULMAN. My name is Morton H. Yulman.

I am president of the Empire State Bedding Co., in Schenectady, N.Y. We have a Sealy franchise which covers central and eastern New York State and western New England.

I have been engaged in the manufacture of mattresses and allied products for 25 years. Upon the death of my father in 1936, during my senior year in college, I found it necessary to change my plans and enter the company, which was the sole source of income to our family. The company was a very small one and I soon came to realize that many problems faced a small manufacturer in an industry then dominated by a handful of giant national manufacturers and advertisers. The situation can best be summed up by my repeated experience of being told by dealer after dealer at that time, "You give us a lot more product for the money, but our salespeople take the line of least resistance and sell the national-branded mattress and go on to the next customer—why should they fight the acceptance which has been built into the branded product with the merchandising and advertising made possible by their unlimited capital?"

I was very interested here to hear Mr. Ezelle, about an hour or an hour and a half ago, make the same statement about his father in the late 1920's. I had never met Mr. Ezelle until late yesterday afternoon. This, however, I assume, is something which has happened to hundreds of small manufacturers and is happening today.



I determined very quickly that my future in the mattress business lay in attempting to be able to do all the things that the "national boys" were doing and, since I could not hope or afford to do what was necessary as an individual, it became important that I join a group of manufacturers in the same position who collectively could afford to do these things. In short, it was a full-time job for me to expend my time and energies using the tools of merchandising and advertising instead of using this time and energy to first build these tools in addition to using them.

A few years later, in order to accomplish this purpose, our company joined the Sealy group of licensees, a move which permitted me as a small, local manufacturer to take advantage of the research and development, sales and advertising, brand identification, as well as improvements in manufacturing procedures and techniques, which Sealy had been developing over the years and still is.

As a result of this association, we have been able to effectively build our business and develop an organization to successfully compete in the local marketplace on the same footing as the singly operated, national manufacturers of the bedding industry who have been and still remain our most important competition. This would have been impossible to accomplish if we had to depend on our local resources and capital to develop product programing, point-of-sale advertising, and all the various other phases of running a business, the base cost of which is so great that only a company of large volume can afford to underwrite such a program. A small company can only drift helplessly and forgo the important merchandising and advertising aids which are far beyond its reach from a cost standpoint.

Despite the fact that the licensee has, in essence, become part of a national group insofar as certain tools of running his business are concerned, he retains the freedom and flexibility of an independent company. He owns and directs his own business. He can make quick, important decisions without the delay of referring to a distant central headquarters. He can render prompt, efficient service to his customers in his relatively small trading area. He has the prestige of national advertising and reputation. He can assure his customers that his product will be serviced regardless of where it is sold and that the warranty of his product will be honored nationally. By virtue of his exclusive trading area, he can also assure his dealers that his product will be distributed only to sources who use it fairly and that it will not be abused by those whose only desire is to take advantage of the product's reputation for their own selfish purposes. In this way, the licensee can build an acceptance for his product and earn the respect and confidence of his dealers and the consumer public.

Again, it is interesting to note that this very item, this facet of the licensee operation, is no different than that enjoyed by the so-called national manufacturer, the singly owned and operated national manufacturer.

He would consider it ridiculous to have salesmen from two different plants or two different warehouses calling on each other's customers. It just is not done. It would be considered a ridiculous situation. It just would not be considered.

For this reason, it has become important over the years to limit and control exclusive trading areas for licensees. Trading areas are



usually formed naturally by the manufacturer's or distributor's ability to service a given area efficiently and economically. In order to do this, he makes a sizable investment in facilities for the manufacturing and delivery of his product, creates consumer acceptance and confidence by advertising and by building a dealer organization to properly display, sell, and service his product. He must protect these dealers from unfair competition of other dealers who may attempt to downgrade the brand by misrepresentation. The licensee at all times has his hands full with his large national competition without the need for facing competitive problems with his own product.

It should not be construed by any means that, because of an exclusive territory, any licensee controls a feudal barony to do with what he wills. His competition is of an incessant nature. While his national headquarters may suggest retail prices, this is done only because the bedding business is so constituted and because he must in his advertising be able to refer to a retail price, so that a price-conscious public may know the quality of his product. However, his wholesale prices are another story. These fluctuate constantly because of competitive conditions controlled by the law of supply and demand and the requirements of his dealers. These prices vary in all directions from licensee to licensee, and again are controlled by conditions within the individual licensee company, such as manufacturing costs, delivery costs, competitive factors, and so forth.

The best indication of all the above lies in the history of the bedding industry itself. At one time, the industry was composed of large regional manufacturers who dominated their regional trading areas. As the large national manufacturers came into the picture, the regional manufacturers slowly but surely dropped by the wayside until they have become the rare exception with the final chapter yet to be written as to their future. Their place was taken by the large national manufacturers who slowly but surely came to completely dominate the industry. For self-preservation, some of the regional manufacturers banded together, but most did not. The small, local, independent manufacturer drifted along or joined a licensee group for his salvation. Why all this happened was very obvious. The large or small independent manufacturer simply could not afford to duplicate all the techniques for his relatively small business that the large national manufacturer was able to do for his nationwide distribution. Only by banding together could they bring into being the tools, instruments, and other devices necessary to assure their survival.

It is my earnest and sincere hope that this committee will recommend passage of S. 1396.

Senator HART. Mr. Yulman, it has no relevancy, I am sure, to this hearing, but you have again cited a circumstance that I know is of concern—I am sure it is of concern—to all of us.

It is the business of this free competitive enterprise system of ours where the real trigger to an economic manufacturing endeavor is pulled by the decision of a man or a woman in a retail store to buy this rather than half a dozen other items. That decision actually determines the volume of production and the growth or death of a producer.

And you, as an earlier witness did, described the seemingly irrational choice that is being made so often by the customer; that is, he or she is pulling a trigger not on target but sort of cockeyed.



The earlier witness, I think, described the product line that was superior to the offering of the nationally advertised line, but even the sales force had given up trying to market it.

Among the other things that I think Congress should be concerned with is what, if anything, government should do—I know business people will immediately assume they should do nothing—to insure a more intelligent choice at this source of really ultimate decision.

It is a very troublesome thing.

Mr. YULMAN. You would have to eliminate advertising and advertising agencies because, basically, products are sold today because they are presold where they are of a competitive nature. Where one item is presold, every item, in order to compete with it, usually has to be presold or else the public knows nothing about it.

I think your clearest instance is what is happening today in the distribution of food products. Where it used to be sold in a grocery store where the grocery could sell the item if it wanted to, and today the consumer walks to a shelf and if she knows nothing or has never heard of the product, it has not got a chance.

As a result, advertising and the knowledge of what goes behind the product because of advertising is what motivates the consumer to buy the product.

Senator HART. This is true.

Does it not follow that the emphasis, then, should be upon a very strong insistence that the advertising be the truth, the whole truth, and nothing but the truth, and that sort of puts an anchor on the advertising?

Is that not the key to this thing?

Mr. YULMAN. I would say so, but we are getting a little theoretical, are we not, when we talk about that?

Senator HART. We are getting theoretical in assuming, I think, against the entrenched efforts of the advertising industry Congress would ever do anything.

I do not think we are theoretical in suggesting that we should not seriously consider whether we should not do something.

Mr. HAAS. May I just say a word there, Senator?

It seems to me that the point is this:

That when you are competing with a presold product, there is no opportunity for the customer to choose based upon the worth of the merchandise itself, and there may be no deceptive advertising involved on the part of the person who does advertise, but it is just that until this preselling is done, the customer, regardless of the intrinsic worth of the two articles, is in no position to make a judgment, and the advantage of advertising on an equal basis with the national advertisers is that you put your product equal to them and then let the customer choose on the worth of the product.

But no matter how good your product may be, unless it has reached the customer's consciousness, they will not look at it in certain lines of endeavor, and that, I think, is the point that they make.

The salesman who is in the store is anxious to make his commission. It is easier for him to sell something that has been presold, so he sells on the basis, "Well, you have heard about the X brand or the Y brand or the Z brand," and it is very difficult for him to say, indeed, it may even arouse a suspicion on the part of the customer, for him to



turn and say, "Now, this is actually a better matters than the X, Y, or Z," if the customer has never heard of that mattress.

It would be very difficult to break down that brand consciousness the customer has. I think that is the idea: The idea of putting them all on an equal basis.

Senator HART. I hope I was not misunderstood. I am not quarrelling with you.

Mr. HAAS. No, I understand.

Senator HART. I am just saying that we oversimplify this business of what makes our economy tick if we think that the level of production reflects the rational mind at work. We are just kidding ourselves.

Mr. YULMAN. This has become our way of life and whether it can ever be changed by legislation, I am sure I do not know. It seems rather difficult.

Senator HART. Thank you very much.

Mr. GREEN. May I ask one question?

Mr. Yulman, in the first page of your statement, in the third paragraph, you state:

A few years later in order to accomplish this purpose, our company joined the Sealy group of licensees.

Just what was the mechanics of that? How did it come about? Was that by invitation of the Sealy people or by your application, or what was the situation generally?

Mr. YULMAN. Strangely enough, at the time—this is interesting—at the time I knew very little of Sealy. Sealy had very little influence in the East. I actually applied to another group of licensees, and did not realize at the time that they were having a lot of internal problems of organization and, as a result, I never got an answer to my letter. After attending conventions of our trade association, I came in contact with other people who were in groups, expressed my interest.

I actually at one time courted and was courted by two licensee groups, Sealy and Serta, and eventually made my choice, for one reason or another, with the Sealy group, but it was my interest, and I evidenced this interest to suppliers and friends in the bedding business that I wanted to join a group because I felt this was—I actually was ashamed of the industry because of the dog-eat-dog business.

I had intended to go into other fields and, as I said, I was forced into the mattress business because of economic conditions at the time. I eventually, after making my needs felt, my wants felt, and expressing this interest, I was approached by two or three licensee groups, and eventually this association was effected.

Mr. GREEN. Of course, that is the point I am trying to get to.

In light of the exclusive territorial franchise, at that point there was no representative or no manufacturer of the Sealy group or the Serta group or anybody else in that area?

Mr. YULMAN. That is right.

Mr. GREEN. Under the situation as it exists today, you would not be eligible to become such a representative of Sealy because somebody already has it, is that not correct?

Mr. YULMAN. That is right, and this has resulted in other groups forming over the years, and there are groups still being formed. This is a constant process.



Mr. GREEN. In other words, what you are saying, there are other groups which are being formed in order to compete with the Sealy people?

Mr. YULMAN. Oh, yes.

Mr. GREEN. Or the Serta people, as the case may be. That is a continuing process going on at this time?

Mr. YULMAN. That is right.

Mr. GREEN. That is all, Senator.

Senator HART. Mr. Haas, any comments you might want to make, you are welcome to proceed.

#### STATEMENT OF JOSEPH F. HAAS, ATTORNEY, ATLANTA, GA.

Mr. HAAS. Senator, I can state that it would be really a work of supererogation to make a statement that would duplicate all of the statements that have previously been made, and I am not going to make any statement.

I have some material that I would like to place in the record because I think it is relevant. There are statements from two of our additional licensees, the licensee in California, and the licensee from Pittsburgh, whose personal history is somewhat different than the history of the testimony, and that is the statement of Mr. Kaufman and the statement of Mr. Ostrow, both of which have been mimeographed, and I think are available.

I am not going to read them because, to a great extent, they duplicate much of what has gone previously, but I thought it would be interesting to see, and for the record to show, the different ways that the licensees came into the picture and also how they view the services which they get and the importance of them.

So, with your permission, I would just like to present those for the record.

Senator HART. The two letters to which you refer, both dated June 20, one from Mr. Ostrow in California and the other from H. F. Kaufman—

Mr. HAAS. That is Pittsburgh.

Senator HART (continuing). Will be made a part of the record. (The documents referred to are as follows:)

JUNE 20, 1961.

Senator JOHN McCLELLAN,  
*Chairman, Patent, Trademark, and Copyright Subcommittee, Senate Committee on the Judiciary, Washington, D.C.*

DEAR SENATOR McCLELLAN: I am writing to ask your support for the proposed amendment to the trademark law, which I understand is known as S. 1396, and to explain to you the reason why I, as a small independent businessman believe that this bill is of the greatest importance to me and to others who are in my position.

1. My name is Seniel Ostrow, and I am the Sealy licensee for the States of California, Arizona, and Nevada. I have been a bedding manufacturer for 35 years, 14 years as an independent manufacturer, and 21 years as a Sealy licensee.

2. We are part of a licensing group of factories with 28 individually owned and operated plants. We distribute our goods under the Sealy brand.

These factories are located so as to distribute our products throughout the entire United States.

The sales value annually of this licensing group amounts to approximately \$50 million of trademarked products.



3. The functions of this licensing group are important for the following reasons:

1. It provides research and development programs for improving the quality of our products. These benefits are passed on to the consumer. This function would not be possible if attempted individually.

2. Procedures and methods for establishing quality control and inspection is another group function. No individual plant could perform such service to the consumer without the aid of this group function. The consumer gets the benefit of uniform products no matter where purchased.

3. No individual plant could undertake by itself the cost of advertising and promoting of our product to the consumer.

4. The central role of trademark licensing permits better quality products to be distributed throughout the Nation at the lowest cost to the consumer. It avoids distribution and delivery costs because it permits closer proximity from the point of manufacture to the ultimate consumer.

5. The value of services to the consumer include the following:

(a) Quality control.

(b) Uniformity of manufacturing techniques providing cost saving.

(c) Product service made faster due to proximity of manufacturing facility.

(d) Cost of delivery reduced because of shorter distances between customer and manufacturer.

4. The importance of the foregoing operations is because we would not be able to compete with other integrated national organizations.

5. In regard to budget requirements, we would not be able to finance, by ourselves, all the services provided by our national group. Our group cooperates together to establish funds and budget for research and development, advertising, quality control, and consumer service.

6. Even though we are part of a national group, we are able to maintain independent control of our own privately owned business venture. The flexibility required for local independent action is maintained.

7. The need for limiting the licensee's sales to a defined area is dictated by the following:

1. It avoids confusion to the retailer by working with specific plant representatives. It also avoids duplications which are costly. It clears and maintains channels of communications between retailer and ultimate consumer. It avoids confused advertising.

2. It helps the retailer maintain better inventory controls and allows for better delivery service.

3. It affords better consumer service.

4. It establishes responsibility with one factory instead of diluting it among many.

5. It minimizes the cost of distribution which consumer otherwise would have to pay for.

8. To summarize: It would appear to us the following would result if we were not able to maintain the existing relationship:

1. There would be chaos and confusion to both retailer and consumer.

2. There would be bankruptcy for the independent manufacturer and the monopolistic growth of the integrated national manufacturer.

3. The consumer would lose the benefits outlined in the above paragraphs.

4. There would be a loss of progressive research and development programs from which the consumer benefits.

9. The geographic area of our territory is defined by the most economical cost of distributing goods. The industry pattern is established by experience.

It is my sincere and earnest hope that your committee will recommend passage of S. 1396.

Yours very truly,

SENIEL OSTROW.

JUNE 20, 1961.

Senator JOHN McCLELLAN,  
*Chairman, Patent, Trademark and Copyright Subcommittee,  
Senate Committee on the Judiciary,  
Washington, D.C.*

DEAR SENATOR McCLELLAN: I am writing this letter to enlist your support in the passage of S. 1396, which I feel is of the greatest importance to small



independent businesses in general, and to me, as a small independent businessman in particular.

I have been engaged in an executive capacity in the manufacturing and selling of sleep equipment for the past 30 years.

In the spring of 1946, Sealy, Inc., extended to me and to two associates, a license to manufacture and sell Sealy products in our traditional selling area.

The Sealy licensing group at present is composed of some 23 individually owned plants with annual sales of approximately \$50 million, with sales in every State of the continental United States.

My association with the Sealy licensing group was indeed a revelation and education, and forcibly brought home to me how little I knew of this business prior to my association with this group. In such areas as engineering, research and development, and indoctrination in advertising and sales promotion techniques, the valuable trademark of the Sealy name, disseminated through the medium of national advertising, was immeasurably beneficial to the conduct of our business. The result of this association enabled us to achieve a better product and at the same time reduce our costs, which, in turn, resulted in a lower selling price to our customers and a better value to the ultimate consumer.

Parenthetically, if we were faced with the prospect of losing all these services, we would be hard put to survive economically.

Especially in the field of national advertising, which we could not possibly attempt on our own because of the prohibitive cost, not to mention the other foregoing services rendered us locally, we could not possibly compete successfully with the giant national advertisers today.

Aside from all this, one of the most beneficial assets of holding a Sealy franchise is that the individual licensee retains independent control over whom to sell to and at what prices to sell the product.

Historically and practically, ours is a local business. The bulk, weight, and girth of the product manufactured makes shipping costs to distant points prohibitive. For this reason alone, it is proper and necessary to limit licensee sales to a defined exclusive area. It is for this very reason that the large single-owned national organizations have found it necessary to maintain dozens of manufacturing plants in trading areas national wide, and also maintain warehouses in almost every large city in the country.

In my opinion, the elimination of exclusive territories would surely end in the collapse of licensing organizations and place each former licensee at a tremendous competitive disadvantage with the giant single-owned corporation. Consequently, this would accelerate the rate of corporate concentration and virtually put our customers at the mercy of the giant corporations. The potentialities for injury to the ultimate consumer are obvious.

As mentioned before, we are completely autonomous as far as our wholesale pricing goes. I know for a fact that our wholesale prices do not coincide with those of other Sealy licensees even though the suggested retail prices are similar. The most important reason, in my opinion, for these variations in wholesale prices is due to competitive pressure in each area.

In conclusion, in analyzing our field, I note that the independent regional manufacturer is finding it almost impossible to exist in relation to the large nationally integrated manufacturers. The reason for this is briefly as noted before:

- Lack of national advertising to a brand-conscious public.

- Lack of research and development for new products.

- Lack of quality control, and lack of know-how in sales promotion techniques.

We earnestly hope that we will not become one of these.

It is my sincere and earnest hope that your committee will recommend passage of S. 1396.

Very truly yours,

SEALY MATTRESS CO.  
H. F. KAUFMAN.

Mr. HAAS. Thank you.

The only additional thing which I would like to introduce averts back to the previous question concerning the extent of this franchising business, and I have here a reprint of an article from the Reader's Digest, a letter prepared by the Kiplinger organization for the Dallas Morning News of May 23, 1959, and a reprint of an article from the Business Week, all about franchising and what it is and how it has grown and what it offers the individual businessman.



It is not directed to any specific industry, but covers a myriad of different kinds, and I thought it would be helpful.

Senator HART. I agree with you it would be helpful to understand. (The documents referred to are, as follows:)

[From the Reader's Digest, September 1959]

### YOU CAN BE YOUR OWN BOSS

THE FRANCHISE SYSTEM, NOW SWEEPING THE UNITED STATES, OFFERS COURAGEOUS PEOPLE OF LIMITED CAPITAL AND EXPERIENCE A CHANCE TO BECOME INDEPENDENT

(By Blake Clark (Condensed from Today's Living))

At 34, John Allen was a \$6,000-a-year automobile sales manager in a Midwest town. He could support his wife and two children, but he felt a gnawing discontent. An urge as old as commerce itself told him he should own his own business. So he was interested when he read in a Chicago newspaper an ad headlined, "Go into business for yourself," and describing an organization called Servicemaster. Men with no previous experience, it said, were making \$8,000 to \$20,000 a year cleaning carpets and furniture in customers' homes.

After some correspondence, John went to Servicemaster headquarters in Chicago. There, for a franchise fee of \$595 cash, \$692 for equipment and cleaning materials, and a promise to pay Servicemaster 10 percent of his gross income, he received an exclusive territory, training in how to run his dealership, and a stock of Servicemaster supplies: carpet brushes, chemicals, spot removers. He also had a guarantee that if he applied himself for a year and was not satisfied, he could have his franchise fee back.

That was 3 years ago. Today John works harder than ever, and his wife puts in long hours keeping the books. But they are happier than at any time since they were married. He made some \$13,000 profit last year, expects to do 20 percent better this year. "But what I like even more than the money," John says, "is being my own boss."

Thousands of young people who, like John Allen, have the courage to strike out on their own are realizing this dream of independence through the franchise system—something new in human relations under capitalism. It works like this: someone develops a superior product or service; then, for a fee or other consideration, he shows others how to succeed in the same way. Result: he expands his operation far faster than he could otherwise; the franchise holder gets an opportunity he would not have had; and the public benefits from the improved product or service.

The effectiveness of the system is indicated by its explosive growth. Most of the 75 exhibitors at the "Start Your Own Business Show" in the New York Coliseum last March were franchisers. They offered the 35,000 visitors aid in starting every kind of enterprise from a one-man sandwich counter to a car-washing establishment. National Franchise Reports, a monthly newsletter, says that at least 100 additional companies a year are now making franchise offers. One dry-cleaning concern has helped 1,800 operators start establishments of their own. Since Howard Johnson pioneered so successfully with his franchise restaurants, 25 different full-restaurant or single-item companies have set up hundreds of independent operators along the highways. Ten thousand franchise holders operate frozen-custard stands. Annual total sales made by all the businesses operated on a franchise basis already run into billions of dollars.

How much capital is needed? You can find a franchise for almost any size pocketbook, from a \$16.25 candy vending machine to a \$300,000 motel. Ninety-two percent of those described by National Franchise Reports in 1957 required under \$10,000.

The man who extends the helping hand of a franchise to the little fellow has often found that same hand heaped with gold. Take the fabulous case of Midas Muffler. Four years ago, Midas was only an idea in the mind of 32-year-old Gordon Sherman, working in his father's auto-parts company in Chicago. People, he felt, would welcome a repair shop run by experts specializing in one job. He set up a model shop where workmen did nothing but sell and install mufflers. Fascinated customers watched men work so fast that there was no charge for labor. A guarantee went with every job—the muffler would last as long as you own your car, or you would get another free.



Sherman trained his first applicant for a dealership in March 1956. He concluded his third year with 275 dealers in operation. Through this organization, he sold \$20 million worth of mufflers last year. Indications are that the 1959 total will be 400 dealers selling \$30 million worth.

Many franchised operators, too, have been successful beyond their highest hopes. Some have got back their investment the first year. One operator of a McDonald's Drive-In, selling 15-cent hamburgers, is a former executive ousted by a company reorganization. It had been quite a shock; he was 61, with three children in college. "Now," he says, "I make more money than the president of the company that fired me. And here I'm president, the chairman of the board, and the man giving orders."

The great force in franchise success is the release of energy created when a man invests his savings—and probably some borrowed money, too—in his own business. "The franchised operator," says Howard Leopold, president of Ero Corp., which franchises Protecto Seat Covers, "offers as a result of self-interest an aggressiveness, zeal, and application not to be expected of hired management. And he can be counted on to stay on the job."

Karl E. Hill, a former bank officer, became owner-manager of a Ben Franklin variety store. A complete stranger to this business, he followed faithfully the parent company's clearly defined program. As he learned, the business improved and, in the first year, exceeded the estimated sales of \$80,000. A year later, Hill had to lease an adjacent store to accommodate his increasing flow of customers. Now his sales have tripled, and he employs a manager, an assistant manager, and 20 clerks.

This growing army of franchise holders comes from all walks of life. They are chemists and sea captains, tile setters and radio announcers, young men from school and mature executives fed up with being organization men, even housewives. Their success is due in large part to thorough, step-by-step training and careful supervision in the early stages of their new careers. A man with limited capital could never get anyone to buy land, put up a special-purpose building worth \$40,000 or \$50,000 and lease it to him. But the franchise company often swings the deal for him or leases the property and gives him a sublease on the same terms. He could not quickly work out inventory methods, installation and display techniques, and the 1,001 details that precede success in business. To the franchising company, these matters are routine.

When Ben Bubenias and his wife, Betty, asked for the rights to set up a Science and Sound Center, the parent company, Raydean, Inc., of Tulsa, Okla., sent its sales manager to see the couple in Daytona Beach, Fla. He studied conditions of the trade area and approved a location. Then Ray DeLamater, president of the Tulsa company went to Daytona Beach and instructed Stan and Betty in the specifics of merchandising, purchasing, advertising, and sales promotion. Six weeks after opening, they were in charge of a smooth-running enterprise, selling electronic equipment and scientific instruments. "We couldn't have made a go of it without the parent company's assistance," said Stan recently. "It helped us bypass the long, rough road of trial and error."

Most reputable franchise operations have succeeded because they meet public needs. Capable, imaginative entrepreneurs detect the many wide gaps in our distribution system and do something to close them. One welcome consumer service started as a result of a man's frustration in trying to rent tools to make a few repairs about the house. He would have had to buy a lot of equipment for which he would have little use once the job was finished. "I decided right then," says Dwight Patton, "than in any sizable town many people would love to go to a kind of rental department store and rent instead of buy all sorts of things."

Patton, a stocky Nebraskan, had the courage to act on his reasoning. He started the first equipment-tool rental store in his home town of Lincoln. As business increased, he added other items. A family giving a wedding reception needed 100 champagne glasses; he had them. Grandmothers came to him for baby cribs, high chairs, play pens, and extra folding beds wanted just for the week the family came home. In addition to all the floor sanders and polishers, paint rollers and sprayers, T-squares, tree-pruners, and blowtorches that were the backbone of the operation, he did a brisk business in bridge tables, folding chairs, dishes and silverware.

Through trial and error, Patton gained knowledge that he has passed on to some 200 others now running their own United Rent-All stores on a franchise basis. He knows what items will be most in demand, how much to charge for



each, how to advertise to bring in customers. He gives his operator a simple, step-by-step procedure which removes guesswork and probability of failure.

Most companies offering franchises are reliable. It is only commonsense, however, for any person looking for a franchise to investigate carefully before signing up. Check the financial condition of the firm and people behind it. Be sure you understand the terms of the contract, and watch out for propositions calling for part-time effort and small investment. Don't believe claims of high earnings until you check them personally. Ask for names of other franchise holders, visit them and find out how they like it. Ask your local Better Business Bureau for information on the firm. Discovering just the right opportunity is never easy, but takes time and effort. Don't be discouraged if it doesn't appear in a couple of weeks.

Of one thing you can be sure; the franchise system is here to stay. With proved benefits for the franchise originator, the agent-operator, and the customer, it is a most useful means of spreading ownership and responsibility, and so strengthening private enterprise.

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[The Dallas Morning News, May 23, 1959]

#### MAKE MORE MONEY—FRANCHISING IS A GROWING BUSINESS

(Editor's Note: This 14-part series by a world-famous authority shows how you can make more money for yourself and your family by taking advantage of the prosperity that lies ahead. Article seven follows.)

(By W. M. Kiplinger and Staff)

A franchise business is a business of your own operated as a part of a national, local or regional chain. As a franchise holder you get the right to sell for, or represent, the firm in your area. For this you pay a sum of money, a commission on sales, or agree to buy equipment from the parent firm.

Franchising is growing. It is a good way for a manufacturing or service business to get national distribution at relatively low cost, to itself. It is also a good way for a man to get a start in business with professional help and advice.

Here are some of the pros and cons about a franchise business:

Capital requirements are usually low. The average for such lines as food chains, tool rentals and other specialized businesses is under \$10,000.

Financing is often arranged for you by the franchising firm. You may be required to put up one-third, pay the rest out of profit in the first 2 or 3 years.

Credit may be easier to get if you hold a recognized franchise—credit for supplies and equipment, even for other expenses of opening your own place.

You get the advantage of group buying on equipment and supplies, advertising leaflets, etc. The franchising firm is sometimes able to provide savings on these items by spreading the costs over many franchise holders and getting quantity prices on equipment, printing, etc.

You get professional guidance and advice from the franchising firm. Through experience with other franchisers, the parent firm can tell you how much gross you must do to make a reasonable profit. It can give you tips on location (which is crucial), prospects (also crucial), or cost breakdowns.

You are semi-independent in the sense that your profits do depend directly on how well you run your franchise operation.

What are the disadvantages?

You usually must pay a fee of some kind for the franchise. The amount depends on the value of the franchise, the territory you are allowed to cover, and to a great extent on the help and direction given by the parent firm.

You are not totally independent, for the franchise can be revoked if you do not meet your quota of sales, or if you do not follow the franchising firm's rules of operation to the letter.

Your freedom to expand into other lines may be carefully limited; most firms want your undivided efforts in return for the franchise.

There are plenty of risky deals which are touted as big money makers but have serious flaws upon careful examination. You should plan to spend plenty of time and effort investigating the franchise deal before you sign a piece of paper, or spend 1 cent.



How to investigate? What to ask? What to look out for? There's a long list, but here are broad outlines, the essentials:

What's the reputation of the company? Is there a good background of experience in the field behind the principals in the firm? How long have such franchises been offered? What's the financial picture of the company? Solid, or highly speculative?

What are the terms of your contract? Can the seller of the franchise cancel at any time? On what grounds? Are sales quotas part of your contract? Can you sell the franchise to someone else?

Watch for advance fees. Most companies that deal fairly will not ask you for an advance fee to "hold the franchise open." You should pay for the franchise and equipment of stock only after the contract is signed.

Are supplies of goods always available? If your sales go well you won't want to be hamstrung, or have your investment watered down for lack of goods to sell. Be sure that delivery is guaranteed in the contract.

Are there other successful franchises in your area, or in similar areas? Can a franchise of the kind you are interested in be operated in a town your size? Has the product or service proved popular in your region? These are key questions.

What kinds of businesses offer franchises? Many food lines—drive-ins and roadside operations of one kind and another, auto laundries, vending machines (but watch these very closely); accounting and tax service systems, reducing salons, dance studios, trailer rentals, gas stations, of course. Exclusive sales reps for such items as hearing aids, auto accessories, lawn sprinkler systems, water softener systems, aluminum screens, and storm windows, commercial signs, seat covers, imported cars, motorcycles.

Here are two examples of franchise operations which have been successful:

Chicken Delight, Inc., drive-in chain, started in Rock Island, Ill. Using high-speed conduction cookers, franchise holder produces a "take-out" chicken dinner, with free delivery. Since opening up, the chain has added to the menu a "shrimp delight" and "fish delight" platter, and barbecued ribs.

The investment required to open up shop is \$9,500, and this includes remodeling of a building, which will be selected and laid out by the parent firm's experts. It also includes 8 cookers, 2 fryers, 80 steel trays, coolers, 2,500 take-out kits, 550 pounds of special dip, downpayment on delivery vehicles, and signs. No franchise fee is required, but you must buy packaging supplies through the chain. Break-even point can be as low as 400 servings per week.

On a good volume, such an operation can make a tidy profit for its owner. One operator, who sells 1,000 servings a week, reports a net income of about \$18,000 a year. (His gross profit for each serving is about 75 cents.)

There is no sales quota, and no penalty clause in this contract. Franchise holders are trained in an operating franchise for a week and then the parent firms sends a skilled operator to work in the new location for the first week of operation.

The company will not sign a franchise unless the applicant's own lawyer is present. It does little advertising to get franchise holders; most applicants are from word-of-mouth recommendations.

Another franchise is a far different line is an accounting service for doctors and dentists, called Medical Management, Inc. It is a complete service for doctors which provides for handling billing to patients, keeping books, preparing tax returns, collecting delinquent accounts, and consulting on management problems. Much of the work is done on IBM equipment.

The franchise holder pays \$3,000 to become a representative of Medical Management, Inc. This fee includes a month of training at Dayton headquarters. He also pays approximately \$30 per potential client in the area (the payment is spread over the first few years), and invests approximately \$500 in paper forms and sales aids. The service costs the doctor about \$1,000 a year.

Profit margins are 17 to 35 percent, and the minimum net income for a successful operator should be \$10,000 plus. The company has tripled its gross sales for 4 years, and new territories are opening year by year. It takes a population area of about 100,000 minimum to support this kind of operation, according to its founders.

These are but two in a growing list of franchise businesses you should investigate if you have the urge to go into business for yourself. New franchise opportunities become available every month. Some are advertised in the newspapers and in financial and trade journals.



National Franchise Reports, 333 N. Michigan Ave., Chicago, Ill., publishes a monthly listing and description of new and current offers in the franchise field, together with news about franchise businesses as a whole. It is a reliable service and screens out some of the out-and-out schemes and phonies in the field.

It contains offers for distributorships of new products, dealer, and wholesaler operations, other business opportunities. Price, \$12 a year.

Own a business on the side? Franchising is particularly suited to those who have a yen to hang on to their regular jobs and operate a business on the side. One or more investors can pool capital, hire a manager to operate the franchise, and take good profit on their investment.

In some franchise firms, as many as half the franchises are operated by paid managers hired by investors and owners of the franchise. You'll find a difference of opinion on this. Some firms will not sell franchises to any except those who plan to establish owner-operated businesses. Others welcome investors and will aid in finding qualified managers for their franchises.

Warning: In any franchise business, step carefully before you invest. Talk with your lawyer, with other franchise holders, and your banker. Examine all contracts carefully. Check the parent firm with your own Better Business Bureau, or with National Better Business Bureau, Inc., 405 Lexington Ave., New York, N.Y.

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[Business Week, Feb. 6, 1960]

#### FRANCHISE SELLING CATCHES ON

Since World War II, the number of businesses operating under a franchise has grown to an estimated 100,000.

For the franchise holder, the setup means some independence plus the security of a tested business.

For the franchising company, it offers quick, assured distribution and expansion at a relatively low cost.

"We are witnessing a new surge of small, independent enterprise. But, if we're going to be good, we've got to be good. That's why we're here."

Thus roughly you might paraphrase the thinking at a meeting in New York's Coliseum last week. Representatives of some 40 franchising corporations, blanketing 25,000 franchise holders, gathered to midwife and baptize the International Franchise Association. According to A. L. Tunick, president of Chicken Delight chain of carry-out and delivery dinner outlets, and first president of the association, the group has two chief aims: To win recognition for franchising as a major method of merchandising, and to set up a code of ethics.

The meeting coincided with a Start Your Own Business Show (BW—Mar. 21, 1959, p. 28), also at the Coliseum. About 65 exhibitors—not all of them franchise operators—sought to entice would-be entrepreneurs with their wares: rotisserie stands, doughnut-making equipment, laundry services. Timed to coincide with the meeting was the release of the first issue of *Modern Franchising*, published quarterly by Factual Publications, Inc., to keep franchising companies up to date on developments in the field, and to tell aspiring dealers of opportunities.

*Pioneers.*—The far-flung car dealerships and strings of gasoline stations across the country reminds the business world that franchising has been around a long time. Big names such as Western Auto Supply, Ben Franklin Variety Stores, Howard Johnson have thrived under a franchise setup. But since World War II, and especially in the last 3 years, franchising has leaped forward. Roger Sherwood, editor of the monthly *National Franchise Reports*, reckons maybe 50,000 independent businessmen are doing a job under some kind of franchising umbrella. Tunick figures that 100,000 would be a conservative estimate.

The first *Directory of Franchising Organizations*, compiled from Sherwood's reports, lists almost 200 franchising concerns—from bookkeeping services through babysafety equipment, cosmetics, drive-in, and carry-out food operations, motels, pancake shops, soft-serve ice cream stands, swimming pools, all the way to water softeners. Enticing names such as Dog N' Suds, Dunkin' Donuts of America, Pelton's Spudnuts, 7 Steers Specialty Restaurants spot the directory list.

*How it works.*—The franchising formula varies from one operation to another. Basically, though it's a system set up by a manufacturer or purveyor of services, which sets up under a single brand name a chain of small businessmen, who buy some of their equipment and supplies from the franchisers and run their



own show—with some strings. To get a franchise, the dealer may pay a franchise fee—most of them under \$10,000, some as low as \$10—or he may simply make a downpayment on the equipment or plan. Usually, too, he pays a fee or royalty on his own sales. Franchising as the association defines it, Tunick says, is not a one-shot deal. A continuing relationship between franchiser and franchisee marks operations of its members.

For the franchising company, this setup offers quick, assured distribution and expansion at relatively low cost—since the franchise holder himself puts up some of the investment. The franchiser keeps title to the name and basic product or service rights. Because the franchise holder runs the business himself, the franchiser gets a dealer who is both cost and sales conscious.

For the franchise holder, the setup gives him some independence with the security of a tested business. His capital investment is relatively small—and financing comes easier with a big concern backing him. In effect, he gets the buying edge of a big chain, the parent's promotion and management knowhow. In some cases, he gets the plus of direct-from-manufacturer price. Sherwood estimates that bulk buying gives the dealer savings of anywhere from 30 percent to 50 percent. While he is subject to quality and other controls, he is basically a man on his own.

*Postwar spurt.*—The first big spurt in franchise retailing came right after World War II. During the war, Tunick explains, GI's lived with two dreams: The little white cottage they were going to own, and the prospect of a job with no boss to hound them. With their bonuses in their pockets, they constituted a fine potential for the franchiser.

The 1957-58 recession gave franchising another boost. Men lost their jobs or got scared. They wanted security—and they wanted it in an easy-to-handle package.

Expanded credit is a major factor in contributing to franchising's growth, thinks J. J. Connolly, president of Roll-A-Grill Corp. of America, and a director of the association. Credit allows the little man to take part in the kind of enterprise that a Frank Woolworth built up for himself in the old days, he says.

In the last few months, several newcomers—large and small—have moved in. In November, Frank G. Shattuck Co. announced a new Franchise Division for operation of Schrafft's restaurants, chiefly tied into new motel operations (BW-Nov. 28, 1959, p. 75). And last week, an ad in the New York Times urged people to go into the Franchised Art Galleries business.

#### I. PROBLEMS

While the new association insists that it is one of the few industry groups that didn't come into being primarily to deal with a problem, mushroom growth has brought problems aplenty in some lines. The soft ice cream field is a good case in point.

Right after the war, according to the Soft Serve Dairy Products Association, there were only about 100 soft-serve stands in the country; today there are something like 18,000. This development came so fast, says Harry Kimpel, executive secretary of the association, that some franchise chains didn't organize properly. "A lot of smart operators saw an opening to make some money, and with a little solid promoting, set up stands wherever they could."

They would grant franchise, regardless of the candidate's own potential or the potential of his market—and leave him to his own plight after a day or so of training.

*Tricks.*—Fly-by-night operators sometimes deliberately chose poor locations. They would pocket the franchise holder's downpayment—maybe \$3,000 to \$5,000—and move on to another location. Some operators charged their franchisees different royalties, another factor making for friction. Some tricked ma and pa stands with a promise of an exclusive franchise—and neglected to mention that the same parent company might operate stands under different brand names, which might sprout up across the street.

As a result, says Kimpel, turnover in the soft-serve business is about 25 percent a year. One industry source estimates that one-third of the stands are in trouble.

#### II. WHO'S WHO

Nevertheless, several big organizations operate successfully in the soft-serve field—with names such as Carvel, Dairy Queen, Dari-Delite, Tastee-Freez. Now that the country is saturated with stationary stands, in some markets at least,



mobile units, equipped to serve a variety of dishes from trucks, are burgeoning. Mr. Softee, Inc., and Dairy Dan have gone this route—and some of the older companies are taking to the road as choice sites get crowded.

*Services, too.*—While the food field ranks first in the franchising field, services are coming up fast. ServiceMaster and Duraclean, carpet cleaners, have set up large franchised systems.

Home service organizations—the directory lists four—have sprouted and spread through franchised outlets. Allied Homeowners Association of Roslyn, N.Y., has opened up in 67 cities. National Home Owners Club, in Chicago, has 24 franchises. Development of this group took an odd turn. Bozell & Jacobs, public relations consultants, got interested in franchising when it had such franchise operations as Midas Mufflers as clients. Now Bozell & Jacobs is half-owner of National Home Owners Club.

### III. CASE STUDY

A closer look at Chicken Delight shows how this kind of operation works.

Chicken Delight got its start in 1952 when Tunick, a scrap dealer, turned his \$25,000 investment in a defunct Rock Island (Ill.) manufacturing plant into a food operation. The plant had been making conduction cookers—but couldn't sell them. "We couldn't find anyone who wanted to by the appliance," Tunick says, "but the chicken we used one day to demonstrate it was a hit." So the first Chicken Delight outlet was born. Today, there are over 160 outlets in 40 States and Canada, and Tunick hopes to double that number this year.

Chicken Delight offers four dishes—specified by franchise agreement: Chicken, fish, shrimp, and ribs. All are prepared by a special process called conduction or searing. They are served in dinner-size or snack-size portions—about 80 percent of them delivered to the homes in trucks equipped to keep the food hot en route.

*Cost.*—The total cost of setting up an outlet runs to about \$12,000. Chicken Delight charges no franchise fee, but it does require the operator to put up at least \$5,000. "We want him to have a definite financial interest," Tunick explains. The parent company helps the dealer get financing.

The franchise holder buys his equipment—cookers, fryers, trays, and the like—from Chicken Delight, which manufactures the basic units. He also buys from the parent the batter that is a specialty of the house, and packaging—which means paper plates, napkins that the dinner is served in. Chicken Delight's total initial equipment sales—including a starting supply of batter, packing, and promotion aids—comes to about \$8,000.

*Contract.*—Well aware of the troubles the soft-serve industry fell into, Tunick relies on a strong franchise agreement. He maintains territorial divisions—down to the last block. "We give our men a two-mile radius guarantee in cities," he says, "which usually means between 50,000 and 75,000 potential customers. In small towns, one man has exclusive rights to the area."

The contract also spells out down to the last two ounces of chicken and last grain of salt what's to be included in each meal. The company checks from time to time to make sure the franchise holder is keeping his side of the bargain. He must buy his food—other than what Chicken Delight supplies—from sources that meet the company's standards.

The company supervisor in the area—there are eight in all—helps the dealer negotiate the lease for his property, do any remodeling, install the special equipment; the supervisor stays with the novice operator for his first week. Tunick estimates that it costs an operator 69 cents to put a dinner together. Retail price is flexible, but it runs about \$1.45—for a gross profit of 53 percent. Chicken Delight makes its profit from equipment, packaging, at 12 cents a dinner, and batter, at about 20 cents a pound.

The contract calls for a minimum of 500 sales a week; the average dealer sells about 1,000, Tunick says.

*Variations.*—Other operations run a bit differently. Dairy Dan's mobile soft-serve units, for example, operate through distributors, who screen would-be operators, get a commission on truck sales, control the sources, and get a royalty on sales—like the parent concern. Some big motel and restaurant operations, such as Howard Johnson and Holiday Inns, charge a relatively large franchise fee, and a royalty on room rentals.



Though franchised operations may lend themselves to part-time work, nobody undersells the kind of job a successful dealer must do. "The good franchise holder earns his keep," says Tunick. In fact, one secret of the system's success, he says, is that "the man who owns his business finds the 25th hour in the day to make it work."

Mr. HAAS. That is all that I have, sir. Thank you very much.

Senator HART. Before you leave, just one question on the mechanics of the thing. I take it that each of these umbrella corporations are organized under the corporation laws of one or the other of the States; is that right?

Mr. HAAS. I understand so, yes. I know that is true of Sealy, and I understand it is true—

Senator HART. We will limit it to Sealy, and I assume, if we do not hear to the contrary before the record is closed, it is typical of the others.

Mr. HAAS. Yes.

Senator HART. The organizers are one or more of the several companies who are manufacturing bedding?

Mr. HAAS. Yes, that is true.

Senator HART. And I take it that the charter or bylaws of the umbrella corporation spell out membership eligibility?

Mr. HAAS. The bylaws do not spell out—I mean in the case of Sealy the bylaws are typical corporate bylaws, which deal with the functions of the officers and directors, and do not spell out what is or what is not a member of Sealy. That arises strictly by contract between the corporations, Sealy, Inc., and the licensee.

Senator HART. One does not become a licensee, though, without making a capital investment in the Sealy Corp., does it?

Mr. HAAS. Oh, one may, yes.

Senator HART. One may?

Mr. HAAS. Yes, in the Sealy organization one may do that. As a general rule, they buy, they may, if stock is available in the Sealy organization, they will buy some shares of stock, but it is not always available.

You see, our stock representation and distribution is not the same, I think, as it is in the other organizations. We actually have a separate corporate structure.

We do not have, for example, each licensee—I think one of the other groups mentioned that each licensee owned the same number.

Senator HART. Yes.

Mr. HAAS. We do not have that. To answer your question specifically, they may buy a share of stock. They need not.

Senator HART. In either case, I take it that the franchise, the license, is not conditioned upon the stock ownership?

Mr. HAAS. Absolutely not.

Senator HART. In the event a manufacturer licensee acted in a way displeasing to the umbrella, what would happen?

Mr. HAAS. The rights of the umbrella company are strictly limited in the franchise contract. If the way which were displeasing were one which amounted to a breach of contract, then the umbrella corporation could terminate the license. If it were not, no matter how displeasing it might be, there would be nothing they could do.

The relations between the umbrella corporation and the licensee is contractual, and the contract is spelled out in some detail.



Senator HART. What had occurred to me at some point in the afternoon, you were talking about the limitation on a manufacturer licensee which prohibits him from selling in the area, in the territory of another.

Mr. HAAS. Yes.

Senator HART. But there is no restraint, of course, on retail distribution?

Mr. HAAS. Oh, no.

Senator HART. And it occurred to me the old example, if a licensee was to organize a retail store and cause to be sold by that store or permitted to be sold by that store the Sealy product in the territory of another—this is what I am leading up to—what would happen?

Mr. HAAS. Of course, Senator, your ingenuity has created a problem that has not, as yet, arisen.

Senator HART. I am sure things like that have gone on for as long as there have been corporate structure.

Mr. HAAS. Yes. You are presupposing a situation where a manufacturing licensee for, we will take as an example, the State of Tennessee decides to open a retail store, and then he sells himself the Sealy merchandise into the retail store and proceeds to sell from the retail store over into Kentucky. Well, I would suspect that, as attorney for the umbrella corporation, I would take the position that that would be an indirect violation of the contract.

That is a special circumstance, sir, that the man himself who is engaged in the contractual obligation not to sell his merchandise outside the State of Tennessee would set up a separate corporate entity for doing the very thing that he had agreed not to do.

This does not mean, however, that if this chain of collusion between himself and his new organization were broken by there being an independent retailer there who was doing these things, that there would be anything the umbrella corporation could do.

They could not.

In other words, if he were actually bona fide selling to a retailer, who, in turn, chose to sell in some other territory, I do not think there is anything in our contract that would permit us to stop that.

Does that answer your question?

Senator HART. Yes.

Mr. HAAS. But I think I would take the position, if he were on both sides of that, I would say that he was indirectly violating his contract and that he must stop.

Senator HART. I think I would be more comfortable as a lawyer in that position if he was merely a licensee in a contractual arrangement, but this gets back to this business of stock ownership in the umbrella company.

Mr. HAAS. Yes.

Senator HART. I was just curious whether there was some built-in protection against revocation of the license by reason of this?

Mr. HAAS. Built-in protection against revocation of the license?

Senator HART. Yes.

I wondered if, under many of these umbrella companies, the arrangement whereby the licensee manufacturer obtains stock gave him for the life of the corporate charter the right to go ahead and use the license whether he fancy danced with this retail operation later or not.



Mr. HAAS. No, not under our arrangement, because his rights in his licensed territory as a manufacturer of bedding are controlled by his license contract.

His relationship as a stockholder, if he is such—and Sealy, Inc., is controlled by the bylaws and the general court law pertaining to corporation—

Senator HART. I think I understand.

Mr. GREEN. What is the length of a license contract?

Mr. HAAS. Ours are perpetual, provided that the standards set out in the contract are met; that is, that the licensee maintains adequate selling and manufacturing facilities which are adequate to meet the demand for the Sealy products and to increase their demand.

The license may terminate at any time, I believe it is on 90 days' or 6 months' notice. I think it is 6 months' notice. But as far as the umbrella corporation is concerned, as long as the manufacturer maintains these facilities and does not otherwise break the contract, the licensee has obligations under the contract, but as far as the term written into the contract is concerned, it is perpetual as long as he complies with the contract.

Mr. GREEN. What does the licensee give to the company as a consideration?

Mr. HAAS. He gives his commitment that he will live up to a standard which satisfies—that is, a standard of production and a standard of sales which will satisfy—the demands of the board of directors of the umbrella corporation for his territory, and there are various indicia that are used to measure this.

Mr. GREEN. Well, there must be some income to the umbrella company?

Mr. HAAS. Oh, yes, the income is a royalty. He pays a royalty on his sales, but I meant in the way of performance, rather than in the way of just income.

Yes, he pays a royalty on his sales from his territory.

Mr. GREEN. I have no further questions.

Senator HART. Is Mr. Livingston present?

There was an indication he might want to testify. Apparently not.

The committee is very sorry that Mr. Dwight D. Townsend, who was patient with us and sat with us through most of this hearing, found it impossible to wait to present his statement in person.

However, the statement of Dwight Townsend, director of the Washington office of the Cooperative League of the U.S.A., will be made a part of the record.

The statement advised that the Cooperative League does favor adoption of the bill, S. 1396, and recites the reasons.

(The statement referred to is as follows:)

STATEMENT OF DWIGHT D. TOWNSEND, DIRECTOR, WASHINGTON OFFICE OF THE  
COOPERATIVE LEAGUE OF THE UNITED STATES

My name is Dwight D. Townsend. I am the director of the Washington office of the Cooperative League, which organization is a federation of producer, consumer, and service-type cooperatives in the United States, numbering among its members some 14 million families.

The Cooperative League has pioneered the consumer cooperative concepts in the United States patterned after Rochdale of England in 1844. Although our primary interest is the ultimate consumer, we are interested in cooperatives



and cooperation as another way of meeting the needs of American business today.

We are pleased to present the views of the Cooperative League and its support for Senate bill 1396. We are authorized to do this by the resolutions of the Cooperative League's 22d biennial congress and by direction of its board of directors.

There are three points which we believe are significant in this bill. They are:

- (1) The cooperative technique used by commerce as well as by consumers.
- (2) Quality control with respect to representation by trademarks.
- (3) The prohibition of uses of trademarks to confuse or to deceive the

public.

We want to elaborate on each point in order.

#### I. THE COOPERATIVE TECHNIQUE

The establishment of a trademark licensing organization by a number of small businesses provides a means whereby such small enterprises may compete effectively with the big corporations of commerce and industry. No one of such small businesses could expect to put forward its individual trademarks effectively, but by cooperative pooling of resources and joint endeavor, can be effective in meeting competition with a single trademark, all of which would benefit the public interest.

#### II. QUALITY CONTROLS

Grades and levels of quality have become increasingly important in the highly competitive field of merchandising. Most advertising and sales promotion seek to stimulate consumer acceptance without always giving equal emphasis to the quality of goods being sold. The public is not protected fully except through the negative actions of certain governmental agencies, and then only under such unusual circumstances where injury to the public health or a criminal action could be alleged.

The reputation of a good trademark results when standards of quality are set forth, and the public learns to put its trust into products identified by that trademark. Likewise, the public expects to put its trust in those persons or firms having use or control over a trademark. A consumer should be assured the same quality of merchandise if bought under the same trademark whether on one coast or the other, or in any 1 of our 50 States. Grade labeling of canned foods has proven this effectively.

#### III. PROHIBITION OF TRADEMARKS TO CONFUSE OR DECEIVE

The provisions of this bill would place certain privileges to users of trademarks under prescribed provisions. Any firm or person so privileged should be charged with the responsibility of affording all the protection to the consumer that may be practical and possible. The right to use a trademark should certainly not carry with it any rights to exploit consumers through confusion or deception. The proposal to require "registered user" instead of a "related companies" is desirable and gives additional assurance to the public interest in that there will be a public record of the licensor-licensee relationship and the identity of the user in any given area.

The Cooperative League is glad to add our endorsement to this kind of constructive legislation that seeks to give small business the same chance to put before the public goods and services that stand for quality, reputation, and confidence, while assuring the public of trust that will merit the public good will.

Chief Justice Hughes once defined good will to be the disposition of a man to return to the place where he has been well treated. We believe this bill will give encouragement to this disposition.

Mr. GREEN. Mr. Chairman, I have two letters here, one from James Edwin Archer of Stamford, Conn., dated June 17, 1961, to Senator McClellan, and another from the law offices of March & Curtiss of New York City, N.Y., dated June 16, 1961, also addressed to Senator McClellan, and I would ask that they at this time be placed in the record.

Senator HART. Both will be made a part of the record.

(The letters referred to are as follows:)



STAMFORD, CONN., June 17, 1961.

Re S. 1396

HON. JOHN L. McCLELLAN,  
*Senate Judiciary Committee, Senate Office Building,  
Washington, D.C.*

MY DEAR SENATOR: It is my understanding that a request for permission to appear before your subcommittee at the hearings on June 20, 1961, regarding S. 1396, has been filed in my behalf. Unfortunately, it now appears that I will be unable to be present because of unavoidable business obligations.

If I am not able to appear, I respectfully request that the following statement be incorporated into the record of the hearings on the subject bill.

While I represent American Cyanamid Co. as trademark counsel, my comments here are my personal views and are based upon 10 years of trademark practice under the Lanham Act.

S. 1396 is drawn along the lines of the registered user statutes in the British Commonwealth countries where such statutes have been used for a long time and have proven to be effective and satisfactory methods of handling the question of permitting use by others than the trademark owners. There are many questions regarding the scope and validity of permitted uses under the present provisions of the Lanham Act. It seems to me that it is desirable from every point of view that our statutory law be clear and definite as to what is and what is not permitted so that our business community is able to operate with a high degree of certainty as to whether a trademark licensing program into which considerable money must be invested is valid and as to whether or not the validity of any trademark registration involved therein will be jeopardized.

I am, therefore, in favor of the principle of S. 1396 and would only suggest that perhaps some minor revisions may be necessary in order to take care of all of the many varied problems which should be receiving consideration under the terms of any enactment embodying the principle of this bill.

It is my understanding that there may be opposition to the subject bill because of the fact that it permits territorial limitation. It was my understanding that there will be many who will elaborate on the desirability of territorial limitations in order to promote competition between a series of local manufacturers on the one hand and a national organization who can afford national advertising and promotion on its behalf which the individual small business could not afford. On the other hand, opponents to the subject bill will argue that territorial restrictions improperly restrain trade. I want to emphasize very strongly that any limitation on the use of a trademark does not restrain trade nor competition. Anyone, including a permitted user of a trademark, may market his goods anywhere under another designation which is not confusingly similar with the trademark and, hence, there is no restraint of trade. The owner of a trademark has the right to refuse to give anyone else the right to use it and, in fact, under the common law, he could not give anyone else the right to use his mark. Under modern business conditions this has proven to be unsound since, when the trademark owner can control the quality of the goods, and, of course, he must under the provisions of S. 1396, the public benefits by an increase in competition or by a more widespread distribution of products of the same quality as that of the trademark owner.

I understand that some arguments may be presented to your subcommittee to the effect that the enactment of S. 1396 might raise some doubts as to validity of trademarks which have been the subject of permitted use under the related company's provision of the Lanham Act. I do not believe that this is sound since the present proposed law is very clear and only needs perhaps a provision which would provide that all permitted uses under the present act can be brought under the provisions of the new act within a certain stipulated period of time and that all prior uses by such permitted users will enure to the trademark owner with the same benefits as those provided under the present act.

It is submitted that the provisions of the bill which are contained in section 5(a) (1) are too limited in that it would appear that it may not provide for a registered user who would take the trademark registrant's goods and merely dilute them under quality controlled conditions. I, therefore, suggest that section 5(a) (1) be modified to permit one who takes a trademark owner's



active ingredients and merely dilutes them to become a registered user. I call your attention to the fact that even though the user in this case would be merely diluting, nevertheless, quality control is quite essential in many areas such as in the food and medicine field where the quality of diluent and the concentration of the active ingredient must be controlled by the trademark owner to insure that a satisfactory product is offered to the public.

I further call attention to the fact that section 5(b)(3) is too limited since it would be impossible to specify a registration number or an application number if a request for registration of a person as a registered user be filed concurrently with the filing of an application for registration of a trademark.

It is believed that there may be other matters which will require attention when, and if a revision is made and I respectfully request permission to submit such further suggestion as may be desirable to the counsel for your subcommittee.

I hope that the foregoing will be of some help to you and your subcommittee and if I am not able to be present on June 20, I hope that you will permit it to become part of the record of the hearings.

If I can be of any further assistance to you in the consideration of this bill, please do not hesitate to call upon me.

Respectfully yours,

JAMES EDWIN ARCHER.

NEW YORK, N.Y., June 16, 1961.

Re S. 1396.

The Honorable JOHN J. McCLELLAN,  
*Senate Judiciary Committee,*  
*Senate Office Building, Washington, D.C.*

SIR: The right of a trademark owner to license others to use the mark in designated areas is essential to business interests. The restriction of this right would not enhance competition but would, instead, ultimately act as a restraint upon competition.

The principle underlying Senate bill 1396, which would permit licenses of trademark in specific areas, is, therefore, one which should receive the most favorable consideration. The effect of prohibiting allocations of designated areas for the operations of trademark licensees should be carefully considered. Ultimately, this prohibition could result in the elimination of any licensing grants by trademark owners. Thereafter, relatively small businesses would not be able to continue their operations, especially those who depend upon nationwide advertising by the trademark owner itself. Obviously, such a condition would have a very detrimental effect upon the Nation's economy.

In addition, there is, as you know, a requirement for policing and controlling the quality of the goods which are distributed by a trademark licensee. This control might prove to be extremely difficult in the absence of area designations in which the mark could be used by a licensee. Where licensees' use of the trademark overlap in areas, the exact producer of a defective item of merchandise sold under the mark could be difficult to ascertain. This could be so, no matter how rigid were the controls at the place of manufacture.

It is to be noted that the designation of an area concerning the use of a mark does not restrict competition. All parties are entitled to sell the same or similar goods freely. The only restriction concerns the use of the trademark owner's valuable property right. There is not present, therefore, a restraint upon competition but merely the protection of the trademark.

Therefore, the principle underlying S. 1396 is highly desirable, both from the standpoint of fostering competitive enterprises as well as policing the quality of goods sold under the license trademark.

With certain limited modifications, I believe that S. 1396 involves legislation which would be extremely beneficial. This type of legislation has existed for some years in countries like Great Britain and Canada, with fine results.

I, therefore, wish to record my statement for the record that I fully support the principle underlying Senate bill 1396.

Very truly yours,

ARTHUR A. MARCH.



Senator HART. I think this completes the witnesses who were scheduled for hearing today.

If so, the committee will adjourn, to resume at 10 o'clock tomorrow morning. We will be in room 318 of the Old Senate Office Building. This is the caucus room.

(Whereupon, at 6:10 p.m., the hearing was adjourned, to reconvene at 10 a.m., Wednesday, June 21, 1961, in room 318 of the Old Senate Office Building.)



## REGISTRATION AND PROTECTION OF TRADEMARKS

WEDNESDAY, JUNE 21, 1961

U.S. SENATE,  
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND  
COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 318, Old Senate Office Building, Senator Philip A. Hart presiding.

Present: Senators Hart and Cotton.

Staff members present: George S. Green, professional staff member, Committee on the Judiciary.

Senator HART. The committee will be in order.

The first witness scheduled, and very likely because of the fault of the chairman in switching the scene of action without adequate notice, is lost in the New Senate Office Building, it is reported. Hopefully, he will find us; but, if there is no objection, I would then next call Mr. Robert Bonynge, of the New York Patent Law Association.

### STATEMENT OF ROBERT BONYNGE, THE NEW YORK PATENT LAW ASSOCIATION

Mr. BONYNGE. Good morning, gentlemen.

Mr. Chairman, I am Robert Bonynge of the New York City law firm of Nims, Martin, Halliday, Whitman & Bonynge. Our firm specializes in trademark litigation and unfair competition matters and, as such, are from time to time called upon to represent clients pretty well scattered around the country, including, I might say, Michigan, on occasion.

I am a member of the bar of the State of New York, and have been since 1935. And I am a member of the Trademark Law Committee of the New York Patent Law Association.

When I first contacted Senator McClellan, with respect to this bill, it was as chairman of the Committee on Federal Trademark Law Revision of the American Bar Association, which was considering the merits of the proposed bill. However, the report of this committee has been rendered, but has not been approved, as yet, by the section on patents, trademarks, and copyrights, and therefore necessarily has not been approved by the house of delegates of the American Bar Association, and it is impossible to obtain such approval in time for this hearing, since the section will be unable to act on the report until its meeting in St. Louis the early part of August.

Therefore, I would like to make it clear that my appearance here today is not on behalf of the American Bar Association but on behalf of the New York Patent Law Association, as set forth in a letter to



Senator Eastland by Mark N. Donohue, president of said association, dated June 14, 1961.

I appear in opposition to the registered-user bill, S. 1396, and its companion bill in the House, H.R. 6004, introduced by Representative Lane.

The New York Patent Law Association was organized in 1922 and represents over 1,000 members. It is a legal society recognized by the American Bar Association. Since its inception, and in fact as a part of its constitution, there has been a committee on trademarks. The objectives of the association are set forth in article II of the constitution, to wit:

The association is established to maintain the honor and dignity of the profession of the law of patents and trademarks; to promote the development and administration thereof; to cooperate with foreign associations in harmonizing the substance an interpretation of international conventions for the protection of industrial property and to cultivate social intercourse among the members of the association.

In Mr. Donohue's letter he stated to Senator Eastland that at the annual meeting of the New York Patent Law Association which was held on May 25, 1961, the report of its committee on trademark law was accepted as disapproving S. 1396 in principle, and further recommending that the existing provisions of the Trademark Act of 1946 concerning related companies be retained.

The registered-user bill was considered very carefully by the Committee on Trademark Law of the New York Patent Law Association, which committee is under the chairmanship of Dr. Walter J. Derenberg, professor of law at New York University Law School, author of the well-known textbook "Trademark Protection and Unfair Trading" and numerous articles on trademarks and unfair competition, and former counsel to the Commissioner of Patents of the U.S. Patent Office.

That portion of the report of the committee with respect to the registered-user bill is as follows:

S. 1396, introduced March 21, 1961, by Mr. McClellan. This bill would seek drastically to change our present trademark statute by eliminating the related-company provisions from the act and by substituting therefor a system of registered users patterned after corresponding provisions in the law of certain British countries.

Under the proposed bill the application for registration of registered users must be accompanied, inter alia, by a statement setting forth the relationship between the parties involved, the method of control exercised by the registrant or applicant over the nature and quality of the goods or services and "any conditions imposed by the registrant or applicant for registration of the mark with respect to the characteristics of the goods or services, or the mode or place of the permitted use."

However, the Commissioner may require additional information and may authorize registration of the registered user only if he is satisfied that the permitted use is not likely to cause confusion or mistake or deception (5d).

In a "statement of purpose" submitted to the Congress in explanation of the bill it is stated that the existing provisions concerning related companies have resulted in ambiguities and confusion and that the proposed registered-user procedure will "add dignity to the licensor-licensee relationship" and "will provide greater certainty as to the respective rights and responsibilities of licensors and licensees."

The statement further observes:

"It (the bill) will permit the small business of this country to enjoy the benefits of national and regional trademark advertising and promotion on the same



footing as their national competitors, thereby promoting their competitive potential and aiding their survival, which is so essential to the functioning of our industrial economy from both a social and economic standpoint."

A preliminary canvass of the members of this committee has revealed that the great majority of its members as well as trademark owners in general are opposed to the elimination of the present related company provisions of the act of 1946, and have very considerable doubt as to the advisability of introducing the registered-user system into the law of the United States.

Without at this time going into detail, it may be pointed out that, far from benefiting U.S. trademark owners, the proposed legislation would, in effect, be retrogressive. While in Great Britain and Canada licensing of trademarks was not recognized before the registered-user provisions were adopted, controlled licensing has long been permitted in the United States and found expression in the flexible provisions of 5 and 45 of the Lanham Act.

It goes without saying that the proposed bill would throw an enormous administrative and financial burden upon U.S. trademark owners who are presently employing a system of multiple permitted users.

Moreover, it is well known that many leaders of the British Trademarks Bar have become convicted of the undesirability of the existing registered-user system under the British act and of the unnecessary burden and hardships which these provisions have thrown upon British trademark owners desirous to protect their trademarks in the export trade.

It is understood that efforts are presently underway in Great Britain to repeal the registered-user provisions and substitute therefor a system similar to that presently prevailing under the U.S. act of 1946.

It is our view that S. 1396 would not result in the vaguely defined benefits to small business outlined in the statement of purposes, but would, on the contrary, result in inflexible and burdensome formalities and substantial expenditures to American business both domestically and internationally.

It is recommended, therefore, that S. 1396 be disapproved in principle and that the existing provisions of the Trademark Act of 1946 concerning related companies be retained.

The members of the committee who recommended that the bill be disapproved in principle are as follows: Charles C. Allyn, Robert Bonyngne, Frederick Breitenfeld, Marcel Deschamps, Paul Hoffmann, Alice V. Kenney, Stewart W. Richards, Lenore B. Stoughton, Curt von Boetticher, Robert B. Whittredge, Walter J. Derenberg, chairman.

Mr. Chairman, you will recall that toward the close of the committee report the statement was made that efforts are presently underway in Great Britain to repeal the registered-user provisions. In this connection I would like to read a letter from Robert Burrell, Queen's counsel, and one of the most eminent barristers on trademark law in England, which I have been authorized to read by Mr. Burrell and its recipient, Mr. Ladas of the firm of Langner, Parry, Card & Langner.

Mr. Burrell was instrumental in revising the English trademark law of 1938, and at that time he testified before the revision committee on behalf of Trademark, Patents and Design Federation, Ltd. For many years he was chairman of the trademark committee of the International Law Association. Mr. Burrell's letter is as follows:

LLANDUDNO, NORTH WALES, April 30, 1961.

DR. STEPHEN P. LADAS,  
*Langner, Parry, Card & Langner,*  
*New York, N.Y.*

DEAR LADAS: I must apologize for the delay in dealing with your letter of March 27 last in which you inform me of the proposal to introduce legislation in the United States on the lines of the registered-user provisions of the British Trade Marks Act of 1939. As you know, I have for a long time held the view that the more liberal system introduced in the Lanham Act is for many reasons



to be preferred to the British system, and for some years I have been agitating in this country for the abolition of the registered-user system and the substitution of some more flexible alternative system.

The introduction of the registered-user system in 1938 involved a serious departure from the general principles of British law hitherto governing the user of registered trademarks, it being a well-established principle of law that the grant by the registered proprietor of a trademark license necessarily invalidated the registration. In these circumstances it was not surprising that, at the outset, the legislature was not prepared to validate the grant of such a license except upon terms involving, in each case, a formal application to the registrar, who was given the widest discretionary powers to refuse an application unless satisfied that, having regard to the terms and conditions governing the use of the mark by the proposed permitted user, such user would not be contrary to the public interest. If so satisfied the name of the proposed permitted user would be entered on the register, registration of the permitted user conferring upon him a statutory right to use the mark. This procedure necessarily entailed administrative action with its concomitant delays and the expenditure of considerable sums of money by way of official fees and other legal expenses, particularly in the case of companies using a large number of trademarks for their products and companies who would require to grant any considerable number of registered user rights.

As a result of the experience since the act of 1938 came into operation the conditions upon which the British registrar insists have, for a long time, become very clearly stereotyped and they can be classified under the following three heads:

1. Where the registered proprietor and proposed registered user are subject to the same financial control; in such a case the registrar does not insist on the conclusion of any special control agreement;
2. Where the parties have entered into an agreement under which the manufacture by the registered user is controlled by the issue of specifications, etc., or the provision of samples and the registered proprietor has powers of inspection;
3. Where the registered user is operating under a patent license.

Now that the conditions for the grant of registered user rights have become stereotyped, applications under the registered user section of the British act have become a mere formality, and I can see no valid reason why the act should not now be amended so as to incorporate the conditions imposed by the registrar into the act itself, a statutory right being granted to any registered proprietor freely to grant licenses on the conditions laid down in the act. For many years I have been pressing for an amendment of the act on these lines, and I am hoping that the departmental committee which will in the near future be appointed to consider the amendment of the British act will in due course recommend an amendment such as I have indicated. The introduction of such a system would at once serve, without any detriment to the public interest, to do away with the cumbersome, complicated, and expensive formalism necessarily involved in our registered user system to which you refer in your letter.

I appreciate that the present system insures the recordal on the trademark register of any registered user right which may have been granted, but I must confess that I fail to understand what public benefit flows from such recordals. So far as the public is concerned, I should be very surprised to learn that any member of the public has ever taken the trouble to inspect the register for the purpose of ascertaining whether a particular trademark has been the subject of a grant of any registered user right. Furthermore, the majority of trademark owners who grant registered user rights, as, for example, the Coca-Cola Co., insist in their own interests that any permitted users clearly indicate on their products the fact that the trademarks used by them are used in that capacity, and a notice to this effect on the goods themselves is a much more effective form of notice than any entry recorded on the trademark register. If it is thought desirable that such a notice should always be given there would be no difficulty in so providing in the Trademarks Act itself.

In pressing for an amendment of the British act on the lines above indicated I have been much influenced by the fact that British legislation on the subject of trademarks serves as a model for the legislatures of the colonies and other



members of the Commonwealth of Nations. But it does not necessarily follow that a system which might be satisfactory from the point of view of a British trader who is engaged merely in the home trade will prove equally satisfactory for the trader who has an export trade to a large number of oversea countries. In my experience the fact that so many colonies and Commonwealth countries have in fact adopted the British system has placed on British and foreign exporters to those markets an intolerable burden in connection with the use of their trademark by registered users either for manufacture in those territories or for export thereto. In this connection it should be borne in mind that the failure to comply with the necessary formalities in the countries to which the products are to be exported might well have the effect of invalidating the trademark registrations involved in the countries of export. If the British act were amended on the lines which I have indicated and such legislation were in due course adopted by the British oversea territories this burden would be removed to the great benefit not only of British traders but also of traders in foreign countries who carry on an export trade in the British colonies and countries forming part of the Commonwealth.

It would perhaps be useful if I were to give you one or two examples coming within my own experience which indicate how ill-adapted the registered user system can be in relation to international trade.

1. A well-known British company for whom I have acted in the past has a large number of wholly owned subsidiary companies located in foreign countries which manufacture locally products to the specification of the parent company which are sold under license by the subsidiary companies under the trademarks of the parent company both locally and for export. In the particular trade in which the companies are concerned quite a large number of different trademarks are used for the various qualities of goods manufactured. It often happens that it becomes desirable that the demand for a particular product sold under a trademark normally supplied by the parent company or one of its subsidiaries in a particular foreign market should, for quota reasons for example, be supplied by one of the other subsidiary oversea companies. If the country to which the goods are proposed to be exported happens to have adopted the British registered user system, this cannot be done unless steps are first of all taken to secure the registration of the oversea subsidiary concerned as a registered user of the parent company's trademark in the country to which the goods are to be exported. As the taking of this precaution necessarily takes time, it often becomes impossible to permit the export without jeopardizing the validity of the trademark in the country of export and as a result the trade is lost. Owing to the number of marks involved it would be quite impossible from the point of view of expense alone for the parent company to arrange for each of the foreign subsidiary companies to be entered as registered users of all the parent company's marks in all the other countries, merely on the chance that at some future time it might be convenient for them to export to such countries.

2. A well-known British company possessing valuable patent rights and know-how in relation to its own field of trade is the proprietor of a trademark which is used under license or registered user rights by its licensees, both here and abroad, to indicate that the goods in question have been produced by the licensees in strict accordance with the specifications and directions of the British company. From the financial point of view agreements to this effect form a very important element of the British company's business. Foreign manufacturers, who would otherwise be only too glad to enter into a license agreement with the British company will not do so unless they are permitted to use the mark not only for their home trade but also freely for export. It is quite impossible for the manufacturer when entering into the license agreement to specify the foreign markets to which he will be exporting, as this depends on trading opportunities which he is naturally unable to foresee. If in the country to which the goods of the foreign licensees are subsequently exported, either by the licensees themselves or by a third party, the registered user system is in force, the validity of the British company's registration in that country will be placed in jeopardy unless the precaution has been first taken to enter the name of the licensee as a permitted user. As a practical matter it is generally impossible for the British company to take this precaution, and if the foreign licensee were to delay the proposed export pending the completion of the necessary formalities, he might well lose a valuable order.

3. There are quite a number of British overseas territories whose economy does



not justify the setting up of an elaborate system of trademark administration as, for example, Gibraltar. In these territories it would not be a practical proposition to set up the necessary administrative machinery to operate registered user systems of their own. Accordingly the local laws merely provide for the recordal in the local trademark registers of entries of registered users already effected on the British register. In cases in which it is intended that the proposed registered user should manufacture the product locally, in Gibraltar for example, the system in force is completely useless, as the British registrar has no jurisdiction under the British act to register a person as a registered user except in respect of goods traded in in the United Kingdom either for sale there or for export from the United Kingdom.

If the British law were amended in the manner suggested earlier in this letter it is probable that in due course countries whose laws are based on the British trademarks system would follow suit, and if they did so all the international difficulties exemplified above would at once disappear.

For the purpose of international trade a registered user system is particularly ill adapted and no system would, in my view, work satisfactorily which involves, as a condition precedent to the use of a mark by the licensee, a formal application to the trademark authorities and/or recordal on the register of a license when it has been granted.

It is for the above reasons that I regard the proposal to introduce the registered user system in the United States as a very retrograde step, particularly as it may encourage other countries which at present have a more liberal system to follow suit. It may also be tempting to some countries to introduce the registered user system if only as a means of obtaining further revenue.

Yours sincerely,

ROBERT BURRELL.

Gentlemen, I sat here yesterday, as you may have observed, and I would like very much to have an opportunity to make one or two comments on some of the statements which were made yesterday which I believe may have created an erroneous impression.

Senator HART. I think it would be very helpful.

Mr. BONYNGE. One thing I think that may have been gleaned from my reference to the letter of Robert Burrell was a statement yesterday indicating that the common law of licensing in this country originated in Great Britain. And, of course, this is not so.

Until the Trademark Act of 1938, licensing was not permitted in Great Britain. It was, over here, however.

Senator COTTON. Just a moment.

In justice to the witness, I don't think that was quite the statement. The statement was merely thrown in that if the charge was made that this bill was copying a foreign law that we should remember that all our common law came from that country.

Mr. BONYNGE. Not this portion of the common law, however.

Senator COTTON. Beg your pardon?

Mr. BONYNGE. Not the portion of the common law dealing with licenses. That is the point I want to make.

Senator COTTON. I didn't understand that was pinpointed, in fairness to the witness. But your understanding may be correct.

Mr. BONYNGE. It also might be helpful, it seemed to me, to just touch on a few fundamental concepts of licensing in the United States.

A naked license or an assignment apart from the goodwill of the business in connection with which the mark is used has always been deemed invalid in this country.

Senator HART. I apologize. Would you repeat that?

Mr. BONYNGE. Yes. A naked license or an assignment apart from the goodwill of the business in connection with which the mark is used has always been invalid in this country.



With the industrial revolution and the expansion of our markets in this country necessitating coast-to-coast sales, the courts did liberalize the provision which provided that licenses could be granted apart from the business if the trademark owner closely supervised the nature and quality of the goods.

Under this liberalized concept today a trademark not only indicates source of the goods but also may indicate that the goods are sponsored or approved by the trademark owner.

The thing that I particularly want to emphasize is that in consideration of licenses the test is what is the fact as to controls. If the trademark owner controls the nature and quality of the goods and closely supervises and checks, it is a perfectly valid license. If he doesn't, it isn't. It is as simple as that.

Whether the license provides for controls doesn't have any effect if he doesn't in fact and in truth, test and supervise it.

I got the impression yesterday that the thought was perhaps abroad that the situation as exemplified by the bedding companies is unique, that this pertains only to the bedding companies, and that, of course, is not true. Licensing is a very common, very popular form of agreement today in America.

Some examples, of course, are your chain restaurants, the Howard Johnson situation which all of us, I think, are aware of. Another example is the Quality Court motels where the trademark Quality Court is owned by a collective association which licenses the use of that mark to motels who maintain a certain standard.

Those situations have been tested on various occasions by the courts, and the test has always been, "Is it in fact being supervised and controlled?" And in a recent case dealing with Quality Courts one of the tests that the court pointed to was the fact that in a year's time about 10 percent of the franchises are revoked because they fall below the standard.

There are other situations such as the soft drink industry who license and franchise soft drink bottlers. If that wasn't done, a soft drink bottler, trademark owner, might very well lose his trademark. If the bottler were permitted to use the mark by perhaps diluting the syrup to make a larger drink, uncleanness, this would all destroy the value and goodwill of that particular trademark.

In all these license situations a territorial allocation is quite common by one means or another. As was stressed yesterday, of course, it is unreasonable to expect any franchisee to spend substantial sums of money which, in the case of a motel, may run to \$100,000 or more, and just citing the Quality Court as an illustration, if the Quality Court Association were to permit a new Quality Court motel across the road from his, he would cry to high heaven, of course. There has to be some territorial allocation.

Just in passing it might be well to mention one other factor, fundamental concept of trademarks, which is that registration as such grants no additional right to the trademark owner. He has perfectly good rights whether he ever registers the trademark or not. The test is use. The first to use a trademark gains the right.

There are many companies who never register. There are other companies who have registered perhaps in the East only to find that someone on the west coast has been using it from a date which antedates his, and finds his registration canceled.



There are three general types of trademarks. The trademark which appears on the goods; a service mark which, as its name implies, applies to the services rendered by the trademark owner; or a collective or certification mark, collective mark being an example of a Quality Court situation, or certification, perhaps the Good Housekeeping seal of approval.

I mention that because yesterday you will recall there was some conversation about the automobile situation, and in the general conversation about it there was a statement made that a licensor is responsible for the product of the licensee.

Now I am not sure whether it was intended to mean legally responsible. If such was the intent, this is a new concept as far as I know. I know of no case which has held that a licensor is legally responsible for the goods of the licensee.

The only case that I know of involving that is in the Fruit of the Loom situation where Fruit of the Loom, a manufacturer of piece goods which are later made up into shirts or pajamas, not only guarantees the piece goods but guarantees the workmanship of the finished garment.

Now this is a contract situation. That is part of the license. And you can, if you buy a Fruit of the Loom shirt which doesn't have good workmanship, take it back either through the licensee or the licensor and get your money back. But that is not the general rule.

In the automobile situation I agree that in the salesroom the dealer who sells a new car does not do anything to affect the trademark. But I agree only as to that single, confined aspect.

In the automobile situation or in the TV situation or any other product such as refrigerators that require service and maintenance, you have an entirely different concept. There the service mark aspect comes into being, and that service mark is just as important to the trademark owner as his trademark. He registers that mark as a service mark, the service which his dealers render to the customer.

If that service mark is abused, the goodwill of the trademark is going to be seriously affected.

There is no responsibility that I know of that, for instance, if a servicing of a car is sloppy you can go back to the manufacturer and get your money back. I don't believe that is so, and I agree.

However, the effect is not one of legal responsibility. It is the effect that if that mark is not properly used by the dealer it will affect and damage the goodwill of the trademark.

In order to see that that doesn't happen, the manufacturers that I have mentioned have customarily sent their repair people to schools conducted by the factory. They send and distribute manuals to those service people. They inspect to see that they are doing the work properly. That is licensing whether it is in an agreement or not. It doesn't make any difference.

A license does not have to be a formal license if, in effect and truth, it is a license and the manufacturer or trademark owner does supervise the nature and quality of the goods.

It is the feeling of some of these organizations that this proposed bill, S. 1396, will incur a heavy burden because of this dealership arrangement, that these dealers will have to be registered as registered users under S. 1396. The same provision, of course, applies to the



situation that was also discussed yesterday of the used car lot where one manufacturer uses A-1 for used cars, or another uses OK, and Chrysler uses some other symbol which escapes me at the moment.

Those used cars are conditioned under instructions from the manufacturer properly. They must meet minimum requirements. Therefore, when a customer does buy an A-1 or an OK they feel they are buying something that is above the run-of-the-mill used car that you might pick up on some nondescript lot.

What does this bill hope to achieve? Unfortunately, we do not have available the report of the Justice Department. I wish we did. It would certainly make our task easier.

I don't think the bill achieves anything that is not already available to the trademark owner under the Lanham Act and the related company provisions. As I understand it, the Justice Department still takes a very dim view of section 5(k) which permits the territorial allocation of the trademark area.

If that is so, what has been achieved by all this inconvenience and expense which is inherent in S. 1396? It seems to me that what has been behind this is basically a price-fixing aspect, and that is what the antitrust people are concerned about.

Isn't the proper method then to amend the antitrust laws and not take the backdoor approach through the Lanham Act?

I think it would be very helpful in this connection if we knew what the opinion and feeling of the Patent Office was currently. They are the ones who will be tremendously burdened by the administrative work involved in this situation of S. 1396, and it would seem to me that it would be helpful if their views could be reported to the committee.

I will be glad to answer any questions if I can.

Senator HART. Senator Cotton must leave, and I think perhaps, if the time is available to him, we should give him the first opportunity.

Senator COTTON. I didn't want to get ahead of the chairman, but it is a very minor matter.

Mr. Bonyng, your statement is very interesting and excellent. On page 2 of your statement you speak of the opposition to the bill of the New York Patent Law Association. Then at the bottom of the page you say that portion of the report of the committee with respect to the bill is as follows, and on page 3 and part of page 4 you quote this report.

Mr. BONYNGE. That is right, sir.

Senator COTTON. But the report, the direct quotation is simply a résumé of what the bill provides. It doesn't express—if it does I did not note it—the conclusions of the committee or the association, and I wondered if in their report they did express their conclusions and the reasons therefor.

Mr. BONYNGE. They did, sir. If you will look at page 5, at the bottom where it says "It is recommended, therefore," this is a continuation of the quote "that S. 1396 be disapproved in principle and that the existing provisions of the Trademark Act of 1946 concerning related companies be retained."

Senator COTTON. Well, now, is all that appearing on page 5, is all that a direct quote?



Mr. BONYNGE. Yes, sir. It goes from page 3 to page 5, and then—  
Senator COTTON. Then the quote does not end in the middle of page 4 with the words "economic standpoint"?

Mr. BONYNGE. No, sir. I was afraid that might lead to some confusion. I tried to avoid that by setting it in. If you will notice, it is considerably set in from page 2. But all from "S. 1396" on page 3 over to the bottom of page 5 is the report of the committee on trademark law of the New York Patent Law Association.

Senator COTTON. And is that the whole report insofar as it has to do with this bill?

Mr. BONYNGE. Yes, sir.

Senator COTTON. That is all of it?

Mr. BONYNGE. Yes. The other report had to do with other trademark bills which are pending.

Senator COTTON. Thank you.

Just one other question. You referred to a restaurant chain, and I would want to refrain from any colloquy which would serve either as an advertisement or a detriment to any company, but would you tell me this: In just what respect—and I seek this for information because it might clear up some things in my mind—in just what way would the enactment of this legislation affect the operations of such a chain. How would it change their present situation?

Mr. BONYNGE. In my opinion, sir, it would mean that each such restaurant would have to be registered as a registered user.

Senator COTTON. Well; is that all?

Mr. BONYNGE. Yes.

Senator COTTON. Would it require more supervision?

Mr. BONYNGE. Not necessarily, no; I don't think it would. But it would be expensive, time-consuming, and it would be just as difficult to remove one of those from the register, and these do change as you know.

If the restaurant falls below a certain minimum, the franchise is withdrawn, and it would be the same administrative headache to remove one from the registered user record as it would be to put it on the registry.

Senator COTTON. Well, now, on the records at the Patent Office, however, the arrangements between the restaurant parent company and its licensees would be on file.

Mr. BONYNGE. That is right, sir.

Senator COTTON. The contract in part, I am told, requires that a licensee shall construct a restaurant in a proper manner; that is, in a manner that makes it, in appearance, conform to the licensor pattern: that they must purchase all their ice creams, all their frankfurters, all their clams from the licensor; they must have on sale the various prepared foods to take out, packaged foods.

Mr. BONYNGE. Yes.

Senator COTTON. Also, that they have the option of purchasing meats and various other ingredients from the licensor, but they are not compelled to. So, if they choose, they can purchase their meats other places, locally or wherever they can get the best deal; that they shall maintain their premises in a sanitary condition and conform with practices subject to inspection.



Now the public at present doesn't know what portion of the food served is the licensor food and what portion is purchased from some jobber in the locality.

Mr. BONYNGE. That is right, sir.

Senator COTTON. If this legislation were passed, that information would be a matter of public record.

Mr. BONYNGE. I don't believe so, sir. Only to a bare minimum because, as I understand the provisions of this proposed bill, they would not have to register each item of food that was to be supplied by the licensor, but simply the general terms of the license and the terms of supervision and control. But that portion which permitted them to buy any of the other items would not be set forth on the register.

Senator COTTON. On the ground that it wasn't material, wasn't an important part.

Mr. BONYNGE. That is right, sir.

Senator COTTON. I would think that would be an extremely important part.

Mr. BONYNGE. I think that you will find, sir, that the trademark law in regard to licenses doesn't attempt to say that the buyer must know every person who manufactures under a license that product so long as the trademark owner does not deceive him or confuse the public in a way that is to his disadvantage.

Now, if the franchisee maintains his establishment in a way which meets the standards of the trademark owner this is all that the law requires.

The franchisee when he ran his original restaurant, undoubtedly shifted his suppliers from day to day, and he didn't feel obligated to tell his customers "I am buying it from X company today rather than from the Y company." So long as those meals he served were good meals and met the approval of the public, that was his concern.

Senator COTTON. Mr. Chairman, I find myself rather embarrassed, and regret that I started questioning about an individual company. I don't think it is fair to have on the record this sort of comment on the practices of the company and I ask the chairman's consent and the consent of the committee, subject to the ruling of the chairman of the full committee, that this colloquy so far between the witness and myself, so far as it specifically refers to the company, be eliminated from the published record.

Senator HART. Assuredly, the subcommittee chairman shares your view and shares the strong desire that this be done, and I am sure the full committee will do it without objection.

Senator COTTON. I should not have done it. And this is off the record.

(Discussion off the record.)

Mr. BONYNGE. There may be times when the trademark owner licensed products which the public has never expected to come from him. As an example, there are various radio or TV characters who have achieved celebrity or movieland characters who have licensed manufacturers to make merchandise—slippers, shirts—for the children, and that sort of thing, which bear those names. Now the public doesn't really expect that those goods are made by the TV character or the movie character, and I hesitate to mention any of the names. I am sure you are familiar with them.



But this is a matter of degree from what, of course, the public would not expect in that case.

I agree that it is a relative situation which does get further and further removed as you get into chain restaurants or something of the sort that the public might have some wonder about. That is true.

Senator COTTON. I thank the chairman.

For the purposes of the record, because it was off, I was impressed by your point that the practical effect on the public of this method suggested in this bill might not be very effective because so few of the individuals in the public would consult the records. However, if the question arose there would be times that those records would be available and would have some moral effect on licensors and licensees because they were available for inspection. Is that not possible?

Mr. BONYNGE. That is true. I certainly admit that. But I say that the real incentive for the trademark owner to be sure that the goods of the licensee are proper goods and conform to the standards he sets up, is the damage that will occur to the goodwill of his trademark if he permits his licensee to misuse it, to dilute the goods or make shoddy goods and so forth.

Senator COTTON. Mr. Chairman, I thank you. I should not have preceded the chairman.

Senator HART. I am very grateful that Senator Cotton, who is faced with a very busy day, was able to spend this time with us, and I certainly hope he will find time to remain over the term.

You said you had the impression that the motivation in this bill, in offering this bill, was to achieve a price-fixing position. Where in the bill do you derive this? From where in the bill do you get this impression?

Mr. BONYNGE. No; I am afraid I didn't make myself clear.

Senator HART. Then I am glad I asked. I understood you—

Mr. BONYNGE. The action of the antitrust people in the case of the bedding companies, I believe is motivated largely from the price-fixing aspect of the situation which is involved in the license agreements, as well as the territorial allocations. And some comment has been made from time to time that the *White* case—I believe that was mentioned yesterday—the *White Motor Co.* case was an extension of this and had an important bearing on the case.

I have the *White* case here in my briefcase. It is, in my opinion, primarily a price-fixing case. It does discuss in an oblique fashion territorial allocations, but the primary rationale of that case is that it is an invalid price-fixing situation.

Senator HART. I didn't want to interrupt you as you were speaking from your notes, in discussing the motel trademark license franchise arrangement. You, I think, made a statement that in substance acknowledged the necessity for territorial allocation.

Mr. BONYNGE. Yes, sir.

Senator HART. Do you distinguish this from the mattress concerns whose testimony you listened to yesterday?

Mr. BONYNGE. No, sir. My position is that there is nothing illegal about territorial allocation of territories. There is nothing in the present law. It is perfectly valid.

Now if the antitrust people take a dim view of this, before we discard the Lanham Act and its provisions this should be tried out in



the courts. If the Supreme Court holds that exclusive territorial allocation is per se invalid, all right, then something may have to be done. But such has not been the case up to date.

The normal license agreement has same provisions of territorial allocation in the license. There is nothing unique with the bedding companies in this regard.

Senator HART. And, last, and really just to give me a little more background, the service department in an automobile dealer's establishment, did I understand you to say that if the manufacturer permits a dealer to use the trademark, which I think has always been to name some particular style, and permits him to use it in connection with sales and service, there is not a legal obligation to reimburse for faulty service, but there is the danger that if supervision is not sharp, that the manufacturer would lose the trademark?

Mr. BONYNGE. If it continued long enough it would dilute and damage the goodwill which is inherent in that trademark.

Senator HART. In the sense of public acceptance he would lose his position.

Mr. BONYNGE. Yes, right.

Senator HART. But you did not mean, or did you, that as a matter of law he would not be able to continue to assert against another user the exclusive mark or whatever it was?

Mr. BONYNGE. I doubt that that would occur immediately. If in a license arrangement and if the service mark was licensed, as I have every reason to believe that they are, and if in fact the trademark owner wholly apart from the automobile situation at the moment does not supervise the nature and quality of the goods, then the courts eventually will declare that there is no valid license, and that he has abandoned the trademark.

Senator HART. In the letter from Robert Burrell, the English firm or the lawyer, is he not saying that he believes that the British act should be amended so as to condition trademark grants or registering to the requirements which he now says have become somewhat stereotyped arrangements?

To put the question more simply, would he not, if testifying, say that our act should be amended at least to incorporate as conditions the three specifics that he describes as now stereotyped in Britain?

Mr. BONYNGE. I grant that there is somewhat of an inconsistency in Mr. Burrell's statement on page 1 and page 2. To that extent I confess that he is inconsistent. However, I think that his total view is expressed on page 1 where he says that he thinks the British registered-user provision should be amended to accord with and liberalized to that of the United States under the Lanham Act. And he sets up and explains the reasons why the British registered user is unworkable. And some of the gentlemen who will follow me, who in this country have extensive licensing problems involving international trade, and so on, will say amen to that, I am sure, and will give you more information on that than I can.

Senator HART. Thank you very much.

Any questions, Mr. Green?

Mr. GREEN. I just have one question.

In regard to the products that are made by a manufacturer under a trademark, why should there not be a provision of law requiring



that the seller carry a notice to the effect that it is being manufactured under the authority of a license from the trademark owner and under his control for the public benefit if the registered-user proposition would not give the public that information?

Mr. BONYNGE. There has been considerable discussion over that aspect for some time, and some trademark owners do require their licensees to note on the product that it is manufactured under license, and I think that probably in the long run an amendment, a simple amendment to the Lanham Act, to that effect would be helpful. That is my personal opinion.

Mr. GREEN. Thank you.

Senator HART. Thank you.

Has Mr. Gerrit Groen come in?

Mr. Francis Bouda will be the next witness then.

### STATEMENT OF FRANCIS BOUDA, PHILADELPHIA PATENT LAW ASSOCIATION

Mr. BOUDA. Mr. Chairman and gentlemen, my name is Francis Bouda. I am chief patent and trademark counsel for the Scott Paper Co. of Philadelphia, Pa.; a member of the bar of the Court of Appeals for the District of Columbia and of the Supreme Court of the United States.

I appear here on behalf of the Philadelphia Patent Law Association as chairman of its trademark committee which is charged with the responsibility, among others, of considering proposed changes in the trademark and copyright laws.

The Philadelphia Patent Law Association consists of approximately 250 lawyers actively practicing patent, trademark or copyright law and registered patent attorneys and agents living or practicing in Delaware, the eastern half of Pennsylvania and southern New Jersey. They represent a wide spectrum of trademark owners, from the largest of corporations to individuals owning only a single trademark.

Senate bill 1396 and its companion bill, H.R. 6004, have been under consideration by our trademark committee since May of this year. At a meeting on May 18 the board of governors of this association approved the sending of a communication to Senators Eastland and McClellan and Representatives Celler and Lane requesting public hearings on the bills. In addition, a resolution, a copy of which is attached, has been passed requesting not only the hearings but also asking the subcommittee to defer any action on the bill until the business community and the legal profession have had ample time to appraise the probable effect and legal implications thereof and to express their views thereon in the hope that this committee will thereafter modify such bill to reflect the views so expressed.

(The document referred to follows:)

#### RESOLUTION

Whereas Senate bill 1396 (and its companion bill in the House, H.R. 6004) would repeal the highly important provisions of section 5 of the Trademark Act of 1946, and would substitute therefor onerous provisions generally described as "registered user" proceedings and which provisions would (a) be of little or no apparent value to trademark owners and users (b) might have serious effect upon the validity of registered as well as common law trademarks and (c) would present an unnecessary burden in domestic, as well as



foreign, commerce in connection with the use, registration, and licensing of trademarks:

Now, therefore, be it resolved that this association urges upon the upon the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee its belief that Senate bill 1396, which would so drastically change the present Trademark Act of 1946, should not be enacted into law until the business community and legal profession have had ample time to appraise the probable effect and legal implications of such bill and until the aforesaid subcommittee has had ample time to hear all parties interested in expressing views on the matter and has had an opportunity to modify such bill to reflect such views.

Be it further resolved, that a copy of this resolution be forwarded to the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, as well as to any subcommittee of the House Judiciary Committee charged with responsibility for considering H.R. 6004.

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THE PHILADELPHIA PATENT LAW ASSOCIATION,  
*Philadelphia, Pa., June 7, 1961.*

Re Senate bill 1396.

HON. JAMES O. EASTLAND,  
*Chairman of the Senate Judiciary Committee,*  
*Washington, D.C.*

DEAR SIR: This letter is written with reference to the above bill which, in substance, is an amendment to the Lanham Act and substitutes registered-user proceedings for the present related-company concept of section 5. Because the board of governors of this association believes that such amendment is of a sufficiently serious nature to require a full exposition of the matter prior to its enactment, we respectfully request that public hearings be held, and the opinions of members of the bar and on behalf of the various patent and trademark associations be solicited prior to your committee acting thereon.

Very truly yours,

C. MARSHALL DANN.

Mr. BOUDA. The trademark committee of the Philadelphia Patent Law Association strongly suggested that the passage of Senate bill 1396, in its present form, would not only inflict a burden upon the trademark community, both economically and procedurally, but in such form would accomplish no useful purpose and provide no benefit to the trademark community.

It has been suggested by others that the Trademark Act of 1946, if amended as provided in this bill, would clarify certain activities of the commercial community relating to licensing of trademarks. It is our belief that this bill would accomplish no such purpose.

We do not believe that the Trademark Act of 1946 is the place to clarify the effect of a trademark license on territorial allocation. The problem of the exclusive dealings between two parties is presently, and has been for half a century, the specific concern of antitrust enforcement agencies. The last few decades have seen a classic struggle involving an attempt to apply the rule-of-reason approach as contrasted to the concept of illegality per se.

Only last week the District Court for the Northern District of Ohio, in the case of the *United States v. The White Motor Co.*, handed down the latest decision involving this point. But the decision in that case was intertwined with many other factors, including a system of resale price maintenance. Therefore, it is not necessarily controlling on a subsequent case dealing only with territorial allocation. There is need for straightforward clarification of the situation, not a back-door approach.



Do not burden the Lanham Act with a difficult registered-user procedure if the only problem to be solved is to convince the Department of Justice, or the courts, that exclusive territorial trademark licenses do not violate the Clayton or Sherman Acts.

If the proponents of Senate bill 1396 believe that definitive legalization of territorial allocation through the use of trademark licenses is desirable and necessary, it is submitted that any bill so directed should be an amendment to the Clayton Act or the Sherman Act, not an amendment of the Trademark Act of 1946.

It is submitted that the problem before this subcommittee is to determine whether registered-user proceedings are a necessary or desirable substitution in the Lanham Act for the related company concept. You have heard that the British bar has under consideration a proposal which would replace the present registered-user proceedings with a related company concept similar to our section 5. There should be little enthusiasm on the part of the American bar for a procedure which, in the countries where it has been practiced, is believed in need of change.

Incidentally, in my own company we know, from many years of experience, how expensive and burdensome these registered-user proceedings are. From Canada to the Union of South Africa, and from the United Kingdom to North Borneo, we have had problems with registered-user proceedings.

Although this bill would saddle the professional and economic community with an expensive and burdensome program, we do not say that the Trademark Act adopted 15 years ago is so sacrosanct as to be immune from changes or proposed amendments; nor that some aspects of registered-user proceedings are without merit.

However, the principal purpose for my presence here today, and the principal concern on the part of the trademark bar, is that this amendment is being hurried through the subcommittee without concern for the views of a great majority of the economic community. Consider how long one proponent of this bill labored on behalf of the very act now sought to be amended, and how long even noncontroversial amendments have been considered by coordinating committees in the past.

My principal request to this committee is to defer action upon this bill at the present time and to establish a study commission which would determine what aspects of trademark licensing might be clarified in this act or any other acts, such as the Clayton or Sherman Act, to remove any stigma of improper territorial allocation.

I suggest that there are many of us who are willing to serve on such a commission to review the matter and to propose to this committee appropriate steps to accomplish such end.

There is already in operation a central clearinghouse for trademark problems which consists of representatives of many of the patent and trademark associations in this country, including also such groups as the National Association of Manufacturers and various trade associations. This clearinghouse is specifically constituted to coordinate the views and activities on trademarks and trademark law of associations throughout the country. Among its members you would find many who are willing to serve on such a study commission.

On behalf of the Philadelphia Patent Law Association, I strongly urge the establishment of such a study commission, whose report you



will consider and act upon prior to any action on bill S. 1396 in its present form.

Senator HART. Thank you very much.

This bill was introduced in March, just under 3 months ago, and while I do realize that your association by resolution asked that action be deferred until everyone had an ample time to appraise the effects, you have also asked for hearings.

Mr. BOUDA. Yes; the first letter from the president of our board of governors was a request for a hearing, and, happily, the hearing was noted—he received the notice of setting of hearings the day after receipt of that letter by you. I hope it was that effective.

Senator HART. To clarify the record, you are not suggesting that holding the hearings constitutes and improper action by the Congress, are you?

Mr. BOUDA. On the contrary, sir. We would be very happy to have more of these so that more voices could be heard.

Senator HART. My point is you suggest that this is being hurried through, and I think that is the phrase you used, and in fairness to the subcommittee I must insist that for the record you indicate whether you think that thus far there has been any impropriety in the conduct of this matter.

Mr. BOUDA. On the contrary, we believe that the opportunity to be heard at this time constitutes a very definitive step on the part of the subcommittee to receive the views of us. But I suggest that at the present time there are voices still to be heard.

As Mr. Bonyngé indicated, the American Bar Association will not meet until this summer, at which time that group will not have an opportunity—it will not until that time have an opportunity—to investigate and express its views.

My own Philadelphia patent law association has had but one meeting, at which time we took action with respect to the request for these hearings. If we want definitive action from all members of that association, we must have another meeting, a special meeting. And, unfortunately, these problems take quite a lot of time.

I, in a sense, regret the request of this sort because I was interested in reading in the June 22 issue of the Reporter a little quotation with regard to the longest way from thought to action, and they say:

As they say on Capitol Hill, the longest known distance between a thought and an act in Government is via the committee rooms—

and I hesitate to impose upon this committee any more time-consuming action except that.

I am suggesting that the voices which were heard yesterday constitute a very small part of the economic community interested in trademarks. There are no more than 99 licensees of only 3 different trademarks represented in all of the speeches heard yesterday. My own trademark committee of the Patent Law Association represents hundreds of trademark owners of thousands of trademarks, and this is multiplied even more so in such associations as the New York Patent Law Association and the American Bar Association.

There is just one other thing I would like to touch on, and that is with regard to Mr. Green's question to Mr. Bonyngé.

Senator HART. Well, before you leave that point, you very gracefully have described the dilemma that always confronts a legislative



body. We are either ramming something through or we are incredibly slow, and I voice both impressions myself, and usually it reflects the very strong and quite proper judgment of the economic interests of the person that is voicing it.

It is as simple as that. You never ram something through fast enough that in your judgment is good, and you never delay long enough if in your judgment something is bad. Good and bad usually are measured by the personal interest of the spokesman, and there is nothing wrong with that necessarily. It is human nature.

Mr. BOUDA. This is what makes a horserace.

Senator HART. That is the reason we have government which theoretically reflects the common denominator.

Mr. BOUDA. I hope we are reflecting the good of all in this case.

Mr. Green raised a question to Mr. Bonyng in connection with the importance of marking products as contrasted to the importance of registering the relationship that would exist between a user and a licensor, and in our own experience we found that this is particularly important. In the United Kingdom procedure, for instance, it is possible and in fact necessary to record the registered user agreement or a registered user agreement. Most often the thing that is recorded is a rather short form of agreement which sets forth the necessary limitations and requirements but does not go into any of the detail that the speakers of yesterday would have indicated would be desirable to have in such an agreement. One does not do this for practical reasons because he does not want his competitor to know all of the details of his relationship between himself and his licensee; all quality control matters, all details of manufacturing the product. But, short of that lengthy and detailed explanation, there is recorded an agreement which sets forth the relationship properly within the scope of the law.

But, as Mr. Bonyng indicated in reading the letter from Mr. Burrell, very few if any persons interested go to the records to see what that relationship is or what it amounts to. They are more interested in looking at the package itself and seeing on the package that this particular product was made in Florida by the ABC Co. under license from the trademark owner, or under the control of the XYZ Co. Then they know the relationship; they know who owns the trademark; they know who the manufacturer is; they know where it is made; they know something about the relationship.

So the British law countries require the statement that the quality is approved by the registered owner. The quality is approved or laid down by the registered owner. These are details which are placed right on the product. And, as Mr. Bonyng indicated in the letter from Mr. Burrell, statements to that effect or amendment to this particular bill incorporating such terms in the bill itself without setting up a registered user procedure which was itemized in three paragraphs as being followed by the registrar in England, for instance, without having that burdensome procedure one can accomplish the same end in the bill if the bill is properly worded to reflect that relationship or require that relationship. Then the procedure and the expense is eliminated, but the net effect is the same.

What I am suggesting is that this type of amendment, if properly reflecting these views, would accomplish the end that the subcommit-



tee desires without burdening the trademark community with the expensive and time-consuming and space-consuming details of registered user proceedings as such.

Senator HART. Well, in the event that should be the judgment of the committee, we would welcome your submitting suggested draft language to achieve that end.

Mr. BOUDA. I have already talked to a number of people involved who are interested in this particular situation. Some of those who have written the now famous trademark management book which was published by the United States Trademark Association; people whose voice is well respected and who are willing to work on this particular problem. And we will be very happy to submit such language or proposed modification to the committee.

Senator HART. Thank you.

Mr. GREEN. No further questions.

Senator HART. Thank you very much.

Mr. Andrew R. Klein.

**STATEMENT OF ANDREW R. KLEIN, OF THE FIRM OF SYNNESTVEDT  
& LECHNER, PHILADELPHIA, PA.**

Mr. KLEIN. Good morning, gentlemen.

I am Andrew R. Klein, speaking in opposition to S. 1396. I have been associated with the firm of Synnestvedt & Lechner since 1922, and have been engaged in the practice of patent and trademark law since my admission to the Pennsylvania bar in 1928.

I served on the National Coordinating Committee on Amendments to the Lanham Act, as the representative of the Philadelphia Patent Law Association, from 1949, which marked the inception of that committee in January under the sponsorship of the United States Trademark Association, until I became president of the Philadelphia Patent Law Association in 1957.

I have represented the firm of Joseph Bancroft & Sons Co. of Wilmington, Del., since 1935 and have had responsibility for the protection of its trademarks during the intervening years. Some of those marks have been registered in as many as 55 countries and are internationally known. Bancroft has authorized me to appear on its behalf in these hearings. I am familiar with many of the legal problems incident to the need for satisfying registered user requirements in the British Commonwealth countries.

Senate bill 1396 proposes to repeal the very simple and effective provisions of section 5 of the Trademark Act of 1946 dealing with use by related companies. It would substitute for these farsighted and useful provisions the relatively cumbersome, complex, and costly mechanism of a registered user procedure.

The bill contains no saving clause to avoid impairment of existing contracts entered into in good faith in reliance on the provisions of section 5, or entered into in reliance on the common law of the United States. This is a very serious matter for many hundreds, possibly many thousands of contracts have been made in reliance on these legal standards. Every one of these licenses would have to be processed and recorded, and in only 6 months' time, under the provisions of S. 1396.



I am aware that certain proponents of the bill have observed that its provisions are not mandatory. I see no escape from the conclusion that if the present law, providing great freedom of licensing and permitted use, is expressly repealed, then Congress must intend that such freedom of licensing is no longer to be permitted. No use by a related company could be allowed to occur unless the ponderous ritual of the bill were followed to the letter. It is not truly an optional bill at all.

I have sought Bancroft's permission to testify in this proceeding because I believe the clearest way to present some of the dangers of this proposed legislation is to show how it would affect a business which widely and extensively has licensed others to produce the fruits of its research and development activities, and to use its trademarks on any products which conform to a specified standard of excellence.

The situation will be clear from a brief, historical review.

Joseph Bancroft established a textile business in this country in 1831. From its inception this business has been a pioneer. It was the first to introduce and market, in this country, dyed fabrics which were resistant to fading. It had to teach an incredulous public that its trademark "Sunfast" (which was at that time a coined word unknown to ordinary purchasers) did in fact refer to a colored fabric which could be exposed to sunlight without immediately fading.

The history of Bancroft is a history of research and development in a constant drive for the improvement of the quality and usefulness of textile products.

Bancroft leads the field in the United States, teaching textile finishers how to impart durable, washable finishes to cellulosic fabrics. It has exploited the new wash-and-wear techniques and it was the first company in the United States to develop and exploit the properties of what is now called textured yarn.

Instead of keeping its new knowledge to itself and thereby requiring the public to buy the new products only from Bancroft, Bancroft has for many years followed the policy of granting licenses to its competitors, giving them the right to use the Bancroft patented processes and formulations, the right to use its priceless Bancroft know-how, and, provided only that the products measure up to Bancroft's standards, the right to use Bancroft's trademarks to identify their goods.

This has been extremely beneficial to the purchasing public for it has made the new products which Bancroft has developed available to the public in the shortest possible time and from the greatest possible number of producers, and yet has preserved for the protection of the customer the quality of the products which its licensees may sell under the Bancroft marks.

This was possible under the common law—

Perhaps I should interject under the common law as it developed in the United States, because in Great Britain the statutory law, which grew out of the common law, did not permit the licensing of trademarks until 1938 when the registered-user statute was adopted. But in this country, case law—judicial decision—recognized the propriety of licensing trademarks so long as quality and nature of the goods were controlled by the licensor, and that has been the rule long prior to the adoption of the Lanham Trademark Act.



May I repeat that sentence again:

This was possible under the common law of this country for it has long been recognized in the United States that it was proper to license a trademark if the licensor controlled the nature and quality of the goods on which the licensee could use the mark.

Section 5 of the Lanham Act was not a new doctrine in the trademark law. It merely codified the law announced by many courts in previous cases.

Relying on the common law and later on section 5, Bancroft has granted many hundreds of licenses. Indeed, a quick check of the records indicates that more than a thousand licenses have thus far been issued, each contemplating the production of some quality product in the textile field which could be made or sold by reference to a Bancroft trademark, provided only that the quality established by the licensor was satisfactorily maintained.

This last requirement has been uniformly implemented by inspection of the licensee's premises, supervision of the licensee's processes, and the testing and evaluation of samples of the licensee's production.

Originally, Bancroft's licensed processes were mainly concerned with the imparting of special durable finishes to fabrics, a field in which it was relatively easy to establish standards and tests which would determine quality. Everglaze fabrics are representative of this group, with "Minicare" and Ban-Care representing more recent additions.

Beginning in the early fifties Bancroft became interested in processes for imparting a permanent crimp to continuous synthetic filaments such as nylon, and using these filaments to spin yarns which were characterized by a high degree of softness and warmth. These yarns are now sold under the trademark Textralized and garments knitted from them bear the trademark Ban-Lon. Both yarn and garment are scrupulously quality controlled, even though this required Bancroft to enter into an unprecedented activity, namely, the establishing of standards to control the nature and quality of knitted garments, notwithstanding the great number of variables which influence the quality in this class of goods.

The licensees who make and sell Ban-Lon sweaters and other full-fashioned knitted garments vary in size from rather substantial establishments, consuming sometimes as much as a million pounds a year of yarn, to what might almost be referred to as marginal producers, using very much small quantities of yarn.

About the smallest commercially economic plant consists of two circular knitting machines with auxiliary equipment. There are scores and scores of knitters who have been licensed to produce Bancroft Ban-Lon garments in shops containing less than half a dozen knitting machines. This is small business with a vengeance. Yet, in the aggregate, it supplies employment and an income for great numbers of people and it makes available to the general public numerous sources from which these quality products can be obtained.

This is competitive enterprise at its best and it has resulted in a free market where the finer garments sell at prices commensurate with their superior quality, but even the least expensive garments can still be relied on to give a definite standard of performance.

But if S. 1396 should be enacted into law, it would be necessary to reappraise Bancroft's long-standing policy. The financial return is



based on the amount of yarn used by the licensee, and in many of these minor plants that is so small a figure that Bancroft would not be justified, from an economic point of view, in maintaining the registered user entries.

This may seem surprising for proponents of this bill have suggested that the registered user is the one who should be made to pay the cost of complying with this very cumbersome procedure. The very fact that the small establishments are marginal producers shows the impracticality of this suggestion.

It is quite common among this class of producers to find that the home, the car, and the bank account have been pledged as collateral against the cost of the knitting machines, and that the manufacturer of the machines, in addition, has extended very substantial credit on a chattel mortgage or a bailment lease.

These licensees do not regard the expenditure of \$50 or \$100 as a trifling matter. Furthermore, they are usually sufficiently astute to realize that when they sign one of these license agreements they bind themselves to exploit and promote a trademark which does not belong to them, and they are, therefore, quick to argue that if Bancroft wishes them to exploit Bancroft's mark, then Bancroft itself must defray the cost involved.

Under the very flexible provisions of section 5 of the Trademark Act of 1946 it has been fairly easy to work out letter agreements which were simple in form and easy to understand and enforce. These follow a single pattern which is adapted to changing conditions or to fit the specifically different needs of diverse licensees. These agreements cost little to prepare. The only serious burden is the cost of maintaining quality control. That is a cost which is borne entirely by Bancroft and which is very great because it is most faithfully performed.

The entry of registered users under the bill will involve much more than the payment of a \$35 Government fee. We have had experience with registered user agreements which have been presented in Bancroft's behalf in various countries of the British Commonwealth, and I can assure you that the first cost is by no means the last. The licensee may change his name; the licensee may move to a different address. Two licensees may merge. The licensee may seek permission to add another product to its line. Bancroft itself may devise some appealing indication of origin to be added to the registered trademarks. All of these changes require amendment of the registered-user entry so that it will conform to the facts. Even if the charges for legal services were always nominal, the multiplication of these charges over some hundreds of licensees and over several years of constant change would amount to a very sizable burden on the licensor.

And may I add that since the quality control program is meticulously enforced, there are and have been cases in which the license has been revoked or suspended. And if the licensee qualifies again, and puts up a guarantee against having to resort to further complaint and procedure against him, he will be reinstated, sometimes.

Well, the cancellation of the agreement is a terrific job all by itself, and the reinstitution of it is another terrific job. These registered-user contracts are a constant headache.

What possible gain can be achieved to compensate for this burden? I must confess that I have not been able to perceive any.



Indeed, the burden of continuously policing registered user entries might become so disproportionately large that it might be necessary for Bancroft to abandon its program of licensing all qualified knitters and restrict its program to those large producers who are rarely subject to sudden changes of the type that requires amendment of the registered user entry and who can well afford to pay the costs. This would represent a serious loss to a great many small businesses. It would reduce employment and would also reduce the number of sources from which quality products could be safely procured. It would mark a step backward from the dynamic concept of the Lanham Act as passed, especially the dynamic concept of the section 5 provisions.

There are other difficulties latent in this proposed legislation. One rather serious difficulty is found in section 2 where it is provided in lines 12 to 14 of page 3 that the Commisisoner may require such other and further information as may be necessary to determine registerability for a registered user.

I foresee endless and fruitless dispute in the Patent Office over problems which do not properly fall within the province of the Patent Office in its normal functioning. I may comment on the fact that Mr. Timberg yesterday stated in his testimony that the Patent Office is admittedly not the agency to police trademark agreements.

The Patent Office should not be burdened with the task of solving a judicial problem, namely, whether control over the nature and quality of goods does in fact and effect exist. It was infinitely wiser in my judgment to place the burden on the licensor. It is his mark which is at stake, and he has an overwhelming interest in seeing to it that the goodwill of his mark is not impaired by any licensee.

The question, moreover, of whether or not he has exercised an adequate degree of control over some or all of his licensees is one which may never arise. It is vexatious to require that every trademark license must be expensively explored and supervised by Patent Office personnel when only one contract out of a thousand may ever be called into question. Better to leave that matter where it is, namely, before a court of law on full hearing.

There is another serious objection in the provisions found in subsection (i) appearing at line 3, and those that follow on page 6, for that section gives to the registered user a right to initiate action on his own volition if the licensor does not bring suit for infringement within 90 days after notice that the infringement exists,

It is a common experience that when a new product appears on the market under a well-publicized trademark there will be a rash of imitations under confusingly similar marks. That happens always, just as soon as the product has established public acceptance. The owner of the mark must control this, and his effective remedy is to seek out the most flagrant abuse and institute suit. But, unless he has provided otherwise in his license agreement, impatient licensees could involve him against his will in a multiplicity of suits, in each of which his own mark is at stake and all of which he must, therefore, prosecute.

The escape clause, that the parties might agree that the licensee cannot sue, is, I greatly fear, illusory. I apprehend that licensees might well refuse to so agree, in which case the only alternative is not to license them. This will reduce, pro tanto, the number of competitors in



the market and the number of sources from which quality goods under the mark can be procured.

It has been mentioned that Bancroft has trademarks registered in 55 countries. If each of these countries were to adopt a registered user procedure such as is contemplated here, it would mean that Bancroft, to be perfectly certain that no goods were ever sold in any country by a licensee who had not been registered there, would have to record each of a thousand licenses, in each of these 55 countries, a total of 3 million registered user applications. This is *reductio ad absurdum*, it is true, but if this type of legislation is really important to our own country, why should it not be equally important for all countries?

I have listened to the testimony yesterday, and would like, if possible, permission to amplify my comments just a little in connection with it.

The burden of all the testimony yesterday, as far as I could see save only for the first speaker, was that we need to have something which specifically states that Congress recognizes the necessity and propriety of exclusive territorial agreements.

If that is the real burden, it could be solved so much more easily than by the provisions of this bill. Take section 45, which defines a related company in these words:

The term "related company" means any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used.

If you add just one more sentence, can you not reach this problem? The sentence I propose is this:

Limitations as to place or mode of use shall not impugn the legitimacy of any form of control which is otherwise lawful.

That is one suggestion. An alternative suggestion is not to cancel section 5. Let section 5 remain and put an additional section in the act as an optional, truly optional procedure which could be resorted to by those companies which do include territorial restrictions in their licenses.

None of the Bancroft licenses has any territorial restriction in it. Any Bancroft licensee can export his product to any country in the world. But for those places and those industries where territorial restrictions are important, perhaps this alternative, truly optional suggestion, might be very helpful.

I would like to summarize the position which I believe I have stated here, namely, that Government control over all trademark licenses which is inherent in the provisions of this bill is very bad. I don't see why these business arrangements involving so much confidential material should be spread abroad upon the public record for the benefit of competitors and defendants who have tried to appropriate the mark. It is bad, I think; inherently bad.

Government control over all licenses is also needless. No such overwhelming problem has been shown as to justify this drastic type of legislation. No real purpose is served in recording these licenses—this, I am afraid, has already been explored by the previous speakers—because the injured party always complains to the store that sold the goods. It would be inconceivable to me that he would go to the



registered user files if he had a complaint about something that he bought in the open market. The normal practice is to go to the man that sold it to you, and if you bought it from John Wanamaker, believe me, John Wanamaker will get action much faster than the customer can from the man who made the product, and there will be no question about registered user.

The merchant knows who his supplier is. I see no useful purpose, in other words, insofar as consumer protection is concerned, in encumbering the files of the Patent Office with innumerable registered user entries.

Furthermore, repeal of section 5 casts a cloud on the validity of thousands, possibly, of registrations. I have no method of knowing how many registrations have been licensed in one industry or another, but when you think that only 3 companies have issued 90 licenses in the bedding industry, when you think that Bancroft has issued 1,000 licenses in its own small field, there must be thousands of licenses that are outstanding, all negotiated in good faith in reliance on the common law and on section 5 of the act.

It will take a generation, gentlemen, for litigation to die down on the question of what has happened to the rights that were established under the Lanham Act, section 5, if this new bill is passed.

Now I don't see any escape from the conclusion that the provisions of this bill are not optional. I have made that point, and I want to state it once more and clearly.

If you repeal section 5 there is no alternative to a trademark licensor but to go ahead and register under the provisions of this new bill.

Now as far as the practical working considerations of the bill are concerned, I just don't see these cases of abuse that Mrs. Leeds referred to. I know she was on the hot spot. Her job as Assistant Commissioner of Patents in charge of trademark matters put her where she saw every case that involved any question, and it may be that she has gotten an exaggerated impression of the extent of the misunderstanding of trademark law, but I thoroughly agree with Fran Bouda that the place to teach trademark law is in the textbooks and not in the statute law of this particular bill.

I have mentioned that there are other ways out of this problem of territorial restriction. There is the additional method that if it is important under the antitrust laws, the antitrust laws are the laws that should be changed.

Now I come to the final point, and this is one that fills me with consternation. I can't escape the impression from what Mrs. Leeds said that it is her conception that if this bill is passed, or possibly even if it is not, a whole new cause of action is created. So far as I know, there is no cause of action for breach of warranty between a customer and the owner of a licensed trademark. There is no privity of contract between them. The only cause for breach of warranty is against the man who sells the goods as far as I know unless there is a contract as in the *Fruit of the Loom* case which specifically provides voluntarily that both parties will be responsible for the product, legally as well as commercially.

Now this question about responsibility is a very serious thing. If you are going to create a new cause of action you ought to pause well and carefully and consider it. I can hardly believe that this



is the intention. But if it is the intention it is a very dangerous thing to do. It may put a brake on the entire licensing program.

I know that there are many authorities which refer to the fact that where you have a related company situation or a trademark license, the licensor is responsible for the nature and quality of the goods. But that is not legal responsibility in the hands of the customer.

As Mrs. Craig said in Philadelphia—she was the marketing expert for the Philadelphia Chamber of Commerce and conducted television programs for several years entitled “Both Sides of the Counter”—women quickly earmark a tarnished trademark. That is the responsibility I am talking about. If your trademark is abused, if the quality is downgraded by one of your licensees, the damage done to the trademark owner is fantastic and immediate and irrevocable half the time. It is faster than injunctions. It is faster than court action. It is devastating in its effect.

Senator HART. Mr. Klein, your presentation was most interesting.

To take up your last point, to ask a question which implies I formed a judgment—I immediately assert I haven’t, but I think I can bring it into focus by asking one question—you described the damage to the trademark owner if a manufacturer puts out shoddy business under his mark. You say that is immediate and irrevocable, and so on.

That doesn’t do the customer any good, does it?

Mr. KLEIN. No; but I don’t see any remedy that—

Senator HART. Well, you are suggesting that there may be in this bill a remedy, and now I ask you why shouldn’t there be that remedy?

Mr. KLEIN. I think the remedy against the storekeeper, which the customer has, is ample protection for the customer. Breach of warranty in the goods is right there, and the customer can have the store make good on the product. And the store, believe me, will get after the supplier fast enough, and the store itself may take the goods off the shelf and sue the supplier for defective products. There is plenty of legal remedy right back from the stores.

The customer can be made whole right there at the counter. He needs no further remedy.

Senator HART. Assuming the collectibility of the outlet, you do acknowledge that there may be an isolated case even under your answer where the customer buying the mark, thinking it was you, finds that your retailer is not collectible. Is the action over?

Mr. KLEIN. Well, I do not recall a case in which subrogation arose under such circumstances except in those rather restricted cases in which in the merchandise as manufactured there appeared a latent and inherently dangerous defect.

I recall some cases under the law of subrogation that did provide such a remedy.

Senator HART. Well, I ask that question because you commented on the very narrow marginal operation of some of your own licensees.

Mr. KLEIN. Yes.

There again I think that we must look at two different aspects of the problem, sir. These knitting machines cost maybe \$20,000 apiece. The investment in that plant is not a small investment. But the knitter knows that he isn’t going to sell any more jobbers or any more retailers.



if his goods have caused a kickback, and to preserve that investment he will stretch every resource to make good. That is very important.

I thought of another incident which might demonstrate what I mean by immediacy of the remedy. A few years ago there was a store in Philadelphia, a bargain store which offered for sale goods marked—I think it was Ban-Lon—at a price well below the price which was necessary to produce a good quality Ban-Lon sweater that would meet Bancroft's standards.

The Ban-Lon sweaters on the shelves of all the stores in Philadelphia disappeared like magic, and I couldn't find a single store, reliable store, that was selling Ban-Lon sweaters on the counter, and I wanted to buy one for my wife's birthday.

We brought a suit for a restraining order. The proceeding was concluded in the space of 2 days. The news crept around the retail field, and on the third day every store had Ban-Lon sweaters on the counters once again.

You see what a devastating effect even just the use of a deceptively similar mark can have. The public wasn't going to buy Ban-Lon sweaters any more.

These actions can take place. The damage can be done in no time. And if you can't find it and reach it quickly you are in trouble. But the way to fix it is not to encumber the field with registered user procedures.

Senator HART. I think your point, your last point is well taken.

I made a couple of notes as you went through this. You answered one. There is no territorial restriction on any of these scores and scores of knitters that you have licensed.

Mr. KLEIN. None whatever.

Senator HART. Did you comment—if you didn't I am sure the record will benefit from your years of experience in the field—on the question of whether the action by the Department of Justice in the bedding case startled the patent law fraternity?

Mr. KLEIN. Well, it certainly startled me in a sense. That is, we had anticipated—my firm had anticipated many years ago when a series of actions was instituted involving, among other things, territorial restrictions, the possibility that the Department of Justice or the courts might at some future date regard territorial limitations themselves as being bad. It never occurred to us that the court would go so far as to hold that a territorial restriction was per se bad, but as I read the *White* case, that is precisely what the judge said there, and I think that is a crippling blow to American industry.

Senator HART. And you would recommend that Congress express a view on that. Is that right?

Mr. KLEIN. I most emphatically would, sir. I think it is a most serious problem.

Senator HART. On page 8 of your prepared statement you say:

Indeed, the burden of continuously policing registered user entries might become so disproportionately large—

and so on.

You have in mind there the mechanical rather than the quality supervision results, do you?

Mr. KLEIN. Well, I have a double problem in mind there but not the quality supervision.



Senator HART. But not the quality supervision?

Mr. KLEIN. Not the quality supervision.

Senator HART. What two things do you have in mind?

Mr. KLEIN. Here is the nature of the problem: suppose that Woodie's sweater buyer over in Paris sees a very fine collection of Ban-Lon sweaters with that priceless Parisian styling and wants to get maybe 50 dozen for sale in Woodward & Lothrop's store down here. We would have to do something to make sure that the manufacturer of those sweaters in Paris remembered that it was necessary before sending those sweaters to notify us that he had to hold the order and refrain from doing business until we had sent the proper forms over to have him entered as a registered user in this country, because if his goods came into this country without his having been entered as a registered user we might lose our mark.

Now that would—he might lose the sale. He might very well lose the sale because it takes time to get these papers properly drawn and executed.

And you have the additional problem that all of these changes are occurring day to day; address changes, name changes, product changes and so on. And unless somebody is constantly aware of the fact that whenever that happens you have got to change the registered user entry, you are likely to miss out and fail to change the record, and then you bring suit against some infringer and he goes back to the registered user files and finds that you slipped up on this place or that place and defends on the ground that you have failed to maintain your registered user record.

It is just an opportunity for the defendant to get in there and destroy the man whose mark is at stake.

Senator HART. Mr. Green?

Mr. GREEN. I have no questions, sir.

Senator HART. Thank you very much.

Mr. KLEIN. Thank you.

Senator HART. It had been my hope that we might conclude without the need of a recess. Unfortunately, I must make a luncheon appointment.

Off the record.

(Discussion off the record.)

Senator HART. We will recess until 2 o'clock.

(Whereupon, at 12:05 p.m., the committee recessed until 2 p.m., this same day.)

#### AFTERNOON SESSION

Senator HART. The committee will be in order.

The schedule indicates that our next witness is Mr. John A. Gosnell.

#### STATEMENT OF JOHN A. GOSNELL, GENERAL COUNSEL, NATIONAL SMALL BUSINESS MEN'S ASSOCIATION

Mr. GOSNELL. Senator, in order to conserve your time, if you agree, I will be glad to just submit my statement for the record and add a few remarks.

Senator HART. Thank you. The statement will be printed, then, in full.



MR. GOSNELL. I am general counsel of the National Small Business Men's Association. We were not apprised of this hearing until a very late moment, and had to prepare a statement without being fully apprised of all the facts. I want to make it clear for the record that I now understand the reasons behind this legislation, and we do not intend to disparage or to minimize the problem faced by the small business people, who are the principal proponents of this legislation.

I think there is a serious problem here with respect to the enforcement policy of the Department of Justice, and I agree with the previous witness, Mr. Klein, that this is a matter which certainly needs congressional attention in some way.

We are strongly opposed to the methods proposed by S. 1396 as a cure for this situation, because we believe that the burdens imposed are all out of reason.

And, furthermore, I have grave doubts whether or not they reach directly to the problem.

I think Mr. Klein made some very fine suggestions with respect to alternative methods which might be employed to do the job much more directly and much more effectively.

Now, with respect to the policy of the Department of Justice dealing with exclusive territorial rights, I think there is an area here of great importance to small business, and I think that policy ought to be adjusted, giving more latitude to agreements of the type under discussion.

I think this can be done without jeopardizing the effectiveness of the antitrust laws in any way and, at the same time, giving the small business people an opportunity to legitimately use trademarks and joint ventures for their own best interests and for the best interests of the public.

I believe that is all I have to say, sir.

Senator HART. Specifically, as I understand you, to summarize your statement, it is as one which opposes the adoption of the bill S. 1396, which we are considering, but you do suggest the desirability of specifically insuring territorial protection?

Mr. GOSNELL. Yes.

Senator HART. That is one of the specifics—

Mr. GOSNELL. Sir?

Senator HART. That is one of the specifics which you think is desirable?

Mr. GOSNELL. Right.

Senator HART. But in your judgment, the machinery provided by or in S. 1396, you think, is needlessly burdensome and perhaps does not achieve the required—

Mr. GOSNELL. Yes, I do, Senator, and I say that as one with considerable background in trademark law.

Senator HART. Well, I envy you, Mr. Gosnell.

Mr. GREEN. No questions.

Senator HART. Thank you very much.

Mr. GOSNELL. Right.



(The prepared statement of Mr. Gosnell follows:)

STATEMENT OF JOHN A. GOSNELL, GENERAL COUNSEL, NATIONAL SMALL  
BUSINESS MEN'S ASSOCIATION

My name is John A. Gosnell. I am general counsel of the National Small Business Men's Association, 801 19th Street NW., Washington, D.C. As a practicing attorney I have devoted a substantial amount of time to trademark law, but I confess that I am unable to pinpoint either a need for, or any constructive purpose to be served by, the cumbersome procedures proposed by S. 1396.

This bill is advanced as a measure of great benefit to the small-business community, because among other things it provides a mechanism by which small firms can successfully compete with larger firms through a joint advertising budget and use of a common trademark. This might be noteworthy if such a course of action were not now entirely possible under the law as it now stands. The small-business community is not averse to receiving the benefits of constructive legislation which eases the competitive burden, but the mere confirmation of the existing right to participate in proper trademark licensing, will hardly support this bill as a small-business measure.

What then is the real objective sought to be gained? The answer certainly does not appear on the face of the bill, but it is clearly apparent from the supporting testimony that the primary objective is to lay a foundation for allocation of exclusive territories on a basis that will placate the Department of Justice. Just how S. 1396 proposes to accomplish this escapes me.

If a legal foundation for allocation of exclusive territorial licensing of trademarks is a desirable end, and it may or may not be, it would certainly seem more practical to attack the problem in a straightforward way that would definitely have the desired effect on the enforcement policy of the Department of Justice. The effectiveness of the approach in S. 1396 toward this end is most dubious to say the least, and is certainly not worth the burden imposed by the complex procedural redtape proposed by the bill.

With respect to the need for such legislation as a small-business measure it is somewhat singular that exclusive territorial licensing has never been brought to the attention of the association among the hundreds of small-business complaints and problems which engage our attention. Nor have we ever heard the matter mentioned in any of our frequent contacts with the Small Business Administration.

It is by no means a foregone conclusion that exclusive territorial licensing, without carefully delineated restrictions, is a constructive move either for the small-business community or the public. The trademark is an indispensable part of our business system. It is the index to source and quality, and any diversion of its function by group action or otherwise may be a step toward deterioration which may strike at the roots of our entire business system.

The support of the co-ops for this measure is not reassuring. The co-op movement is not generally renowned for support of the free-enterprise profit system, nor, incidentally, for support of the Federal revenue. Also their interest in grade labeling is hardly consistent with a desire to further the interest of private trademarks. If any aspect of this proposal will tend to facilitate the swallowing up of tax-paying small business by the tax-free co-ops then we are unalterably opposed to it for this reason alone.

This does not mean that we have not recommended the pooling of effort both in purchasing and distribution in order to meet the competitive problems of small business. But in every such case the resultant profits are subject to the Federal corporate income tax. The small-business community is not interested in being helped at the expense of other segments of the economy.

It is entirely possible too, that the jointly used trademark, instead of being a boon to small business, can become just another tool to eliminate smaller competition or to force it to merge.

The argument that this legislation is needed to prevent deception of the public appears to me to be without merit. Effective trademarks are extremely valuable properties, and as any trademark lawyer knows, self-interest alone will efficiently protect the public against any type of misuse which may threaten the continued validity of the mark. In any event, so far as I know, no evidence of abuse has been presented to this committee. One very hazardous aspect of S. 1396 is the deletion of section 5 of the present act. There is no way to foresee the morass of legal complications which may result from the proposed amend-



ment, particularly with respect to the treatment of the thousands of service marks common to small business, and the status of common law rights.

There is little merit too in the fact that the bill is derived from the Canadian statute. The Canadian and British statutes were necessitated by an entirely different state of the law. Furthermore the experience under those acts has been very unsatisfactory.

For these reasons we strongly oppose the enactment of this bill and endorse the resolution presented by the U.S. Trademark Association.

Senator HART. Robert B. Whittredge.

**STATEMENT OF ROBERT B. WHITTREDGE, ATTORNEY AT LAW,  
NEW YORK**

Mr. WHITTREDGE. Mr. Chairman, I am Robert B. Whittredge of the firm of Fish, Richardson and Neave in New York City, and I appear in opposition to the bill, S. 1396.

I am a member of the bar of the State of New York and specialize in trademark and patent law.

I am consultant to and immediate past chairman of the Lawyers Advisory Committee of the U.S. Trademark Association, on whose behalf I appear here today.

Let me say by way of an identifying statement with respect to the U.S. Trade Association, that it was organized in 1878 and is the oldest association of its kind in this country.

Its entire purpose and aim is to foster and protect trademarks and trademark rights in the best interests of the trademark owners and the public.

Several hundred national manufacturers and trademark owners are regular and supplementary members of the association, and many leading trademark attorneys and law firms are associate members.

Foremost among the association's activities have always been its efforts to create and maintain a Federal trademark statute which would afford the registrant and the public the strongest possible trademark protection under our constitutional system.

It was with that thought that careful consideration has been given to Senate bill S. 1396 by Senator McClellan, as well as its identical companion bill, H.R. 6004, by Representative Lane.

As a result, the U.S. Trademark Association, on behalf of its membership, finds it necessary to oppose S. 1396 and H.R. 6004 as being improvident and unnecessary.

I am submitting a resolution of the association's board of directors and a report of its lawyers advisory committee to the board, which set forth the reasons for this opposition to the measures proposed.

I should like to read only the resolution and to submit the committee report in order to save the Senators' time.

The resolution of the Board of Directors of the Trademark Association is as follows:

*Resolved*, That the U.S. Trademark Association strongly opposes the enactment into law of S. 1396 for the reasons that:

1. S. 1396 seeks to substitute in the 1946 act—

that is, the Lanham Act—

a comparatively complex registered-user procedure for the present related company concept without conferring any benefit or advantage to the registrant, the registered user, or the public.



2. The related company provisions of the act of 1946 have served the public well and have in every respect admirably fulfilled the lawful needs of trademark owners and permitted users.

3. While S. 1396 can be said to pertain only to registered trademarks it would, if enacted, be likely to raise serious doubts as to the validity of the common-law trademark which is the subject of permitted use, since it abolishes the related company provisions of the act of 1946 which codified, clarified, and settled the concept of permitted use.

4. S. 1396 is largely derived from the Canadian registered-user statute which had its genesis in the British statute. Both statutes were enacted to solve problems that do not exist here, and there is substantial evidence that some of the British people are now dissatisfied with their statute.

And it is

*Further resolved*, That a copy of this resolution be transmitted to the chairman of the Committee on the Judiciary of the U.S. Senate, together with a copy of the report of this association's lawyers advisory committee and the request that should a public hearing be held on S. 1396, this association be permitted to express its views.

The resolution is dated May 20, 1961.

The report of the lawyers advisory committee on which this resolution is based has been submitted, and I request that it be printed in the record, Senator.

Senator HART. It will be, immediately following this statement.  
(The document referred to follows:)

REPORT OF THE LAWYERS ADVISORY COMMITTEE OF THE U.S. TRADEMARK ASSOCIATION ON S. 1396 BY WALTER J. HALLIDAY, CHAIRMAN, LAWYERS ADVISORY COMMITTEE

Your committee is opposed to S. 1396 for the bill seeks to substitute in the 1946 act a comparatively complex registered-user system for the present related company concept without contributing any benefit or advantage to the registrant, the registered user, or the public.

Section 5(k) of S. 1396 provides that:

"The registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, *prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark.*" [Italic supplied.]

But a registrant under the 1946 act may "prescribe conditions and restrictions as to mode and place of permitted use" provided that there is not such a misuse or abuse of the trademark as will render the arrangement unlawful. Many of us have arranged for the lawful permitted or licensed use of registered trademarks in which the proprietor, to use the words of the bill, prescribed "conditions and restrictions as to mode and place of permitted use." This is contemplated by the related company provisions of the Lanham Act and this was the governing concept of permitted use or licensing arrived at by the profession and the courts prior to its being, in effect, codified and put beyond question by the Lanham Act. Certainly there are questions as to what conditions and restrictions as to mode and place of permitted use are lawful but the present bill provides no definitions of these words nor does it specify what conditions and restrictions that may have been unlawful up to now will be lawful under the bill.

The proviso in 5(a)(1) excepts certain classes of persons. The purpose of this proviso is not understood. Wholesalers, retailers, agents, or others who resell the registrant's goods in the original package are not users of the registrant's trademark. They merely deal in or with the registrant's goods. Those who merely repackage the registrant's goods are not usually users of the registrant's trademark. The same is true of those who use the registrant's mark primarily to identify and distinguish goods manufactured or sold by the registrant. Why then are all these persons excepted when probably most of them do not come within the meaning, as it has been understood up to now, of a permitted or licensed user?

Compared to the arrangements presently in effect for permitted use, the procedure provided in the bill is complex. As it is now, a private agreement



between the parties is all that is needed. S. 1396, on the other hand, requires a written and verified request to be filed in the Patent Office and to put it shortly, a statement of the arrangements made between the registrant or applicant and the permitted user. Moreover, the Commissioner who must approve the permitted use may require such other and further information as may be necessary to determine registrability and a proper showing must be made in the event the parties do not wish to make their arrangements, as a matter of public record, available to the trade and to the public. Cancellation of the registered-user registration may be sought by any person who believes he will be damaged by the registration. Anyone who has been confronted with the registered-user procedure in effect in countries of the British Commonwealth will appreciate the additional paperwork and nuisance involved. The fees are quite similar to those for an application under the present act but they could be substantial in the case of multiple permitted users such as might be required in the case of service marks.

It is in connection with service marks that the bill has its widest application or effect. Reference to the classified telephone directory of any reasonably large city will show the extent to which service marks of many registrants, who manufacture and sell durable goods which require maintenance and repair over a period of years, are used by persons furnishing maintenance and repair service, the nature and quality of which are controlled to the extent possible by the registrant, and who in very many cases are related to registrant only by a franchise or dealership agreement. This is true of automobiles as well as of many household appliances, including television. Hundreds and, in some cases, thousands of permitted uses of one service mark are in existence. Again there are many service industries where the facts would indicate the presence of permitted uses with additional hundreds and thousands of permitted users. Examples of some industries in which services play an important part in connection with a registrant's mark would be moving van services, trailer rental systems, car rental systems, truck rental systems, perhaps also television and radio networks. Gasoline service stations may be another case in point. A study might show that in many of these industries the registrants do not consider that they are dealing with permitted uses of service marks but some of the obvious facts would certainly render the conclusion doubtful and prudence might dictate that the provisions of the bill would have to be followed.

The language of the bill would indicate that a good deal of it is derived from the Canadian statute which in turn had its genesis in the British statute. There is nothing wrong with adopting the practice or law of Canada or Great Britain if a real need is shown for it, but the circumstances which gave rise to the British and Canadian registered user systems do not exist in this country for here permitted use or licensing was recognized by the courts prior to the Lanham Act, and is provided for in the Lanham Act. In Great Britain and in Canada, on the other hand, up to the advent of the registered user system, permitted use and licensing were not fully recognized by the law and raised serious doubts as to the validity of the mark which was the subject of the permitted user or license.

S. 1396 is proposed as an amendment to the Lanham Act and can be said to pertain only to registered trademarks. In many cases the trademark proprietor could choose to rely on his common law rights and either not register or cancel, but this would create an even greater disparity between the status of the registered and unregistered marks in this country. The proposed legislation might also bring into question the validity of unregistered marks which are the subject of permitted or licensed uses.

We are not aware of any compelling need of trademark owners or the public for legislation which on its face would offer no advantage over the present law and which would only substitute a complex and burdensome procedure for one that is simple and effective.

Senator HART. May I ask if, in addition to the recitals in the report to which you have just referred and which has been made a part of the record, do you have any additional comment that you would like to make for our benefit, based on what you have heard today or yesterday?

Mr. WHITTREDGE. Yes, I do, Senator.



I would like to make a comment based on my understanding that there has been testimony here—I was not here the first day of the hearings, but I understand that there was testimony yesterday—on behalf of the bedding manufacturers, several of them, to the effect that this registered user provision is thought to be necessary to solve a difficult problem which they have as to allocating sales areas among the various members of the industry, and apparently there is also a problem of price fixing.

Now, I would think that the proper reaction to those problems is along these lines:

First, it seems entirely unrealistic to hope that a few lines in the Federal trademark statute are going to affect the law as to territorial allocations of business or price fixing or any of the other antitrust problems that business has.

I think that neither the courts nor the Department of Justice is likely to accept that method of legislating on such problems.

Secondly, it seems hardly proper to relieve a special situation for a few by saddling the many with the wholly unnecessary burden of a system which will merely yield more expense, more difficulty, more nuisance, more paperwork—namely the registered user system.

The present system, the related company system, as embodied in the Lanham Act, in section 5 and in the related companies definition of section 45, has proved to be very workable, very simple, and we are now enjoying the simplicity and the workability of those provisions.

We enjoy those, I may say, to the envy of some of our English friends who are now fretting under precisely the added load that this new measure would impose upon the trademark community in this country.

Thirdly, the Lanham Act is not the place to deal with territorial allocations, price fixing or any antitrust matters. I think that they should be handled as legislative amendments to the antitrust laws, if it should be found that those amendments should be made, if those are proper things to be permitted. I am not in a position to express an opinion about that; I am here to express views about the trademark aspects of this proposed legislation.

I think it is not the place of the Lanham Act to legislate on antitrust problems.

Fourthly, if there is any real and proper desire for this bill, any real and proper need for this bill, why not let it stand alongside the present related companies provisions in the Lanham Act as an additional statutory system, which would supplement rather than displace and throw away the perfectly workable related companies system that we have now.

The bill now says throw away related companies, take on registered user. My suggestion is: let us take on registered user, keep related companies, and then let the customer decide which is the best system. The customers, that is, the trademark users of this country, I think, will soon let the Patent Office and the Congress know which is the better system, by their relative patronage of the two systems.

There seems to me to be simply no need to throw away the proven, workable related companies system.

If we must experiment with registered user, let us experiment with it on a coexistence basis, with related companies still in the statute.

That is all I have to say, Senator, to this problem, as I have heard the hearings reported to me.



Senator HART. As a trademark practitioner, what has been your opinion as to the law on the imposition or attachment, as a condition in a license, of territorial limits on a trademark license? What has been the counsel you have given persons with that idea in mind?

Mr. WHITTREDGE. Well, Senator, as the law now stands, I think it is lawful. However, I would be cautious in advising any client to impose any restrictions in any license. I think all lawyers realize the danger in restrictive covenants in any business license, and that is the attitude I would take in advising clients with respect to territorial allocations or other restrictive provisions.

But, as I said to begin with, I do not think in the present state of the law there is anything wrong with territorial allocations, and therefore, if this committee should feel that there should be something spelled out clearly in the law permitting territorial allocations under licenses, whether they be patent licenses or trademark licenses, or whatever, then that should be done directly in the antitrust laws, in the Sherman Act, Clayton Act, or wherever it may be most appropriate, rather than tucked away rather inconspicuously in a corner of the Trademark Act. I think that would be a vain act of the committee, of the Senate, and of the Congress, to attempt to handle the problem in that fashion. I just cannot bring myself to feel that the courts would accept that kind of amendment of the antitrust laws—by what has been called here, and I think properly so, a back-door approach.

Senator HART. You are familiar generally with the action brought against certain bedding manufacturers by the Justice Department?

Mr. WHITTREDGE. Only in its barest outlines.

Senator HART. Do you know whether the charge was a violation of the Sherman Act or the Clayton Act?

Mr. WHITTREDGE. That I do not know, Senator.

Senator HART. Do you know whether—

Mr. WHITTREDGE. I would assume it was a charge of violation under some one of the antitrust acts, but specifically, I do not know.

Senator HART. Thank you very much.

Mr. WHITTREDGE. Thank you, Senator.

Senator HART. I understand that Gerrit Groen, who was scheduled as the first witness for today, has not been able to come.

However, a statement over his signature dated June 16, 1961, to the Committee on the Judiciary has been received and will be made a part of the record at this point.

(The letter referred to follows:)

CHICAGO, ILL., June 16, 1961.

COMMITTEE ON THE JUDICIARY,  
U.S. Senate, Washington, D.C.:

The committee is requested to accept this statement indicating my support of S. 1396, popularly known as the Trademark Registered User Bill.

Although section 5 of the Lanham Trademark Act, 15 U.S.C. 1055, has usually been interpreted as affording the proper basis for licensing and franchising trademark rights by trademark owners to various franchise operators, in the last 2 or 3 years serious doubts have been cast upon the right of businesses to operate under trademark franchise agreements, when such agreements necessarily involve limited trading areas and joint advertising efforts. Although this practice is common to numerous firms, particularly small businesses, throughout the United States and has opened wide areas for small businesses to cooperate and compete with larger firms, the practice is now apparently being construed by some authorities as being in violation of the antitrust laws.



Numerous small businessmen, and most lawyers familiar with trademark practice and antitrust practice, believe that the related companies provision of the Lanham Act fully justifies present day franchising operations. It is my opinion, however, that recent pronouncements of the Justice Department indicate that a strong effort will be made to so limit franchising of trademarked articles and services that it will be impossible to effectively carry out franchising programs. This would greatly jeopardize small businesses' operations and force many to merge, in order to get the full benefits of trademark rights and joint national advertising.

S. 1396 is carefully designed to explicitly provide for the right of trademark owners to franchise various firms in designated areas to manufacture, advertise, and sell items under nationally known brands, thus giving small local businesses an opportunity to compete with concerns of national scope.

Registered user laws of this type have been familiar in commonwealth countries for many years. This operation of businesses under registered user trademark agreements has been fruitful and beneficial in those commonwealth countries.

GERRIT P. GROEN.

Mr. GREEN. Mr. Chairman, I think there was reference made this morning to a request from the Patent Office as to its views on this matter.

Senator HART. A suggestion was made that we should obtain those.

Mr. GREEN. Such a request was made to the Patent Office, as well as to the Department of Justice.

I believe Mr. Merchant is in the room at the present time, representing the Patent Office, and he may give some information as to the status of that report, if the chairman so desires.

Senator HART. Yes, it would be welcome.

#### STATEMENT OF JOHN H. MERCHANT, DIRECTOR, TRADEMARK EXAMINING OPERATION, U.S. PATENT OFFICE

Mr. MERCHANT. Mr. Chairman, my name is John Merchant. I am presently Director, Trademark Examining Operation, of the Patent Office.

I have been a member of the Patent Office staff for about 36 years and have served as Director of Trademark Examining Operation since January 1, 1947.

The Patent Office has prepared a comment on this proposed legislation. Unfortunately, this draft has not been approved by the Department as yet. Approval is expected within the next day or two, and I would ask permission to insert it in the record, if and when it is cleared.

Senator HART. Well, we will hold the record for that purpose, and I hope your optimistic estimate is proved to be a sound guess.

I take it that, in view of the position not having been adopted officially, that you would not care to make any comment with respect to the bill, or do you feel that you are free to do so? We would welcome it if it would not embarrass you.

Mr. MERCHANT. If we could, Mr. Chairman, put it this way: If any remarks I make could be held in abeyance, and if and when the report is approved, they could be inserted in the record—is that proper?

Senator HART. You have to put that on the third copy. [Laughter.] I do not know how it would be.

Mr. MERCHANT. That would be satisfactory. I am assuming that this is going to be approved, and it is a question of time.



Senator HART. Would there be objection, then, to receiving the testimony subject to subsequent approval of the report, which you say you have in front of you, by the Patent Office?

If the report is cleared, then your testimony will be printed if you have no objection to testifying?

Mr. MERCHANT. No, I do not. There are some technicalities—some oversights—I think, that we would like to call attention to, that have not been mentioned in any of the other previous reports.

Senator HART. Very well.

Mr. MERCHANT. The provisions of present section 5 are relatively simple. They represent a codification of the doctrines of permitted use or licensing as laid down by the courts in decisions prior to the enactment of the Trademark Act of 1946. No particular administrative difficulties have arisen in the Patent Office in operating under this section. However, a minor revision of the definition of related companies in section 45 might be desirable for clarity and to confirm the present Patent Office interpretation of the provisions of section 5.

It is not clear from an analysis of the proposed revision of section 5 just what advantages, if any, will result for either the trademark owner, the registered user, or the public. Actually, the proposed revision would seem more restrictive than present section 5, to the detriment of the trademark owner; and from an administrative viewpoint the Patent Office will be confronted with many problems in interpreting the new language of the section.

In accordance with the provisions of proposed section 5(a)(1), any person, other than the registrant of a registered mark, or the applicant for registration, who uses such mark on or in connection with goods or services, the nature and quality of which are controlled by the registrant, may be registered as a registered user for "permitted use" of the mark.

The requirements for registration as a registered user are set forth in proposed subsection (b). The application or request to register must be in writing and verified, and, in addition to certain formal recitations, must set forth the method of control, by the registrant or applicant for registration of the mark, over the nature and quality of the goods or services on or in connection with which the permitted use is to take place; the duration of the permitted use; and any conditions imposed by the registrant or applicant for registration of the mark with respect to the characteristics of the goods or services, or the mode or place of the permitted use.

The Commissioner is authorized, by the same subsection, to require such other and further information as may be necessary to determine registrability as a registered user. It is not clear just what other information the Commissioner would need to determine whether or not the application conformed to the requirements of subsection (b), and no other section seems in point.

Subsection (d) provides that, if the Commissioner is satisfied that there has been compliance with the provisions of this subsection—presumably subsection (b), although not identified—and that, in all the circumstances, the permitted use of the mark is not likely to cause confusion or mistake or deception, he shall authorize registration of the user as a registered user.

It is not clear from these subsections whether or not the Commissioner is to exercise any discretion in determining whether or not the



method of control of the mode or place of the permitted use is appropriate and proper under the decisional law. Presumably, the agreement by the trademark owner and the applicant for registered user will not be subject to review by the Commissioner. Such discretion as the Commissioner may exercise seems to be limited to the determination of whether or not the agreement by the parties conforms to the recitals required by items (1) to (7) of subsection (b). So much is confirmed by subsection (k) which provides that the registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark.

The filing of an application for registered user, as proposed, appears to be permissive rather than mandatory, but the results of failure to file are such as to make filing mandatory.

If no application for registered user were filed and approved by the Commissioner, a use by a permitted user would not inure to the benefit of the trademark owner, as is the case under present section 5, even though the owner exercised appropriate control over the nature and quality of the goods or services in connection with which the mark was used. The bill thus would carry with it a material curtailment of the rights now enjoyed by trademark owners and approved by decisions of the courts.

Subsection (c), I think, deserves comment. It provides that, upon a proper showing made by any person filing a request, the Commissioner shall take appropriate steps to insure that any document, information, or evidence furnished for the purpose of determining registrability as a registered user is not disclosed to any other person except by order of a court of competent jurisdiction. Were this subsection strictly construed, the Commissioner could not delegate the examination of the stated materials to any other Patent Office official, and could not disclose their contents to any other governmental agency even on the basis of official request, that is, in the absence of a court order. We believe that such a burden and restriction should not be imposed upon the Commissioner.

Now, provision is also made in subsection (f) for modification or cancellation of a registered user's registration by petition of the registrant of the mark and of the registered user, and for cancellation by the Commissioner on his own motion in respect of goods or services for which the mark is no longer registered. It would appear that if a trademark registration were to be canceled, or to expire, the Commissioner would forthwith cancel the registered user's registration.

Provision is also made by subsection (g), whereby any person who believes that he is damaged by the registration of a registered user may, upon payment of the prescribed fee, apply to cancel the same by filing a verified petition in the Patent Office. The petition would be considered initially by the Trademark Trial and Appeal Board, from whose decision an appeal could be taken to the U.S. Court of Customs and Patent Appeals, or review otherwise sought in a U.S. court of competent jurisdiction.

The reasons for providing for cancellation of a registration of a registered user at the hands of a third party are not clear, since it is not understood how any person could be damaged by the registra-



tion of a registered user and not be damaged by the registration of the trademark owner.

Mr. Stewart explained to me at lunch that was really intended to apply to the trademark owner applying to cancel a registered user, where he had terminated the contract with the other user-licensee.

Notice of modification or cancellation of a registration of a registered user would, under subsection (h), be given by appropriate publication in the Official Gazette of the Patent Office.

An inconsistency is noted in the language of subsection (a) (1) and subsection (b) (5). The first subsection refers to the applicant as one who is using the mark at the time of application for registered user. By the second subsection, however, the applicant is required to make allegations in respect to the goods or services on or in connection with which "the permitted use is to take place."

The latter seems to refer to future use and it is unclear to us whether or not the party applying to be a registered user is required to use the mark before he files his application.

Thank you.

Senator HART. The committee has been joined by Mr. Kittrie, counsel for Senator Wiley.

Do you have any questions?

Mr. KITTRIE. No, Mr. Chairman.

Mr. MERCHANT. The reporter states that this report is now a part of the record. I request that it not be put into the record unless and until it has received departmental<sup>1</sup> approval.

Senator HART. Without objection, let me make a ruling that will insure against disaster to you.

The statement presented and the remarks made by Mr. Merchant will be made a part of the record if the committee is advised by the Patent Office that the statement is the position taken by the Patent Office.

We can anticipate the receipt of this information within a matter of a week or so, I take it?

Mr. MERCHANT. Thank you.

Senator HART. Mr. Green advises me that Mr. Stewart, who testified yesterday, would like to submit for the record certain documentation. Is my impression correct?

Mr. Stewart, I understand there is certain documentation you want to add to the record?

Mr. STEWART. Yes, Mr. Chairman.

Senator HART. You may proceed.

#### STATEMENT OF CHARLES L. STEWART, JR.—Resumed

Mr. STEWART. Yesterday the question was raised as to whether this method of franchising trademarks to producers of goods and services subject to territorial limitations was a rather general thing, or whether it was pretty much confined to a few industries.

I noticed this morning that quite a few of the persons who gave statements indicated that they do have clients in a number of different

<sup>1</sup> The substance of Mr. Merchant's testimony is embodied in the letter of the Secretary of Commerce dated Aug. 2, 1961, to James O. Eastland, chairman, Committee on the Judiciary. That letter received clearance from the Bureau of the Budget, and is a part of this record.



fields and who do have this kind of licensing, so that it is already apparent that there is a good deal of it.

But I thought I might bring to the attention of the committee the fact that there is a publication, and it might be included in the record here, or a reference to it, at least, might be included in the record of the hearings, entitled, "1960 Directory of Franchising Organizations."

This is put out by Pilot Industries, Inc., of 42 West 33d Street, New York, N. Y. It appears to be under the sponsorship of National Franchise Reports.

Now, National Franchise Reports in itself is a series of publications issued apparently monthly from the Clearinghouse of Franchise Information at 333 North Michigan Avenue, Chicago 1, Ill., and I have a couple of examples of their publication here which, like the other issues in the series, include listings and descriptions of various forms of franchising opportunities that are offered to small businessmen who have accumulated just enough capital to get themselves started, with the aid of a national advertising and merchandising and trademark licensing from what we have come to refer to here as the umbrella corporation.

These, of course, vary in form from one industry to another and from one type of licensor to another.

Senator HART. I would suggest that we make part of the record the two bulletins, but receive for the files of the committee the directory.

Mr. STEWART. Yes, fine.

(The directory referred to will found in the files of the committee.)

(The documents referred to follow:)

[From National Franchise Reports, Chicago, Ill., July 1960]

#### \$10,000 MAXIMUM INVESTMENT OFFERS LEAD IN 1960

The investor seeking a franchise this year could have considered a wide range of dealership and distributorship offers under \$10,000. But if he had wanted to operate a franchised retail business, his investment, in most cases, would have been higher. The following table lists capital requirements of representative franchise offers published by National Franchise Reports during the first half of this year:

##### Distributor-dealer:

|                         |         |
|-------------------------|---------|
| Hearing aid.....        | \$5,500 |
| Chemical line.....      | 2,500   |
| Credit system.....      | 2,900   |
| Building material.....  | 2,810   |
| Industrial product..... | 6,500   |
| Business service.....   | 5,000   |

##### Retail business:

|                      |        |
|----------------------|--------|
| Gift shop.....       | 16,000 |
| Specialty foods..... | 15,000 |
| Discount drugs.....  | 25,000 |
| Furniture.....       | 11,350 |
| Muffler-brakes.....  | 20,000 |
| Automotive.....      | 10,000 |

The above figures do not tell the full story. In some instances, investment listed is minimum capital required—a reserve fund for initial operating expenses has not been included. In the retail category, the January-June period has been notable for an increase in the number of nonfood opportunities. There has been a drop in drive-in offers at the national level, but regional operations have continued to present a wide variety of franchises in the food field.



## FOUR BEDDING FRANCHISE COMPANIES CHARGED WITH ANTITRUST VIOLATIONS

Last month in the Chicago district court, the Government attacked four companies, Sealy, Serta Associates, Restonic Corp., and Spring Air Co., on two counts: (1) forbidding retailers to buy outside the manufacturers' franchised territories; (2) with pricing agreements in violation of the Sherman Act. These companies are syndicates, in the opinion of the antitrusters, and their suggested listed prices are agreements, the Government contends. The companies do not make bedding. Manufacturers are licensed by them to make products to their specifications. Exclusive territories are assigned the manufacturers, and they are supported with a complete packaged marketing program. All four firms deny having any control over the prices that the manufacturers charge dealers, though they do advertise suggested prices. The case, says Carl N. Singer, executive vice president of Sealy, "strikes at the very heart of the great variety of franchise operations in the United States." He claims that Sealy promotes competition by licensing small businesses under its trademark.

## ASSOCIATE STORE DEALERSHIPS OPEN WITH WESTERN AUTO SUPPLY COMPANY

A solid 51-year background of retailing experience plus a successful, time-tested franchised dealership program form the basis of a current opportunity to independently own and operate an associate store with Western Auto Supply Co., 2107 Grand Avenue, Kansas City, Mo., one of the Nation's leading merchandisers of automotive supplies, household appliances, hardware, sporting goods, and related lines.

The company's far-flung network now covers 49 States with over 3,700 privately-owned associate stores and 400 company-owned outlets in addition to dealer representatives in Puerto Rico, Mexico and Guam. Serving this huge operation, which includes a merchandise line of over 15,000 items are 5 regional offices, 16 warehouses, 15 divisional offices, 4 special merchandise warehouses and 14 service centers. Gross sales last year totaled more than \$265 million.

*No experience necessary*

Western Auto's associate store program has been in existence for the past 25 years. According to the company, previous retail experience is not necessary to operate an associate store profitably. Former tradesmen, farmers, and office workers as well as businessmen are among the currently successful store owners. A comprehensive, seven-step plan sponsored by the company guides new dealers in getting started and continues to aid them after their stores open. A brief outline of this program is as follows:

1. *Selecting the town.*—Covers detailed surveys and analyses of communities in the selected area to determine success opportunities.

2. *The right location.*—After the town has been selected, the most favorable location is picked and lease negotiations get underway.

3. *Planning the store.*—Trained company personnel work on store plans and make arrangements for fixtures and supplies.

4. *Dealer training.*—Dealer training schools operated by Western Auto offer a course of approximately 2 weeks' duration to prepare new dealers with the necessary experience in store operations. Five training centers serve the country and are staffed by full-time instructors whose backgrounds include many years of retail store experience. This same course is also utilized to train managerial personnel for company-owned stores.

5. *Store installation.*—An experienced installation man works with new dealers in setting up every phase of operation.

6. *Stocking.*—Merchandising specialists plan opening inventories to fit the investment, market, and location and prepare outlines to be followed in stocking future inventories.

7. *Grand opening and beyond.*—In addition to store opening assistance, all dealers continue to receive aid from company sales representatives who contact each store periodically, and from a monthly "Dealer Profit Guide."

No charge is made for any part of this seven-step program nor is there any franchise fee. Stores receive additional support from the company through an annual million-dollar advertising campaign that regularly includes such magazines as Life, Saturday Evening Post, Progressive Farmer, Farm Journal, Sports Afield, and other well-known publications, plus newspapers, radio, and direct mail, at no additional cost to the dealers. In addition, Western Auto supplies associate stores with advertising materials, catalogs, sales and display materials, operating manuals and business forms free or at nominal costs.



*Investment, earnings vary*

Size of investment to open a Western Auto franchised store depends on the size of the town, trade area, and competitive conditions. Generally, the figure runs between about \$12,000 and \$25,000, although some larger markets may require more. The company has information available on the investment requirement for individual towns and is able to fit the town to the investor. Original cash outlay covers the cost of opening inventory, fixtures, store opening expense, and cash reserve for an initial operating fund. Annual earnings depend entirely on the size of the store and its relation to the market area.

A free book, "Doorway to Opportunity," which describes the associate store program in detail, is available to anyone interested in a Western Auto Supply franchise. To receive a copy or to have specific questions answered, write to Charles M. Wilson, Jr., Western Auto's sales research manager, at the company's general offices in Kansas City, Mo.

## FRANCHISEES SOUGHT FOR NEW HOME THERAPY WHIRLPOOL BATH DEVICE

Every family is a sales prospect for "Aqua-Spa," a new, low priced, professional-type home whirlpool bath unit being marketed by Aqua-Spa Corp., 855 Sixth Avenue, New York, N.Y. Described as a new development in the field of hydrotherapy and hydromassage, Aqua-Spa is a compact, portable device about the size of a tank-type vacuum cleaner. It weighs only 21 pounds and has a number of patented features.

Whirlpool action is created by a fully encased agitator attached to a flexible shaft leading from the unit, which is submersed in the bath water. Its action can be as gentle or as vigorous as the user desires. Placed deep in the tub, it will produce a stimulating, forceful turbulence. Suspended just below the water's surface, it will result in a gentle, swirling action. The manufacturer claims Aqua-Spa will "soothe, relax, and revitalize tired, aching muscles and nerves, bring relief from circulatory disturbances and ordinary aches and pains, and help to banish fatigue, ease away tension and calm jittery nerves." The unit, which has been on the market about 6 months, is automatic, easy to operate, and UL approved.

*High profit item*

Exclusive franchises for distributors to handle Aqua-Spa on a direct selling basis are available in the United States and Canada. Territory is determined by two factors: scope of the trading area and size of the franchisee's sales organization. Initial investment is up to \$5,000 for a maximum starting inventory of 36 units. Retail price of Aqua-Spa is \$199.95. Distributor's cost is \$90, earning him a gross profit of \$109.95 per unit.

All advertising and promotional materials, necessary sales aids, paid initial local newspaper advertising, and sales leads are furnished by the parent company under its national advertising setup. Although no special training or knowledge is required to handle the sale of units, the company will consider only "financially responsible individuals with direct selling experience."

Write to Bernard Berengard for details on either a United States or Canadian franchise.

## ESTABLISHED DEBT COLLECTION FIRM OFFERS FRANCHISES FOR FIRST TIME

An opportunity to earn more than \$15,000 in the first year of operation with a low cost, delinquent debt collection service for all types of businesses is available on a franchise basis with the National Mercantile Clearing House, Inc., 6363 Wilshire Boulevard, Los Angeles, Calif.

Since 1914 the company has used only direct mail and sales representatives to promote its service, and the area of operation has been confined to east of the Rocky Mountains. The 46-year-old firm is now expanding with a program of franchised distributors who will become established in exclusive territories throughout the entire United States (except Dade County, Fla.) and Canada.

Its service is called the direct collector system. A 25-account system retails for \$31.50, a 50-account system for \$50, and a 100-account system for \$75. Gross profit per system to a franchised distributor is approximately 62 percent. Joe Newman, vice president of National Mercantile Clearing House, explains the direct collector system this way:

"The purchaser, if he is a small businessman or in the professional field, will use the 25-account system at a cost to him of \$1.25 per account, regardless of



the amount due. Each size system is delivered to the account based on his average number of delinquents in any 3- to 4-month period. The account receives a written guarantee that in the event this system does not collect at least a total of four times the amount he is asked to pay for it, there is a cash forfeiture of twice the amount of the purchase price. Repurchases of these systems will average three to five per year. Many well-known companies in the East have been using the service of National Mercantile Clearing House for the past 30 years."

Sale of a territory to a distributor is based on a potential of 15,000 accounts. Investment is normally \$6,150, which includes 100 each of the 100-, 50-, and 25-account systems. No franchise fee is asked. The company will assist the distributor in obtaining a minimum of 105 accounts in order to insure his financial success. Annual earnings are \$15,000 and up. Write to Joe Newman for all the facts.

#### FAST-EXPANDING SAFEWAY BRAKE SHOPS ANNOUNCE NEW PLAN FOR SMALL TOWNS

With the increasing popularity of such automotive design features as automatic transmissions, power brakes, smaller wheels and higher horsepower, automobile brake linings are taking a bigger beating than ever. Car owners, in fact, are spending well over \$1 billion a year to keep their brakes in shape.

Billed as "America's largest brake specialists," Safeway Brake Shops, Inc., 1931 Lewis Tower Building, Philadelphia, Pa., has been rapidly branching out with an accelerated program of franchised brake service shops from coast to coast. Since Safeway's franchise program was last described in National Franchise Reports (December 1959), the chain has grown to 75 brake centers in 25 States and Canada with 22 additional new shops now in opening stages.

#### *New franchise program announced*

Now in another expansion move, the company has announced an entirely new plan of franchised outlets which has been developed exclusively for small towns with populations of between 15,000 and 50,000. Up to this time, franchised dealers have been set up only in large metropolitan areas and offered only brake service under the name of Safeway Brake Shops. The current program calls for setting up new outlets which will handle not only brake service but mufflers, shock absorbers, front-end alignment and tune-ups as well. These will be known as Safeway Brake & Service Centers. Robert H. Davidson, assistant to the president of Safeway, describes the new development this way:

"In contrast to Safeway Brake Shops, where the franchise holder supervises the activities of at least six mechanics, the Safeway Brake & Service Center owner may be an experienced mechanic who can pitch in and work alongside two or three hired mechanics. The same marketing techniques which have been instrumental in the success of the Safeway Brake Shops are being applied to the Safeway Brake & Service Centers. Franchise holders derive all the advantages of being associated with a large organization, including marketing research, pretested advertising, cost controls, advanced accounting procedures, real estate specialists, and new product development, plus the advantage of the tremendous purchasing power only a national organization can command. Teams of specialists attend to every detail from initial market analysis to the preparation of a grand opening. There is a comprehensive training program for every franchise holder also."

The company estimates it will soon have over 100 Safeway Brake & Service Centers in operation and that the entire Safeway chain will total over 300 units within a year. The parent firm also plans to further back up its dealer promotion activities by advertising on network TV and in such magazines as Life and Look.

Safeway mufflers are of the new aluminum, cadmium, lead- and zinc-coated type and are lifetime guaranteed. They can be installed in 15 minutes. Cost varies from \$13.50 to \$16.95 for the complete job on most makes of cars. Cost of a Safeway brake relining job, which can be completed in 1 hour or less, is from \$9.95 to \$12.95 dependent on make of car.

An investment of \$8,146.88 is required to open a Safeway Brake & Service Center. This total breaks down to \$4,527.09 for inventory (Thermolyte brake linings, brake drum parts and accessories, mufflers, and tailpipes); \$2,284.79 for shop equipment, tools and supplies, furniture and fixtures, indoor signs and office forms; an estimated \$835 for outside signs, 1 month's rent, electricity, and telephone deposits, classified advertising for mechanics and miscellaneous expense, and \$500 for the franchise fee.



Here is an annual sales analysis of a typical Safeway Brake & Service Center :

|                                                                                                                     |           |           |
|---------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| Gross sales.....                                                                                                    |           | \$75, 000 |
| Sales and administrative expenses (advertising, rent, heat, accounting, legal, insurance, franchise fee, etc.)..... | \$22, 500 |           |
| Indirect shop costs (payroll taxes, small tools, supplies, laundry, machinery maintenance, etc.).....               | 6, 000    |           |
| Direct shop costs (parts, labor, etc.).....                                                                         | 31, 500   |           |
| Total expenses .....                                                                                                |           | 60, 000   |
| Net profit.....                                                                                                     |           | \$15, 000 |

Secure full details by writing Robert H. Davidson at Safeway's Philadelphia home office.

#### CREDIT-HEALTH SYSTEM PREPARED TO LICENSE INDEPENDENT OFFICES

About \$4 billion in health benefits are paid out annually by insurance companies. But this amount is only a third of the annual American health bill, which in 1959 amounted to over \$12 billion, according to Social Security Administration figures. To help Americans charge and budget-pay these health bills of around \$8 billion not covered by insurance, a health credit card which pays all health bills (including dentistry and even burial) has been developed by Credit-Health System, 600 South Michigan Avenue, Chicago, Ill. With a health-credit card, a holder signs his own health bills, or the health bills of anyone else he is willing to pay for, and then the system pays such bills, and the cardholder in turn repays the system.

To develop a workable format of operation, experience in the insurance and consumer finance fields was drawn upon, and then credit-health system established a pilot division in order to perfect the required forms and other tools of operation. These operating instruments were then patented and copyrighted by the system, so that as similar divisions were established under its license, they would be protected.

#### *License is perpetual*

According to the system's licensing agreement, as long as a division adheres to the operational format, a license cannot be revoked. Primarily, this format allocates by percentages the way the division can use the cardholders' pledge moneys for its own expenses, for holder payout, and for reserves. (Cardholders, in order to obtain a health-credit card, must pledge to purchase a certain amount of health credits from the division every month, so that when a credit line is needed such credits previously purchased can be used as a downpayment.)

Under the system's format, a division earns income for its overhead as soon as it starts enrolling cardholders. As an example, with 6,000 cardholders, after all overhead expenses are paid, a licensee could draw an administrative salary of \$36,000 a year, by following the system's format.

In order to organize his own division of the credit-health system, a licensee must incorporate with paid-in capital (for reference purposes) of \$25,000. A portion (about 20 percent) of this capital is paid to the system as an advance against the 1 percent of pledge royalty paid annually by the division to Chicago headquarters. The exact amount of this advance royalty is determined by the amount of assistance required of the system by the licensee to organize his division, and if need be to help with its financing. Another factor bearing on advance royalty payment is the extent of the area licensed; territories may vary in population from 250,000 to 900,000, exact size depending upon their location.

System provides the articles for a division's incorporation, and supplies at cost all printed forms, materials, and sales aids, including the following: Display stands, credit cards, payment notices, budget repayment schedules, statements, sales commission schedules, brochure applications, bookkeeping control cards. The main requirement of a licensee, in addition to a business background, is a good community standing. Write, giving a résumé of your experience, to Allan Gerstenberg, licensing director of Credit-Health System, for literature and complete information, as well as available areas for licensing.

#### MASONRY PRODUCTS LINE OFFERED FOR SALE TO BUILDING CONTRACTORS

Corner poles, extension rods, gable clamps, sill clamp assemblies, line extenders, and chimney brackets constitute the line of building specialties, manufactured



by Masonry Specialty Co., 172 Westbrook Road, New Kensington, Pa. Distributorships are open in many sections of the country for the sale of these products to building and masonry contractors. The company reports its average sale runs around \$400. Usual trade discounts are allowed distributors. Investment requirement will be negotiated.

This firm's "perfect" corner poles eliminate the costly, time-consuming use of the level or plumb rule and save layout time, enabling each mason to lay from 150 to 200 more bricks per day. These patented poles do away with corners, virtually opening up the building being bricked and making it possible to start or stop brickwork anywhere desired. The poles are made from two distinct types of aluminum alloy of all-welded construction, and come in a set of six. Because of their unique construction, they do not touch the brickwork, making it possible to tool or strike without having to move any of the poles. Testimonials from masonry contractors point up the savings effected from use of the poles. Secure details of this distributorship offer from Chester Bongiovanni, national sales director.

#### NEW DRYCLEANING STORE LEASING PLAN ANNOUNCED BY ONE-HOUR VALET

One-Hour Valet of America, Inc., 1844 West Flagler Street, Miami, Fla., has introduced a new franchise program under which the national chain, said to be the largest of its kind, offers to set up operators in their own drycleaning and laundry business on a lease arrangement.

The entire plant and all of the equipment are leased from the company by the franchised operator who pays a regular fee out of weekly earnings. Explains Edward M. Markoff, assistant general manager of One-Hour Valet: "By leasing such an operation you eliminate the amount of capital investment normally required to enter a business of this type and curtail the risk of heavy loss or bankruptcy due to business failure. Furthermore, since you operate on a retail cash-and-carry basis, you are free from the usual worries of credit, deliveries, extra payrolls, heavy inventory, layoffs, and so forth. And you need know nothing about the drycleaning business. As a franchised member of a national chain you will be thoroughly trained and constantly guided in your operation."

#### *Exclusive territorial franchise*

The franchise agreement calls for an initial cash outlay of \$5,000 and entitles the operator to an exclusive store franchise in a territory of 1,000 families for a period of 5 years. This investment covers a franchise fee of \$1,000 (to be paid in five annual installments of \$200) and a charge of \$4,000 for location surveys, initial supplies, signs, store opening expense, grand opening advertising and promotional material, technical training and advice, operations manuals, brochures and promotion, and advertising for 6 months.

Thereafter, the franchisee is required to pay One-Hour Valet successive payments of \$110 a week for 5 years for lease of the plant and equipment. At the end of this time, the operator has an option to renew the lease and franchise at a reduced cost or to purchase the equipment at a fair market price to be jointly determined by the franchisee and the company. The total weekly payments over a 5-year period amount to \$28,600. The operator is also required to carry his own insurance, subject to company approval, covering the equipment and loss and damage of garments.

#### *Equipment and supplies*

Equipment leased from the company includes the following items: a 10 horsepower boiler with return system, 35-pound cleaning machine, 2 presses, combination cooker and filter, reclaimer, air vacuum system, one-half horse power air compressor, steam electric iron, ironing board, form finisher, puff iron 3-way unit, steam spotting board, backdrop and cornice, bag rack, scale and tray, marking table, counter with cash drawers, clock, prespotting table, exhaust fan, outside sign, light fixtures, lobby chair, ash trays, sales tickets and inside signs and posters.

Other material which the company furnishes for the store opening includes paper garment bags, hangers and baskets, buttons, threads, scissors and needles, chemicals and lubricants, spotting brushes, staplers, brooms, sleeve former, shoulder press pads, press clamp, marking pens, nets, and pins.

After the business gets rolling the operator is not required to purchase additional supplies from the company, but he must, however, sell only goods and furnish services which conform to company standards and specifications.



*Volume absorbs costs*

"All operating costs are easily absorbed by the store's gross volume," points out Mr. Markoff. "It has been determined that a minimum weekly volume of as low as \$400 is sufficient to cover a One-Hour Valet operation and to net a profitable income. Existing stores enjoy weekly volume exceeding \$1,000 and in many instances, \$2,000. The profit picture is made even more favorable through the association with One-Hour Valet on chain discounts covering the purchase of accessories and supplies. There are also other mass promotional programs which are of big advantage to the operator. And every One-Hour Valet store is set up in a handpicked location free from overshadowing competition. Total net earnings of \$10,000 or more in the first year are highly realistic."

For full information regarding a franchised lease arrangement, send inquiries to Edward M. Markoff at the company's executive offices in Miami.

## CALIFORNIA SPECIALTY RESTAURANTS PLAN NATIONAL FRANCHISE PROGRAM

Burger Chateau Restaurants, 12351 Westminster Avenue, Santa Ana, Calif., have announced franchises for restaurants which feature top quality char broiled hamburgers. Rus-Nan Corp., the developers of the Burger Chateau concept, feels that the United States has seen enough of low-quality, low-price hamburger restaurants. The management believes today's best opportunities in the food field are to be found in a departure from the 15 cent and 19 cent hamburger drive-ins, for which traffic locations are difficult to secure.

Finding a suitable location and negotiating a lease are the responsibilities of the company. It is expected that many leases will have option-to-buy clauses. The Burger Chateau franchise holder will own the building and fixtures. Building cost is \$19,500; fixtures amount to \$9,000. Initial payment of \$16,000 covers the following:

- Downpayment on building
- Hookup and installation of equipment
- Downpayment on neon sign
- Necessary supplies
- Pregrand opening advertising

The present operating area of Burger Chateau restaurants is in southern California. The company plans to expand eastward, and franchises are available in the United States and Canada, according to Herbert Chessler, president.

The restaurants feature a high quality one-fourth-pound char broiled hamburger selling for 60 cents. Other items on the limited menu include cheeseburgers, ham and steak sandwiches, hot dogs, hamburger steak plate. A fish sandwich, french fries, bar-b-que beans, tossed salad, pies, malts, and beverages round out the menu. All sandwiches and steaks are char broiled in full view of the customer.

*Training helps novices get started*

Rus-Nan Corp. will provide free on-the-job training to each owner-operator. Care and maintenance of equipment, food preparation, employee relations, and bookkeeping are some of the subjects to be stressed. Burger Chateaus operate on a cafeteria-style basis; no waitresses are needed. A new and different feature of the restaurants is the garnish bar, where a customer can garnish his sandwich to his own taste.

The Burger Chateau buildings are of Swiss Alpine styling and identical in every way. Food-to-go business is expected to account for a substantial portion of gross sales, but Burger Chateaus are not drive-ins. Seating capacity is 52 persons inside; 36 patrons can be accommodated at the outside patio tables. The highest standards of food quality and cleanliness will be maintained by Burger Chateaus at all times, Mr. Chessler emphasizes.

Franchise holders will aim for a minimum of \$2,000 per month net profit. They will benefit from mass purchasing contracts arranged by the home office. Full details about available franchises can be secured by writing Rus-Nan Corp., 12351 Westminster Avenue, Santa Ana, Calif.

## NEW SMALL BUSINESS BUYERS' GUIDE INCLUDES SELF-SCORING CHECK LISTS

Interested in being your own boss, owning a small business, building a new business career? Think you have the ingredients for success—sufficient capital,



experience, talent, persistence? If your answer is yes—then your first step should be investigation before investing. That's the theme of Pilot Books' new paperback, "How To Buy a Small Business," a compact guide for the prospective small business owner. It explains step by step how to go about buying a small business, with tables, charts, and self-scoring checklists, designed for quick and efficient reading.

The book was written by Management Consultant Maxwell J. Mangold, founder of the Business Acquisition Institute, and author of "How Public Financing Can Help Your Company Grow," a basic guide to equity capital formation. Prospective small business buyers will find the new book helpful in judging if they are suitable for independent business ownership, whether the prospects for success justify taking such an important step, where to go for detailed information, the function of the business broker, pitfalls to watch for in buying a business, how banks can help, etc. The guide is available from the publisher at \$2 per copy. Send your order to Pilot Books, 42 West 33d Street, New York, N.Y. Free descriptive data on all Pilot business paperbacks is available to interested readers.

#### DIRECT SALE OF NEW MAGNETIC LINE OF PRODUCTS OPEN TO DISTRIBUTORS

International Magnetic Research Corp., 1603 South Michigan Avenue, Chicago, Ill., is setting up a network of franchised distributors to handle a new line of consumer and industrial items featuring a firm-locking magnetic holding device that will never wear out.

The structure of each unit is based on a newly discovered principle of magnetic arrangement that represents a notable advance in the field of magnetic research. Whereas most magnets have only an ability to cling and lose much of their holding power after a time, the IMR magnets will always maintain positive-locking action and, in fact, grow stronger with use, eventually reaching a level of maximum efficiency about 10 percent greater than original capacity. This patented feature is backed by the company with a lifetime guarantee.

Explains Seymour Roth, president of IMR: "Discovery of this new magnetic arrangement principle opens an entirely new field in the application of magnetics in areas where their use was previously rejected due to limited performance. Magnets now can be utilized successfully and economically in an unlimited number of ways to eliminate the need for ordinary snaps, bolts, screws, buckles, catches, and other types of fasteners now commonly in use."

The company plans to manufacture and market a wide range of products incorporating a magnetic holding device. First product released is a detachable automobile key chain called "Magnetic Lock." Held together by a small-attractively styled, circular magnetic assembly, the chain can be snapped open and shut with ease, permitting a motorist to leave his ignition key in the car when parked and to take other keys on the chain with him. Unlike other pull-apart key chains which have a mechanical holding device that eventually breaks down, the "Magnetic Lock" magnet will never become weak, wear out, or have to be replaced.

Key chains retail for 98 cents each through such outlets as novelty, tobacco, hardware, drug, and department stores, men's wear and novelty shops, supermarkets, filling stations, automotive supply stores, and so forth. Franchised distributors sell direct to retail dealers. Investment in a franchised territory is \$388.80 for an initial inventory of six master cartons of key chains. Each carton contains 144 chains packed 12 to a retail display card. Return on investment at the consumer level is \$846.72.

Local franchised territories are open throughout the United States and Canada. Exclusive territories covering an entire city, trade area or one or more States are available on a minimum sales quota basis determined by population and market potential. There is no fee for either franchise. Net earnings in a large metropolitan area can range between \$12,000 and \$15,00 a year on the sale of key chains alone. Within the next 90 days the company plans to introduce three new items in the jewelry, men's wear and hardware fields, all of which will be available to franchised distributors as part of the IMR line.

An inquiry to Seymour Roth will bring complete information on either a local or statewide distributor's franchise.



## STANLEY BUILT-IN VACUUM SYSTEM GEARS FOR NATIONAL DISTRIBUTION

A national program of franchised distributorships which will sell the Stanley built in cleaning system for new or old homes has been announced by Stanley Electronics Industries, Inc., 610 Ritz Building, Tulsa, Okla.

The appliance eliminates the need for a portable-type vacuum cleaner and can be installed in the average home at an economical cost in a matter of a few hours. It operates simply by plugging a lightweight hose into a wall or floor outlet. Special tubing carries dust and dirt direct to a receptacle permanently installed in the garage, utility room, or basement. Outlets are placed in convenient locations to facilitate cleaning the entire home, including carpets, draperies, furniture, closets, etc. The near-silent operation also permits the operator to hear the radio or the ring of the telephone or door bell while the system is in use. Each installation is engineered to last the life of the home.

Minimum investment requirement in a Stanley built-in system distributorship is \$2,400 for inventory. Territories are determined by the trade areas for consumer durable goods established by the Hearst newspaper chain. According to Stanley Electronics, a franchised distributor can expect to gross anywhere between \$25,000 and \$100,000 annually, depending on the territory assigned. Territories throughout the United States are open. For full information write to Eugene E. Sewell, of Stanley Electronics Industries, in Tulsa.

## HOME FIRE ESCAPE UNIT FRANCHISE OPEN TO DISTRIBUTORS AND DEALERS

More than 6,000 persons die in fires that hit over 500,000 American homes each year. Because heat rises and deadly toxic fumes spread so rapidly, the most vulnerable spot in a burning home, according to fire-prevention experts, is the upper floor area. In order to lessen this danger and to help speed the evacuation of second- and third-story occupants in the event of a blaze, a compact, automatic home fire escape unit is being marketed by Fire Escapes, Inc., 980 Northampton Street, Buffalo 11, N.Y., and is available to distributors and dealers on a franchise basis.

Called Hide-Escape, the unit can be installed quickly and permanently on an outside wall of any new or existing two- or three-story home. It consists of a heavy gage, noncorrosive aluminum folding ladder that operates on a spring tension and gravity principle, requires no electrical power or maintenance of any kind. The turn of a handle within the home (a child can operate it) activates a mechanism that unfolds the ladder automatically. When not in use it folds neatly against the wall and resembles the downspout of a drain.

*Company assists distributors*

Retail price of a Hide-Escape ranges from \$295.95 to \$369.95, depending on size. Cost to a franchised distributor is between \$85 and \$130. Investment in a franchise runs between \$2,500 and \$10,000 for inventory, which determines size of territory. There is no franchise fee. A distributor also functions as a dealer in his assigned territory and helps to set up other dealers with the assistance of the parent company's field representatives. (Dealer's cash outlay for inventory is \$2,500.) The company will supply all necessary sales aids, such as television film, brochures, newspaper mats, etc.

Twenty-seven State territories are now open in the United States with plans under consideration for franchise setups in Canada. Net income potential is estimated at between \$50,000 and \$70,000 a year. A new dealer in western New York State, the company says, has reported profits of over \$4,000 in his first 2 weeks of operation.

Paul H. Klein, general manager of Fire Escapes, Inc., will furnish full details on this opportunity at either a distributor or dealer level.

## FRANCHISEES SOUGHT TO ACT AS STATE DIRECTORS FOR NATIONAL MOTEL GROUP

Better Motels of America, of Charleston, Ill., a new national association of motel operators, has franchised openings for qualified individuals to function as State directors. Aim of the organization is to act as an official recommending and referral body, set up standards for members, and to stimulate new business at BMA motels.

According to M. R. Faller, president of BMA, the association has been tested successfully for 1 year in central Illinois and is now branching out nationally. Mr. Faller further points out: "In a recent survey it was found that over 40 percent of the guests are directed to a motel by road signs. In view of this,



we are supplying without cost to each participating motel our official membership sign plus two large road signs with our official emblem. The signs urge motorists to 'spend tonight at one of the better motels of America.' Members also receive a membership card and advertising material from BMA at no additional cost.

A BMA guide book listing member motels, their rates and a brief description of their facilities will be published annually and furnished to all members. It will also be available to major oil companies, travel bureaus and firms with large traveling organizations.

#### *Directors approve membership*

Annual dues for a BMA membership is \$85, of which a franchised State director receives \$55 on both new business and renewals. His duties are to personally inspect each prospective motel before recommending approval and to make at least one annual visit to see that the association's standards are being maintained. Membership is approved or withheld on the recommendation of the State director.

Amount of investment in a State franchise varies between \$300 and \$500, depending on potential of the territory. According to Mr. Faller, each director will be given a territory large enough to build up an active membership of approximately 300 to 500 motels. This would amount to potential earnings of \$16,500 to \$27,500 a year. Write to M. R. Faller for full information on a BMA State director's franchise.

#### NATIONAL ROUNDUP OF CURRENT FRANCHISE OFFERS

*Corrections on offers.*—In the May report, NFR stated: "Putt-R-Golf franchises are available throughout the United States (except Ohio and Pennsylvania) and Canada." This was incorrect. The company has informed this service that Ohio and Pennsylvania are the two States in which it has a particular interest in setting up franchises. Address inquiries to Putt-R-Golf, Inc., 3914 Akron-Medina Road (Route 18), Akron 13, Ohio. The address listed in the June report for Talking Scale Corporation was incomplete. Correct address of this company is Suite 705, 1701 K St. NW., Wash. 6, D.C.

*Coin and stamp supplies.*—Coin folders for all denominations of coins, and coin cleaners, stamp albums, stamp hinges, foreign coins, and several allied items are included in the line offered by Des Moines Coin & Stamp Co., Box 1064, Des Moines, Iowa. Franchised dealers will invest from \$75 to \$300 in inventory. A dealer may sell to collectors, or secure retail outlets for the supplies. Direct sales will return 35 percent commission. The market is larger than generally realized—Boy Scouts and other school-age children go through a phase of collecting either coins or stamps, or both. Adult collectors number in the millions. Supplies are difficult to buy outside the metropolitan areas. Secure details from Ken Mitchell, president.

*Spotting chemicals.*—Two spotting chemical products for dry cleaners and laundries are available from Shucart Industries, 4744 N. Albany Ave., Chicago 25, Ill. If a spot can be removed, these chemicals will do the job, Shucart claims. Dry cleaning plants and laundries usually have a spotting board with different chemicals for each type of spot, and for various materials. The two Shucart products eliminate the need for other chemicals. A gallon of the company's concentrate makes 36 gallons of spot-removing liquid, free of bleach, acid, alcohol or ammonia. Distributors are allowed 35 percent off selling price of \$51.80 per case of 4 gallons of concentrate. Minimum investment of \$300 for a smaller territory is asked after a prospective distributor has satisfied himself regarding the performance of the products, and is prepared to follow a sales procedure found to be successful. Investment is for inventory. Louis Shucart will furnish complete information.

*Outdoor sign.*—"Locked-in letters" are a feature of the new "Diversa" changeable letter outdoor signs distributed by Duncan Sales Co., 737 Carnegie Ave., Cleveland 15, Ohio. The letters are of all-aluminum construction, silk screened on plates of various widths for automatic, proper spacing. No maintenance is required. Standard sign sizes run from 1- to 6-letter lines high, 4 to 12 feet long. Letters are of three standard sizes: 4½", 7" and 11" high. They are offered in six colors on standard and 3-M reflector materials. Distributorships are open throughout the United States and Canada. A 4-foot 6-copy-line "Diversa" sign retails for \$198. Larger sizes are proportionately higher. Distributors will purchase this sign line at 50 percent off suggested selling price. A



distributor starts with a sample inventory for a very nominal investment. He can sell to dealers, or he may lease the signs directly to users on a long term basis and provide a copy-changing service for a moderate fee. Inquiries should be addressed to S. J. Smith, sales manager.

*Data centers.*—A full line of data processing equipment and supplies, from popular priced units to advanced electronic machines, is the basis of a sales and service franchise announced last month by Dashew Business Machines, Inc., 3660 Lenawee Ave., Los Angeles 16, Calif. In addition to the sale of original equipment, Dashew data center owners will have a profitable repeat business on supplies. Most Dashew products are unique, embodying new principles never before used in this field. Sales will be made to all branches of industry, business, banking, the military, the government, and educational institutions. Investment of up to \$50,000 or more is required. While experience in the business equipment field will be valuable, it is not an absolute requirement for a franchise.

*Parking device.*—A new and patented concept for the automatic handling of automobiles has been developed by Electromatic Autoparks, Inc., and is offered to financially responsible and qualified distributors by the national sales agents, Parking Associates, 111 New Montgomery, San Francisco, Calif. Investment requirement not known.

*Attention getters.*—"Meco-Men," mechanical gas station attendants, clowns for toy store windows, golfers for miniature golf courses—these and other novelties are offered distributors by Meco-Man, 1200 Spring Garden St., Philadelphia, Pa.

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[National Franchise Reports, Chicago, Ill., August 1960]

#### TRENDS, NEW PRODUCTS, CAST COMPETITIVE SHADOWS

"Your toughest competition may not come from visible sources—it may originate in a research laboratory a thousand miles away and slip in through the back door." This remark by an observer of the current marketing scene cannot be dismissed lightly. New products pouring into the market threaten to displace old established brand names. Distribution innovations and buying trends are also important factors in the competitive picture unfolding this year. You can alert yourself early to these so-called unseen competitors, prepare to match or outdistance them, and stay right in the parade. Ignore them, and you'll be wise not to sign a long business lease.

Take an everyday item like vitamins. They are sold through retail outlets, by mail, and direct to the consumer. The entry of Sonotone Corp. into the vitamin field last April points up the devious course of competition. Here was a national manufacturer of hearing aids giving its distributors the Sonomins line of vitamins. Sonotone distributors will not sell Sonomins as an aid to hearing. The company simply thinks vitamins are a product its field representatives are well set up to market. Will Sonotone's action cause other hearing aid manufacturers to give their distributors unrelated products? Can the added source of income attract new distributors to Sonotone? These questions cannot be answered now, but the hearing aid and vitamin industries are certain to be measuring the effects of Sonotone's move.

If American Motors Corp. has a winner in its ceramic-coated exhaust system slated for installation on 1961 Ramblers, the muffler replacement industry may be in for trouble. Tests indicate that AMC's ceramic-coated mufflers and tailpipes might last the life of an automobile. While many motor executives doubt that Rambler's exhaust components will stand up under several years' use, they are, at the same time, watching the AMC development closely. It is understood that Ford is considering the possibility of stainless steel for lifetime exhaust systems.

A Dallas, Tex., supermarket chain has recently advertised Fruit of the Loom men's shirts. It was the first time that a national brand in soft goods had been advertised by a supermarket chain in the Texas area. The chain started carrying the Fruit of the Loom brand quietly, stocking the men's shirts several weeks before they were advertised. The quiet approach was chosen in order to keep department stores and other merchants from becoming alarmed over the introduction of a national shirt label in supermarkets. Retailers of soft goods might well be alarmed over the matter, for it may signal a trend. Drug manufacturers refused to sell supermarkets for some time. Now, nationally advertised drug



items are as accessible in grocery chains as canned goods. The fact that soft goods merchandising is outside the main franchising area does not lessen the significance of this development. Franchisors are now faced with the new responsibility of protecting their franchise holders from competition that strikes from many directions.

#### SNAP-ON DEALERS SELL TOOLS FROM WALK-IN TRUCKS, EARN TOP PROFITS

A chance to earn from \$7,000 to \$20,000, and up, annually is the income potential under the franchised dealership arrangement being offered by Snap-On Tools Corp., 8028 28th Ave., Kenosha, Wis., leading manufacturer and distributor of professional mechanics' hand tools and equipment.

Snap-On dealers operate out of walk-in mobile units on regular calls in specified territories. They sell a complete line of highest quality tools and equipment for maintenance and service work in the automotive field and related industries. Customers are primarily garages, service stations, new and used car dealers and other businesses connected with automotive servicing, such as truck and bus fleet owners, taxicab companies, municipal garages and construction companies.

#### *More than 4,000 items*

Dealers carry a representative stock of fast-moving tools and equipment which they purchase through branch sales offices of the company at various discount rates priced to return a good share of profit to the dealer. (Stock may be returned for refund in case the franchise is terminated.) The complete line, which has over 4,000 items, includes such tools (for which the company is best known) as socket wrenches, handles and attachments, open end, box end, and combination wrenches, punches, chisels, pliers, screw drivers and hammers. Some of the other units are torque-measuring wrenches, tool chests, roll cabs, impact wrenches, punches, chisels, pliers, screwdrivers, and hammers. Some of the end alignment and wheel balancing units, valve service machines and electrical testing equipment.

Over 900 franchised Snap-On dealers are now operating in 57 cities in the United States and Canada with numerous territories still available in both countries. Territories are based on the number of potential customers rather than on geographical area. No franchise fee is asked nor does the company claim any percentage of profits. All earnings go to the dealer. He is, however, required to operate his franchise on a full-time basis.

#### *Initial cash outlay varies*

Size of investment varies according to the amount of earnings a new dealer sets his sights on—the bigger the tool stock, the larger the sales and income potential. Average cash outlay in starting a Snap-On dealership is about \$7,500. A portion of this initial investment may be financed if so desired. Depending on the applicant's credit rating and background, a franchise may be obtained for an initial cash investment as low as \$2,000 to \$2,500. The company, however, encourages dealers to enlarge and reinvest as quickly as possible to take advantage of the full sales and profit potential. Most successful dealers, the company points out, have as much as \$15,000 invested in their businesses.

Snap-On Tools Corp. offers all franchised dealers the following assistance and benefits on a continuing basis:

- Aid in buying and setting up a walk-in truck.

- Continuous sales and product training.

- Exclusive, protected territory.

- Established system of buying and pricing of new tools.

- Advice and assistance with laws and regulations.

- Trained assistance on initial trips through a new territory.

- Easy-to-use business record system.

- Regular calls and assistance from a local Snap-On field sales manager.

- Continuous merchandising and promotion aids.

- National advertising in leading trade magazines.

- Mass-purchasing advantages on tools and business equipment.

- Established methods of financing large and small sales orders.

- Credit for all mail order sales within a dealer's exclusive territory.

- Advantage of selling tools with a nationally known trademark and reputation.

Write to Gus S. Childress, general sales manager of Snap-On, for full information.



## LARGE VOLUME PLUS HIGH EARNINGS SET PACE FOR DUNKIN' DONUT CHAIN

The humble donut, all dressed up in countless different ways for wider consumer appeal, has taken on a position bigger than ever before as a reliable sales-stimulator in the bakery goods field. Almost half of the cake-eating population buys them, and 43 percent of the customers eat them regularly. Donuts, in fact, now represent 11.4 percent of the total baked goods sales output in the United States annually.

One of the Nation's most prominent and successful leaders in the donut merchandising business is the chain of Dunkin' Donuts of America, Inc., 440 Hancock Street, Quincy, Mass., which experimented with a roadside stand near Boston 10 years ago and parlayed it into a network of retail shops located throughout principal areas in the United States and Canada.

Dunkin' Donuts are made of finest ingredients prepared with exclusive recipes. Light and wholesome, they are served up in 52 taste-tempting varieties, delicately designed and handcut right on the premises of each shop. Retail cost is generally 6 cents each, 69 cents a dozen, with specialty items selling at 10 cents each. The contemporary-designed, brightly colored shops contain a streamlined coffee bar (at which the customary beverages, soft drinks, and juices are also sold) and a counter for takeout orders, one of the chain's best selling features.

Customers buy Dunkin' Donuts in bags and boxes by the dozens.

A franchised Dunkin' Donut operator owns his own shop and buys his materials, ingredients, and equipment from the parent organization in return for an exclusive distributorship. Minimum cash investment is \$18,000, but it may go as high as \$28,000, depending on the real estate transactions involved; i.e., direct purchase of land, leasing land alone, or leasing land and building. Of this initial amount, \$7,000 is held by the franchise owner for working capital and \$11,000 is used for the downpayment on the complete package, which costs \$31,000 (the \$20,000 balance is financed over a 3-year period). The package includes all equipment, signs and services needed to set up the franchisee in business.

The following assistance is provided by the company to each franchise owner:

- Training of production and sales personnel.
- Architectural and construction services.
- Use of exclusive formulas and ingredients.
- Sales and merchandising supervision.
- Standard accounting system.
- Researched selection of location for volume traffic.
- Standard signs and equipment.
- Advertising and promotion programs.
- New product development.

According to a recent Dun & Bradstreet survey, net profit percentage (before income taxes) for a typical Dunkin' Donut shop is almost five times as much as the return realized from a drugstore, six times the net profit from a restaurant, and seven times the net profit from a package liquor store. One of the reasons: the donut business is good all year around; there are no seasonal slumps.



Annual income averages about \$35,800 (before taxes) on gross sales of \$182,000. Some operators, however, do as much as \$250,000 gross business annually. Estimated earnings and expenses at an average sales level of \$3,500 a week break down like this:

|                                                                                                     | Amount    | Percent |
|-----------------------------------------------------------------------------------------------------|-----------|---------|
| Annual sales.....                                                                                   | \$182,000 | 100.0   |
| Cost of sales:                                                                                      |           |         |
| Food.....                                                                                           | 61,880    | 34.0    |
| Payroll.....                                                                                        | 38,220    | 21.0    |
| Supplies.....                                                                                       | 9,100     | 5.0     |
| Total cost of sales.....                                                                            | 109,200   | 60.0    |
| Gross profit.....                                                                                   | 72,800    | 40.0    |
| Deduct—Operating expenses:                                                                          |           |         |
| Rent (including real estate taxes), depreciation, utilities, advertising, cleaning and laundry..... | 26,660    | 14.6    |
| All other expenses (payroll taxes, insurance, etc.).....                                            | 11,830    | 6.5     |
| Total operating expenses.....                                                                       | 38,490    | 21.1    |
| Operating profit.....                                                                               | 34,310    | 18.9    |
| Vending machine income.....                                                                         | 1,500     | .8      |
| Net profit before income taxes.....                                                                 | 35,810    | 19.7    |

Direct inquiries regarding this franchise to S. Joseph Loscocco, executive vice president.

#### NEW CORRECTIVE METHODS FRANCHISE DEALS WITH COMMON CHILD PROBLEM

Corrective Methods, Inc., 270 Commonwealth Avenue, Boston, Mass., has announced a new national franchise program covering a field which generally has been overlooked because of its unusual nature and the fact that it deals with the sensitive side of human nature. It is concerned with the correction of "nocturnal enuresis," more commonly referred to as "bed-wetting."

Kenneth A. Young, president of Corrective Methods, explains: "Because of the hush-hush attitude and taboos associated with this problem, the subject is rarely discussed, and, as a result, the average layman has absolutely no concept of how common it is among children, teenagers, and even adults. The scope of the potential market can best be realized from latest statistics which show that one out of five children beyond the age of seven has a bed-wetting problem."

The company's corrective approach to this physical disturbance is through a technique involving the use of electronic equipment which, through the medium of sound, results in a conditioned response based on the Pavlov theory of conditioned reflexes. According to Corrective Methods, the technique was developed by child specialists and has received favorable publicity in numerous medical journals, as well as in other publications, to the extent that an increasing number of families are now actually looking for this service.

Parents are contacted either by phone or in person for an appointment in the home, generally as the result of small-sized display advertisements in local newspapers. Visits are usually arranged for early weekday evenings or during the day on weekends. The corrective equipment is contracted for on a rental basis. Average cases are completed in approximately 30 days. The fee for this service is \$95 which, under ordinary circumstances, represents a profit of \$60 for the franchised operator.

Either men or women, or a husband-wife team, can operate this business successfully from their home without having to rent an office. No medical training or license is required. Territorial franchises are offered for a minimum cash investment of \$3,900, which includes 25 electronic units plus all the necessary training. Size of territory is open to adjustment, with larger territories calling for bigger cash outlays. The company says a minimum 25-unit operation should net an operator a return on his investment within 90 to 120 days and a profit of over \$11,500 the first year. Larger operators can expect proportionately higher profits. An inquiry to Kenneth A. Young will bring complete details on this new offer.



## FRANCHISED DEALERS CAN HANDLE NEW PORTABLE SPEECH PROMPTER

Anyone with a speech or lecture to deliver will find it a smoother job all around with the aid of TelExecutive, an easy-to-use, portable, automated prompting device being marketed by Telit Industries, Inc., 226 South Wabash Avenue, Chicago 4, Ill. Operated electrically, it is actually a scaled-down version of larger, more costly equipment used by the television industry. Here is how it works:

The talk is either typed or hand lettered on a continuous-form paper, and then wound on an interchangeable spool and placed in the device in the same manner you would insert film in an ordinary box camera. When in operation, the script moves automatically across an illuminated panel at a speed controlled by the speaker. Each spool holds an hour or more of continuous script, depending on the size of type used. Dim or bright illumination from the TelExecutive provides glare-free light regardless of room lighting. Smaller and lighter than a portable typewriter, it plugs into an ordinary a.c. wall outlet and may be placed on a desk, table, or lectern.

Among other events, TelExecutive can be used for conventions, luncheons, board meetings, sales conferences, lectures, presentations, or wherever speeches are made. The market covers all phases of industry, government, advertising and public relations agencies, military field, associations, schools, TV stations, motion picture film producers, et cetera.

Franchised dealerships for handling the sale of TelExecutive are now being set up by the company. The unit retails for \$169.50, including a dispatch-type leather case, extra spools, script paper, and editing kit. Dealers receive a discount of 40 percent on each sale. Cash investment ranges from \$500 for a minimum territory to \$1,000 for a medium-sized territory. The amount of cash outlay involving larger territories is open to negotiation between the company and the individual. For details regarding a TelExecutive franchise, write to Paul Kohout, president of Telit Industries.

## NEW CONCEPT IN AUTOMATIC PARKING BASED ON UNIQUE, PATENTED CHAIN

Investors or groups with substantial funds may find an attractive investment situation in the parking facility developed by Electromatic Autoparks, Inc. This company's national sales agents, Parking Associates, 111 New Montgomery Street, San Francisco, Calif., have announced a franchise program designed to interest men qualified to conduct negotiations calling for large capital outlays.

Basic patents of the Electromatic system cover the constrained link chain which pushes as well as pulls. It is the unique chain which makes possible lateral or longitudinal parking, which is the feature of this system. Standard units in this simple design may be installed side by side, back to back, or in such geometric fashion as location and plot area, shape, and topography dictate. It is possible to install equipment on a lot no more than 25 feet wide or feasible to fill whole city blocks with the units. Only standard steel construction members are needed to erect Electromatic Autopark. Each unit is designed with tiers of stalls on either side of an elevator shaft. Tiers may be of any height compatible with location.

To park his automobile, the customer drives into the car cage in the elevator shaft of the parking unit. Each cage has its own gear motor and individual set of chains. After locking his car, the customer leaves through the passenger doorway and turns a key or pushes a button in a control board to park his car. Safety doors close. The automobile and its cage are gently raised in the elevator shaft and deposited in a preselected stall in seconds. No one drives the car, reducing strain on tires, brakes, and transmissions, often placed there by hurrying parking lot attendants. There is no possibility of dented fenders and the car can be locked at all times.

*Smaller space required*

The ingenious design of the Electromatic Autopark results in maximum income from space occupied. A site which parks 30 cars can park 200 in one of this system's 10-tier-high garages. A car is parked in a matter of seconds. Only 40 minutes is required to empty a 200-car garage in such a system with only 2 attendants, whereas it would take as long as 3 hours to empty a conventional garage with at least 10 attendants. The Electromatic requires only 80 percent of the cubic-foot area of the ramp-type garage, either self-service or service type. However, the ramp garage requires a minimum area of 180 by 200 feet, while the automatic garage takes only 24 by 24½ feet as a minimum.



Holders of the Electromatic Autopark franchise will point up the income possibilities of the system to individuals and companies capable of making a substantial investment. Cost of construction of a 200-car-stall facility runs to approximately \$488,000. Gross income based on 200 car spaces at one and a half times turnover, or \$1.85 per day, could total \$135,050 annually. Income from service area (gasoline, oil, lubrication, and wash) should swell total revenue to \$162,060 per year, according to estimates prepared for representative garage projects. On such gross, net profit before taxes and depreciation would approximate \$113,910, the financial forecast reveals. Allowance is made for interest payment of \$12,810.

#### *2-year franchise payments*

Details of the franchise agreement have been outlined to NFR by W. A. Buckman, of Parking Associates, as follows:

"Investment required will vary, depending upon the territorial sizes and potentials. The entire State of Florida, for example, requires an investment of about \$33,000. One-third of the franchise fee is payable at the contract signing, one-third at the end of the first year and the remainder at the end of the second year. With average diligence, a franchise holder should be able to have an annual gross equal to his franchise fee. In addition to this amount, franchisees also receive an annual royalty on each car stall in operation."

Electromatic Autoparks, Inc., provide a completely engineered package—a "turnkey" operation that relieves the operator of all construction details. Financing assistance is also provided. Franchisees will be supported with marketing, promotional, and management assistance. The market for parking facilities seems to present one of the most challenging investment opportunities today. In selling the Electromatic system, a franchise holder will be presenting an opportunity in a field where a 50 percent annual net return on an equity investment (before taxes and depreciation) is not uncommon. He will point out that approximately half of all passenger car mileage is accumulated within city limits. In spite of increased demand, curb parking space is decreasing at the rate of 7 percent each year. The need for modern parking facilities in most cities is forcing the development of such innovations as the system just described.

#### NEW FRANCHISED TERRITORIES OPEN ON FREE WEIGHT, AD MESSAGE SCALE

The colorful, illuminated sign atop the scale flashes on and off with this invitation: "Weigh Yourself Free." When you step on the platform, the sign automatically turns off and your own image is reflected in a "magic mirror" framed to resemble a TV screen. Suddenly the reflected image vanishes and in its place you see an illuminated, 11- by 14-inch, full-color advertising message, and, in an illuminated dial just below it, your correct weight is shown. As long as you remain on the platform, the message and weight dial remain lighted. The moment you step off, the message and weight dial cut out, and the top sign starts flashing its invitation to the next passerby.

The attention-getting device is called the "ADver-dupois Advertising Scale," now available as a franchised income-producing opportunity with ADver-dupois, Inc., 35 Chestnut Street, Rochester 4, N.Y. An ADver-dupois scale can be installed in any public location, especially one where pedestrian traffic is heavy. Income is derived from the sale of advertising on a lease basis to both national and local sponsors. Research by the company shows that one out of three persons passing the scale will use it, affording the advertising sponsors several advantages: (1) his message commands user's undivided attention; (2) the unique presentation (messages consist of rear-illuminated, color transparencies) help break down the indifference many people have toward ordinary advertising methods, and (3) a built-in automatic counter tells the advertiser the exact number of impressions his ad receives.

#### *Brand new opportunity*

ADver-dupois was conceived a little over 2 years ago and has undergone a successful testing and development period since that time. Only 29 scales are now in operation, and the company's franchise offer is a new one. Exclusive, fully protected territories are open throughout the United States and Canada. A prospective franchisee should have a background in advertising or sales promotion to qualify, plus a proven record of successful business management and sound financing. Roger D. Blank, president of ADver-dupois, further explains:

"An ADver-dupois franchise entails an investment of time, effort, and the purchase of scales in sufficient number to adequately cover the assigned territory.



It cannot, therefore, be considered a 'get-rich-quick' operation; rather, it offers an excellent opportunity for continuous, long-range profits. Size of territories is open to negotiation and will be determined by two chief considerations—population concentration and the franchise owner's capacity to service a maximum number of appropriate locations in his territory."

During the first year, the franchisee is required to purchase a minimum of 100 scales at \$350 each, f.o.b. Chicago, representing a total investment of \$35,000. Of this total, at least 25 scales must be purchased within 30 days from the date of the franchise agreement and the remainder in 3 additional orders of 25 scales over consecutive 3-month periods. Payment must accompany each order. Thereafter, scales may be purchased as needed.

ADver-dupois, Inc., solicits national sponsors and acts as the franchisee's exclusive national sales representative. It collects the fees from the sponsor or its advertising agency and remits to the franchisee on this basis:

Example (per scale, per week) :

|                                                                  |             |
|------------------------------------------------------------------|-------------|
| Gross amount paid by national sponsor-----                       | \$8.00      |
| (Less) sponsor's advertising agency commission (15 percent)----- | —1.20       |
| <b>Total-----</b>                                                | <b>6.80</b> |
| ADver-dupois sales commission (15 percent of \$6.80)-----        | —1.02       |
| <b>Net amount paid to franchise owner-----</b>                   | <b>5.78</b> |

The franchisee solicits local and regional advertisers to sponsor scales not being used by national advertisers. He may establish his own local and regional rate card, except that rates must not be lower than the national rates set forth by ADver-dupois. The franchisee pays ADver-dupois a royalty of 25 cents per scale per week, whether it is sponsored or not. Length of franchise agreement is for 5 years with an option to renew.

Under another arrangement, scales may also be sold outright to banks and other financial institutions for use on their premises to advertise their own businesses. ADver-dupois has produced a series of color transparencies for this purpose covering a full range of banking services. Scales are sold at \$695 each plus \$25 for each color transparency. Franchisees earn a 30 percent commission on the sale of each scale plus 10 percent on the sale of each transparency. For full details on this new franchise opportunity, write to Roger D. Blank.

#### FOUR MARKETS FOR "MEMO-PAL" GIVE DISTRIBUTORS HIGH SALES POTENTIAL

The patented, precision-engineered writing device manufactured by Prevue-Radsell Co., 180 North Wacker Drive, Chicago 6, Ill., provides a convenient, dependable and economical method for message-taking. It gives the user a continuous roll of writing surface that can be torn off neatly at any time, or left in one piece to become a compact cylindrical file. The trademarked "Memo-Pal" is made of prime steel in crackle finish, and has these top-quality features: all-enclosed housing; built-in writing platform; touch control knob movement; exclusive feed mechanism which grips, locks, and guides paper in proper alignment; nonskid, nonmark grooved rubber feet. Distributors are wanted for this specialty, which already has won acceptance by many national organizations.

Prevue-Radsell offers two models of "Memo-Pal"—one retails for \$3.98, the other for \$5.98. The higher priced device is equipped with its own high-styled, magnetic mechanical pencil, chained to the unit for safekeeping. The pencil sticks tightly to the writing surface when not in use, ready for instant service. The units are guaranteed against defects of workmanship or materials.

#### *Unlimited market claimed*

Distributors have thousands of prospects for this item. They may open retail accounts, but largest volume will be secured by selling direct to offices, factories, and homes. Multiple sales can be made to large offices, where the "Memo-Pal" has a place on many employees' desks. In the home, housewives need the device for making up shopping lists, taking telephone messages, keeping bridge scores, and numerous other uses. The manufacturer has other office items it will make available to distributors, but main emphasis is placed on the message-taking device, since it is unique and has such a broad market. Repeat sales of pencils and paper filler will swell distributors' profits.

Investment of \$1,200 secures a minimum area of 100,000 population. This investment covers a stock of "Memo-Pals" and accessories (pencils and paper



rolls). Promotional material will be supplied at cost. Distributors receive 50 percent discount off list. Communicate with S. M. Radzyner, president of Prevue-Radsell, for details of this opportunity.

#### NEW "DO-IT-YOURSELF" COLLECTION SYSTEM PAYS \$20 PROFIT PER UNIT

A series of eight letters, sufficient for servicing 50 delinquent accounts, is the basis of the copyrighted collection system developed by Financial Protective Service Bureau, 2447 New Street, Blue Island, Ill. With this system, all collections are made by the creditor, with no agency commissions to be paid. The collection costs are said to be a fraction of what they would be if the accounts were turned over to a firm specializing in collecting bad debts. The system sells for \$35, and costs the distributor \$15. Territories are open across the country.

Minimum orders are for 10 systems, but before an investment is made, an applicant for a distributorship may examine the system by ordering one copy for \$15, which is refundable if the system is returned. Distributors will stock the systems, make deliveries, and handle their collections. Professional men, retailers, service business operators, and manufacturers constitute the market for the system. Address inquiries to H. Schmitt.

#### C.I.T. NOT IN HOME FINANCING

Universal C.I.T. Credit Corp. and C.I.T. Corp. have stated that the story in the March issue of NFR to the effect that the Prudential Homeowners Club, Inc. (sometimes called PHC Homeowners Club, Inc.) has an exclusive contract with C.I.T. Corp. for financing home repair service was erroneous. The March article was based on material supplied by Prudential Homeowners Club, Inc. C.I.T. Corp. is not in the home repair financing field; Universal C.I.T. Credit Corp. is in that field, but has no exclusive contracts with anyone or indeed any contracts for financing, but instead buys acceptable home repair financing contracts from established dealers and contractors. It has not made arrangements for purchasing any home repair financing contracts from homeowners clubs and does not expect to do so.

#### CHICAGO "START YOUR OWN BUSINESS EXPOSITION" SCHEDULED FOR OCTOBER 5

The next business opportunity show featuring franchising organizations will be held at the International Amphitheater, Chicago, starting October 5 and continuing for 5 days through October 9. Sponsoring group is Enterprise Exposition, Inc., 541 Lexington Avenue, New York, N.Y. Write George Arons, managing director, for details.

#### NEW MEXICAN TERRAZZO IMPORT SELLING TO BUILDING TRADES BEING FRANCHISED

"El Gallo Pre-Cast Terrazzo," a new, practically indestructible floor and wall material imported from Mexico, is available for distribution in franchised territories in the United States and Canada by Mexican Imports Co., 4012 East 27th Street, Tulsa, Okla.

The product is machine made, 12 inches by 12 inches by 1 inch in dimension, and comes in a variety of color patterns with such fascinating names as blanco, cafe, rose, verde, negro, and paja. Compressed in the cement base of El Gallo terrazzo are chips of marble or onyx, ground smooth and polished to an attractive gloss. The beauty of it, according to Mexican Imports, is "indescribable and impossible to duplicate in the United States." It is acidproof, greaseproof, waterproof and, in fact, is not perishable to any degree and will withstand practically anything.

In home construction, it is highly suitable in the floors of entrance halls, bathrooms, family rooms, and patios. In the construction of industrial buildings it lends itself ideally to use in the floors of lobbies and offices, and it also can be effectively utilized in walls, building fronts, and in other types of wall coverage. "From a construction viewpoint," says Robert H. Stallborries, of Mexican Imports, "El Gallo Pre-Cast Terrazzo, unlike pour-in-place terrazzo, can be installed like concrete or clay tile and is the last operation on the job, thus retaining the floor in perfect condition. This does not delay for weeks the other trades in their duties as does the conventional poured and ground terrazzo flooring method."

Potential market for the product is through marble, tile, and floor covering dealers, builders, and lumber companies, architects, and interior decorators.



Investment in a franchised territory consists of ordering at least one minimum-sized rail carload (4,500 square feet) of El Gallo terrazzo at a cost of \$2,700 (f.o.b. Laredo, Tex.). A distributor is then required to maintain a similar amount of inventory at all times and to order at least one carload of stock a year. The company says a distributor can expect to sell at least 5 carloads a year in an average territory of 300,000 population and earn a minimum of \$10,000 annually.

Territories are granted on the basis of 250,000 or more population and franchises are renewable on a 3-year basis. Franchises are open in 18 States in the midwestern, southern, and eastern regions of the United States and throughout all of Canada. The Pacific coast and Rock Mountain territories are closed. Robert H. Stallbories will send literature and further information on request.

#### FIRM SEEKS DISTRIBUTORS FOR NEW "SCINTILLATING" DISPLAY LETTERS

Scintillating Letters Co., 719 Industrial Bank Building, Providence, R.I., has franchised territories open for distributors to handle a new line of motion-producing sign letters which can be effectively adapted for both indoor and outdoor advertising and displays.

Called "scintillating disk letters," they are completely prefabricated of half-hard aluminum and lined with either one, two, or three rows of bright aluminum disks that create a constant flashing action and have the ability to attract attention from great distances. Letters are of a gothic style and come in sizes of from 6 to 72 inches. Larger sizes and various trademarks, designs, and strips can be custom made to customer specifications.

Scintillating letters can be installed easily with nails, screws, bolts, or rivets over practically any surface, require no maintenance of any kind, and are not affected by high winds, snow, sleet, dust, or driving rain. Potential market includes sign and billboard companies, advertising agencies, display houses, and so forth.

#### *Sales at wholesale level*

No investment or franchise fee is asked of a distributor wishing to secure a protected territory. Only requirement is an activity warranty figure based on a 6-month period. This is negotiated between the franchisee and the company and is determined by the size and potential of the market area. A distributor is required to deal only with wholesalers and receives a 25-percent discount off list price of all sales in his territory. He also will be furnished with all leads and inquiries in his area generated through the company's national advertising program. The distributor pays a nominal charge for a supply of sales literature and samples as he requires them. For complete details on open territories, contact Jack H. McElroy, vice president of Scintillating Letters Co.

#### SHIM-R-LITE MOTION SIGNS EXPAND LINE; DISTRIBUTOR FRANCHISES OPEN

"Shim-R-Lite," a patented strip material originally produced for the fabrication of motion signs, is now being offered in a new line of readymade letters and backgrounds. The material was developed by the Italian firm of Giovanni Nosenghi, Inc., and is widely marketed in Western Europe. The Keller Co., 139 North Clark Street, Chicago, Ill., has acquired the manufacturing rights to produce Shim-R-Lite in this country and distribute it in the Americas.

This product and the company's franchise offer were first described in the August 1959 issue of NFR. Shim-R-Lites provide the appeal of flashing lights, the attraction of motion, and the effectiveness of being in a constant state of animation. The reflection of natural or artificial light keeps them shining, and the natural movement of air maintains them in motion. They are equally effective day or night. Shim-R-Lite will not rust or corrode, needs no maintenance, and will last indefinitely. No power source of any kind is needed. Shim-R-Lite signs sell for a fraction of the cost of neon.

The original Shim-R-Lite material, designed for use in the fabrication of new signs or the remodeling of existing ones, is offered in  $\frac{3}{4}$ -inch and  $\frac{9}{16}$ -inch sizes in a variety of attractive colors. Strips can be easily attached to any surface in any shape or design, using regular fastening devices or certain adhesives.

The new Shim-R-Lite letters are used where fast and low-cost installation is required and will serve as a companion line to the fabricating strip material, selling for about 33 percent less than custom-made characters. Made of sturdy sheet metal, the letters come ready to be attached in the same manner as the strips. They are offered in fonts of 100 characters in 6-inch, 8-inch, 12-inch,



and 16-inch sizes with silver backgrounds and silver or color disks. Rectangular shapes, measuring 4 square feet, are also available for use as sign backgrounds.

Cash investment in a Shim-R-Lite distributorship depends on territory size. There is no franchise fee asked. Distributors buy the strip material for 58½ cents a yard and sell it for \$1.35 a yard. Minimum investment in inventory is \$1,500 for an assorted stock plus sales aids. This supply of strip material carries a suggested retail price of \$4,492.50.

A minimum initial order on the new Shim-R-Lite letters is 400 characters at a distributor's cost of \$1,282, and includes one font of each of the four sizes. Retail price for this stock is \$3,370.

A sample kit containing a large, ready-made letter and assorted strip material is available from the Keller Co. for a nominal \$3 charge. Address all requests for samples and additional information on this franchise offer to E. N. Keller.

#### HIGH NET EARNINGS POSSIBLE WITH COFFEE VENDING MACHINE FRANCHISE

During the recent recession of 1958, when most industries slowed down considerably, the food and drink vending business kept climbing. Annual dollar volume has continued to rise over the past 13 years and is now at \$2 billion, and the outlook is exceptionally good. Best estimates point to substantial increases for the next few years.

A franchised opportunity to enter into this expanding field on either a full-time or part-time basis is available with the Coffee Queen Corp., 2900 Superior Avenue, Cleveland, Ohio. Exclusive, protected territories are available to qualified individuals capable of placing and servicing automatic vending units in such establishments as small plants, offices, stores, gas stations, beauty shops, etc. The Coffee Queen unit is no larger than a water cooler and dispenses self-brewed coffee with "fresh-roasted flavor and aroma."

The company will provide complete training and field support, advertising and promotional help, management and financial assistance. There is no franchise fee. Size of territory is determined entirely by the investment made in Coffee Queen units. The units sell outright for \$350 each, f.o.b. Cleveland, or they can be leased from the company by the month.

Potential earnings, according to the company's estimates, are as follows: on a full-time 100-unit franchise basis, with a minimum average weekly sale of 85 cups per machine or 3,680 cups per month, the operator can expect to net approximately \$1,850.20 per month or \$22,200 a year. With a part-time, 10-unit franchise, net monthly earnings are estimated at \$196.25 or \$2,355 annually. Full details on this franchise program may be obtained from Edwin A. Hamala, director of marketing of the Coffee Queen Corp.

#### NATIONAL ROUNDUP OF CURRENT FRANCHISE OFFERS

*Motorized drive-ins.*—Drive-in restaurants will be put on a neighborhood basis by Pixie Pantry Mobile Food Service, Inc., 3717 Sauk Trail, Richton Park, Ill. Following a year's test in Indianapolis, Pixie Pantry is offering franchises for its service throughout the country. The company adapts Volkswagen trucks for use as motorized drive-ins. The converted Volkswagens are equipped with a grill, refrigerator, milkshake and coffee makers, hot and cold water systems, sinks and other devices, all powered by a 7-horsepower propane gas motor. The grill turns out 35-cent hamburgers at the rate of 13 in 45 seconds. Other sandwiches are included in the limited menu. Routes will be followed by Pixie Pantry operators for day and night coverage of franchised territories of 10,000 to 15,000 population. Investment in the motorized unit will be less than \$10,000, according to Allen Rose, president.

*"Spacelight."*—An innovation in lighting, under development in Switzerland for years, is heralded as a source of sunshine in the dark. The new "Spacelight," with a powerful set of four lenses and a unique cooling system, is not to be compared with a normal spotlight projecting a pinpoint beam. It throws a square of light that will illuminate an area 600 feet by 600 feet at a distance of two city blocks, with equal intensity throughout the 600 feet by 600 feet square. Thus the square's outer corners are lighted as brightly as its center. The "Spacelight" is packaged into a metal container 18 inches long and 4 inches in diameter. Various versions of the unit range in weight from 12 to 23 pounds. Prices run from \$500 to \$1,200. Tests have shown that six of the new lights illuminated a football field better than the 64 installed lights, each of which



was equipped with a 1,500-watt bulb. The "Spacelight" was found to burn for 75 continuous hours. It uses a single 1,000-watt bulb as a light source. Six of the units altogether burned only 12 cents worth of electricity per hour as against \$1.92 for conventional spotlights. This light can be plugged into a household electrical outlet; autos, planes, and ships can be easily fitted for its use. A built-in battery model will soon be available, making the unit portable anywhere. Western Hemisphere right to market "Spacelight" has been obtained by Charles R. Rudolph, a Washington lawyer. A new company, Spacelight Corp., 100 Exchange Park North, Dallas, Tex., has been organized to handle distribution through franchised dealers. Write Darrell Blanton, president, for details.

*"Wind-O-Lite"*.—Small, high luster aluminum disks, grouped together on a formed aluminum strip and arranged to suspend freely, deliver "magical, electrical impact" to signs, according to the manufacturer, Wind-O-Lite, Post Office Box 1250, Brownsville, Tex. The Wind-O-Lite disks can be applied on or around the letters of any painted sign. They come ready-made for easy positioning. The strips can be tacked, stapled, screwed, or cemented to any surface. The disks need only the slightest breeze to create effects only possible heretofore with expensive moving machinery and electrical relays, Wind-O-Lite states. Each yard of the sign material is individually wrapped. Plain aluminum discs, packaged 100 yards to a shipping container, are priced to the distributor at 42 cents per yard, f.o.b. Brownsville. A container of 100 yards weighs approximately 6 pounds. Colored disks (red, blue, green, and gold), cost distributors 67 cents per yard. Dealers and distributors are wanted for many open territories. Initial investment in stock will be determined by size of territory assigned. Contact J. L. Harrison, partner in the manufacturing firm, for detailed information.

*Ad maps*.—The line of maps published by Champion Sales Corp., Post Office Box 6050, Charlotte, N.C., is offered to State distributors for sale to banks, oil companies, and municipalities. Champion's maps are designed for promotional use, and have large space for advertising copy. Distributors are given six proven sales plans. Investment requirement has not been disclosed. D. W. Robinson will furnish all particulars of this offer.

*Bavarian dinnerware*.—Jersey Specialty Co., 332 Madison Street, Hoboken, N.J., importer of a line of Bavarian dinnerware, seeks distributors for direct selling of several exclusive patterns not available through store. Inventory investment of \$650 reserves one pattern. Secure details from D. Zerola.

*Costume jewelry*.—Franchises for party plan selling of a full line of costume jewelry have been announced by Elizabeth Morrey Division, Van Over Enterprises, Inc., 1610 West Vliet Street, Milwaukee, Wis. Only investment is for the jewelry in the sample kits used by distributors' agents. This investment might be as little as a few hundred dollars. One company marketing costume jewelry through the party plan has approximately 10,000 women agents. The sales pattern has been soundly developed. Paul Van Over, president, will supply pertinent facts on his company's program.

Mr. STEWART. May I also mention the existence of a couple of articles dealing with this subject in publications.

One of these is the Modern Franchising magazine. The issue that I have here is July-August 1960, and it contains an article by Dr. David J. Schwartz, professor of marketing at the Georgia State College of Business Administration.

The article apparently was taken from the Atlantic Economic Review and is part of a larger study by Dr. Schwartz.

The title of the article is, "Franchising Systems: What? Why? How?"

I would just like to call attention to the fact that on page 8 of the magazine, the second page of the article lists contractual arrangements usually used to define the rights and responsibilities of the franchisor and the franchisee, and the first item listed out of about five that are generally agreed to by the franchisor is to grant a protected territory to the franchisee.

There are a number of other items in the magazine.



Senator HART. I think we can make that a part of the record.

Mr. STEWART. Fine. Perhaps a reference to the magazine as one of a series might also be included because, presumably, there is other material which would similarly show the extent—

Senator HART. That is so indicated in your introductory remarks. (The document referred to follows:)

[Modern Franchising, July–August 1960]

#### FRANCHISING SYSTEMS: WHAT? WHY? HOW?

(By David J. Schwartz<sup>1</sup>)

The careful observer of business practices in the United States notes that new approaches to doing business appear to meet changing conditions. One of these new approaches, for want of a more descriptive term, is called the franchising system. While the franchising system is not new, its development has taken place largely since the end of World War II.

Today franchising systems are established to develop coin-operated laundries, hamburger drive-ins, "soft" ice cream stores, baked goods stores, swimming-pool construction firms, drug stores, beauty salons, self-improvement schools, and dozens of other types of retail and service establishments.

#### HOW A FRANCHISE SYSTEM FUNCTIONS

Franchising systems vary widely in operation procedures, but a generalized pattern can be constructed. The parties involved are the franchisor, sometimes referred to as the seller or the licensor, and the franchisee, variously known as a dealer, outlet, associate, licensee, or member.

The franchisor may already be a corporate chain, as is true, for example, of Howard Johnson's and Western Auto. Or the franchisor may operate no retail outlets of its own, as is the case of Midas and some of the petroleum companies. In either case, the broad objective of the franchisor is to develop a market for its products or services.

The franchisee is usually an independent businessman, although it may be a partnership or a corporation. The franchisee invests all or a substantial part of the capital required to establish the outlet.

The franchisor and the franchisee work together in this general manner: the franchisor advertises nationally (or over the area in which franchisees are located) and in other ways attempts to create public recognition of the franchised outlets. The franchisee, following the merchandising and business procedures outlined by the franchisor, proceeds to operate his outlet as an independent establishment.

The net effect of the cooperative action of the franchisor and franchisee is to develop a chain of independent businesses. In the ideal situation, the franchise system has the advantage of both the chain and the independent business. Extensive public recognition, standardized procedures, and known merchandise plus the enthusiasm and devotion of independent owner-operators in many cases result in a very successful marketing approach.

It should not be inferred that the franchising system is in any way a guaranteed approach to business success for either franchisor or franchisee. It is not. Attention is focused in this article, however, on the methods employed by successful systems.

#### COST OF A FRANCHISE AND PROFIT POTENTIAL

It is difficult to generalize regarding the cost of a franchise; as little as only a few hundred dollars to \$100,000 or more may be involved, depending on the type of business and the franchisor's requirements.

One company that franchises seat cover retailers requires a minimum investment of \$30,000; a company that franchises a take-home food service requires an initial investment of at least \$8,500. Coin-operated laundries are offered at prices ranging from \$7,500 to over \$25,000.

<sup>1</sup> Dr. David J. Schwartz is professor of marketing at the Georgia State College of Business Administration. This article from the *Atlantic Economic Review* was taken from Dr. Schwartz' larger research study published by the Bureau of Business and Economic Research.



As a rule, the franchisor does not make a profit from the sale of the franchise. Rather, the initial investment is used to establish the business, that is, lease a location, remodel, purchase equipment, provide operating capital, and purchase signs and displays.

The return to the franchisee on his investment is not easily determined. Advertisements frequently make claims such as "make \$15,000 per year on \$3,500 investment," or "200 percent return first year." While the accuracy of such claims is questioned, there is general agreement that the franchised outlet in most fields is a more profitable operation than its unaffiliated competitor.

One accurate illustration of the profit potential of a franchised outlet was supplied by Midas, Inc., the well-known muffler and exhaust system supplier. Based on past experience, Midas estimates that a franchised outlet, which costs the individual franchisee approximately \$15,000 to establish, should develop a business volume of \$100,000 during the second full year of operation. After payment of all expenses including direct labor, the owner's compensation and profit before taxes should approximate \$23,000.

It must be emphasized that this illustration of profit potential, while typical for Midas, is not necessarily typical for any other franchising system.

#### CONTRACTUAL ARRANGEMENTS

Formal contractual agreements are usually used to define the rights and responsibilities of the franchisor and the franchisee.

Generally, the franchisor agrees to:

1. Grant a protected territory to the franchisee.
2. Supply merchandise to the franchisee at a competitive price.
3. Insofar as possible create and maintain goodwill for the benefit of the franchisee.
4. Furnish trademarks, signs, and other materials which will identify the franchisee as an affiliate of the franchisor.
5. Provide assistance in the management of the franchisee business.

Generally, the franchisee agrees to:

1. Invest a certain sum in his business.
2. Purchase all or a specific portion of his merchandise from the franchisor.
3. Pay the franchisor a certain amount at regular intervals for advertising purposes.
4. Identify (with signs, posters, etc.) his outlet in exactly the manner prescribed by the franchisor.
5. Advertise in the manner outlined by the franchisor.

#### SELECTION OF FRANCHISED DEALERS

Companies most experienced in franchising operations exercise considerable caution in granting franchises. One company in the auto supply industry estimates that it rejects 95 percent of the applicants for its franchise.

Regarding selection, National Car Rental System states its policy in this manner:

"National Car Rental System is composed of the finest car rental operators in the world—and it intends to remain that way. For this reason a high degree of selectivity is employed in the choice of all new members of National and all must meet high standards in order that National Car Rental System's reputation for outstanding service to the traveling public may be maintained."

Leading franchising organizations generally investigate the applicant's past work history, credit and financial standing, health record, home and community life, and educational background.

How much experience is needed? With highly standardized procedures and with intensive training programs, some leading franchising organizations regard past experience in related activities as being of strictly secondary importance. The view of Midas, Inc., is particularly interesting:

"Were you to study the backgrounds of a group of successful Midas Muffler shopowners, you'd find each one surprisingly different.

"You might find, for example, a former TV announcer, a research chemist, a Government accountant, a retired sea captain, an airlines radio operator, and a housewife.

"No two are alike. Yet they must have something in common that caused them to succeed so well in a business so apparently foreign to them.



"Your first clue might come from the absence of something you might have regarded as important. Not one of these people had any previous automotive business experience. This is also true of most of the rest of the Midas Muffler shopowners.

"They simply don't need it. In fact, it relieves them of unlearning some of the bad business habits that have so long been plaguing the American public.

"As for mechanical knowledge, the people our shopowners hire can be quickly and easily trained in the proper techniques of muffler installation. The inner qualities that will bring you happiness and success as a Midas Muffler shopowner have little to do with things mechanical or automotive."

"No previous related experience" is also preferred by other franchisors, including many of those sponsoring hamburger drive-ins, "soft" ice cream stores, and coin-operated laundries. Even in petroleum retailing, the operations of which are relatively complex, a leading individual made this statement:

"With regard to previous experience, we do not insist that the applicant have service station experience. We would much prefer that he had already proven himself a businessman in some other endeavor, and that he come to us with a sincere desire to learn the service station business. We employ an aptitude test for prospective dealers that we have found successful in identifying qualified individuals."

The "no experience needed" rule is by no means universal. Some franchisors, such as those in the swimming pool construction or home remodeling fields, generally insist on considerable previous related experience.

#### FORMS OF ASSISTANCE PROVIDED BY FRANCHISORS

One of the basic elements of virtually all franchising systems is a program of management assistance for the franchisee. Management services provided by franchisors differ in variety and thoroughness, but the most common ones include general management counsel, assistance in personnel management, advertising, personal selling, and sales promotion assistance, accounting and recordkeeping, market research, outlet location, credit management, and community relations.

Since the franchisor's success depends entirely on the combined success of the franchised outlets, the trend is to devote more and more resources to developing the business ability of the franchisee.

#### SPECIAL QUALITIES REQUIRED FOR FRANCHISING SUCCESS

Two qualities stand out as absolute essentials in building a successful franchising system. These are (1) a highly standardized approach in all business operations by all franchised outlets, and (2) a cooperative attitude on the part of everyone.

##### HIGHLY STANDARDIZED APPROACH

Obtaining standardized operations is also one of the most challenging problem areas in developing a franchise system. One major executive made this comment:

"In our industry, probably the greatest problem in working with independent franchised outlets is that of coordinating and standardizing their operations on a nationwide level so that the customer traveling from city to city will always find the same standardized service facilities and brand name at each outlet. Independent businessmen are naturally individualistic in their thinking and in their preferred methods of doing business, making it difficult to achieve the degree of standardization of operation and identification that intercity travelers demand."

##### COOPERATIVE ATTITUDE NEEDED

As noted above, one of the major problems in building a successful franchising system is helping highly individualistic businessmen adopt procedures and techniques developed by the franchisor. That is why, as pointed out in the section, "Selection of Franchised Dealers," many franchisors prefer dealers who have had no related experience. Unlearning preferences and prejudices pertaining to business procedures is sometimes impossible for the individual with extensive experience in his own business.

The attitude "teach me the franchise way—I'll do everything possible to learn it"—seems to be the one most outstanding quality needed by the individual who chooses to operate a franchised outlet.



## CHECKLISTS FOR PROSPECTIVE FRANCHISORS AND FRANCHISEES

Franchising systems are very attractive to franchisors and franchisees when properly managed and operated. Below are two sets of guideposts, one for franchisors and one for franchisees, which suggest the key questions to be asked before deciding to establish a franchise system or to join such an organization.

*Guideposts for prospective franchisees*

The individual considering acquiring a franchise will do well to investigate the proposition carefully before making a decision. Questions that need a positive answer prior to reaching a decision to go ahead include:

1. Do I have sufficient capital to meet the minimum required by the franchisor and still cover living expenses until the business is profitable?
2. Do I have absolute proof that the franchisor is a thoroughly reputable company? (If in doubt, contact a better business bureau or purchase a credit report on the company and its principal executives.)
3. Does the franchisor have full-scale training and merchandising programs?
4. Am I convinced that affiliation with a franchisor is superior, all things considered, to going into business for myself with no affiliation whatever?
5. Am I willing to sacrifice some independence of action and conform to procedures established by the franchisor?
6. Is the contract fair in every respect? Does it guarantee a protected territory? Are the terms for termination satisfactory? (It's generally advisable to have the proposed contract reviewed by a legal expert.)
7. Has the franchisor been in business long enough to demonstrate the profitability of the system? (Ask to see actual operating statements of other franchisees which belong to the system.)
8. Has the franchisor investigated me very carefully? (Generally, the more thoroughly the franchise applicant is investigated, the better is the franchise.)
9. Am I satisfied that the demand for the product or service is both permanent and increasing?
10. Is the franchisor well known and taking positive action to becoming better known?

*Guideposts for prospective franchisors*

The company considering developing a franchising system will profit from giving thorough consideration to these questions:

1. Do we have sufficient capital to develop the system and carry on until it becomes profitable?
2. Have we developed a merchandising approach which can be applied successfully in different areas? Is our approach thoroughly tested? Do we know it will work?
3. Do we now have substantial public recognition? Do we have plans for increasing this recognition?
4. Is our proposition sufficiently promising to attract capable individuals to our franchising system?
5. Are we prepared to offer extensive training services to develop successful franchisees?
6. Is our plan for franchising superior in certain respects to competitive systems?
7. Will we be able to secure the degree of conformity on the part of our franchisees to make the system successful?
8. Is the franchising method definitely superior to expansion through company-owned outlets?
9. Is there a clearly defined and growing demand for our product or service?
10. Do we have the management talent and management philosophy that will develop loyalty and respect among all franchised outlets?

Mr. STEWART. Just one other reference here, which is an article from *Mechanix Illustrated* for August 1960, which first brought to my attention the existence of the other publications.

The title of this article is, "Franchise: Easy Way To Start Your Own Business."

The author is Harry Kursh.

As far as its length is concerned, it is practically—it is approximately 4½ pages, about table size, is the length of that article.



Senator HART. Without objection it will be made a part of the record.

Mr. STEWART. Thank you, sir. I will hand these up to the clerk. (The document referred to follows:)

[Mechanix Illustrated, August 1960]

#### FRANCHISE

#### EASY WAY TO START YOUR OWN BUSINESS

(By Harry Kursh)

A few years ago Glenn G. Miller, of Eugene, Oreg., was a young papermill employee with a wife and two children, plagued by illness and stiff medical bills. The future appeared pretty dismal. But there was one faint ray of hope.

If he could scrape together a little more than \$1,000 he could get a fresh start operating an exclusive-in-his-locale franchise agency for cleaning rugs and home furnishings. Miller was able to raise the money but he had some doubts. He had had no previous business experience and knew nothing about franchise techniques or what he would need in money, training, equipment.

But the company—one of several topnotchers in the field—said in effect: "Never mind. We'll supply everything you need and we'll train you thoroughly. You'll learn how to run the business, how to use the equipment, and increase sales. All you'll need is the minimum investment, a real desire to be your own boss, and the willingness to work hard."

Miller decided to take the plunge. To help him over the hurdles, he took on some part-time janitorial duties in exchange for a low-rent apartment. He kept his supply of new franchise equipment in a nearby garage and operated out of a basement office with his wife's help. It was a slow start. The first month he took in only about \$100.

"But we've found that it pays to be patient," said Miller. "Today, we are averaging around \$400 a week. We have a beautiful new ranch home in the country and all the comforts we never dreamed would be ours."

How does a franchising outfit work? Essentially it is a chain of stores in which each store is owned by an independent operator. The operator of the outlet has a contract with the parent company. This contract is called a franchise.

For a cash investment or percentage of the profits—sometimes both—a company will invite you to join a local or national business chain operating under its name. They will advertise and promote to make their name, goods, and services well known. They'll teach you how to run the business profitably. They'll protect you against competition from others in the chain and even help you borrow the cash investment, to be paid off from future profits.

It has been estimated that at least 100,000 Americans now own successful franchise businesses, and new ones are being created at the rate of some 10,000 a year. The franchise boom was touched off by a growing roster of companies who decided to expand outlets for their products by making it easier for ambitious Americans to start their own businesses.

The Duraclean Co. of Deerfield, Ill., one of the oldest in the lucrative franchise business, has an exclusive absorption process for cleaning upholstery and carpeting. It offers franchisees some 25 services to start them off and keep them going. One Duraclean franchise holder is said to average \$50,000 a year.

There are many other kinds of franchises. Consider, for instance, Peter G. Krosunger, a Long Island milkman. Pete had heard about franchises being offered by General Spray Service, Inc., of Katonah, N.Y., a lawn and garden spraying firm. The business is based on the use of a special truck and a new device known as the Agi-Sprayer. For a total investment of \$7,850, General Spray would give Pete one of its special trucks, train him in its use and teach him how to get customers. If Pete could raise \$2,850, the company would help him finance the balance over a period of 3 years. On top of that the company guaranteed that Pete would make at least \$300 a week for a minimum of 30 weeks, or they'd buy back the equipment.

Pete didn't have the downpayment, so in his spare time he went out and sold scores of homeowners service contracts for cash downpayments. Then Pete used the cash to get his General Spray franchise. That was a little more than



a year ago. Now Pete owns two General Spray trucks and according to company records he should be earning about \$25,000 a year.

Perhaps the greatest lure of today's franchise market is the fact that most companies don't give a hoot about your business experience, age, or education. Just show them that you're ready, willing, and able to work hard and the sky's the limit. And if you're the kind who can come up with good ideas—

There is, for example, the brief but amazing history of Werner M. Maahs, who was until recently a young cop in White Fish Bay, Wis., whose beat took in a Chicken Delight store. Maahs got friendly with the Chicken Delight franchisee and learned that it was a flourishing business, which specializes in selling complete, ready-to-eat packaged dinners to be carried out by customers or delivered to their homes. The business was started by the company in order to sell newly developed automatic cooking equipment.

Maahs learned that he could get a Chicken Delight franchise for about \$12,500, more than half of which the company was prepared to help him borrow. With the help of his family and a mortgage on the house, he raised the cash, got his franchise and within a year he had tripled his \$5,000 per annum cop's income.

But the story did not end there. So pleased was the company with his ideas for store layout and equipment design, that they asked him to join the company's headquarters staff in Rock Island, Ill., as a sales engineer. Within 18 months he was made a vice president and already has more than tripled the income he got out of his first year as a franchisee.

Many of today's franchise operations are rocketing into multimillion dollar empires because they are based on unique or patent-protected ideas. Launched on the franchise route recently, for example, was the toupee business of Glen H. Taylor, a former U.S. Senator from Idaho: It all began back in 1944 when Senator Taylor, while campaigning for election, noticed that his rapidly balding head put him at a disadvantage with women voters.

Unable to obtain a hairpiece that did not look artificial, he made one of his own, painstakingly assembled hair-by-hair on a neatly shaped aluminum pie plate. Over the years, many people remarked how natural his hairpiece looked. He could comb it on his head, wash it and walk through a howling wind with it. In 1956, after he had lost out for reelection to the Senate, he got a patent for his invention, put it on the market as a Taylor Topper. Now he has started a string of franchised businesses, operated by men who are willing to take fittings for Taylor Toppers in homes, small offices, or barber shops.

The United Rent-All Co., a nationwide chain of more than 250 franchised businesses, with headquarters in Lincoln, Nebr., began as one man's idea, when E. R. Patton, a 37-year-old railroad brakeman, found it next to impossible to rent various tools in town. He borrowed \$3,000, bought a stock of tools from Sears, Roebuck & Co. and opened the Lincoln Tool Rental Co.

After several years of highly profitable success, he decided to start the United Rent-All chain which trains its franchisees at a replica of the United Rent-All store in Lincoln. In most cases it takes only about \$5,000 cash to get a United Rent-All franchise. Many of its franchisees, by renting almost anything a homeowner or businessman can use—lawn mowers, milking machines, sporting gear, garden equipment, coffee makers, hospital beds for house-confined invalids, and ordinary tools—are earning between \$10,000 and \$75,000 a year.

Franchising is no "gimmick." Just as in any other form of business, it takes hard work to succeed. However, thanks to the help provided by big company experts, the rate of failures is remarkably low. A. L. Tunick, president of Chicken Delight, Inc., told me that in his chain the failures were less than 5 percent. Other franchise experts reported similar low-failure rates.

Like to cash in on these odds? Like to be your own boss? A franchise may be the answer to your dreams. Your only problem may be in picking the right franchise. To help you make your choice, here are five principal sources of information:

1. National Franchise Reports, 333 North Michigan Avenue, Chicago 1, Ill. A monthly reporting service. Provides details on new franchise offerings, how much investment is required, how much income may be expected, and how to apply. A yearly subscription is \$12; a 90-day trial subscription sells for \$3.

2. 1960 Directory of Franchising Organizations. This is primarily a compilation, by name and address, of some 200 companies who have franchises to offer. It is sold for \$2 by Pilot Publications, Inc., 42 West 33d Street, New York, N.Y.

3. Financial Security and Independence Through a Small Business Franchise, also sold for \$2 by Pilot Publications. It is a concise 45-page, large-sized booklet



which was written as a guide for those who want more details on how various franchising systems operate.

4. Modern Franchising, 320 Fifth Avenue, New York, N.Y. This is a trade magazine which sells by subscription for \$2 a year. It first came out in February 1960, and is designed to cover the entire franchise field. In addition to reporting on new franchise offers, franchise problems, success stories, and tricks of the trade, it also carries advertisements by companies offering franchises.

5. International Franchise Association. Executive secretary, Robert H. Blundred, Screen Process Printing Association, 549 West Randolph Street, Chicago, Ill.

Keep in mind, however, that the franchise field—as in any other business—has its share of phonies. Never sign a franchise contract without the advice of a lawyer. Also, make sure to check on the company making the offer by contacting your local Better Business Bureau or the National Better Business Bureau at 405 Lexington Avenue, New York, N.Y.

It's also a good idea to ask the company to give you the names and addresses of a few of their franchisees so that you may have a look at their operations and ask questions. The phonies will stall you. The reputable companies will be only too happy to supply the information because they know it may convince you to start on the road to fortune with them.

Mr. GREEN. Mr. Chairman, I have four communications which I have been asked to make a part of the record. One is from the National Paint, Varnish and Lacquer Association; one from the All Star Dairy Association, Inc.; one from the Automobile Manufacturers Association, Inc.; and one from the B. F. Goodrich Co.

I ask at this time that they be made a part of the record.

Senator HART. Without objection they will be made a part of the record.

(The documents referred to follow:)

NATIONAL PAINT, VARNISH AND LACQUER ASSOCIATION, INC.,

Washington, D.C., June 19, 1961.

Re Senate bill 1396.

HON. JOHN L. McCLELLAN,

Chairman, Subcommittee on Patents, Trademarks, and Copyrights,  
Senate Judiciary Committee, Washington, D.C.

MY DEAR SENATOR McCLELLAN: The National Paint, Varnish, and Lacquer Association, Inc., with headquarters at 1500 Rhode Island Avenue NW., Washington, D.C., is a voluntary, nonprofit industry association originally organized in 1888 and comprising today approximately 1,200 members, who are engaged in the manufacture and distribution of paint, varnish, lacquer, and allied products, or of the materials used in such manufacture, and who, collectively, produce about 90 percent of the total national volume of paint, varnish, lacquer, and allied products.

This association triennially publishes a trademark directory. The most recent directory published this year contains approximately 35,000 marks used in the paint industry. In view of this, you can readily evidence that we are vitally interested in sound and efficient trademark legislation.

S. 1396 would substitute in the 1946 Lanham Act a comparatively complex registered-user procedure for the present related company concept. This procedure would be substituted without conferring any apparent benefit or advantage to the registrant, the registered user, or the public.

While S. 1396 can be said to pertain only to registered trademarks it would, if enacted, be likely to raise serious doubts as to the validity of the common law trademark which is the subject of a permitted use, since it abolishes the related company provisions of the act of 1946 which codified, clarified, and settled the concept of permitted use. The present related company provisions of the 1946 act have served the public well and have fulfilled the lawful needs of trademark owners and permitted users. As a result, we strongly advocate the disapproval of S. 1396 and respectfully request that our views be made part of the permanent record in these proceedings.

Sincerely,

DONALD P. LYNOTT,  
Director, Trademark Bureau.



ALL STAR DAIRY ASSOCIATION, INC.,  
New York City, N.Y., June 19, 1961.

Hon. JOHN L. McCLELLAN,  
U.S. Senate, Washington, D.C.

DEAR MR. McCLELLAN: We are an association of 104 independent dairies located in 26 States and selling products in 33 States.

S. 1396 has been called to our attention, and we have studied it carefully. Since all of our member plants must follow local, State, and Federal legal labeling laws, we support the passage of this bill since we feel it will strengthen our dairies' legal rights when trying to compete with large national manufacturers.

Very sincerely,

JOHN D. UTTERBACK,  
Founder and Executive Director.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.,  
Detroit, Mich., June 20, 1961.

Hon. JOHN L. McCLELLAN,  
Chairman, Subcommittee on Patents, Trademarks, and Copyrights,  
Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

MY DEAR SENATOR McCLELLAN: We submit the enclosed statement of the Automobile Manufacturers Association, Inc., for inclusion in the record of the public hearings conducted by the subcommittee with regard to Senate bill S. 1396.

We appreciate very much the opportunity of expressing the views of our association on the legislation being considered by your subcommittee.

Respectfully submitted,

HARRY A. WILLIAMS,  
Managing Director.

#### STATEMENT OF THE AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.

The Automobile Manufacturers Association, Inc., which includes in its membership the manufacturers, both large and small, of well over 90 percent of all passenger automobiles, trucks, and busses produced in the United States, desires to go on record as opposing the enactment of S. 1396 which is the basis for the hearings being conducted beginning June 20, 1961, by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary.

The McClellan bill S. 1396 would amend the Trademark Act of 1947, and would require that all permitted or licensed users of registered trademarks be recorded in the Patent Office. A fee would be required and recordal would be made at the discretion of the Commissioner of Patents after the filing of an application setting forth the particulars of the conditions under which the registrant permits the use of, and establishes control of, the mark.

Up to now, we have in this country been able to arrange for the permitted or licensed use of our trademarks, whether registered or not, by private agreement so long as control of the nature and quality of the goods or services in fact existed and so long as the licenses were otherwise lawful.

This proposed law then is a radical departure from the basic procedure of permitted use existing in this country and serves no useful purpose.

The related company provisions of the Lanham Act (the Trademark Act of 1947) have for more than 10 years past adequately served the interests of the public and industry and to change them now, as proposed by S. 1396, would not only result in replacing a simple, efficient, and inexpensive procedure with a comparatively complex and expensive one, but would also create doubt as to the validity of the common law trademark which is the subject of a permitted use.

S. 1396 would not, in our opinion, alter the scope or latitude of trademark licensing nor would it provide a better measure of protection to the public or industry. The criteria or scope of lawful licensing expressed in S. 1396 is found in section 5(k) which provides that the registrant of a mark may "prescribe conditions and restrictions as to mode or place of permitted use." But a registrant now, under the present law, may prescribe "conditions and restrictions" as to mode or place of permitted use provided that there is not an abuse of the trademark that will make the arrangement unlawful. Obviously the placing of



some discretion in the Commissioner of Patents will not make lawful that which is now unlawful and S. 1396 substitutes no other guide or criteria.

Patterned as it is after Canadian and British statutes, S. 1396 is alien to our trademark law and the reasons for the adoption of such laws in Great Britain and Canada do not exist here. The legislation was introduced in those countries in order to make permitted use or licensing of trademarks lawful. Up to then it was not recognized by the courts of those countries as within the law and endangered the validity of marks which were the subject of the licensed or permitted use. That situation does not exist here. Even before the advent of the Trademark Act of 1947, the courts in this country had recognized that permitted use under conditions which controlled the nature and quality of the goods resulted in no deception of the public and in proper cases approved it. Any lingering doubt of the lawfulness of permitted use here was dissipated by the related company provisions of the Trademark Act of 1947 which S. 1396 would repeal.

In the automotive industry, dealers normally and usually are permitted users of trademarks for services; that is to say, our dealers provide "Ford" service, "Chevrolet" service, etc. The automobile manufacturers own the marks and the dealers are permitted or licensed to use them. In many cases, the dealers are also permitted users of the automobile manufacturers' used car marks; for example, "O.K.," "A-1." It is clear then that S. 1396, if enacted, would require the automobile manufacturers to record in the Patent Office their dealers who are permitted to use their used car marks. Moreover, it is our considered judgment that automobile manufacturers would also be required to record dealers who use their marks in connection with services. This is so for our dealers do not, in terms of the exclusion set out in the proviso of section 5(a) (1), primarily sell cars or parts bearing the manufacturers' mark since service is an equally important element of their businesses. Thus, recordal would embrace substantially all dealers. Consider then that for each mark there would have to be a separate application and fee. The fee proposed by the bill for each recording is \$35 and, if there were 5,000 dealers using each mark, the fees alone would be \$175,000. The costs of registration under the bill would be prohibitive as there are, of course, dozens of marks and many thousands of dealers.

For these reasons, the Automobile Manufacturers Association, Inc. is strongly opposed to the enactment of S. 1396.

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THE B. F. GOODRICH Co.,  
Akron, Ohio, June 2, 1951.

Subject: Trademark bill S. 1396

Hon. Senator JOHN L. McCLELLAN,  
U.S. Senate, Washington, D.C.

MY DEAR SENATOR McCLELLAN: I have read your trademark bill, which would provide for registered users of trademarks, as is the case under the present British trademark law.

Before 1938, the British courts had taken an extremely conservative position, and uniformly decided that if an owner of a trademark permitted it to be used by another, the trademark lost its distinctiveness and was permanently void. Long before that time, trademark owners in the United States had become accustomed to permit their trademarks to be used by others in suitable situations, and such arrangements were generally upheld and enforced by the American courts, as long as deception of the public did not result.

The British Parliament recognized the need for a liberalization of the law and rewrote the entire British Trade Marks Act in 1938. The new act went part of the way toward the liberal American views, in setting up a system of recordal of registered users, and that has proven to be a welcome relief from the previous stringency of the British common law of trademarks. Since then, similar laws for recordal of registered users have been adopted in Canada and other British territories.

The United States also had a new act in 1946, drafted by a coordinating committee consisting of representatives of trade associations, the bar, and the Government, extensively publicized and adopted without significant opposition. This act was prepared with full knowledge of the British system of registered users, yet the new American act did not significantly modify the previous liberality of permitting trademark owners to work out such private arrangements as are appropriate in each situation, except to the extent of requiring



actual control by the trademark owner over the character of the use of the trademark by others. This has worked out quite well.

The adoption in this country of the British system of registered users would be a step backward, toward a rigid formalistic system. It would deprive businessmen of the opportunity to make business arrangements to suit the needs of their situations, and would instead force them to use one particular form in every instance. It might even result in loss of trademark rights because of an inadvertent failure to follow strictly the forms and procedures of the statute. It would certainly increase the cost of government and of doing business.

This is clearly a situation in which there is no real need for a change, and in which the best thing to do is to leave matters as they are.

Yours very truly,

HAROLD S. MEYER,  
*Patent Counsel.*

Senator HART. The chairman of the subcommittee, the distinguished Senator from Arkansas, Mr. McClellan, has received a letter from the chairman of the Trademark Subcommittee of the Chicago Bar Association, dated June 15. The request is made that the record of this hearing be kept open so that the statement of the Chicago Bar Association may be made a part of the record.

The writer, Francis N. Palmatier, advises that the formal action by the Chicago Bar Association would not be taken before some time in July, and the committee could not anticipate receipt of the statement until about July 11.

The normal practice, as I have observed it, which has not been for an extended period, in these matters, is to hold the record open for about 14 days. I think that if there is no objection, I would indicate that this record would remain open for a period of 14 days.

This action, of course, is subject to later change by the committee if it desires.

I anticipate that the Chicago bar's position will be—I should not anticipate it, but it would not surprise me if the Chicago bar's position was—a reflection of the attitude expressed this morning by several other trademark and patent sections of the New York and, I think Philadelphia bars.

The hearings may well have given rise to a desire on the part of the interested parties present or others not present to add to the record impressions or, as they see them, corrections. For this purpose also the record will remain open for 14 days, during which time interested parties may make such filings.

If there are no further witnesses to be heard, the committee will adjourn.

(Whereupon, the committee adjourned at 3:20 p.m. subject to call.)



## APPENDIX

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THE SECRETARY OF COMMERCE,  
*Washington, D.C., August 2, 1961.*

HON. JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request of June 8, 1961, for views of the Department of Commerce with respect to S. 1396, a bill to amend the act entitled "An act to provide the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946, as amended.

S. 1396 would provide a substitute for section 5 of the Trademark Act relating to permissive use of registered trademarks by others than the registrant. An elaborate recording in the Patent Office of persons permitted to use a trademark would be established with public listing in the Official Gazette of the Patent Office.

The provisions of present section 5 are relatively simple. They represent a codification of the doctrines of permitted use or licensing as laid down by the courts in decisions prior to the enactment of the Trademark Act of 1946. No particular administrative difficulties have arisen in the Patent Office in operating under this section.

While the Department of Commerce would interpose no objection to enactment of a proposal for the purpose of S. 1396, there follow some general comments from Patent Office officials who would administer the provisions of the bill if enacted.

From an administrative viewpoint, the Patent Office will be confronted with some difficulty in interpreting the new language of the section. Subsection (d) provides that, if the Commissioner is satisfied that there has been compliance with the provisions of this subsection (presumably subsection (b) although not identified), and that, in all the circumstances, the permitted use of the mark is not likely to cause confusion or mistake or deception, he shall authorize registration of the user as a registered user.

It is not clear from these subsections whether the Commissioner is to exercise any discretion in determining if the method of control or the mode or place of the permitted use is appropriate and proper under the decisional law. Presumably, the agreement by the trademark owner and the applicant for registered user will not be subject to review by the Commissioner. Such discretion as the Commissioner may exercise seems to be limited to the determination of whether or not the agreement by the parties conforms to the recitals required by items (1) to (7) of subsection (b). This view appears to be confirmed by subsection (k), which provides that the registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark.

The proposed revision would be more restrictive than present section 5 to the detriment of the trademark owner. While the filing of an application for registered user, as proposed, appears to be permissive rather than mandatory, if no application for registered user were filed and approved by the Commissioner, a use by a permitted user would not inure to the benefit of the trademark owner, as is the case under present section 5, even though the owner exercised appropriate control over the nature and quality of the goods or services in connection with which the mark was used. The bill thus would carry with it a material curtailment of the rights now enjoyed by trademark owners and approved by decisions of the courts.



Provision is made in subsection (f) for modification or cancellation of a registered user's registration by petition of the registrant of the mark and of the registered user, and for cancellation by the Commissioner on his own motion in respect of goods or services for which the mark is no longer registered. It would appear that, if a trademark registration were to be cancelled, or to expire, the Commissioner would forthwith cancel the registered user's registration.

The Bureau of the Budget advises there would be no objection to the transmission of this report from the standpoint of the administration's program.

Sincerely yours,

LUTHER H. HODGES,  
Secretary of Commerce.

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., June 22, 1961.

HON. JAMES O. EASTLAND,  
Chairman, Committee on the Judiciary,  
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1396) to amend the act entitled "An act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946, as amended.

Section 5 of the Lanham Act (July 5, 1946, 60 Stat. 429; 15 U.S.C. 1055) provides that when a registered mark or a mark sought to be registered is or may be used legitimately by related companies, such use shall inure to the benefit of the registrant or applicant for registration, and such use shall not affect the validity of such mark or of its registration, provided it is not used in such manner as to deceive the public.

Section 45 of the Lanham Act (15 U.S.C. 1127) defines the term "related company" as "any person who legitimately controls or is controlled by the registrant or applicant for registration in respect to the nature and quality of the goods or services in connection with which the mark is used."

The bill would delete the present section 5 of the act and insert in lieu thereof a new and more detailed section 5. Subsection (k) of the new section 5 would provide that "the registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark." Also, the bill would strike out the definition of "related company" in section 45 of the act.

The apparent effect of the bill would be to cause the dismissal of three suits pending in the U.S. District Court for the Northern District of Illinois (*United States v. Serta Associates, Inc.*, Civ. Action No. 60-C-843; *United States v. Sealy, Inc.*, Civ. Action No. 60-C-344; *United States v. The Spring-Air Company*, Civ. Action No. 60-C-845) commonly referred to as the *Mattress* cases. In each of these cases, the defendant, whose stock is owned exclusively by a number of mattress manufacturers, is itself not engaged in manufacturing, but is the registrant of certain trademarks, all of which it licenses to each of its stockholders. The respective agreements contain numerous restrictions which are strictly enforced; among them are establishment of uniform prices by all participants, the division of territories among the stockholders for the manufacture, distribution, and sale of mattresses, and the compulsion to buy certain material only from certain sources chosen by the registrant, which obligation may amount either to a tying clause or to a joint refusal to deal with others. All of these restrictions are *per se* violations of the antitrust laws. *Northern Pacific Railway Company v. United States*, 356 U.S. 1 (1958).

Such a scheme does not lose the stigma of illegality because of the fact that it is founded on trademarks and their licensing. It was never intended that the effects of antitrust violations may be escaped by the licensing of trademarks. *United States v. Timken Roller Bearing Company*, 83 F. Supp. 284, 314-316 (N.D. Ohio, 1949), expressly affirmed in this respect, 341 U.S. 593, 598-599 (1951). The Lanham Act itself shows that violations of the antitrust laws are not immunized by the magic touch of a trademark. Section 33(b)(17) (15 U.S.C., 1115(b)(7)) provides that the use of a trademark in violation of the antitrust laws shall be a defense even against an incontestable trademark whose



5-year registration otherwise constitutes conclusive evidence of the exclusive right to its use.

The provisions of the proposed new subsection (k) of section 5 would give the registrant well nigh absolute power to impose, with impunity, otherwise antitrust-tainted restrictions. The word "place" would protect every division of territories. The word "mode" would save—from antitrust illegality—tying clauses, compulsory joint agencies, and many other conceivable restraints. Also, the establishing of suggested prices (which have a natural tendency to become rigidly fixed) might be contended as a mode of use.

The effect of the bill would be to exempt numerous per se violations from the applicability of the antitrust laws in general and to bring about the dismissal of the *Mattress* cases against per se violators of the antitrust laws in particular. This would be inconsistent with the declared purpose of the author of the act "to protect honest business and also to protect the purchasers of commodities so that they may know the origin of the goods they are buying." (Congressman Lanham, 91 Congressional Record, 1724.)

In the light of the foregoing, the Department of Justice is opposed to the enactment of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

BYRON R. WHITE,  
*Deputy Attorney General.*

SMALL BUSINESS ADMINISTRATION,  
*Washington, D.C., July 24, 1961.*

Re S. 1396, to amend the act entitled "An act to provide for the regulation and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes," approved July 5, 1946, as amended.

The Honorable JAMES O. EASTLAND,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Further reference is made to your letter of June 22, 1961, requesting my views on the captioned bill.

S. 1396 calls for a number of changes in the Lanham Trademark Act, including an amendment providing that "the registrant of a mark used by registered users may, irrespective of any affiliation or relationship between the registrant and such registered users, prescribe conditions and restrictions as to mode and place of permitted use by each registered user of the mark."

As construed by the Department of Justice the quoted provision would permit the owner of a registered trademark to subject users of the mark to virtually any restrictions he pleases—in disregard of the antitrust laws. Such restrictions could include territorial limitations, tying clauses, compulsory joint agencies, and other restraints on trade.

Exemptions from the antitrust laws should be, and have been, granted where the need is shown. Such exemptions must, however, be carefully limited in scope and attended by appropriate safeguards. Since the captioned bill lacks these attributes, I do not favor its enactment.

The Bureau of the Budget has advised that it has no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

JOHN E. HORNE, *Administrator.*

JOSEPH BANCROFT & SONS CO.,  
MANUFACTURERS, BLEACHERS, DYERS, AND FINISHERS,  
*Wilmington, Del., June 5, 1961.*

In re S. 1396.

Senator JOHN L. McCLELLAN,  
*Senate Office Building, Washington, D.C.*

MY DEAR SENATOR McCLELLAN: Our mutual friend, J. Caleb Boggs, tells me that you introduced Senate bill 1396 by request, and that no hearings on that bill are presently contemplated.



I am much relieved to hear that this is the case, for the proposals of S. 1396 might have very serious consequences, not only to the business which I head, but also to the operations of a very large number of other business establishments, who operate under license from this company.

Here is what it means to us. We spend a sizable part of our budget on research and development, and when we get a real good product, instead of trying to keep the market to ourselves, we license other people to use our new technique and to sell the product which they make. If their product is up to our established standards, they can use our trademark on it. We work with our licensees until they understand the technique thoroughly, and from that time on our quality control division regularly checks up on their industrial production.

We can afford to do this, because we are protected by section 5 of the Trade-mark Act, which S. 1396 would specifically repeal. The flexibility and simplicity of the procedure under section 5 has been tremendously valuable to the American consumer, because it has greatly increased the availability of the new things which we produce. In other words, we provide the consumer with as many competing sources as possible, but at the same time give the consumer a reasonable guarantee of quality by permitting our licensees to use our mark only on goods which are equal to or better than the minimum standards which we establish.

But if we are going to have to fight our way through the Patent Office on every license that we grant—and we have granted over a thousand of them—we may find it necessary, as a matter of just plain economics, to restrict our licensing operations.

S. 1396 sets up a very complex ritual, and our lawyers indicate that it might easily cost \$100 or more in legal fees, plus the Government fee of \$35, provided by the act, for every licensee.

Entirely apart from the very doubtful wisdom of giving the Government control over every license involving a trademark, there is the further problem, provided in this bill, of giving to our licensees' control of litigation. Any licensee who complains about infringement of our mark has a right to sue in his own name if we do not bring suit within 90 days. This could be devastating to us, for it has been our experience that every new product is followed by a flood of imitations as soon as its success has been assured. Generally, a couple of well-publicized suits against the most flagrant instances of piracy will be enough to stop the other pirates. But if any licensee can put our mark and our budget at hazard by involving us in litigation against our will, especially in situations where the mark complained of is not the same as ours but only similar to it, our position will become precarious indeed. We might find ourselves engaged in 50 suits at once, when 1 or 2 would be sufficient.

There are a lot of other objections to this bill involving rather complex legal problems. I have simply mentioned a couple of points to show you how very bad this measure is as it applies to our business. If we have to drop our licensing programs because of it, employment will suffer in the plants of every licensee, and the supply of new things which our system promotes will shrink to the output of a single plant.

The bill has been referred to the Committee on the Judiciary, and I would appreciate it if the bill should be reported out that plenty of time be given to permit industry to express its views.

Respectfully your friends,

W. R. MACINTYRE, *President.*

CHICOPEE MANUFACTURING CORP.,  
North Little Rock, Ark., July 21, 1961.

The Honorable JOHN L. MCCLELLAN,  
Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: I should appreciate your taking a few minutes to read my views on Senate bill 1396, which you introduced and which is now being studied by the subcommittee of which you are a member.

We view this bill with grave concern, because it not only is likely to impose a substantial burden upon normal commercial operations which in many cases require licenses, but it also is bound to add to cost and delay and to increase the amount of Government redtape as well as to the amount of expenditures and personnel. In addition, and this is always something that should give us pause,



the law purely and simply proposes to regulate an activity which has been carried on for many, many years in the United States without problems, and regulation for regulation's sake is something that it would seem important to avoid.

At the present time, licenses or agreements under trademarks are made wherever indicated to protect the public and the parties involved. The parties have had considerable pressure upon themselves to make such agreements properly because failure of proper and careful handling could mean loss of the important trademark rights involved and the trademark owner, and trademark licenses would thus proceed at their peril.

Great Britain and a number of other countries in the British Commonwealth proceeded in another manner by originally having provisions outlawing trademark licensing. After realizing that trademark licensing was necessary under conditions of modern commerce, they instituted a procedure providing for registration of such licenses in an attempt not to provide too sharp a break between the old and the new practice in their countries. This is the registered user procedure that Senate bill 1936 would introduce into U.S. law. It has not worked well abroad, has provided long delays, has given excuses to trademark registers to burden the applicants with requests for all types of information, has at its worst served to provide the more powerful firm with information about its weaker competitor, and above all, has led to long delays, substantial expenditures, and a whole procedural set of rules for a field that has amply demonstrated that it needs no such rules.

Incidentally, the number of trademark lawyers in the United States is relatively small, and the advice necessary to comply with the formal Washington registered user provision would seem to be difficult to come by except in a few major places such as New York and Washington.

At best, a voluntary bill permitting such registration to the few persons who would desire it may offer a useful compromise. By and large, however, we respectfully submit that this is a legislation not needed and one which the Congress can well avoid burdening itself with in these critical times.

Many thanks for your assistance.

Yours very truly,

ELMER J. YEDLICK, *Plant Manager.*

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THE CHICAGO BAR ASSOCIATION,  
*Chicago, Ill., July 31, 1961.*

*To the Chairman and Members of the Senate Judiciary Committee and the  
Senators and Congressmen from Illinois:*

The attached report represents the position of the Chicago Bar Association on S. 1396. It is hoped that this report will be helpful to you in the consideration of this proposed legislation.

Respectfully submitted.

RICHARD H. CAIN, *Executive Secretary.*

CHICAGO BAR ASSOCIATION, COMMITTEE ON PATENTS, TRADEMARKS, AND TRADE  
PRACTICES REPORT ON S. 1396, REGISTERED USER BILL

We oppose the passage of Senate bill, S. 1396, introduced by Senator McClellan on March 21, 1961, for the following reasons:

This bill would substitute a registered user system for section 5 of the Trademark Act. Section 5, in substance, provides that legitimate use of a trademark by related companies will inure to the benefit of the trademark owner, and that such use will not affect the validity of the mark, provided the mark is not used in such a manner as to deceive the public. Under the proposed registered user system, it will be necessary for the registrant of a trademark to file a registered user application in the Patent Office with respect to each trademark licensee or other user of the registered trademark.

Experience with similar registered user systems in Great Britain and Canada has shown that a registered user provision of this type is burdensome to trademark owners, yet does not confer any benefit that is not already conferred by the present related company provisions of section 5 of our Trademark Act. In Great Britain and Canada registered user systems were adopted to overcome judicial decisions which denied to the trademark owners any right to license their trademarks. In the United States, on the other hand, the courts have recognized the right of the trademark owner to license his trademark, provided that the use of the trademark is controlled so that the public will not be deceived.



The burden of administering the proposed registered user system would substantially increase the cost of operating the trademark branch of the Patent Office, without conferring any substantial benefit on trademark owners.

The present provisions of section 5 of the Trademark Act are preferable to the proposed registered user system. Trademark owners and licensees receive the benefits of section 5 without taking any action other than arranging their licensing programs so that the public will not be confused. Under the system proposed by this bill, trademark proprietors will be compelled to register their licensees, even though the registration provisions purport to be permissive, because the failure to register such licensees exposes the proprietor to charges that his licensing program is illegal.

In three pending antitrust cases, the Department of Justice has contended that certain trademark licensing programs violate the antitrust laws. However, the court has not yet reached these cases for trial, so that they constitute no more than a threat at this time. In the past, a properly managed trademark licensing program has not been regarded as any violation of the antitrust laws. Thus, the pending antitrust cases do not justify the burden that would be imposed by the enactment of this bill. Moreover, the bill does not purport to amend the present antitrust laws and thus does not necessarily resolve any of the antitrust questions raised by the Department of Justice.

We urge that this bill be defeated by Congress.

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NEW JERSEY PATENT LAW ASSOCIATION,

June 27, 1961.

*Chairman and Members of the U.S. Senate Judiciary Committee, Washington, D.C.*

DEAR SIRs: In view of a number of provisions which appear to be objectionable from the professional practitioner's point of view, the board of managers of the New Jersey Patent Law Association has asked me as secretary to transmit to you the following resolution:

"Resolved, That the board of managers of the New Jersey Patent Law Association hereby disapproves enactment into law, S. 1396, for the reason that this bill would introduce a complicated procedure which would not result in any benefit to either the public, the registered user, or registrant. The bill is not believed to solve any problems with respect to permitted users which are not already taken care of by the act of 1946."

Accordingly, it is requested that the above resolution be given due consideration.

Very truly yours,

E. M. THOMAS, *Secretary.*

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

New York, June 27, 1961.

HON. JOHN L. McCLELLAN,

*Chairman, Subcommittee on Patents, Trademarks, and Copyrights,  
Committee on the Judiciary, U.S. Senate, Washington, D.C.*

MY DEAR SENATOR McCLELLAN: I am writing to advise you of the position of the Association of the Bar of the City of New York concerning S. 1396, which would amend the Lanham Act of 1946 to establish a "registered user" procedure for trademarks. The association's committee on trademarks and unfair competition, after discussion at a regular meeting held on May 16, 1961, unanimously adopted a resolution disapproving the bill.

It is respectfully requested that this letter be made a part of the record of the hearings on S. 1396.

Very sincerely yours,

SIDNEY A. DIAMOND,

*Chairman, Committee on Trademarks and Unfair Competition.*



DURENE ASSOCIATION OF AMERICA,  
New York, N.Y., June 30, 1961.

Hon. JOHN L. McCLELLAN,  
*Subcommittee on Patents, Trademarks and Copyrights,*  
*Senate Judiciary Committee, Washington, D.C.*

DEAR SENATOR McCLELLAN: In behalf of the members of the Durene Association of America I respectfully wish to note our opposition to S. 1396, now pending before your subcommittee.

The Durene Association of America is the national trade association representing the cotton yarn mercerizing industry. As a branch of the textile industry the members of the mercerizing industry find it essential for the distribution of their products to own and maintain trademarks and collective marks and under proper conditions to license the use of these marks as is now permitted under the Lanham Act of 1946 and other existing law.

The consuming public, in turn, has come to depend upon trademarks as the means of identifying the products of time-tried firms and also to rely upon standards of quality denoted by certification and collective marks. Legislation which would impose unnecessary restrictions on licensing of trademarks, as is now permitted by law, can only be harmful to firms and industries which depend upon their trademarks and trademark licensing as invaluable aids in the distribution of their products. Likewise the public, which has learned to rely upon many trademarks as symbols of reputable origin or certifications of quality, which manufacturers and industry groups will stand behind, cannot benefit from complicating the essential system of trademark licensing now authorized.

Our members wish to support the oral and written statements presented in opposition to S. 1396 by the U.S. Trademark Association.

In conclusion it is requested that this statement be made a part of the record of the hearings on S. 1396 and it is urged that this bill not be reported from the subcommittee.

Very truly yours,

A. C. LAYTON NEWSOM,  
*Executive Secretary.*

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HOUSE OF REPRESENTATIVES,  
Washington, D.C., June 21, 1961.

Hon. JOHN L. McCLELLAN,  
*Chairman, U.S. Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights, Washington, D.C.*

DEAR SENATOR McCLELLAN: I want to thank you for the opportunity to submit my statement in support of S. 1396 to the subcommittee.

It is respectfully requested that my statement be made a part of the hearing record on this important bill.

With cordial thanks, I am,

Sincerely yours,

ABRAHAM J. MULTER.

STATEMENT OF HON. ABRAHAM J. MULTER, REPRESENTATIVE, 13TH DISTRICT OF NEW YORK

Mr. Chairman, I want to thank you for giving me this opportunity to make this statement to this subcommittee on behalf of S. 1396, concerning the licensing of trademarks.

At the present time the statutory provisions in this regard are rather broad. This advantage in taking care of contingencies unforeseen when the Trademark Act of 1946 was passed, has created some misunderstandings. The primary purpose of the act of 1946 was to enact into law trademark licensing as it had been developed by the courts.

S. 1396 would provide that persons other than the trademark registrant or the applicant for registration who uses such trademark may be registered as users of the trademark. Those, however, who merely resell the registrant's goods, or who merely use the trademark to identify or distinguish goods they sell, may not be registered.

In addition, it requires the disclosure of information concerning the licensor- licensee relationship being entered into. It clarifies the responsibility of the registrant in his relationship to the registered user and provides adequate safeguards for those a party to the relationship and the public interest.



Enactment of S. 1396 will go far to correct the uncertainties which have arisen by providing for public disclosure of the licensor-licensee relationship and of the identity of the user of a trademark. It will help to reestablish public confidence in brand names. Another positive aspect of the provisions of S. 1396 is the greater certainty as to the rights and responsibilities of licensors and licensees.

One of the problems that arises under present law might best be shown by the following example: Those who sell automobiles, that is a retail dealer, frequently use the name of the automobile manufacturer as part of the name of their firm, i.e., "Jones Chevrolet" or something similar. Under present law many feel that the General Motors Corp. is responsible for the quality of the services performed by Jones since Jones is a franchised Chevrolet dealer. Under present law, however, no such quality control responsibility exists on the part of General Motors. They own the Chevrolet trademarks, but there is no real licensor-licensee relationship between them and Jones. General Motors, then, is only responsible for the quality of the product they manufacture, the automobile, and not the service that Jones performs.

If S. 1396 is enacted this misunderstanding will be eliminated by the new section 5(a)(1) which provides that persons who use a trademark registrant's mark to identify goods manufactured by the registrant may not be registered as a user or licensee of that trademark.

S. 1396 will fill a much needed gap in our trademark law and provide greater protection for both the trademark owner and the public.

Thank you.

CHICAGO, ILL., June 29, 1961.

HON. PHILIP A. HART,  
*United States Senate, Washington, D.C.*

DEAR SENATOR HART: The undersigned lawyers, all engaged in the active practice of trademark law at Chicago, Ill., are opposed to the passage of Senate bill S. 1396 introduced by Senator McClellan on March 21, 1961. We understand that hearings on this bill were held on June 20 and 21, 1961, before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, and that you presided at such hearings. It is our understanding that the record of the hearings is being held open for 14 days to provide for the submission of written statements with regard to this bill. We respectfully request that this letter be made part of the record as a statement in opposition to the bill. Our reasons for opposing this bill are as follows:

This bill would substitute a registered user system for section 5 of the Trademark Act. Section 5, in substance, provides that legitimate use of a trademark by related companies will inure to the benefit of the trademark owner, and that such use will not affect the validity of the mark, provided the mark is not used in such a manner as to deceive the public. Under the proposed registered user system, it will be necessary for the registrant of a trademark to file a registered user application in the Patent Office with respect to each trademark licensee or other user of the registered trademark.

Experience with similar registered user systems in Great Britain and Canada has shown that a registered user provision of this type is burdensome to trademark owners, yet does not confer any benefit that is not already conferred by the present "related company" provisions of section 5 of our Trademark Act. In Great Britain and Canada, registered user systems were adopted to overcome judicial decisions which denied to the trademark owners any right to license their trademarks. In the United States, on the other hand, the courts have recognized the right of the trademark owner to license his trademark, provided that the use of the trademark is controlled so that the public will not be deceived.

The burden of administering the proposed registered user system would substantially increase the cost of operating the trademark branch of the Patent Office, without conferring any substantial benefit on trademark owners.

The present provisions of section 5 of the Trademark Act are preferable to the proposed registered user system. Trademark owners and licensees receive the benefits of section 5 without taking any action, other than arranging their licensing programs so that the public will not be confused. Under the system proposed by this bill, trademark proprietors will be compelled to register their licensees, even though the registration provisions purport to be permissive, because the failure to register such licensees exposes the proprietor to charges that his licensing program is illegal.



The repeal of the present provisions of section 5 and the substitution of the registered user provisions will tend to create grave doubt as to the legality of trademark licensing programs based on unregistered common law trademarks. At the present time, the use of an unregistered common law trademark may be licensed, provided that the trademark owner exercises sufficient control over the use of the trademark to prevent the public from being deceived.

In three pending antitrust cases, the Department of Justice has contended that certain trademark licensing programs violate the antitrust laws. However, the court has not yet reached these cases for trial, so that they constitute no more than a threat at this time. In the past, a properly managed trademark licensing program has not been regarded as any violation of the antitrust laws. Thus, the pending antitrust cases do not justify the burden that would be imposed by the enactment of this bill. Moreover, the bill does not purport to amend the present antitrust laws and thus does not necessarily resolve any of the antitrust questions raised by the Department of Justice.

We urge that this bill be defeated by Congress.

Respectfully submitted.

FRANCOIS N. PALMATIER,  
C. LYMAN EMBICH, Jr.,  
CHAS. W. RUMMLER,  
JEREMIAH D. MCAULIFFE,  
CALISTE J. ALSTER,  
MARSHALL A. BURMEISTER.

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MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,  
Chicago, July 3, 1961.

Re S. 1396

HON. PHILLIP A. HART,

*Subcommittee on Patents, Trademarks and Copyrights,  
Senate Committee on the Judiciary, Washington, D.C.*

DEAR SENATOR HART: This letter is written to supplement the statements made by the undersigned and others in support of Senate bill 1396 at the subcommittee hearing on June 20 and 21, 1961. It is respectfully requested that this communication be incorporated in the record of that hearing.

Three matters will be covered in this letter: A reply to the charge of some opponents of the bill that the registered-user provisions were written to obscure the basic purpose of the bill which is to enact statutory provisions authorizing territorial limits in trademark licenses; a statement of how we understand S. 1396 would influence the interpretation and enforcement of section 1 of the Sherman Act in pending litigation between the Government and the four mattress groups; and references to previous instances of congressional actions which clarify or change the law on issues which were in litigation at the time of the congressional actions. We were invited to comment on this last subject by Mr. George Green, counsel of the Senate Committee on the Judiciary.

In the statement of purpose prepared by proponents of S. 1396, the following paragraph appears:

"One of the primary objectives of the bill is to insure that there is no discrimination against trademark owners on the basis of the form of organization utilized by them in the licensing of their trademarks. Another intimately related objective is that trademark licensees be enabled to compete on fair and equitable terms with large single integrated companies which are in a position to do their own national advertising and distribution without recourse to trademark licensing. Operations under trademark licenses are an accepted method of doing business in our industrial establishment, embrace a large segment of the smaller enterprises of this Nation, and are necessary to the economic survival of such enterprises. This fact requires Congress to recognize, as the courts have already done, that a trademark owner be free to designate the specific area in which each of his licensees is authorized to use the mark. Only through the licensee's knowledge that he will be entitled to the fruits of his efforts in a defined area, will he have the incentive to make the investment and incur the expenditures necessary fully to exploit the mark and develop his market."

In a summary entitled "The Provisions of the Bill," the following statement was also prepared by proponents of the bill:

"The bill provides that irrespective of any affiliation between a registrant and registered users, the registrant of a mark may impose conditions and restric-



tions as to mode and place of permitted use by each registered user of the mark, thus placing all licensor-registrants on the same footing. (Sec. 5(k))."

Despite these explicit comments and the unmistakable provisions of section 5(k) of Senate bill 1396, and despite the many explicit statements of businessmen supporting the bill as to the reasons why licensees require exclusive territories to enable them to compete against nationwide corporations which own their own trademarks outright, some persons appear to believe that the registered-user arrangement described in the bill is an elaborate facade erected for the purpose of concealing or obscuring the bill's main objective, which is to clearly articulate a policy in favor of territorial limits in trademark license agreements.

We wish the record to be clear on this point. Our approach is that the licensing of trademarks is a lawful and constructive means of extending commerce in a variety of goods and services to a diversity of markets, but that protection of the public through registration should go hand in hand with protection of licensors and licensees in their arrangements to control the use of licensed trademarks.

Far from being an unnecessary system of registration or a smokescreen to conceal the real objective, the registered user provisions are conceived to be the means whereby sufficient protection is given to the public to remove or overcome policy objections to the territorial protection given to licensees of nationally advertised trademarks by the bill.

At one point in the hearing (Tr. 66-67) the view was expressed that enactment of S. 1396 "confirms the right of a trademark owner to assign exclusive territories to his licensees, but it does not confirm his right to do so in violation of the antitrust laws. Trademark rights, like most other rights, are subject to the overriding policy of the Sherman Act." It is true that this bill seeks to amend the trademark law rather than the antitrust laws. However, as proponents of the bill we do not believe that amendments which may be made in 1961 to the trademark law should be interpreted as subordinate to a policy adopted in 1890 when the Sherman Act was passed or in intervening years when the Clayton Act and other antitrust statutes were adopted. This amendment to the Lanham Act expresses the congressional intent that trademark license agreements with territorial protection for licensees do not constitute violations of the Sherman Act by virtue of such territorial protection. If the pending case of *United States v. The Spring-Air Company* reaches the point where the U.S. district judge must frame a decree either granting the relief sought by the Government or declaring in effect that the Government is not entitled to the relief sought, the district judge must obviously give consideration to the legal rights of the parties arising from their relationships as licensors or licensees under the trademark statute, including any amendments to that statute which may go into force before entry of such a judgment or decree.

Insofar as the prayer for relief filed by the Government seeks a decree prohibiting the assignment of separate marketing territories to the various licensed manufacturers of Spring-Air products, the enactment of S. 1396 would require the Court to either deny injunctive relief or so limit injunctive provisions as to allow each licensee to have the right to sell products bearing labels on which licensed trademarks appear only in territories for which authority is given by the licensor.

In short, S. 1396 is intended to have a direct and substantial effect upon the policy of the law at that point where trademark rights and antitrust provisions must be considered together. If S. 1396 is enacted the Government's cases against the mattress industry should be dismissed unless the Government has probative evidence of illegal price fixing practices. (We are informed that such evidence does not exist, but the Government may dispute this information.)

The following are instances in which congressional action was taken with knowledge that it would affect or control the outcome of pending litigation: the *Capper-Volstead Act* (42 Stat. 388 (1922)); *United States v. Schooner Peggy* (5 U.S. (1 Cranch) 103 (1801)); *Duplex Printing Press Co. v. Deering* (254 U.S. 443 (1921)); *Carpenter v. Wabash Ry. Co.* (309 U.S. 23 (1940)); *Payne v. Hearst* (269 Fed. 678 (D.C. Cir. 1920)); *District of Columbia v. American Pharmaceutical Ass'n* (133 F. 2d 43 (D.C. Cir. 1943)); *Battaglia v. General Motors Corp.* (169 F. 2d 254 (2d Cir. 1948)). See also *Ziffrin v. United States* (318 U.S. 73 (1943)).

Before the enactment of the Capper-Volstead Act (42 Stat. 388 (1922)), farmers who joined in cooperative marketing associations were threatened with prosecution under the Sherman Anti-Trust Act (61 Cong. Rec. 1033 (1921)) (remarks of Senator Volstead). After an indictment had been returned against such



an association (61 Cong. Rec. 1037 (1921)) (remarks of Senator Volstead), Congress passed the Capper-Volstead Act, which clearly exempted agricultural cooperatives from the prohibitions of the Sherman Act.

The earliest instance which we have found where Congress took action determining the rights of the parties while a suit was pending occurred in congressional action after the trial but before decision on the appeal in the case of *U.S. v. Schooner Peggy* (5 U.S. (1 Cranch) 103 (1801)). This was a proceeding by the Government to condemn a captured French vessel. While appeal to the Supreme Court was pending a treaty with France was signed and ratified by the Senate, providing for the return of captured property not yet finally condemned. In accepting the legislative determination of the case, Chief Justice Marshall stated:

"[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." (*Id.* at 109.)

Remedies under the antitrust laws were involved in a later example, *Duplex Printing Press Co. v. Deering* (254 U.S. 443 (1921)). That instance involved a congressional determination of one of the issues of law which was before the trial court and had not yet been decided when Congress acted. The plaintiff had brought suit to enjoin violations of the Sherman Anti-Trust Act (act of 1891, ch. 647, 26 Stat. 209) but it was disputed whether a private party was entitled to injunctive relief under that statute. Some Federal courts had previously answered this question in the negative. After the suit was instituted but before it was brought to hearing, Congress enacted the Clayton Act. The Supreme Court held that the Clayton Act was applicable to the *Duplex* case although it was pending in the trial court when the statute was amended, stating (p. 464):

"Insofar as the act (a) provided for relief by injunction to private suitors, (b) imposed conditions upon granting such relief under particular circumstances, and (c) otherwise modified the Sherman Act, it was effective from the time of its passage, and applicable to pending suits for injunction."

In *Carpenter v. Wabash Ry. Co.* (309 U.S. 23 (1940)), rehearing den. 309 U.S. 695 (1940), the Supreme Court gave effect to an amendment to the bankruptcy laws which by its terms was to apply "In proceedings \* \* \* now or hereafter pending in any court of the United States \* \* \*" Act of August 11, 1939, ch. 689, 53 Stat. 1406. The statute in question gave priority to tort claims in equity receivership cases, and the *Carpenter* case was one of those which was pending at the time the amendment was adopted. (H. Rept. 1458 (1939)) made it clear that the amendment to the Federal bankruptcy laws would serve as the basis for determining priorities in suits which were pending at the time of the congressional action. The court in the *Carpenter* case cited the *Schooner Peggy* case and held (p. 27):

"[I]t is our duty to consider the amended statute and to decide the question in harmony with its provisions, if it is found to be applicable, \* \* \*"

In *Payne v. Hearst* (269 F. 678 (D.C. Cir., 1920)), the question of law involved was whether the United States Shipping Board had authority to sell former German vessels taken over by the United States during World War I. During pendency of an appeal Congress passed the Merchant Marine Act of 1920, § 5, Ch. 250, 41 Stat. 990, authorizing the Board to sell vessels so acquired. The new statute resolved the litigation.

One of the clearest examples of legislative intervention occurred during the pendency of *District of Columbia v. American Pharmaceutical Ass'n.* (133 F. 2d 43 (D.C. Cir. 1942)). The complainant brought suit for a declaratory judgment that its property located in the District of Columbia was exempt from taxation on the grounds that it was used for educational purposes. While the litigation was in progress the case was submitted to Congress. Congress settled the controversy by declaring that "buildings belonging to and used in carrying on the purposes and activities of the \* \* \* American Pharmaceutical Association," as well as certain other property in the District of Columbia, are exempt from taxation. Act of December 24, 1942. § 1(k), ch. 826, 56 Stat. 1090. There is no question that Congress knew that litigation was pending at the time of the enactment, and that the question of the taxability of educational institutions was in issue. In the hearings before the Senate Committee on the District of Columbia, Mr. E. F. Kelley, secretary of the American Pharmaceutical Association testified,

"We were exempted from taxation by the Commissioners of the District in 1935, the year following the erection of our building here, on the basis of its



being an educational institution, and that exemption was withdrawn, as in the case of previous speakers, as a result of a recent study.

"We have filed exceptions to that ruling with the District and have been heard by the Board of Tax Appeals."

The House Committee on the District of Columbia stated in recommending clarification of the law prior to a judicial determination of taxability, "It is felt that the language of this bill will clarify and definitely determine the classes of property rightfully entitled to tax exemptions in the District." H. Rept. 2635 (1942).)

When the Portal-to-Portal Act was passed in 1947, there were thousands of lawsuits pending in the Federal courts, involving claims which totaled many millions of dollars. These were claims asserting that employers were liable under the Fair Labor Standards Act for failure to compensate employees for their time on the premises controlled by the employers consistent with the decision of the Supreme Court in *Tennessee Coal Co. v. Muscoda Local No. 123* (321 U.S. 590 (1944)). Although the *Tennessee Coal Co.* case had already been decided, thousands of other cases raising the same questions were in various stages of progress when Congress acted. The propriety and the effectiveness of congressional intervention was considered and upheld in *Battaglia v. General Motors Corp.* (169 F. 2d 254 (2d Cir. 1948)). Upholding the constitutionality of the Portal-to-Portal Act, the court of appeals in that case held (p. 259):

"[S]o long as the claims, if they were purely statutory, had not ripened into final judgment, regardless of whether the activities on which they were based had been performed, they were subject to whatever action Congress might take with respect to them."

*Ziffrin v. United States* (318 U.S. 73 (1943), rehearing denied 318 U.S. 800 (1943)), held that a 1940 amendment to the Motor Carrier Act of 1935 was controlling with respect to proceedings before the Interstate Commerce Commission which had been initiated under the 1935 act before the amendment became law.

We respectfully suggest that the cases considered above probably represent but a few of the many instances in which Congress has taken action in time to avoid consequences of interpretations of existing law contrary to what those comprising the current legislative majority deemed to be the proper policy of the law.

S. 1396 has been prepared and is supported by the Spring-Air Co. and others because the policy decision made in the Anti-trust Division when complaints were filed seeking to enjoin territorial limits on trademark license agreements seems to be contrary to the intent of Congress in the trademark, antitrust and small business areas. To avoid creating an unlimited exception to the anti-trust laws, proponents of S. 1396 are advocating that the trademark law be strengthened and clarified in such fashion as we counteract that erroneous interpretation of the Sherman Act. We have found that Congress has frequently taken steps to protect citizens against serious consequences resulting from erroneous interpretations of its intentions, but that it is necessary in taking such action that Congress clearly express its wishes with respect to the effect of amending one statute upon the interpretation of statutes which impinge upon the same kind of commercial conduct.

For all of the reasons discussed in this letter, it is respectfully requested and suggested that the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary recommend favorable consideration of S. 1396 by the full committee and make it clear that the intention in so doing is to authorize manufacturers who have trademark licenses to be assigned exclusive territories within which to enjoy such licenses and to assure to licensees which own stock of their licensor companies the right to make licensing arrangements under the provisions of S. 1396 without being deemed to be conspiring in violation of the Sherman Act.

We sincerely appreciate the opportunity to submit this additional material and we wish also to take this opportunity to thank you, Senator Cotton, and the members of the staff for their courtesy and thoughtful interest in this bill and in the problems of small business organizations with which the bill seeks to cope.

Sincerely yours,

CHARLES L. STEWART, Jr.,  
Attorney for the Spring-Air Co.



STATEMENT OF DANE E. WELLS, DEVON, PA.

JUNE 12, 1961.

I am submitting this statement in support of S. 1396 because I believe it is important to small businessmen, particularly small furniture manufacturers, and to consumers, and will serve the public interest.

I am a manufacturers' representative handling the lines of a number of small (less than 500 employees) furniture manufacturers in the Middle Atlantic States. In addition to being a furniture manufacturers' representative, since 1935 I have at various times been an assistant buyer, buyer, assistant merchandise manager, and merchandise manager of various classifications of furniture and home furnishings with the following companies: R. H. Macy Co., New York; L. Bamberger & Co., Newark, N.J.; Gimbel Bros., New York, N.Y.; Strawbridge & Clothier, Philadelphia, Pa.; and Montgomery Ward & Co., Chicago, Ill. I make the following statement based upon 25 years of experience and observation in the buying and selling of furniture, including bedding (mattresses, box springs, and dual sleep).

I believe that the facts concerning the nature of the furniture and bedding business outlined below are generally beyond dispute. The conclusion to be drawn from these facts seems to me equally clear, namely, that the banding together of a group of independent mattress makers to promote a common brand name under a trademark licensing, or franchise system has increased effective competition in the bedding industry, and in doing so has benefited the public. It has also been beneficial to the small manufacturers concerned and to their dealers.

I. Brand names and other brand identification are of particular importance to the bedding industry. This is so because:

A. A mattress or box spring is an almost completely "blind item" to the customer.

1. They are all of the same sizes and shapes.
2. Within narrow limits they look alike.
3. Without spoiling them, the customer cannot see what is inside.
4. Within narrow limits they all feel alike when new (although this is not true after a period of service).

B. The average customer buys mattresses or box springs so seldom that he knows little about them (i.e., what to look for to determine quality, etc.), and therefore relies upon the brand name of the item, and in some cases upon the reputation of the store from which he buys.

The larger, better known department stores do more bedding business, proportionally, than furniture stores doing a comparable home furnishing business, because the customer knows the department store from frequent contact. Small furniture stores do relatively little "mattress only" business, whereas better known stores do a great deal. What "mattress only" business the smaller store does is in established brand names. Some large, well-known stores do a good private brand business. Small stores almost never attempt it.

II. Factors considered by a professional buyer in selecting lines to carry and push show the increasing need for a well-advertised, strongly merchandised brand name. These factors are:

A. The amount of presold demand for a line in his area. This is a function of:

1. The amount and quality of national advertising.
2. The amount and quality of local advertising and, particularly in the case of bedding, the quality of the store names associated with the brand.

B. The amount and quality of merchandising service the line offers in:

1. Display and advertising material.
2. Interest of promotional ideas offered, and skill and cooperation in presenting.

C. The ability of the line to deliver a profit to the store, both long and short range. This is determined by weighing:

1. The price-quality ratio.
2. The cost of items in relation to their probable retail prices.
3. The general reputation of the line for quality and integrity, and the likelihood that its quality and "quality image" will be maintained.



4. The ability of the supplier to provide prompt, low-cost delivery service, and repair or replacement services.

Based upon these criteria, a store buyer, in a position to pick and choose among different lines of substantially equal quality and service, will select one that (a) has customer acceptance as great or greater than his store's own name; (b) is carried (and is known to be carried) by stores having quality lines equal to his own (or, in smaller communities, he may obtain the franchise for the line); (c) offers merchandising services adequate to his store's needs; (d) offers quality and price to enable his store to meet or surpass his competition; and (e) is favorably known to him either personally or by reputation.

Only with an advertised brand name can a small manufacturer compete upon equal terms on all of these points with the well advertised and strongly merchandised lines of the larger national companies. Without a good brand name, particularly in the bedding field, it is my opinion that the small manufacturer can reasonably expect to obtain only limited, relatively local, distribution under his own name, distribution under private brands of stores, and custom sales (odd sizes, etc.).

III. The need for the registered-user bill: Brand names have value in proportion to the amount and quality of the public exposure they receive.

The most effective method of giving a brand wide publicity involves coordinated use of various media on both a national and local basis. Such a program requires skilled central direction, continuity, and expenditure of substantial sums of money, as well as patient building of goodwill, and a reputation for personal and brand integrity at the local level. Small manufacturers can, of course, promote and protect their goodwill at the local level by personal selling efforts and service, but they cannot, individually, afford to hire skilled personnel for the development and maintenance of advertising and merchandising programs, nor to pay for the necessary media; they can only do this upon a cooperative or group basis.

However, any small manufacturer would, in my opinion, be ill advised (and in all probability most would be entirely unwilling) to invest time, effort, and the substantial sums of money required for any cooperative or group brand advertising and merchandising effort unless he could reasonably expect to enjoy the fruits of this investment. There could be no such expectation by any one member of a group if other members had the right to sell like products of their manufacture under the jointly promoted brand in his normal area of distribution. In my opinion, the brand acceptance enjoyed, for example, by such names as Sealy and Serta in the bedding field could not have been built, nor could it be maintained for any substantial period, without territorial protection of each licensee.

In many respects the furniture industry as a whole is similar to the bedding industry. There is a relatively small number of companies which have nationally advertised brands, and a large number of small manufacturers whose brands are unknown to the consumer. With the increasing importance of brand names, the problems of the small furniture manufacturer are very similar to those faced by the small bedding manufacturer. Therefore, it is my view that in the furniture field generally, as well as in the bedding field, one of the best hopes for the future of the small manufacturer lies in brand development through group trademark licensing. I strongly urge Congress to confirm the right of the small manufacturer to participate in such licensing arrangements by adopting S. 1396.









