REGISTRATION AND PROTECTION OF TRADEMARKS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

PURSUANT TO S. RES. 267

ON

S. 1396

AND AN AMENDMENT IN THE NATURE OF A SUBSTITUTE THERETO

PART 2

MAY 16, 1962

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Part 1 of these hearings held June 20 and 21, 1961, were printed in December 1961.

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REGISTRATION AND PROTECTION OF TRADEMARKS

WEDNESDAY, MAY 16, 1962

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 a.m., in room 357, Old Senate Office Building, Senator Philip A. Hart presiding.

Present: Senator Hart.

Staff members present: George S. Green, professional staff member, Committee on the Judiciary, and Thomas Brennan, assistant counsel, Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary.

Also present: William G. Murphy, administrative assistant to Senator Hugh Scott.

Senator HART. The committee will be in order.

These are resumed hearings, the initial stages of which are to be found in the printed hearings entitled "Registration and Protection of Trademarks," held on June 20 and 21 of last year.

Mr. GREEN. Since that time, Senator, there has been an amendment in the nature of a substitute to the original bill, S. 1396, and of which a notice of this hearing was published in the Congressional Record. I should like to have placed in the record at this point a copy of that notice.

Senator HART. Without objection, it will be made a part of the record at this point.

(The notice referred to is as follows:)

[From Congressional Record, May 2, 1962]

NOTICE OF HEARING ON AMENDMENT IN THE NATURE OF A SUBSTITUTE TO 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"

Mr. MCCLELLAN. Mr. President, on behalf of the Committee on the Judiciary, I desire to give notice that a public hearing has been scheduled for Wednesday, May 16, 1962, at 10 a.m., in room 2228, New Senate Office Building, before the Subcommittee on Patents, Trademarks, and Copyrights, on an amendment in the nature of a substitute to 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.

At the indicated time and place persons interested in the hearing may make such representations as may be pertinent.

The subcommittee consists of the Senator from South Carolina [Mr. Johnston], the Senator from Michigan [Mr. Hart], the Senator from Tennessee [Mr.

Kefauver], the Senator from Wisconsin [Mr. Wiley], the Senator from Pennsylvania [Mr. Scott], and myself, as chairman.

Mr. GREEN. And also at this point I should like to offer for insertion in the record a copy of the original bill, S. 1396, together with a copy of the amendment in the nature of a substitute.

Senator HART. Both of these will be made a part of the record at this point.

(S. 1396 and the amendment thereto are as 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 repackage 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 authorized 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 used 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 market. 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 proceding" 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 filling 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 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 user".

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.

[S. 1396, 87th Cong., 2d sess.]

AMENDMENT (in the nature of a substitute) Intended to be proposed by Mr. MCCLELLAN (for himself and Mr. HART) to 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, viz: Strike out all after the enacting clause and insert in lieu thereof the following:

That section 5 of the Trademark Act of 1946 (15 U.S.C. 1055) is amended by—

(1) redesignating the text thereof as subsection (a) thereof;

(2) strike out the period at the end of that subsection, and inserting in lieu thereof the following: "and notice is given that the quality of the goods or services in connection with which the mark is used is controlled by the registrant or applicant for registration by an appropriate statement placed on the goods or their containers or on displays associated therewith or on tags or labels affixed thereo, or displayed in the sale or advertising of services."; and

(3) adding thereto, at the end thereof, the following new subsection:

"(b) The registrant or applicant for registration of a mark which is legitimately used by related companies may, irrespective of any affiliation obtaining among them, impose limitations and conditions as to mode and place of use of the mark by each of said companies, provided that such limitations and conditions, when viewed in the light of all the surrounding facts and circumstances, do not result in an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used."

SEC. 2. This Act shall become effective six months after the date of enactment of this Act.

(By order of the chairman the following reports were inserted in the record:)

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 22, 1962.

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 on the amendment in the nature of a substitute intended to be proposed by Senators McClellan and Hart to S. 1396, a bill to amend the Lanham Act.

The objective of the bill as introduced and that of the proposed amendment appears to be essentially the same although the bill approaches it primarily through the enactment of a substituted section 5 of the Lanham Act while the substitute approaches it through an amendment of the section. Hence the comments made in this Department's report of June 22, 1961, on the original bill are equally applicable to the amendment, with one exception. Whereas the original bill was said by the Department to exempt division of territory and price fixing as violations of the antitrust laws, the amendment would not do so. Rather, it would eliminate them as per se violations, prescribing a rule of reason test, i.e., in each instance such division of territory or price fixing would be judged by whether it constituted an unreasonable restraint of trade. This is also objectionable as an undue obstacle to the enforcement of the antitrust laws.

Your attention is invited to Senate Joint Resolution 159, a measure to be cited as the "Quality Stabilization Act." The legislative proposal under consideration by your committee is somewhat similar in purpose and objective to Senate Joint Resolution 159. For your information, I am enclosing a copy of Assistant Attorney General Loevinger's prepared statement of April 19, before a special subcommittee of the Senate Commerce Committee, recommending against enactment of Senate Joint Resolution 159.

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,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

STATEMENT OF LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, BEFORE A SPECIAL SUBCOMMITTEE OF THE SENATE COMMERCE COMMITTEE, APRIL 19, 1962

I appreciate the opportunity of appearing before this committee to present the views of the Department of Justice concerning Senate Joint Resolution 159, a bill bearing the title, "Quality Stabilization Act."

Though called a "Quality Stabilization Act," it is in fact another price maintenance bill of the type which has had the so-called fair trade label for many years. It would amend section 5(a) of the Federal Trade Commission Act to provide a Federal system of resale price fixing. The Department of Justice strongly opposes enactment of this type of legislation, which would substantially alter our traditional free enterprise system and hamper the nation's economic growth.

The bill would authorize the owner of a brand, name or trademark to establish resale prices of goods bearing his identifying mark. It would accomplish this by authorizing the owner of the name or trademark to revoke the right of the owner of the goods to resell them if the owner of the goods has (1) used them "in furtherance of bait merchandising practices;" (2) knowingly sold them at prices other than the trademark owner's "currently established" resale prices; or (3) with intent to deceive, "published misrepresentations" concerning them.

Enactment of this bill would lead to the following undesirable consequences: (*a*) Substitution of arbitrarily fixed prices for open competition; (*b*) placing sellers under Federal supervision for possible price infractions; (c) establishment of artificially held price lines tending toward a pronounced inflationary effect on the economy; (*d*) elimination of the States' right to determine their own policy in this field; (*e*) flooding of the Federal courts with price litigation; (*f*) reduction of the incentive for better quality, increased standards, or better values; (*g*) stifling of private initiative and depriving small distributors of their one essential competitive weapon—price; (*h*) conferring advantage on large manufacturers, who would be able to pay for private enforcement; and on large distributors who could use private brands to compete, at the expense of small manufacturers and distributors; (*i*) establishment of distributive margins akin to subsidies determined privately and paid for by the consuming public; and (*j*) fostering a climate favorable to agreements among competitors.

Senate Joint Resolution 159 carves out from antitrust coverage a vast segment of the Nation's economy. It would apply to "all acts and transactions in or affecting commerce which Congress may lawfully regulate," thereby apparently covering all aspects of wholesale and retail trade as well as most of manufacturing and other economic activity. It would exempt from the antitrust laws "the exercise of any right or remedy" given by this legislation. It specifically provides that it shall not be deemed to "modify or repeal" the Lanham Trademark Act, the Miller-Tydings Act, the McGuire Fair Trade Act, or any State fair trade laws described therein. By largely abolishing price fixing as an offense under the antitrust laws, it weakens section 1 of the Sherman Act without even referring to that basic antitrust statute. Moreover, the bill is aimed at overruling decisions of the Supreme Court in *United States* v. *McKesson & Robbins*, 351 U.S. 305, and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

In creating a Federal system of resale price maintenance, this legislation would eliminate competition and curtail free enterprise at all levels of distribution. Competition has always been the lifeblood of the Nation's economy. It is competition that has brought about improved methods of production and distribution, new products, lower prices, all to the benefit of the American

consumer, as well as to the business community. Without competition, there is little incentive for improvement. And the sine qua non of economic competition is price competition; other aspects of competition are basically means of securing price advantage without competitive pricing.

The bill, in providing for the establishment of a reseller's price by the owner of the name or mark, would remove the reseller (whether wholesaler, retailer, broker, or other distributor) from price competition with others selling the same product. Thus, effective competition among sellers would be largely eliminated. It would also serve as a means of curtailing competition among manufacturers.

If anyone sells goods bearing the name or mark after his right to use the name or mark has been revoked, under the bill he would be deemed to have committed an act of unfair competition, and would be subject to a suit for damages and injunctive relief in Federal court.

Price maintenance legislation would subject independent retailers to severe competitive disadvantage, turning them into distributive appendages of the manufacturer, and depriving them of their right to exercise independent judgment in establishing prices. With a price established for him by the manufacturer, the retailer would be powerless to make adjustments to conform with his own selling situation. This price could be fixed high to cover all retailers, efficient and inefficient, large and small, urban and rural, independent and chain, under an umbrella of protection. Conversely, it could deliberately be fixed low to drive out the small independent retailer, especially where the manufacturer is competing at the same level of distribution, as he would be specifically authorized to do by this legislation. Either way, the independent retailer would be barred from using competitive pricing. He could only sit and wait for customers, since personal initiative and incentive would be stifled.

It is difficult to envision any goods that would not be subject to price fixing under the bill, since its provision would encompass all goods "identified by a distinguishing brand, name, or trademark, either on the label, container, dispenser thereof, *or otherwise*." [Emphasis added.] Although in the past fair trade has been used less extensively in some fields, such as groceries, than in others, such as drugs, under this bill it could be extended to cover all products. Little of what the consumer buys is not identifiable, hence such commodities as fresh produce, canned goods, clothing, medicines, appliances, gasoline, building materials, almost everything, even meat and potatoes could be price fixed at the discretion of the manufacturer, wholesaler, or processor merely by imparting knowledge of the owner's currently established price or prices to his customer-resellers. And, as a practical matter, it is likely that more and more goods would bear fixed prices, for the owner of a trademark or name would be susceptible to pressure from retailers to establish resale prices. Since many commodities are sold in conjunction with services, this legislation could also extend price fixing to many services.

The bill refers to "currently established resale price or prices." On the one hand, it would appear that the owner of a brand or mark could impose uniform, nationwide resale prices for his goods, ignoring differing costs of living in various sections of the country. On the other hand, he apparently would also be free to establish several different prices for any item of merchandise. It might be, therefore, that by establishing different prices, a manufacturer could favor some retailers over others. This would be contrary to the philosophy of the Robinson-Patman Act. But the bill is silent as to what effect it is intended to have on that act, which prohibits discriminatory pricing.

No sales would be exempt from this legislation—including sales to governments, Federal, State, and local. This would not only raise the cost of governmental procurement, but would devitalize the entire system of competitive bidding for Government contracts.

That elimination of price competition would result in higher prices cannot be doubted. Basic to the fair trade and quality stabilization concepts are higher prices to provide higher margins for sellers. That is the aim of this type of legislation. Prices would be fixed at high, noncompetitive levels calculated to yield what the traffic would bear. Consumers would pay the bill. Markup increases over the broad range of products would accelerate price advances through each distributive level with ultimate inflationary results.

This legislation is inconsistent with the purposes of the President's trade agreements program. Price supports are provided for domestic products at a time when the President is seeking to lower tariffs to promote freer trade by

permitting entry into domestic markets of imported merchandise. Domestic goods through such rigidly held supports could be at a relative disadvantage in competing with imports.

Senate Joint Resolution 159 gives advantage to large manufacturers and large merchandisers. Price maintenance affords built-in protection for the large manufacturer, whose goods bear an accepted brand name, and for the large retailer, who has sufficient sales volume to profit by the use of private brands. For example, many times a fair trade arrangement serves as a means for the manufacturer to secure the cooperation of retailers of this product as the latter agree to push a particular brand when price protection and margins offered are satisfactory. The small manufacturer is usually not in a position to persuade retailers to carry and promote his particular product in preference to the heavily advertised national brands of his larger competitors. Distributors, with a price established for them by the manufacturer, are powerless to make adjustments to conform with their particular selling situation. Notwithstanding that the competitive situations confronting them are widely different in various places and circumstances, they must sell at a fixed price, usually a uniform national price. Independent distributors without a private brand to advertise extensively, are under a handicap in meeting competition of widely advertised brands of large distributors. They cannot reduce prices on the nationally advertised price-maintained products to meet private brand competition. Absent price maintenance, they can use nationally advertised products to compete, not only with other sellers of such products, but also with private brands. Finally, Senate Joint Resolution 159 places the small independent wholesaler and retailer at the mercy of the manufacturer. Regardless of the needs or desires of the retailer or wholesaler the price is fixed and, therefore, the retailers' and wholesalers' profit margins are fixed by the manufacturer in terms of his own economic advantage.

Advocates of price maintenance by legislation have been most active in seeking to freeze distribution channels by making sales below established minimums illegal. They are opposed to new mass distribution methods and to any change in established distribution channels. No ground exists for public policy restricting the developments of new methods of distribution. In a number of cases these have reduced the cost of the Nation's distribution. The efforts of retailers and wholesalers, as well as some manufacturers, to eliminate price cutting follows the classical reaction of the distribution industry to all new entrants. Traditional retail functions and merchandising lines are also shifting—drugstores have taken over candy and hardware; supermarkets have entered drugs, cosmetics, apparel, and hardware; discount houses have grown to department store dimensions from their basic appliance and electric lines. Thus the manufacturer finds widening channels for his mass output.

The resulting changes—the lowering of the costs of distribution and the corresponding rise in efficiency—are precisely that economic result which effective competition—the goal of the antitrust laws—envisions. Progress and growth on the manufacturing and distribution levels of the economy is not possible through restricting opportunities for newcomers or by sheltering the vested interests of established firms in existing price structures and methods. Businessmen, generally recognizing the dynamics of manufacture and distribution in an ever-adjusting economy, adopt newer forms to compete effectively.

Further, to meet cyclical maladjustments in the economy under a free enterprise system, monetary and fiscal policy seem to be the most flexible instruments. But monetary and fiscal policies of the Government cannot operate effectively where prices are kept inflexible in the face of sagging demand. Attempts at readjustment under such conditions only develop further distortions. The economic adviser to the Federal Reserve Board has put the problem succinctly:

"* * * An economic system cannot be expected to operate on the principle that a seller can always obtain any price he wishes to ask for his product. In order to maintain sustainable economic growth, it is the task of the seller to adjust his prices or his product so as to stimulate demand. Otherwise it is to be expected that resources will be allocated to other uses, but this is a time-consuming process and results in unemployment."[1]

Resale price maintenance is not conducive to an environment in which sellers adapt to shifting consumer demands. Such rigidity in the economic system

[1] Letter to the Washington Post and Times Herald, Mar. 12, 1959, p. A25.

makes for idle resources and retards economic growth. Antitrust policy is directed to widening the areas in which market forces dominate and to the minimization of monopolistic decision.

Imposition of this Federal system of price fixing would destroy the right of the States to decide whether or not fair trade should exist within their borders. Four States have never adopted fair trade laws. Nineteen States have declared fair trade laws to be contrary to their State constitutions, either in whole or in part. Thirty-one States have allowed only minimum resale prices to be set, while 15 allowed "absolute" prices. State courts have also repeatedly held that these fair trade laws are price-fixing legislation and that, as such, they delegate legislative powers to private individuals. This bill now would override such court declarations, as it would also override State antitrust laws. As the attorney general of Texas said with respect to a similar bill introduced in the 86th Congress:

"To sum up, this bill invades an area that has heretofore been reserved to the States. It would, in effect, preempt the area and nullify a large portion of the area covered by the Texas antitrust laws under which we have operated since the early 1880's." [2]

However, it is not clear what the status of State laws would be under this legislation. While it would impose a Federal system of fair trade, it would also leave State fair trade laws in effect. The ensuing uncertainty where State and Federal law conflict, as for instance whether minimum prices under State law or established prices under this legislation would prevail, would give rise to endless litigation.

The question must be raised whether this legislation would not require enforcement by the Federal Trade Commission. It would amend section 5(a) of the Federal Trade Commission Act, which declares unlawful unfair methods of competition and unfair or deceptive acts or practices, and specifically empowers and directs the Commission to prevent such acts or practices. It may be, therefore, that this legislation would create a situation involving Federal regulation of retail pricing.

The Department of Justice has had over 60 years' experience in preventing unreasonable restraints on competition. For some 30 years it has watched the operation of resale price maintenance laws. The uniform judgment of all those who have had responsibility in enforcing the antitrust laws has been that resale price maintenance legislation is unworkable, does not accomplish its own objective, and is generally harmful to the economy and the public interest.

Senate Joint Resolution 159 would impose price control as affirmative Federal policy. By making price competition an act of unfair competition, it conflicts with the basic philosophy of the American free enterprise system. It would hand carte blanche authority to private persons to establish prices by fiat. If such blanket authority to fix prices were conferred on a governmental entity, there would be universal protest, and justifiably so. It is equally undesirable to confer that right on private persons.

Senate Joint Resolution 159 destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it. By increasing the general level of prices, it would levy an indirect tax on the general public. By creating a large exemption from the antitrust laws, it would seriously weaken antitrust enforcement generally.

The Department of Justice, therefore, strongly recommends against enactment of this legislation.

THE SECRETARY OF COMMERCE,
Washington, D.C., May 23, 1962.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in further reply to your request for the views of this Department with respect to the amendment intended to be proposed by Senator McClellan and Senator Hart as a substitute for S. 1396, 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 interna-

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[2] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 1st sess. (1959), "Fair Trade," p. 494.

tional conventions, and for other purposes," approved July 5, 1946, as amended.

Both S. 1396 and the proposed substitute are concerned with section 5 of the Trademark Act of 1946. The proposed substitute would amend section 5 by adding a notice requirement. For use by a related company to inure to the benefit of a registrant of a trademark or of a service mark (or an applicant for registration), notice would have to be given that "the quality of the goods or services in connection with which the mark is used is controlled by the registrant or applicant for registration by an appropriate statement placed on the goods or their containers or on displays associated therewith or on tags or labels affixed thereto, or displayed in the sale or advertising of services."

The proposed substitute to S. 1396 further would add a new section 5(b), permitting imposition by the registrant (or applicant for registration) of limitations and conditions as to mode and place of use of the mark, if such limitations and conditions "when viewed in the light of all the surrounding facts and circumstances, do not result in an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used."

In a report of August 2, 1961, the Department pointed out that certain provisions of S. 1396 were ambiguous and might raise problems in the administration by the Patent Office of the Trademark Act of 1946 were it thereby amended. The proposed substitute omits those provisions and would present no problems in so administering the Trademark Act. The Department of Justice raised objections to S. 1396, as introduced, because of antitrust implications of the legislation. The language of the newly proposed section 5(b) is apparently intended to meet such such objections. We would defer to the views of the Department of Justice as to the adequacy for this purpose of the language of that proposed section.

The Bureau of the Budget advised there would be no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

EDWARD GUDEMAN,
Under Secretary of Commerce.

SMALL BUSINESS ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., May 25, 1962.

Re substitute bill S. 1396.

Hon. 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 April 17, 1962, requesting my comments on the captioned bill.

Substitute bill S. 1396, amending the Lanham Trademark Act, includes the following provisions:

"The registrant or applicant for registration of a mark which is legitimately used by related companies may, irrespective of any affiliation obtaining among them, impose limitations and conditions as to mode and place of use of the mark by each of said companies, provided that such limitations and conditions, when viewed in the light of all the surrounding facts and circumstances, do not result in an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used."

It is my understanding that these provisions were devised, primarily at least, to remedy a situation prevailing in the mattress industry. The leading manufacturers in this industry, whose markets extend across the Nation, have gained such acceptance for their trademarks that their small competitors, operating on a regional or local basis, have found it extremely difficult to sell mattresses carrying their relatively obscure brands. To meet this problem such small manufacturers have, in a number of instances, taken group action to develop a common trademark and, by means of intensive advertising, to gain for it sufficient prestige to place it on a competitive footing with the brands of the large manufacturers. The members of the group utilize such a trademark under limitations mutually agreed upon by them.

In a typical situation of this kind the members of the group will assign their common trademark to a corporation, organized and owned by them, which con-

ducts the necessary publicity campaign. The corporation licenses to each of its shareholders, under conditions established by them, the right to manufacture and sell mattresses under its brand. Invariably, each licensee is assigned a territory within which he must confine his operations and from which all other licensees under the common trademark are excluded. The explanation advanced for such "fencing" is that each licensee cooperates with the corporation in advertising the latter's trademark in his area. It is up to each to decide how much money he wants to spend in this cooperative effort. If the territories were not fenced, those who made the greatest outlay and developed the most promising markets would find themselves invaded by the others. For these reasons, it is contended, fencing is essential to provide incentive for the licensees to cultivate their territories.

Needless to say, I sympathize with the efforts being made by such small firms to strengthen themselves by pooling their resources. If they are allowed to continue this group action, they can doubtless compete more effectively with the leaders of their industry. Conversely, if they are compelled to discontinue it, some of them may be forced out of business. Viewed solely from this standpoint, therefore, there is much to be said for the combinations we are considering here. Not to be overlooked, however, is their relationship to the Sherman Act and related statutes. In the long run, the future of small business depends heavily upon the preservation of the principles embodied in these antitrust laws.

The Department of Justice believes that the combinations which I have described are violative of the antitrust laws. It has instituted proceedings against them in three cases which, I understand, are still pending in the courts. In the view of the Department the allocation of exclusive sales territories by such corporations to its shareholders is a per se violation of the Sherman Act—which is to say that, once such an allocation is proved, no further evidence is needed to show that it produced any of the effects on competition which the act was designed to prevent. Such effects, the Department contends, must be assumed from the mere existence of the allocation.

The quoted provision of the captioned bill would strengthen the legal position of these combinations. If the bill were to be enacted, each of the controlling corporations could impose conditions upon the mode and use of its trademark by licensees thereof, including territorial limitations on sales, provided only that they do not result in a monopoly or restraint of trade. The Department of Justice could no longer conduct a successful attack on such a condition without encountering the difficulty and expense of gathering and presenting all of the evidence and arguments essential to proof that the prohibited effects on competition did, in fact, follow.

The Department has found that substitute bill S. 1396 would, like the original version of the measure, create an undue obstacle to the enforcement of the antitrust laws. For this reason I am unable to recommend its enactment. It is my hope that the small manufacturers sponsoring this proposal will, with the advice of counsel, eventually succeed in devising an acceptable method of increasing their competitive strength through joint effort.

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.

With kind regards, I am,

Sincerely,

IRVING MANESS,
Deputy Administrator
(For John E. Horne, Administrator).

Mr. GREEN. The first witness, I believe, Mr. Chairman, is Mrs. Daphne Leeds, a trademark consultant representing Sealy, Inc., Serta Associates, Inc., and Restonic Corp.

Senator HART. Mrs. Leeds, we welcome you back once again.

STATEMENT OF DAPHNE LEEDS, TRADEMARKS CONSULTANT, WASHINGTON, D.C., REPRESENTING SEALY, INC., SERTA ASSOCIATES, INC., AND RESTONIC CORP.

Mrs. LEEDS. Thank you very much, Senator Hart.

My statement will be a very short one. I will reintroduce myself, and you will recall that I appeared before this subcommittee in support of S. 1396 when hearings were held last year, and I appeared in behalf of Sealy, Inc., Serta Associates, and Restonic Corp., then, and I appear in the same capacity today.

The original Senate bill, as you will recall, provided for registration in the Patent Office of trademark licensees as registered users and provided for the recording of certain facts as to licensee agreements. It also provided as a statement of congressional policy that a trademark owner might prescribe conditions and limitations as to the territory in which his trademark licensees could use his mark.

Except for statements from certain interested Government agencies, no opposition was interposed to the matter of territorial limitations, but considerable opposition was pointed to the licensee registration provisions chiefly on the grounds that they would be expensive to the small businesses which operate as licensees and would be costly to administer in the Patent Office.

It appeared that there would be no opposition on the part of those witnesses who testified to a requirement that the licensee should give notice of his relationship with the trademark owner, and I call attention to the testimony of Mr. Bonynge in previous hearings on page 120 and Mr. Bouda whose testimony appeared at 124 in this connection with regard to giving notice.

The present bill, which is an amendment in the nature of a substitute, eliminates all provisions as to registration of the licensees. It provides merely that use of the trademark by the licensees will inure to the benefit of the licensor-owner provided appropriate notice of quality control by the licensor-owner is given.

The statute already provides for the exercise of control over the nature and quality of the goods or services by the licensor-owner and, further, that the mark is not used to deceive the public.

The present bill also includes very specific provisions concerning territorial limitations and conditions, but this provision will be discussed in detail by my associate, Mr. Timberg.

The need for clarification of this section of the law by congressional act was discussed in my previous appearance before this subcommittee and it is not necessary to take the time to repeat it today.

The present draft of S. 1396 will provide a clear statement of congressional policy and will furnish adequate guidelines within which small businesses may operate under a given trademark in given areas and thereby provide fair competition with the larger regional and national companies.

Approval of S. 1396, an amendment in the nature of a substitute, is urged by the committee.

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

Mr. GREEN. I have no questions, Mr. Chairman.

Senator HART. Thanks very much, Mrs. Leeds.
Mr. Timberg?
Mr. TIMBERG. Thank you, Senator.
Senator HART. You are welcomed again, too.

STATEMENT OF SIGMUND TIMBERG, ATTORNEY AT LAW, WASHINGTON, D.C., REPRESENTING SEALY, INC., SERTA ASSOCIATES, INC., AND RESTONIC CORP.

Mr. TIMBERG. As of the previous hearings that were held last year, Mr. Chairman, I am representing Sealy, Inc., Serta Associates, Inc., and Restonic Corp., which are cooperative trademark licensing organizations that embrace numerous small firms in the bedding industry.

I have a prepared statement, which I should like to submit for incorporation in the record.

Senator HART. It will be incorporated in full at this point.

(The prepared statement of Mr. Timberg is as follows:)

STATEMENT OF SIGMUND TIMBERG

My name is Sigmund Timberg. As at the previous hearings on June 20 and 21, 1961, I am representing Sealy, Inc., Serta Associates, Inc., and Restonic Corp., which are cooperative trademark licensing organizations embracing numerous small firms in the bedding industry.

My testimony today is limited to that portion of the substitute bill which clarifies the right of trademark owners to designate exclusive territorial areas for their licensees (sec. 1(3)). The immediate legal, and long-term economic, purposes of this provision are simple. The legal objective is to avoid discrimination—to enable small regional businesses cooperatively to engage in the use of trademarks on the same basis as the large nationally integrated concerns with which they compete. The overall economic purpose underlying this legislation is to aid the competitive survival of such small businesses, by enabling them to engage in the cooperative development of specifications and in national advertising that is indispensable to their commercial existence, yet financially prohibitive for them unless undertaken on a cooperative basis.

Last June, the subcommittee heard a number of small, regionally based bedding manufacturers, who represented some 115 companies belonging to and controlling 4 different organizations licensing a nationally known mark. Speaking from the standpoint of more than three decades of experience, these witnesses described how their cooperative affiliation with such a trademark licensing organization had served to maintain them as potent competitive factors in their local area, and had kept the bedding industry of this country from being monopolized by a few nationwide giants. Not only were these cooperative organizations needed to convey information to the consumer, but they operated to give the consumer the benefit of improved specifications, advances in the art and quality control.

The witnesses pointed out that over the years, they had contributed large amounts of money to the cooperative licensing organization for promotional purposes, and had also spent large sums in local advertising of the national trademark. It was clear that these financial outlays, so necessary to bring their products to the attention of a nationally oriented buying public, would not be forthcoming, and that these cooperative organizations would disintegrate, unless the individual licensees were assured of the continuing exclusive use and control, within their respective areas, of the trademark and good will which they had so diligently built up.

Assurances of territorial exclusivity for specific trademarks had not retarded the workings of competition. Two of the witnesses pointed out that they were faced with competition of 25 rival sources of mattresses within their respective market areas. It was clear that the prices which the individual licensees obtained from their department and furnishing store customers varied considerably, and were dictated by competitive considerations within their local market. (See, e.g., June 1961 hearings, pp. 42, 46, 66.)

The competitive necessity for having the individual licensees pool their limited financial resources, and for confirming the licensee in his exclusive enjoyment of the goodwill so expensively acquired, was highlighted by the costly nature of national advertising. Licensees whose total annual volume of sales of a national brand averaged from $50,000 to $500,000 could not possibly compete with the Simmons' annual advertising budget of $2,400,000, unless they combined their resources. One manufacturer pointed out that Simmons, the largest national concern in the field, spent 660 times as much for national advertising as the average for the 30 members of his licensing group, and that Englander, the second largest, spent 100 times as much. (See June 1961 hearings, pp. 59–61.)

The economic circumstances which made exclusive territorial designations a necessity for small businesses using costly national advertising media were not disputed at the hearings. However, after the hearings were concluded, the Department of Justice submitted a statement which completely ignored the economics and the small business factors brought out at the hearing. Instead, the statement made various legal attacks on the prior version of the exclusive territorial provision (section 5(k) of the original bill), which, in my judgment, were wholly unjustified. On July 10, 1961, I addressed a letter to Senator Hart in reply to the Department of Justice's statement, which letter was not incorporated in the printed record of the hearings. I should like to submit the letter for such incorporation now, and to summarize for the benefit of the subcommittee the main points made in the letter. The Department of Justice was supplied copies of the letter at the time of its submission to the committee.

I will not waste the time of this subcommittee to develop the baseless nature of the Department's novel charges of antitrust violation against my clients—charges which have not been pressed judicially although the *Mattress* cases have been pending before the Federal district court for 2 years. Instead, let me refer to pages 1 and 2 of my July 10 letter and the disclosure as to the facts of the pending litigation made in my earlier appearance before this subcommittee. (See June 1961 hearings, pp. 31–33.)

Every proponent or opponent of the original version of S. 1396 who testified at the June 1961 hearings recognized that section 5(k) was primarily directed at the problem of exclusive territorial designations. Despite this fact, the Department's statement asserts that the provision "would save—from antitrust illegality—tying clauses, compulsory joint agencies, and many other conceivable restraints." As shown in my July 10 statement (see pp. 2, 3), this is based on a demonstrably erroneous interpretation of the words "mode of use." This phrase was present in section 2(d) of the original Lanham Trademark Act of 1946, dealing with concurrent registrations, and had not until last year's statement elicited any objection from the Justice Department. It clearly relates to such matters as the manner in which the trademark is displayed or affixed and the use made of the trademark in advertising materials. The purpose underlying the right of a trademark owner to prescribe conditions and limitations for his licensees as to the "mode of use" of the mark is not to impose antitrust restraints, but to protect the consumer and the trademark owner from improper uses of the mark by licensees that might deceive or confuse the public or impair the integrity of the mark.

Another conclusion by the Justice Department that is lacking in substance is that—

"The provisions of the proposed new subsection (k) would give the registrant well-nigh absolute power to impose, with impunity, otherwise antitrust-tainted restrictions * * *.

"The effect of the bill would be to exempt numerous per se violations from the applicability of the antitrust laws in general * * *."

The foregoing is neither the intention nor the effect of the exclusive territorial provision. To make clear that this is not its purpose, the substitute bill makes the right of the trademark owner to prescribe limitations and conditions as to mode and place of use of the mark by its licensees subject to the proviso—

"* * * that such limitations and conditions, when viewed in the light of all the surrounding facts and circumstances, do not result in an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used."

That exemption or immunization from the antitrust laws cannot be the effect of the exclusive territorial provision, even without the above proviso, is shown on pages 3 to 5 of my July 10 letter to the Justice Department. The

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Department's own statement explicitly recognizes that an amendment to the Lanham Act does not operate to confer any immunity from the antitrust laws. Section 1(3) of the present bill does not exempt territorial restrictions from the application of the antitrust laws; it is simply a legislative declaration that the mere existence of a territorial restriction in a trademark license is not illegal.

In my opinion, that a territorial restriction may or may not violate the antitrust laws, depending on its impact on competition, merely restates existing law. The Department of Justice has taken a different view of the matter. Its position is that the mere existence of a territorial restriction in a trademark license agreement between a cooperative licensing organization and individual licensees is illegal per se. As the Department interprets per se illegality, licensees are not to be allowed to prove to the court that their territorially exclusive arrangements promote rather than restrain competition or are ancillary to the reasonable main purpose or joint venture in which they are jointly engaged, i.e., trademark exploitation and national advertising.

This view of the Justice Department, as is pointed out in my July 10 letter, is inconsistent with the approach adopted by both Circuit Judge Taft and the Supreme Court in the *Addyston Pipe and Steel* case, the landmark case which first laid down the rule that territorial allocations constitute a per se violation of the Sherman Act. In that case, the courts both reviewed considerable economic evidence which established that the challenged territorial allocation had an adverse effect on competition, and laid down the doctrine that "ancillary restraints" to a reasonable main purpose are not forbidden by the antitrust laws. Also, the Justice Department's attitude is counter to the *Timken Roller Bearing* case, cited in the Department's statement, where the court considered whether the challenged territorial allocation was ancillary to a valid exercise of trademark licensing rights or was ancillary to a legitimate joint venture. In summary, the Justice Department and defendants in the *Mattress* cases have divergent views as to what is admissible evidence in an antitrust proceeding, with the defendants asserting the right to prove that a restrictive territorial arrangement is in furtherance of competition and the Department denying such right. This is a far cry from the Department's assertion that the defendants are claiming an immunity from suit or that S. 1396 will afford them such an immunity.

The Justice Department's assertion that the enactment of S. 1396 would have the effect of bringing about the dismissal of the pending *Mattress* cases is certainly not something that can be inferred from the face of the statute itself. It must, therefore, be based on the Department's presumably pessimistic appraisal of the evidence supporting its case. All S. 1396 stands for is the proposition that a territorially exclusive designation under a trademark is not per se illegal. The Department's statement that congressional endorsement of such a proposition necessitates dismissal of the pending lawsuit can mean only that its case against territorial exclusivity depends on excluding evidence of the beneficial effect of the restriction on competition and of the way in which the restriction implements a valid system of trademark licensing and national trademark advertising.

Even if the purpose of the bill were to have the legislature undo an antitrust liability already established under existing law (which is not the case here), this is not a valid argument against passage of the bill. Both in my July 10 letter (p. 6) and Mr. Stewart's letter of July 3 (June 1961 hearings, pp. 186–188), numerous illustrations are given of cases where Congress has acted with the direct purpose of affecting the outcome of pending litigation, even where liability for legal violations had been duly established by the courts. Certainly there should be less inhibition about the enactment of a law which is not directed to the legislative invalidation of a prior judicial decision, but merely codifies trademark law and clarifies, in the public interest, a troublesome issue of antitrust policy.

The issue of public policy which this bill would resolve is whether small regional businesses shall be put on a footing of equality with their large nationally integrated competitors in their use of the essential and expensive business tools of trademarks and national advertising. Legislative clarification which will insure to cooperating small business equal rights under trademarks will improve the competitive potential of American industry. It will help stem the trend toward domination of industrial fields by a few giant nationwide concerns, and enable regional small business to continue to contribute their

individual manufacturing and distribution skills and entrepreneurship to markets requiring cooperative endeavor in national advertising. The bill therefore is in the public interest.

The silence of the Justice Department on this important policy issue confirms the fact that there is no other place than the Congress where the current needless hazard and uncertainty to small business on this score can be resolved. We hope that, on the basis of the economic record made at last year's hearings, this committee will see its way clear toward approval of S. 1396 in the interest of small business and the competitive economy.

Mr. TIMBERG. My testimony today is limited to that portion of the substitute bill which clarifies the right of trademark owners to designate exclusive territorial areas for their licensees.

The purposes of this provision are simple. The immediate legal objective is to avoid discrimination, to enable small regional businesses cooperatively to engage in the use of trademarks on the same footing of equality as the large nationally integrated concerns with which they are in competition.

The overall economic purpose underlying the legislation is to aid the competitive survival of these small businesses by enabling them to engage in the cooperative development of specifications and in national advertising that is indispensable to their commercial existence, yet financially prohibitive for them unless they undertake it on a cooperative basis.

Last June this subcommittee heard a number of small regionally based bedding manufacturers representing some 115 companies belonging to and controlling four different organizations licensing a nationally known mark. The witnesses spoke from the standpoint of more than three decades of experience in their industry. They described how their cooperative affiliation with such a trademark licensing organization had served to maintain them as potent competitive factors in their local area and had kept the bedding industry of the country from being monopolized by a few nationwide giants.

Not only were these cooperative licensing organizations needed to convey information to the consumer, but they operate to give the consumer the benefit of improved specifications, advances in the art and quality control.

Over the years, as the witnesses pointed out, they had contributed large amounts to the cooperative licensing organizations for promotional purposes. They had also spent large sums in local advertising of the national trademark. It was clear that these financial outlays, which are so necessary to bring their products to the attention of a nationally oriented buying public, would not be forthcoming and that their cooperative licensing organizations would disintegrate, unless the individual licensees were assured of the continuing exclusive use and control within their respective areas of the trademark and goodwill which they had so diligently built up.

There was also indicated that the assurance of territorial exclusivity for specific trademarks had not retarded the workings of competition and had, in fact, improved the competitive climate. Two of the witnesses pointed out, as you may recall, that they were faced with the competition of 25 rival sources of mattresses within their respective market areas. It was also clear from the evidence that the prices which the individual licensees obtained from their customers, the department stores and furniture stores, varied considerably and were dictated by competitive considerations within their local market.

The competitive necessity for having the individual manufacturers pool their limited financial resources and for confirming the licensee in his exclusive enjoyment of this goodwill on which so much money had been expended was highlighted by the costly nature of national advertising. If one takes licensees whose total annual volume of sales of a national brand averages from $50,000 to $500,000, it is apparent that they cannot possibly compete with the Simmons' annual advertising budget of $2.4 million, unless they combine their resources.

One of the manufacturer witnesses pointed out that Simmons, the largest national concern in the field, spent 660 times as much for national advertising as the average for the 30 members of his licensing group and that Englander, the second largest, spent a hundred times as much.

These economic circumstances, which are an argument for exclusive territorial designations and which serve to indicate their necessity for small businesses, were not disputed at the hearings. However, after the hearings were concluded, the Department of Justice submitted a statement which completely ignored the economics and the small business factors brought out at the hearing. Instead, the statement made various legal attacks on the prior version of the exclusive territorial provision which, in my judgment, were wholly unjustified.

On July 10 of last year I addressed a letter to you in reply to the Justice Department, which letter was not incorporated in the printed record of the hearings at the time. If agreeable to you, I should like to submit that letter for incorporation now and to summarize merely the main points made in the letter.

I should add that the Department of Justice was given copies of this letter at the time that it was submitted to the committee.

Senator HART. The letter to which you refer, dated July 10 and addressed to me, will be made a part of the record at this point.

(The letter referred to is as follows:)

LAW OFFICES, SIGMUND TIMBERG,
Washington, D.C., July 10, 1961.

Hon. PHILIP A. HART,
Subcommittee on Patents, Trademarks, and Copyrights,
Senate Committee on the Judiciary, Old Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: On behalf of the Serta and Sealy groups who appeared before your subcommittee in support of S. 1396, I should like to submit a supplemental statement intended to correct several basic misconceptions of fact and law that are present in the report in opposition to the bill recently submitted by the Justice Department.

1

Contrary to what is indicated by the Justice Department, the license agreements of the Serta and Sealy groups do not contain any restrictions providing for the establishment of uniform prices by all participants, or joint refusals to deal with suppliers of materials, or tying clauses with respect to materials. As set forth in the hearings, the prices alleged by the Department to have been fixed are not those of the participating manufacturing licensees, but those of their retail customers, who are not parties to either the agreements or the Department's lawsuits; the Department's claim as to the existence of such resale price restrictions is disputed by the defendants; and S. 1396 is not concerned with any issue of horizontal or vertical price fixing. The license agreements contain provisions designed to insure that the materials employed by the licensees in the manufacture of mattresses conform to proper specifications and standards. These are provisions intended to protect the consumer and the integrity of the

trademark, and are part of the system of quality control which is essential to the legal validity, both at common law and under the Lanham Act, and the proper economic functioning of any trademark license; they have nothing to do with collective boycotts or tying clauses.

Although the *Mattress* cases have been before the district court for over a year, the Department's letter of June 22 is the first time that the Department has raised the possibility of any antitrust violation other than those of territorial division and resale price fixing. The Government's complaints in the *Mattress* cases charge the Serta and Sealy groups only with conspiring to—

"(a) . . . sell Sealy [Serta] products only within the exclusive marketing territory allocated to it," and to "refrain from selling Sealy [Serta] products outside such exclusive marketing territory;" and

"(b) Fix uniform suggested retail prices, and to induce retail stores to adhere to such suggested retail prices, for the purpose of fixing and stabilizing the retail prices of Sealy [Serta] products."

2

Every proponent or opponent of S. 1396 who testified at the hearings on the bill recognized that section 5(k) was directed at the problem of territorial divisions and none saw any other purpose in that paragraph. Section 5(k) confirms the right of a trademark owner to prescribe conditions and restrictions as to "mode and place of permitted use" of the mark by his licensees. The Justice Department now contends that the provision "would save—from antitrust illegality—tying clauses, compulsory joint agencies, and many other conceivable restraints."

The only basis advanced by the Department in support of this contention is its unique interpretation of the word "mode." The Department is seemingly unaware of the fact that this word has been present in section 2(d) of the Lanham Trademark Act (dealing with concurrent registrations) since the act was adopted in 1946, and was present in numerous bills which preceded the enactment of the act. Section 2(d) was attacked by the Justice Department at the time as laying a possible basis for territorial allocations, since it authorized the Commissioner of Patents to prescribe conditions and limitations as to the "place of use" in connection with which concurrent registrations may be granted. However, the similar authorization conferred on the Commissioner with respect to "mode of use" was never subject to any such criticism, and it is hard to conceive how it could have been.

The word "mode" is employed, both in the Lanham Act and in S. 1396, in its ordinary sense, as meaning, "manner," "method," "form," "kind," or "particular form." See 58 Corpus Juris Secundum 839; Bouvier's Law Dictionary; Black's Law Dictionary; Webster's New International Dictionary (G. & C. Merriam, 1959). According to section 45 of the Lanham Act, a mark is deemed to be "used" on goods "when it is placed in any manner on the goods or the containers or the displays associated therewith, or on the tags or labels affixed thereto," and on services "when it is used or displayed in the sale or advertising of services," and the goods or services are sold, transported, or rendered "in commerce". Hence it is clear that "mode of use" has to do with such matters as the manner in which the trademark is displayed or affixed and the use made of the trademark in advertising, and supplies no basis for the antitrust horribilia feared by the Department. In this context, control by the trademark owner over the "mode of use" of the mark is most appropriate, for it would protect the consumer and the owner of the mark from improper uses of the mark that might deceive or confuse the public or impair the integrity of the mark.

3

A third major fallacy underlying the Department's report on the bill is its conclusion that—

"The provisions of the proposed new subsection (k) would give the registrant well-nigh absolute power to impose, with impunity, otherwise antitrust-tainted restrictions.

"The effect of the bill would be to exempt numerous per se violations from the applicability of the antitrust laws in general."

S. 1396 is an amendment of the Lanham Act. For this reason, I find it difficult to reconcile these two statements of the Department with the earlier statement in its report that—

"The Lanham Act itself shows that violations of the antitrust laws are not immunized by the magic touch of the trademark."

In my opinion, the last quoted statement of the Department is the correct appraisal of the existing law on the subject, and is at odds with the two sentences quoted earlier.

In my original statement to the committee, I was careful to point out that, under section 5(k), territorial designations pursuant to trademark licenses would not be exempted "from the applicability of the antitrust laws in general," but would merely be removed from the automatic and blindly directed application of a judicial rule of per se violation. Section 5(k) amounts to a simple legislative declaration that the existence of a territorial restriction in a trademark license is not, without more, illegal.

This, in my opinion, restates existing law. For a territorial restriction to be illegal under the Sherman Act, it must be established that the restriction was not ancillary to a reasonable main purpose (which in this case is the trademark licensing and cooperative national advertising in which the Sealy and Serta licensees engage), and that it is fairly protective of the parties' interests but not so large as to interfere with the interests of the public. See *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. (2d) 331, 334 (C.C.A. 2, 1953), certiorari denied, 345 U.S. 994 (1953), and the authorities therein cited. It is noteworthy that the same landmark case which established this so-called "ancillary restraints" doctrine, *United States* v. *Addyston Pipe & Steel Corp.*, 85 Fed. 271 (C.C.A. 6, 1898), affirmed, 175 U.S. 211 (1899), is also relied on for the rule that territorial allocations constitute a per se violation of the Sherman Act. However, this is not an inconsistency.

Territorial allocations constitute a per se violation of the Sherman Act where their clear purpose or effect is to restrain competition. Thus, in the *Addyston* case, both in the circuit court and in the Supreme Court, the courts reviewed considerable evidence as to the effect of the territorial allocation on competition. Both courts concluded that the restraint of competition was substantial, covering two-thirds of the cast iron pipe produced in three-quarters of the country; was accompanied by collusive bidding; and had a direct influence on prices. In these circumstances, the courts concluded that the territorial allocation suppressed competition and was therefore, an unreasonable restraint of trade. On the other hand, if the district court were to accept the Justice Department's view as to how the per se rule of antitrust violation is to be applied in the pending *Mattress* cases, the result would be to keep the defendants from proving to the court that their arrangements promoted rather than restrained competition.

It is also noteworthy that the *Timken* case, which is relied on by the Department in its report and is in fact the only litigated Government antitrust case involving trademark licenses and territorial allocations, did not involve the application of the per se rule of antitrust violation. Despite the factual showing that the defendants in this case dominated the world tapered roller bearings industry, the court felt impelled to consider whether the challenged territorial allocation was ancillary to a valid exercise of trademark licensing rights or was ancillary to a legitimate joint venture, or whether it arose out of an intent to restrain trade. The conclusion reached by the court was that the latter was the case and that the territorial allocations were illegal, but there is no indication that the court could decline to consider the "ancillary restraint" defenses or that the territorial allocation was illegal per se.

The fact that the Serta and Sealy groups feel that their territorial arrangements are not within the scope of the per se rule of antitrust violation does not diminish the necessity for Congress affording relief from the uncertainty created by the Department's disagreement with this view. The testimony has established that the problem dealt with by section 5(k) of the bill is not peculiar to the mattress industry, and that exclusive territorial designations are a corollary of the constantly increasing number of trademark licensing arrangements upon which a substantial section of American small business relies. Apprehension was also expressed that the recent *White Motors* decision in the district court (which it should be noted does not involve trademark licensing) may be applied to trademark licensing agreements with exclusive territorial designations. Independently of the *Mattress* cases, therefore, there is ample justification for Congress accepting the responsibility for accomplishing the codification of the rights of trademark owners and licensees, and the clarification of antitrust and small business policy, that is implicit in S. 1396.

4

The Justice Department's report predicts that the enactment of S. 1396 would have the effect of bringing about the dismissal of the pending *Mattress* cases. I am not trial counsel for the Sealy and Serta groups and my experience at the bar makes me somewhat shy of predicting what judges will do in pending litigation. However, I agree that this would be the probable outcome of the Department's case against the territorial restriction rests only on the court accepting its version of the per se violation rule; i.e., upon the Department's success in excluding evidence of the beneficial effect of the restriction on competition and of the way in which the restriction implements a valid (and in my opinion salutary) system of trademark licensing and cooperative national advertising. As already pointed out, the only other charge in the *Mattress* cases relates to resale price fixing, and is disputed by the defendants.

The further point made by the Department that Congress should not consider legislation that might affect pending litigation is without legal substance. The precedents where Congress has acted with the direct purpose of affecting the outcome of pending litigation are numerous. Possibly the most widely known of these instances was the Portal-to-Portal Act of 1947, which had the effect of relieving employers from liability for millions of dollars claimed by their employees under the Fair Labor Standards Act. In the antitrust field, even where specific amendments to the Sherman Act limiting its scope have been involved, such as the Capper-Volstead Act exempting agricultural cooperatives from the application of the Sherman Act and the McGuire Act legalizing the nonsigner clauses of State resale price maintenance laws, Congress has not felt itself deterred by the pendency of antitrust litigaiton from laying down the policy which it considered to be in the public interest. Certainly there should be even less inhibition about Congress enacting a law directed to a problem of concern to the entire business community, that merely codifies trademark law and clarifies, in the public interest, a troublesome issue of antitrust policy.

5

Finally, I must confess to a feeling of disappointment that the Department's report, which was not received by the committee until a considerable time after the close of hearings on the bill, did not see fit to comment on two major issues of policy that inhere in the bill, were communicated to the staff of the Department and were explored during the 2 days of hearings on the bill:

(*a*) The right of cooperating regional small businesses to a use of trademarks and national advertising that is legally an economically equivalent to that of their large nationally integrated competitors, for the purpose of making their own competition more effective and improving the competitive potential of their industry.

(*b*) The right of the buying public, in purchasing goods manufactured under a trademark license, to have adequate notice of the relationship between the licensor and the licensee, whether accomplished by the registered user mechanism of the bill or by the notice provision discussed during the course of the hearings.

The silence of the Department on these important policy issues confirms my conviction that their resolution is part of the legislative function, and hence of the propriety of our recourse to Congress for relief in the interests of the business community and the buying public.

We are most grateful to you, Senator Cotton and the committee's staff for the careful consideration that has been given to the issues and problems presented by S. 1396, and the courteous and patient hearing accorded us. Since the Justice Department's report contains new allegations of antitrust misconduct that are not even before the court and an unwarranted interpretation as to the scope of S. 1396, I would appreciate your incorporating this statement in the official record of the hearings.

Sincerely yours,

SIGMUND TIMBERG.

Mr. TIMBERG. Thank you, sir.

I will not waste the time of this subcommittee to develop what we consider to be the baseless nature of the Department's charges, pressed for the first time, of new antitrust violations—charges which have not been pressed before the courts, although the cases against these

bedding manufacturers have been pending before the Federal district court for 2 years. I, instead, refer to my July 10 letter and to the disclosures as to the facts of the pending litigation that I made when I testified here last June.

Every proponent or opponent of the original version of S. 1396 who testified at the June 1961 hearings recognized that section 5(k), which is the predecessor of section 1(3) of the substitute bill, was primarily directed at the problem of exclusive territorial designations. Despite this fact, the Department, in its statement, said that the provision—and I quote:

> Would save from antitrust illegality tying clauses, compulsory joint agencies and many other conceivable restraints.

In my July 10 letter I developed the fact that this is based on a demonstrably erroneous interpretation of the words "mode of use." This is language which was present in the original Lanham Trademark Act of 1946 dealing with concurrent registrations and until last year's statement the Department of Justice had not made any objection to this language.

The words "mode of use" clearly relate to such matters as the way in which the trademark is displayed or affixed and the use that is made of the trademark in advertising materials.

The purpose underlying the right of a trademark owner to prescribe conditions and limitations on his licensees as to the mode of use of the mark is not that of imposing an antitrust restriction. The purpose is to protect the consumer and the trademark owner from improper use of the mark by licensees in advertising or in labeling that might deceive or confuse the public or impair the integrity of the mark.

Now, the Department of Justice's statement also made——

Senator HART. At that point let me ask explicitly, then: The Justice Department, in its report on the original bill, objected to the bill in part because it would save from antitrust illegality, tying clauses, compulsory joint agencies and many other conceivable restraints. It is your testimony that the bill originally and the substitute certainly would not and is not intended to authorize any of these things; is that correct?

Mr. TIMBERG. That is correct, sir.

The Department's statement also says that—

> The provisions of the proposed new subsection (k)—

this is the territorial designation provision—

> would give the registrant well-nigh absolute power to impose, with impunity, otherwise antitrust-tainted restrictions . . .

and that—

> The effect of the bill would be to exempt numerous per se violations from the applicability of the antitrust laws in general . . .

I wish to say that this is neither the intention nor the effect of the exclusive territorial provision. To make it clear that this is not the purpose of the bill, the substitute bill now has language which makes the right of the trademark owner to prescribe limitations and condi-

tions as to mode and place of use of the mark by its licensees subject to the proviso:

> . . . that such limitations and conditions, when viewed in the light of all the surrounding facts and circumstances, do not result in an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used.

In my July 10 letter to the Justice Department I also pointed out that this exemption or immunization from the antitrust laws could not have been the effect of the provision as originally worded. The Department's own statement explicitly recognizes that an amendment to the Lanham Act does not operate to confer any immunity from the antitrust laws.

Section 1(3) of the present bill does not exempt territorial restrictions from the application of the antitrust laws. It is simply a legislative declaration that the mere existence of a territorial restriction in a trademark license is not illegal.

In my opinion, it is merely a restatement of existing law to say that a territorial restriction may or may not violate the antitrust laws, depending on its impact on competition.

The Department of Justice concededly has taken a different view of the matter. Its position is that the mere existence of a territorial restriction in a trademark license agreement between a cooperative licensing organization and individual licensees is illegal per se. As the Department interprets per se illegality, the licensees are not to be allowed to prove to the court that their territorially exclusive arrangements promote rather than restrain competition; they are not to be allowed to demonstrate to the court that these arrangements are ancillary to the reasonable main purpose or joint venture in which the licensees are jointly engaged, which is that of exploitation of a common trademark and of national advertising in which they cannot engage except on a cooperative basis.

The view that the Justice Department takes is, in my opinion, inconsistent with the approach that was adopted by both the circuit court and the Supreme Court in the *Addyston Pipe and Steel* case. This is the landmark case which is cited for the proposition that territorial allocations constitute a per se violation of the Sherman Act. In that case the courts reviewed considerable economic evidence which established that the territorial allocation in question had an adverse effect on competition. The courts also laid down the doctrine that ancillary restraints to a reasonable main purpose are not forbidden by the antitrust laws.

The Department of Justice's attitude is also counter to the *Timken Roller Bearing* case, which is cited in the Department's statement, because in that case the court considered whether the challenged territorial allocation was ancillary to a valid exercise of trademark licensing rights or was ancillary to a legitimate joint venture.

In summary, it is clear that the Justice Department and the defendants in the mattress cases have divergent views as to what is admissible evidence in an antitrust proceeding. The defendants assert the right to prove that a restrictive territorial arrangement furthers and promotes competition and the Department denies that right; but this is a far cry from the Department's assertion that the defendants

are claiming immunity from suit or that S. 1396 will afford them such immunity.

The Department makes statements——

Senator HART. May I ask you at that point: Informally, you want to underscore the distinction that you are making in the prepared statement from which you summarize?

The reason I ask that is that, as I have listened, it occurs to me that Members of the Congress might welcome a little more elaboration on this.

You say that your disagreement with Justice is over whether—let me go back and see if I may appropriately summarize what you have already said, and perhaps this would suggest where I think it might be desirable if you would go beyond the point.

You say that territorial restrictions may or may not be in violation of the antitrust laws, but the Justice Department says that per se they violate the law; is this correct?

Mr. TIMBERG. That is correct, sir.

Senator HART. You cite the *Addyston Pipe and Steel* case and the *Timken Roller Bearing* case in support of your position. You say that in the mattress cases you and the Justice Department, disagree as to the admissibility of evidence in an antitrust proceeding. In those cases you are claiming that you have a right to prove competition is enhanced by the territorial agreement. You say the Department denies this or disputes this and says that there is no offer of proof acceptable on this point. Then you say:

> This is a far cry from the Department's assertion that the defendants are claiming an immunity from suit or that S. 1396 will afford them such an immunity.

It is this I wish you would elaborate on.

Mr. TIMBERG. Well, I am not asserting, Senator, that a territorial restriction in a trademark license is exempt from the operation of the antitrust laws. I can conceive of situations in which they would be subject to the operation of the antitrust laws. In fact, the *Timken Roller Bearing* case was such a case; there was a clear arrangement there that had the effect of restraining competition. My understanding of the per se rule is that, the moment you have something which restrains the competitive process, you cannot excuse it by saying that your motives were good, that you tried to keep prices down to the public, that you were forced to do this by business considerations, or the like. But the arrangement must be shown in the first instance to be a restraint of competition before it can be called an unreasonable restraint of trade under the Sherman Act.

The Department makes the statement that what we are asking for is a bill which would exempt trademark license agreements containing an exclusive territorial designation from the antitrust laws in the sense that you could not bring suit against such an arrangement.

As I understand this bill and what it says, it leaves the Department free to attack restrictive territorial arrangements under the antitrust laws, but it requires them to prove that these arrangements restrain competition. This is purely a question of burden of proof.

As a class, trademark license agreements with territorial allocations are not removed by this bill from the operation of the antitrust laws. The important problem is whether these territorial arrangements are

important for the preservation of competition or whether they serve to restrict competition, and that is a proper matter for the courts to inquire into. Accordingly, there is no effort in this legislation to remove a whole class of agreements from the operation of the antitrust laws.

We suggest that such agreements are subject to the antitrust laws, but that being subject to the antitrust laws means that evidence as to their effect on competition is admissible.

The Department's position, as I understand it, is that all they need point to is an agreement between a trademark owner and licensees in which territorial allocations are set forth. That makes an irrefutable presumption, as far as they are concerned, that the arrangement restrains competition, and that means that a court is foreclosed from considering, in any way, the competitive effect of a territorial restriction—whether it is necessary to enhance competition or whether it restrains competition.

Senator HART. I think you have expanded on it so that it will be helpful.

Mr. GREEN. What you are saying is that it should be the burden of proof of the Justice Department that such a restraint does, in fact, exist——

Mr. TIMBERG. Yes.

Mr. GREEN. In order to base an antitrust suit——

Mr. TIMBERG. Yes.

Mr. GREEN. Rather than the simple fact that entering into an agreement is, in itself, the restraint of trade?

Mr. TIMBERG. Yes, because otherwise I believe, Senator, that the rights which are conferred upon the trademark licensees become null and void.

If the position of the Department is correct, then a trademark license owner, merely because he happens to be a cooperating group instead of an individual, is not in a position to impose territorial restrictions which are necessary for the preservation of the continued existence of the groups involved.

Parenthetically, if I go back to the *Addyston Pipe and Steel* case, it is for this reason: I believe that the Department's letter cited the *Northern Pacific Railway* case for the general proposition that many restraints are per se illegal. In that case, the only reference to a case holding that a territorial allocation is per se illegal is the *Addyston Pipe and Steel* case. In referring to this and to the *Timken* cases, I am citing the two cases that seem to me to be most important as far as the policy of the courts are concerned.

I add that as a parenthetical reference for clarification as to why I have selected these two cases.

The Department states also that the enactment of S. 1396 would have the effect of bringing about the dismissal of the pending mattress cases. This is something which certainly cannot be inferred from the face of the statute itself, and I am, therefore, driven to the conclusion that it must be based on the Department's presumably pessimistic appraisal as to the evidence which supports its case.

As indicated above, all S. 1396 stands for is the proposition that a territorially exclusive designation under a trademark is not per se illegal.

The Department's statement that for Congress to endorse this proposition necessitates dismissal of the pending lawsuit can mean only that its case against territorial exclusivity depends on excluding evidence of the beneficial effect of the restriction on competition and of the way in which the restriction implements a valid system of trademark licensing and national trademark advertising.

Assuming, Mr. Chairman, that the purpose of the bill was to have the legislature undo an antitrust liability already established under existing law, which is not the case here, because these cases are still pending, this is not a valid argument against passage of the bill.

Both in my July letter and in Mr. Stewart's letter of July 3d that are in the committee's printed record numerous illustrations are given of cases where Congress has acted with the direct purpose of affecting the outcome of pending litigation, even where liability for legal violations had been duly established by the courts. Certainly there ought to be less inhibition about enacting a law which is not directed to the legislative invalidation of a prior judicial decision, but merely codifies trademark law and clarifies, in the public interest, a troublesome issue of antitrust policy.

The issue of public policy to which this bill is directed and which it would resolve is whether small regional businesses shall be put on a footing of equality with their large nationally integrated competitors in their use of the essential, yet unfortunately expensive, tools of trademarks and national advertising.

Legislative clarification which will insure to cooperating small business equal rights under trademarks will, in my opinion, improve the competitive potential of American industry. It will help stem the trend toward domination of industrial fields by a few giant nationwide concerns and enable regional small business to continue to contribute their individual manufacturing and distribution skills and entrepreneurship to markets which require cooperative endeavor in national advertising. The bill is, therefore, in the public interest.

The silence of the Justice Department on this important issue confirms the fact that there is no other place than the Congress where the current needless hazard and uncertainty to small business on this score can be resolved.

The Senator may recall that there were other witnesses who testified as to the prevalence of this territorial restriction practice in industries other than the bedding industry.

We hope that, on the basis of the economic record made at last year's hearings, this committee will see its way clear to approving S. 1396 in the interest of small business and the competitive economy.

Senator HART. Mr. Green.

Mr. GREEN. Mr. Timberg, if I get your position correctly, if the smaller, that is, the comparatively smaller, people in the mattress industry are not allowed to enter into these agreements for the use of the trademark licenses on a territorial basis, that would eliminate competition as far as the large concerns are concerned; is that true?

Mr. TIMBERG. That is correct.

Mr. GREEN. So that you would have a complete lessening of competition in the bedding industry insofar as the big ones are concerned?

Mr. TIMBERG. Well, I think the tendency would be for bigness to take over, because I think the only outfits that will ultimately gain will be the nationwide concerns.

Mr. GREEN. The test of this is that this is the only way the smaller ones may compete with the larger ones—by these cooperative agreements?

Mr. TIMBERG. That is correct, sir.

Mr. GREEN. In order to get a pool of money——

Mr. TIMBERG. Yes.

Mr. GREEN. For advertising, and so forth and so on?

Mr. TIMBERG. You may recall, Mr. Green, that the testimony of the June hearings last year indicated that this was adopted as an alternative to all-out merger, on the suggestion of an economics professor who had looked into the whole matter, and this was its genesis in the troublesome days of the depression, at the end of 1928.

Mr. GREEN. That was in the hearings?

Mr. TIMBERG. That was in the hearings.

Mr. GREEN. Of last year?

Mr. TIMBERG. Of last year.

Mr. GREEN. On the other hand, there is, in a sense, as far as the trademark subject is concerned, among the group that enters into the agreement, a lessening of competition as between those particular individual members of the agreement; is that true?

Mr. TIMBERG. As far as the trademarked brand is concerned——

Mr. GREEN. Yes

Mr. TIMBERG (continuing). That is true.

You will also recall, Mr. Green, that these people also engage in the marketing of private brands under which they do not operate under any restraints, but it will amount to a lessening of competition with respect to the——

Mr. GREEN. Trademark brand?

Mr. TIMBERG (continuing). Trademarked brand.

Mr. GREEN. As between themselves?

Mr. TIMBERG. As between themselves.

Mr. GREEN. But it would enhance, in your opinion, the competition among this group?

Mr. TIMBERG. That's right.

Mr. GREEN. As to the large concerns?

Mr. TIMBERG. Yes.

Mr. GREEN. So that you would have a situation where the natural fact would be that the restraint in competition in one sense would be offset by a greater competition in another sense; is that true?

Mr. TIMBERG. Yes; that's right. It is restricted competition in a peripheral and short-term sense that would be more than offset by increased competition in a long-term sense. I refer to a restraint of competition in the peripheral sense, because it takes a lot of money to transport mattresses any appreciable distance.

That is the situation on one side.

On the other side is the fact that unless the firms can get together and cultivate their good will cooperatively and yet be assured that they are not going to sacrifice the three decades of goodwill that they have built up in their respective areas, you are going to have a much more substantial lessening of competition in the sense of elimination of firms from the field.

Mr. GREEN. I have no further questions, Mr. Chairman.

Mr. TIMBERG. Perhaps I should also point out that the competitive instincts of these people are indicated by the fact that they did not know what prices were being charged outside of their own territory; it was only the testimony of counsel, if you will recall, at last year's hearings that produced that information. Also, they were so jealous of their own trade secrets and goodwill that I know it to be a fact it has been hard to get statistics reported as to the amount of business that they do within their own territory.

These are people who individually conduct their own businesses on the manufacturing and distribution end, but competitive necessity forces them to combine to reach the nationwide market and the nationwide oriented consumer.

Mr. GREEN. I have no further questions, Mr. Chairman.

Senator HART. Thanks very much, Mr. Timberg.

Mr. TIMBERG. May I add, Mr. Chairman——

Senator HART. Yes.

Mr. TIMBERG (continuing). That Mr. Joseph Haas, who was here representing the Sealy group, would have wanted to attend, and could have, had the meeting taken place earlier, but he is, unfortunately, out of the country. He is, of course, supporting the enactment of this bill.

Mr. Altheimer, representing the Serta group is in the committee room at present. Perhaps it would be in order for him to make a short statement.

Senator HART. Surely.

Mr. Altheimer?

STATEMENT OF ALAN J. ALTHEIMER, ATTORNEY AT LAW, CHICAGO, ILL., COUNSEL FOR SERTA ASSOCIATES, INC.

Mr. ALTHEIMER. Senator Hart, my name is Alan Altheimer. I am a lawyer from Chicago, Ill., and I am legal counsel for Serta Associates, Inc.

I did appear at the hearings last June, but not as a witness. I was at the elbow of Mr. Cooney and Mr. Schob when they testified——

Senator HART. I recall.

Mr. ALTHEIMER (continuing). And I did submit the statements of Mr. Ferguson and Mr. Wuest, all of which appears in the printed record.

I had the privilege also, Senator, of answering your very perceptive question which appears on page 54 of the printed record, and I, in retrospect, am quite delighted that you did ask that question and I had the opportunity of giving you what I considered a very truthful and forthright answer at the time because it developed that the opposition which was submitted by the trademark bar indicated the need, the unanimous need, for this territorial restriction codification in the Lanham Act.

I have no prepared statement to make today.

I am authorized by the 36 small business licensees of my client that testified for them to say that they are very much in favor of the substitute bill, S. 1396, as they were for the original bill.

The two points of the bill that remain; namely, notice and the right to grant territorial restrictions, except for the fact that antitrust provisions will be reserved, we feel are quite salutary.

The notice provision, we feel, is helpful to the general public and it's again something that the law should have had in it from its inception.

The territorial restriction provision, as Mr. Timberg so aptly pointed out, we feel is simply a codification of the present case law as established in the cases that Mr. Timberg referred to.

I would like the privilege, although Mr. Timberg very skillfully answered your question, Senator, and also Mr. Green's question, of supplementing the two questions just a little bit.

On your question as to whether or not the proposed substitute bill would grant immunity from antitrust legislation, I would like to approach the answer by adding to what Mr. Timberg said this fact: The Department of Justice, under its theory, under the Federal Rules of Civil Procedure, could at any time it desired appear before a court in Chicago on a motion for a summary judgment, supported simply by an affidavit that Serta Associates, Inc., for example, does have license agreements which provide for territorial allocations. If the Department of Justice is correct, the court could properly enter a judgment against our client, enjoining the enforcement of the territorial restrictions in the license agreement, and we could put in no evidence.

We believe that this new law simply eliminates that possibility from these proceedings and that the Department of Justice either could not obtain a judgment against us by a summary judgment proceeding or could not prevent us in an actual trial from putting in the evidence of ancillary use and reasonable use that we feel would be a proper defense.

So, that is really the gist of the amendment, as I see it, in this regard, namely, that it is a procedural provision that we are trying to resolve in asking the Congress to codify what we conceive the law to be as established by the circuit courts of appeal and the Supreme Court of the United States.

As far as Mr. Green's question about the lessening of competition is concerned, from my own interviewing of my clients in preparation for the defense of this case, I can say that the competition that is lessened by virtue of the licensing arrangement is minimal. It's again very negligible, as a matter of fact. As between various licensees scattered around the country—for example, a licensee in Florida competing with a licensee in New York—this is practically nonexistent and would not be existent even in the face of the territorial allocation; on the other hand, the competition as between the licensee, we'll say, in New York and the licensee in Philadelphia could be much more marked than between the two I just mentioned, except for the fact, as Mr. Timberg pointed out, the question of transportation and of small business sending salesmen into another man's territory does not justify the cost and expense of doing so. It's rather difficult—and the testimony would so prove—to invade another man's territory on small business efforts, to pay a salesman and his expenses and a commission, in the hope of invading his territory and effectively competing against him where he is on the scene.

So, to reiterate what Mr. Timberg said, the loss in competition is so negligible that it's far and away offset by the increase in competition as against the national manufacturers who compete on a national basis with the combined group.

Senator HART. Maybe you can refresh my recollection. The earlier hearings indicated that this method of doing business applied in the mattress field, and in this field the Justice Department had moved. We had in the earlier hearings indication that similar arrangements with territorial restrictions attaching to the use of the trademark applied in the restaurant business.

Did we have some comment about that or——

Mr. ALTHEIMER. Well, I think someone did mention the Howard Johnson chain at one point.

Senator HART. Yes.

Mr. ALTHEIMER. There are many, many franchise arrangements in existence today.

Senator HART. What I am leading to is this: You respond to the question that Mr. Green raised and then I raised as to whether, on balance, competition is not enhanced by this permitted arrangement or whether it is, in fact, reduced. You answer that—you respond to that—concern by the example of transportation cost, salesmen expenses, and so on not making worthwhile competition even if there was no territorial restraint. Clearly this is true in an item or I would assume this is true in an item such as mattresses. What I am trying to develop is what areas, if any, to your knowledge, are these arrangements in force where the size of the product, cost of the product, would be such that if territorial restrictions were not in force there could be a freer competitive force at work.

It is a little unfair to ask counsel for the mattress people——

Mr. ALTHEIMER. That's right.

Senator HART. Where this argument might fall, but in fairness to the record and the Congress can you think of some?

Mr. ALTHEIMER. I don't know, and I would hesitate to say.

Possibly in the bottling goods industry, where syrups in bulk could be shipped in tank cars possibly from one place to another, or in tank trucks, without too much expense.

Our problem is that with 36 licensees throughout the country the temptation would be, where you have a nationally advertised product and where it sells itself because of the fact that so much money has been spent, that there would be a crossing of territories and there would be competition where none has existed up to this time, and, as Mr. Timberg pointed out, there is competition in the non-Serta or non-branded merchandise line; but I would say that, with modern transportation such as it is and the trucking industry such as it is, almost any kind of product could be transported a reasonable distance.

Now, what those demarcations are I don't know, but in our particular problem, as I mentioned before, the competition between New York and Philadelphia would be very severe, between Philadelphia and Harrisburg would be very severe, maybe between the Florida licensee and the Georgia licensee would be very severe. This couldn't happen and wouldn't happen particularly if it were not a nationally advertised product, but our clients feel that because of the national advertising the product will sell itself and the negligible competition that they might have in a nonadvertised brand would be very severe at this stage if a territorial restriction was eliminated.

Senator HART. Do you have anything, Mr. Green?

Mr. GREEN. I have no further questions, sir.

Mr. ALTHEIMER. Thank you.

Senator HART. Thanks very much, Mr. Altheimer.

I am sorry the full committee is not on hand to welcome back Senator Thye.

I know they would all have me bid you welcome.

STATEMENT OF EDWARD J. THYE, A FORMER U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. THYE. Thank you, Chairman Hart.

I am delighted that I have the privilege to be with you again this morning, and I am sorry that the full committee is not here.

Mr. William G. Murphy, the administrative assistant to Senator Hugh Scott, is in the room.

Senator Scott has not returned from the State of Pennsylvania after the primary election of yesterday, and that's the reason he is not in the room, sir.

Senator HART. Off the record.

(Discussion off the record.)

Senator HART. Let's go on the record.

I do hope if, in acting for Senator Scott, you do have any questions or would have had any questions, of the earlier witnesses that you will feel free to put them.

I have not given proper attention to the returns as reported in the paper this morning from Pennsylvania, but I realize that Senator Scott, himself, was not directly involved.

Mr. MURPHY. Not directly.

Senator HART. It is my impression that Congressman Scranton was well favored by Senator Scott.

Mr. MURPHY. Very well.

Senator HART. Therefore, he should return happy when he gets here.

Mr. MURPHY. Very much so. It was all good news.

Senator HART. I speak as one who was born and grew up in Montgomery County, Pa. So, with a brother there, I am kept informed. Senator.

Mr. THYE. Mr. Chairman, I fully concur in the statements made by Mrs. Leeds, Mr. Timberg, and Mr. Altheimer relative to the problems of the small businessman and the fact that I am a former chairman of the Select Committee on Small Business in the Senate leads me to do everything that I can in behalf of the small businessman that I believe is embodied in the provisions of the substitute amendment to S. 1396.

I was here at the hearing a year ago, and the only reason that brought me back to a committee room of the Senate was the importance of the proposed legislation that was embodied in S. 1396.

I then represented Spring Air. We have within the State of Minnesota a member of the Spring Air associated group, the Salisbury mattress manufacturer of Minneapolis, and these small businessmen associated themselves as an associated group some 30 years ago, and the reason they did—they could not enter into the medium of inter-

national or national advertising on the basis of individual companies because it was too expensive. They had no such resources to draw on, but as an associated group they could pool their funds and enter into the medium of national magazines and now, in later years, television and radio.

I do not know how a small businessman can bring to the consuming public, the buyer, information about his product in any other way than to pool his advertising funds with others in order that he reach the reader through the national magazines and television channels or the viewers on television, and if they are not in the field there is no competition to a national existing organization and the national then would have an absolute free channel of reaching the consumers.

So, I felt, as I reviewed the entire question of these small businessmen in the past 2 years that there was the restraint of competition by legal action that might possibly force the association of such as Spring Air and Sealy or Serta to disintegrate, and if they disintegrated and ceased to exist there would be no competition to any existing national organization that had factories in many areas of the United States or Canada and that had warehouses which they could ship from.

You cannot ship a mattress any great distance because of its bulk and, therefore, they had to be associated, and if they were associated and they agreed upon the type of manufacture, and they enforced the type of a mattress that was being manufactured as to product and quality, they would have to say something about a price or otherwise it would mean nothing in their national advertising, and while they advertised it, yet there was no means of policing it down to what do you charge the consumer for this particular mattress. There was none of that as I learned, and it was merely a means of laying a price before the consumer, either on the television screen or in the national magazines, so that my entire effort here is making possible, if I can, that we continue our little businessmen throughout the Nation.

The corporations are getting larger and they dominate the advertising channels, and yet our main streets of our towns, whether it's one State or another, are important to the very structure of our economy. The strength of our economy has been in the individual and the individual's opportunities and efforts.

I recall distinctly back in the twenties when there was action taken against a group of dairy producers that had joined in order that they could pool their milk product and offer it to the larger cities and thereby permit the consumer to have a direct contact with the producer on the farm as to a dairy product. It had gone through the distributors' hands. The distributors had discriminated against the producer, and oftentimes in the flush or the high production of the early spring, when pastures were good, they would force the price down and the individual producer had no recourse whatsoever until they pooled their supply and bargained with the distributors. There was an action brought, restraint in competition. Congress immediately responded by enacting legislation that made possible such association of producer groups, and they have vastly improved the quality and the quality for the consuming centers.

I see a related situation so far as the small businessman is concerned trying to meet competition such as the large corporations offer them,

and they have to pool; they have to join; they have to pool their funds for advertising purposes, and I think that's embodied in this substitute amendment and what was originally endeavored in S. 1396.

I deeply appreciate the fact that you, Senator Hart, listened to the testimony of a year ago and have permitted us to come here this morning.

Mr. Timberg so very ably stated the entire legal phase of the question and advanced all the reasons for the legislative enactment in order that the small businessman be protected, because if we, as a nation, lose the small. individual businessman or destroy his opportunity of continuing we are not going to see the type of an economy that has made this Nation the very great Nation that it is, because the individual initiativeness of the youth of our land will be destroyed before he has an opportunity to blossom into a productive individual in the field of business.

I have always urged that the Senate, the Congress, concern themselves more with the problems of a small businessman because I see across our Nation, more especially in my own State, the constant closing of individual, small business establishments because of the larger chain corporate structure that overshadows them and thereby destroys and withers them.

So, this morning we are again discussing it, and I hope this subcommittee can report this to the full committee and the full committee will get it approved or approve it and get it onto the calendar of the Senate early enough so that action can be taken, because these small businessmen can become discouraged if they are confronted with a legal action that will take a lot of financial support legally to defend themselves in court, or to constantly be threatened with a court action, they will disintegrate; they will drop out.

I know that Spring Air has been threatened with its continuance by the mere fact that members fear legal action and the adverse conditions or adverse effect that advertising of legal action pending would have on them as a member of an organization, and I think that Congress should clarify this question because the Justice Department has responsibilities of administering certain laws or statutes and if the statute reads or has been so interpreted by the legal counsel that they must bring action, then you and the Members of the Congress should take steps to clarify the question so that they are not confronted with the legal responsibilities.

That's my statement, Mr. Chairman.

Senator HART. Thank you, Senator.

I should have indicated, as you know, I am sure, the chairman of the committee, Senator McClellan, was delighted to advance this amendment in the nature of a substitute in light of the discussions of a year ago and would be here this morning were it not for the fact that—I think Senator Scott in part is responsible for some of this—he is engaged in a matter that has overtones of excitement and controversy, which has something to do with grain and tanks.

Mr. THYE. We read of it.

I was fortunate to serve on Senator McClellan's committee when I first came to the Senate in 1947. I was assigned to the Government Operations Committee. In fact, I would have been the ranking Republican on that committee in 1953 had I not chosen to go on the

Appropriations Committee, and I would have sat opposite to Senator McClellan on that committee at the time Senator McClellan became the senior member.

I did serve with Senator McClellan on two investigational activities that were directly named by the Senate by resolution, and that was the committee's activities into lobbying.

So, I'm very familiar with the great responsibilities of Senator McClellan's committee.

Incidentally, the first assignment that we had with Senator McClellan and Clinton Anderson and the now President, John Kennedy, and Albert Gore, the four Democrats—and I was one member of the four Republicans that sat through many, many months of committee hearing on the question of lobbying activities and the expenditures in the effect of lobbying.

So, I can fully appreciate that Senator McClellan is an extremely busy man.

Senator HART. It is sort of like baseball. The players change, but the subject matter doesn't seem to change very much.

Mr. THYE. Right you are, sir.

Senator HART. Again, thank you, sir.

Mr. THYE. Thank you. It is I, representing the small businessmen of America, that want to thank you, sir, for the time that you have taken.

Mr. GREEN. Are there any other witnesses in the room who desire to be heard either for or against the subject matter now under consideration?

Senator HART. I see that no one responds.

I take it that the witnesses we have heard are the only ones who desire to testify today.

Mr. GREEN. Senator Hart, I have a number of letters and statements which have been submitted for the record. With the permission of the Chair, I would like at this time to have those inserted in the record.

Senator HART. Those will be inserted.

(The documents referred to are as follows:)

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,
Chicago, April 13, 1962.

Re suggested substitute for S. 1396, 87th Congress, 2d session.

Hon. PHILIP A. HART,
Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR HART: The Spring-Air Co., which owns a number of federally registered trademarks for mattresses and related goods, is engaged in licensing such trademarks to 28 small business concerns throughout the United States which sell Spring Air mattresses in free and open competition with mattresses sold by Simmons, Englander, Burton-Dixie, and other multiplant, national corporations and with mattresses sold by licensees of other bedding franchise groups (Sealy, Serta, Restonic, Springwall and others). Each licensee owns one-twenty-eighth of the outstanding stock of the Spring-Air Co. All Spring Air mattresses are manufactured by these stockholder-licensees. No mattresses are manufactured by the Spring-Air Co. Each Spring Air licensee owns in its own right numerous trademarks for mattresses which it sells in competition with neighboring Spring Air licensees as well as with the other competitors mentioned above.

At the hearings on S. 1396 held June 20 and 21, 1961, by your subcommittee, former U.S. Senator Edward J. Thye and Messrs. Robert L. Ezelle, Jr., Frank Collins, Fred Salisbury, and Samuel Posner appeared on behalf of the Spring-

Air Co. and its licensees to present statements in support of S. 1396 in the form then under consideration. I accompanied these gentlemen and I also presented a statement on behalf of the Spring-Air Co. at those hearings.

We understand that additional hearings on this bill are scheduled to be held on April 18, 1962, and that consideration will be given at that time to a shortened form of this bill which differs from the original version principally in that it omits the provisions for registration in the Patent Office of all agreements to license federally registered trademarks to related companies.

This letter is written on behalf of our client, the Spring-Air Co., and of Messrs. Ezelle, Collins, Salisbury & Posner, because we support the shortened version of S. 1396 now under consideration but do not expect to be present at the hearings on April 18.

It is our understanding that section 2 of the suggested substitute for S. 1396 will, if enacted, authorize the Spring-Air Co. in licensing its trademarks to related companies (its stockholder-licensees) to impose limitations as to where they may sell and deliver the part of their manufactured output to which labels bearing the licensed trademarks are affixed, because such territory limitations do not result in unreasonably restraining trade in mattresses, box springs, and like bedding products as a general class of goods. (They sell far more mattresses under their respective local brand names without restriction as to place of sale than under the nationally advertised licensed trademarks.)

The right to impose geographical limitations upon the use of licensed trademarks by manufacturers has been exercised by our client and its predecessors since 1926 and during that period of time has enabled the small companies in the Spring Air group to survive and to give effective competition against large integrated national producers of the same general class of goods. Without the territorial limitations in their trademark licenses, these small companies could not effectively compete in the sale of high quality, nationally advertised mattresses.

Thanks to the protective umbrella of the territory limits, these small companies now invest substantial sums in: (*a*) paying their respective shares of the cost of Spring-Air's national magazine advertisements; (*b*) paying their respective shares of the cost of developing national Spring-Air merchandising plans and preparing and printing window displays, point of sale posters, direct mail advertising material, and similar advertising material for local use by their customers; (*c*) paying for local newespaper advertisements sponsored by their customers operating department stores and furniture stores; and (*d*) paying other costs of sales campaigns in their respective localities. The amounts invested by the respective licensees of the Spring-Air trademark to create good will for themselves and their Spring-Air products and to inform consumers of the fact that nationally advertised, high-quality bedding products are available from their locally owned factories employing local people would be entirely or partly lost if the good will and consumer demand created by such expenditures could be garnered by other licensed manufacturers offering goods made to the same specifications and bearing the same trademarks. The only practical way to stimulate each licensed manufacturer to make such expenditures and thereby increase the effective competition for patronage of retail stores and consumers is to assure him that he will harvest what he has sown and cultivated. His giant, nationally integrated competitors have this assurance because they sell Beautyrest and other major brands throughout the country. The small manufacturer with a Spring-Air license deserves the same assurance in the part of the country where he bears the expenses and assumes the risks of carrying on his local business.

Enactment of this bill would have an immediate beneficial effect on competition in the bedding business, if, as we would expect, it were followed by dismissal of the civil antitrust case of *United States* v. *The Spring Air Company*. The Spring-Air Co. and its stockholder-licensees are forced by the pending suit to defend the legality of continuing the territorial protection of its licensees in that part of their business done under trademarks owned by the Spring-Air Co. Their advertising budget could be larger if they were relieved of this burden, and Spring Air mattresses could soon become even more of a competitive factor than now.

For the reasons stated in this letter and in the oral statements, exhibits and letters at pages 55–79, 145–173, and 185–188 of the printed records of the hearings of June 20 and 21, 1961, we respectfully request that the proposed substitute for S. 1396 be recommended by the Subcommittee on Patents, Trademarks,

and Copyrights to the Committee on the Judiciary and by the Committee on the Judiciary to the full Senate for enactment in this session.

We regret our inability to appear personally this time and most sincerely appreciate the opportunity to present this written statement for the record in support of the suggested substitute for S. 1396.

Very truly yours,

CHARLES L. STEWART, Jr.

SERTA ASSOCIATES, INC.,
Chicago, May 8, 1962.

Hon. PHILIP HART,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: Referring to substitute bill for Senate bill 1396.

I have read very carefully the substitute bill for Senate bill 1396 on which you are to hold hearings on May 16, 1962.

I sincerely hope, Senator Hart, that you will feel favorably disposed to the adoption of this bill and wish to state that the statements that I made at he hearing on the original bill No. 1396 apply to the substitute bill with equal force.

Again, I sincerely hope that you will be in favor of the passage of this bill.

Yours very truly,

J. A. FERGUSON, *President.*

SERTA OF GEORGIA,
Augusta, Ga., May 7, 1962.

Hon. PHILIP A. HART,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: I have just looked over the substitute for Senate bill 1396 on which I understand there is to be a hearing on May 16.

I am not planning on attending this hearing at the present time but would just like to write you that the statements I made before the committee during the previous hearing apply to the substitute bill with equal force.

I am still very much in favor of the passage of this bill and your consideration will be appreciated.

Yours truly,

JOHN P. COONEY.

HONORBILT PRODUCTS, INC.,
Philadelphia, Pa., May 7, 1962.

Senator PHILIP A. HART,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: On June 20, 1961, I had the pleasure of testifying before your Subcommittee on Patents, Trademarks, and Copyrights in support of Senate bill S. 1396.

A substitute bill for Senate bill 1396 has been prepared. I have read this bill and I would like you to know that I am very much interested in its passage.

The statements I made in support of S. 1396, and which appear on page 40 of the transcript still apply, and I sincerely hope this bill will now see favorable action.

Very truly yours,

WALTER J. SCHOB, *President.*

SEALY MATTRESS CO.,
Chicago, Ill., May 10, 1962.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In June of 1961 I appeared before the Senate subcommittee in support of the original bill, S. 1396.

I have carefully read the amendment in the nature of the substitution to S. 1396 introduced by you into the Senate on April 16, 1962.

For reasons given in my original testimony, I wholeheartedly support the amendment and fervently hope it will receive approval in the Congress. In

my opinion, passage of this bill would insure a continuation of aggressive competition and the maintenance of a free and active market in the distribution of bedding. Further, it unquestionably clarifies the will and intent of Congress in aiding the maintenance of a climate to encourage competition and give small independent manufacturers an opportunity to effectively compete with larger national manufacturers.

I'm very grateful to you for your support in this most important matter.

Yours very truly,

MORRIS A. KAPLAN.

THE B. F. GOODRICH CO.,
OFFICE OF PATENT COUNSEL,
Akron, Ohio, May 14, 1962.

Re trademark bill S. 1396.

Senator JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, U.S. Senate, Washington, D.C.

MY DEAR SENATOR MCCLELLAN: On June 2, 1961, I wrote to express my view that it would be a mistake to replace the "related companies" concept of section 5 of the Trademark Act by the British system of formal entry of registered users, and I am pleased to note that your recent substitute bill proposes a different means to accomplish the intended result of permitting limitations to be prescribed in trademark agreements.

I will make no comment with respect to the proposed new subsection (b) of section 5 of the act, as it will have little effect on the kind of trademark situations with which I am familiar, but I would like to express an objection to the proposed addition to section 5 itself.

This addition to the end of the sentence of present section 5 seems to have the purpose of informing the public of the relation between the actual registrant and the related company which makes or sells the goods. While this may be of theoretical interest, it is probably of no real consequence to any ordinary purchaser. If it were important, the companies involved would be impelled by self-interest to place a notice on the goods, so as to obtain maximum benefit from the goodwill attaching to the trademark.

In most cases, though, the requirement that a specific notice be used would be of no benefit to the purchaser and might be detrimental in crowding labels and packages with unwanted information which would obscure the important data as to the character and quantity of merchandise. In addition, the requirement as stated could not be complied with in many cases, as where the user of a trademark is not the registrant but controls the registrant (as in the not uncommon case of ownership of a trademark by a subsidiary, but use of the trademark on goods of the parent company), which is entirely proper and is permitted by present section 5 taken with the definition of "related company" in section 45.

Finally, addition of such a requirement could possibly be construed as establishing an additional technical defense in an infringement suit against an imitator, so that a trademark owner who has innocently permitted use of the trademark by another without a notice of this kind, might lose control of a very valuable trademark.

In short, since there is no apparent need for a notice of the fact of control of quality by another concern, and since a requirement for such a notice would often be difficult or impossible to comply with and could have drastic unintended results, it would be preferable to leave section 5 exactly as it is now written without any addition or amendment.

Very truly yours,

HAROLD S. MEYER, *Patent Counsel.*

LAW OFFICES OF SYNNESTVEDT & LECHNER,
Philadelphia, Pa., May 15, 1962.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: Thank you for your prompt response to my inquiry concerning S. 1396, amendment in the nature of a substitute. I have also received word from Mr. MacIntyre of Joseph Bancroft & Sons Co.

Insofar as Bancroft is concerned, that company has written into all of its agreements a requirement that the licensee affix a tag or label bearing a legend to the effect that the trademark signifies goods which have been produced and tested under processes and by procedures established and controlled by Bancroft. I assume that this form of notice satisfies at least the spirit of the bill.

From the standpoint of Bancroft, I have no comment to offer on the proposed bill beyond the suggestion that it seems rather unfair to provide that a negligent or dissatisfied licensee could sacrifice all of the goodwill and trade value of my client's mark simply by printing tags on which he failed to include the required notice.

I have several other clients on whom the provisions as to notice of quality control might have a somewhat disconcerting impact, and I have found, upon inquiry, that my apprehensions in this area are shared by other members of the Trademark Committee of the Philadelphia Patent Law Association.

I am enclosing a copy of an ad hoc report on behalf of that committee. The original and several copies are being transmitted to the secretary of your subcommittee. I trust that that report may be included in the record of the proceedings. I am sorry that Mr. Bouda, chairman of our trademark committee, is presently in Europe and unable to express his views.

Yours very truly,

ANDREW R. KLEIN.

THE PHILADELPHIA PATENT LAW ASSOCIATION,
May 15, 1962.

Re S. 1396, amendment in the nature of a substitute.

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

GENTLEMEN: We have just been advised that hearings on the bill identified above are to be held on Wednesday, May 16. Notice of this fact was not received in time to afford an opportunity to this committee to discover the views of the entire membership of the association, or even to formulate a statement in time to have it considered and acted upon by the board of directors. Because of the importance and urgency of the matter, our president has authorized us to express the views of the individual members of this committee.

All members who could be reached unanimously agreed that subsection (3) of part (1) of the proposed bill should be adopted forthwith. Limitations with respect to the mode or place of use of a trademark are practically essential in many situations, since it often happens that a licensee is unwilling to spend his own funds in advertising the product which bears a licensed trademark, or to extend himself in order to give consumer satisfaction and create local goodwill, unless he can be assured that the fruits of his good works will be his exclusive property within his own territory. The proposed bill secures an incentive to the franchise holder to do his very best for his customer.

With relation to the proposed addition to what is to become section 5(a), this committee earnestly requests that the subject matter be withdrawn from the present bill, pending a much more careful appraisal of its implications and consequences than has been possible within the time at our disposal.

Our thinking on this matter may be generalized as follows, always realizing that there has not been sufficient time to permit us to agree even on the precise wording of this statement.

It is a sound business practice for the owner of a licensed trademark to require that his name be associated with his mark. Thus the goodwill of his mark is preserved to him, whether or not the licensee continues to do business under it. Because the desirability of such a practice is so evident, enlightened self-interest

dictates that it should be followed unless there are excellent reasons to the contrary.

Since there frequently are excellent reasons for omitting the notice, it is a serious mistake to require by law that notice must always be given.

It is a very harsh law which provides that a valuable property right, such as the right in a licensed trademark, is lost to its owner, if the licensee fails or refuses to put the proper notice on his labels. The penalty for an inadvertence is greatly disproportionate to the harm done thereby, and the penalty is imposed on the one not at fault.

There are situations which justify the omission of a notice of the type prescribed in the present bill. A parent company, for example, may control the nature and quality of the products of its subsidiary by a simple directive. A statement that the quality of the goods is controlled by the parent would, however, be misleading to the general public, for the general public has, we think, come to believe that "quality control" refers only and specifically to the systematic testing of production samples.

It will thus be seen that the nature of the notice provision in the bill may be inappropriate in an important area of related company use. It is also respectfully submitted that in this type of related company use there is no point whatever in requiring such a notice.

There are many other ways in which one company may quite legitimately control the nature and quality of goods sold under its mark by another company, without any necessity for systematic testing of the product. For just one illustration, we may suggest a relationship in which the owner of the mark supplies to his licensee a vital ingredient, possibly having a secret formula. So long as this ingredient is used, the quality of the finished product will inherently appear. This may be true of soft drinks, or of chemical reagents for treating metal surfaces, or of many other similar product relationships. The type of notice specified may well be quite inappropriate in such situations.

We are not clear as to the legal implications of the type of notice prescribed. Does it make any change in the extremely sensitive balance of interest with respect to product liability? Does the licensor of a trademark become an insurer for the products of his licensee? Suppose that deficiencies in the product have resulted from carelessness in manufacturing, so that some of the goods are not up to the standards of the samples submitted for testing: Is the owner of the mark liable, as well as the one who used it? Does the notice supersede express or implied warranties given by the manufacturer; that is, the licensee? Suppose the goods are damaged through mishandling or carelessness in storage: Is the owner of the trademark to be held responsible for the negligence of the retailer, who may be several steps removed, contractwise, from him?

The ultimate consumer has an effective remedy against the store which sold the product to him. Is the sort of notice suggested so important to his protection as to require an amendment of the statute which may create so many and such serious uncertainties as to the rights and liabilities of the numerous trading interests involved?

Because the field of inquiry raised by these proposals is so very extensive, all members of this committee who could be reached urge that the subject be withdrawn from the present amendment in the nature of a substitute, and that the bill be enacted forthwith, containing only subsection 1 and subsection 3, and amending primary section 2 to provide for immediate effectiveness.

Respectfully submitted.

COMMITTEE ON TRADEMARKS,
ANDREW R. KLEIN, *Chairman pro tem.*

Absent from the city: Kennard N. Ware, Francis Bouda, and Robert B. Frailey.

Concurring: Robert G. Danehower, Stanley Dubroff, George J. Harding III, John Dashiell Myers, and Charles H. Johnson.

NIMS, MARTIN, HALLIDAY, WHITMAN & BONYNGE,
New York, N.Y., May 15, 1962.

Re S. 1396, registered user bill.

Hon. PHILIP A. HART,
U.S. Senate, Washington, D.C.

DEAR SENATOR HART: Thank you for your letter of May 10 notifying me of a hearing to be held tomorrow morning on S. 1396. I have been engaged in a

lengthy trial and the writing of a brief after trial, and consequently will not be able to appear at the hearing. However, I would like to give my personal reaction to the proposed amendment, if I may.

I do not believe the proposed change with respect to notice is either necessary or desirable. It would constitute a drastic change in the law and would impose a considerable burden on the licensor, without any real benefit to the public. The practical difficulties of such a proposal would be almost impossible to overcome.

As an example, you may recall that one of the subjects under discussion at the time of my appearance before your committee was the question of chain restaurants, many units of which are operated under a license from the owner of the trademark. As was mentioned, many of the foods or services of the franchise holder are provided locally and do not emanate from the owner of the trademark. On the other hand, many of the foods or services do so emanate from the trademark owner. As a practical matter, how can the public be advised with respect to what portion of the food or services is supplied locally? It would be impossible to advise the public with respect to the true state of facts. It is not necessary to so advise the public. The fact is that the trademark owner supervises the quality of the goods or services in connection with which the mark is used. If this is not done and the quality of the goods or services deteriorates, the public reaction is swift and to the point. Business soon falls of, and if the trademark owner permits this situation to exist, his mark will soon be valueless.

As a matter of law, if the trademark owner does not supervise the quality of the goods or services, the decisions hold that it operates as an abandonment and the license is thereby rendered invalid.

Subsection (b) of the proposed amendment, in my opinion, is unnecessary, because it merely states what the law is today. The licensor today may properly impose limitations and conditions as to the mode and place of use of the mark by each related company. If the limitations and conditions result in an unreasonable restraint of trade, the limitations are invalid. This is clear from the decisions of the courts. I doubt whether any useful service is achieved by making this a portion of the statute, which may require a new body of law to be hammered out by judicial decisions interpreting this portion of the Lanham Act with possible conflict with the present body of law under the antitrust statutes. This, in effect, would introduce an element of doubt into a situation which is now relatively clear.

With kind regards.

Respectfully,

ROBERT BONYNGE.

Mr. GREEN. Also, Senator, for the information of the subcommittee, I have been given to understand that the reports from the Department of Justice, the Department of Commerce, and the Small Business Administration should be along within about 10 days.

Senator HART. I would think that if these should not arrive within that expected period that counsel should encourage the several departments to make them available to us because, as Senator Thye points out, it is May and we would like to be able to act one way or the other finally on this.

Mr. GREEN. There is another thing, Senator, I forgot to mention, and that is in the U.S. Trademark Association letter they state:

> The association does wish to have an opportunity to place its views before the Subcommittee on Patents, Trademarks, and Copyrights as soon as possible, probably within no more than 2 or 3 weeks after the May 16 hearing.

They would like to have the hearings, at least from the printed standpoint, kept open until such time as they may submit their statements in regard to this legislation.

Senator HART. All right. The record will be kept open for their statement and others, but on condition that it not extend beyond the 30 days.

Mr. GREEN. All right, sir.

Senator HART. They asked 3 weeks?

Mr. GREEN. Yes, sir; 2 or 3 weeks.

Senator HART. Let me modify the suggestion that the record stay open 30 days.

We will adjourn subject to the call of the Chair, but on the understanding that the Department reports will be received promptly, that those who have indicated a desire to file statements, including the U.S. Trademark Association, be advised to do so promptly, and that we seek to resolve this question, hopefully wisely, within the month.

Did you have any questions?

Mr. MURPHY. No. I had no questions. Thank you.

Senator HART. Perhaps this is an appropriate time to raise one point, while Mrs. Leeds and Mr. Timberg are here, which has been brought to my attention after reading the letter which has been filed, by the Philadelphia Patent Law Association. They suggest that the committee defer action on the first section of the substitute amendment; namely, the section which would add the requirement that there be a recital on the package or display article that the registrant controls the quality of the goods and services.

Would either of you care to make comment on that recommendation?

Mrs. LEEDS. Well, Senator Hart, so far as I, personally, am concerned, it wouldn't make any particular difference to me whether that were in the statute or not. I think it is implicit there because the public should know who is responsible for the nature and quality of the goods.

The provision is a part of the substitute, I would assume, by reason of the fact that the representative of the Philadelphia Patent Law Association at the last hearing was the one who suggested it, and also Mr. Bonynge from New York, who appeared on behalf of the New York Patent Law Association, likewise said that he would not object to such a provision, and both Senator Cotton and you had asked the specific question about some sort of notice——

Senator HART. Yes.

Mrs. LEEDS (continuing). And now that the Philadelphia Patent Law Association requests that this be eliminated, although they urge immediate action on the second section of the bill. Of course, the second section is that in which we are most interested, but at the same time it occurs to us that there is a public interest involved in the first part of the bill which did not meet with any opposition in the original hearings.

Senator HART. Thank you very much.

Did you have any——

Mr. TIMBERG. Senator, might I simply speak from the standpoint of the groups who are appearing on this legislation.

I think their attitude on this is that they want to do anything that is in the public interest with respect to the promotion of a proper trademark licensing system.

It was with this in mind that they were agreeable to make their arrangements subject to public scrutiny originally under the registered user provisions of the prior legislation. They certainly are in agreement, if the Congress decides that notice is the appropriate

policy, with this provision, which seems to be, as indicated by the chairman in the public interest; but if the feeling of the committee is that that particular provision needs further study I think that once again that's within the discretion of the committee.

Senator HART. All right.

Mr. TIMBERG. We are primarily interested in the other thing, which the record and the last hearings developed, which is the territorial exclusivity provision.

Senator HART. Yes.

Thank you.

If there are no further witnesses, we will adjourn.

(Whereupon, the committee adjourned at 11:16 a.m., subject to call of the Chair.)

(The following was submitted for the record:)

THE PATENT LAW ASSOCIATION OF CHICAGO,
June 1, 1962.

Hon. JOHN L. MCCLELLAN,
Chairman of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing to you as president of the Patent Law Association of Chicago to advise you that the board of managers of this association has adopted the following resolution disapproving S. 1396:

"*Be it resolved*, That the Patent Law Association of Chicago disapproves of substitute S. 1396 since the addendum to subsection (a) complicates the present statute without serving any useful purpose, and subsection (b) is ambiguous, and by implication casts a doubt as to the legality of existing trademark licensing practices."

It is respectfully requested that consideration be given to this action when your committee considers the testimony given with respect to this bill.

Respectfully submitted.

JAMES P. HUME.

THE NEW YORK PATENT LAW ASSOCIATION,
New York, N.Y., May 25, 1962.

Hon. PHILIP A. HART,
Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR HART: I have been instructed by the board of governors of the New York Patent Law Association to advise you and your associates that this association opposes S. 1396 as well as the amendment thereto as to which hearings were held by your committee on May 16, 1962.

This association's views as to the basic provisions of S. 1396 were expressed by Mr. Robert Bonynge when he appeared before your commitee on June 21, 1961.

This association opposes the proposed amendment on the following grounds:

(1) Insofar as concerns the changes suggested with respect to the requirement that notice be given of any license agreement, we believe this requirement to be neither necessary nor desirable. Such a requirement would constitute a drastic change in the law which would impose a substantial burden on the licensor without resulting in a sufficient benefit to the public. In many cases the mechanical difficulties involved would make it totally impracticable. Under our present law the licensor must carefully supervise the quality of the goods or services to insure that the licensee maintain the standards of the licensor. A failure to so supervise the quality of the goods and services operates as an abandonment and the license is thereby rendered invalid.

(2) With respect to the proposed amendment which would permit the imposition of limitations and conditions as to the mode and place of use of the mark by the related companies, we believe that it is also unnecessary since it merely incorporates into the statute what is presently the law and may be undesirable in that it may lead to difficulties and inconsistencies in construction. Unreasonable restraint of trade with respect to the mode and place of use by such related company is an antitrust violation, and such incorporation into the

statutory law would create a situation requiring a Federal judicial interpretation under the Lanham Act in possible conflict with the large body of law presently existing under the antitrust statutes.

We appreciate very much the action of your committee in holding the record in this matter open until May 31, 1962, to permit our association to put its views before you. We hope this letter arrives in good time, and we thank you for your courtesy in the matter.

Respectfully,

CYRUS S. HAPGOOD, *President.*

THE U.S. TRADEMARK ASSOCIATION,
New York, N.Y., May 28, 1962.

Re Senate bill 1396 (amendment substitute of April 16, 1962).

Hon. JOHN F. MCCLELLAN,
Hon. PHILIP A. HART,
U.S. Senate, Senate Office Building, Washington, D.C.

MY DEAR SENATORS: The Lawyers Advisory Committee of the U.S. Trademark Association has carefully studied the amendment (in the nature of a substitute) which was proposed by you jointly on April 16, 1962, in connection with the bill S. 1396, and has found it necessary to recommend disapproval of the proposal as being potentially troublesome and possibly quite needless (as to its pts. (1) and (2)), and of dubious effectiveness (as to its pt. (3)).

This matter, including the committee's adverse recommendation, has been considered and concurred in by the board of directors of the association, which has directed me to express to you in this manner its anxiety that the present proposal not be adopted. The broad composition of the association, including attorneys in the trademark field as well as a large number of companies in many and varied industries, is a prime reason why the association views these problems with broad perspective, including the full interest of the public in the use of trademarks and trade names. For your reference we are sending to you under separate cover a copy of the roster of membership.

This bill as amended by the April 16 proposal would make two changes in the so-called related-company provisions of the Trademark Act of 1946 as amended, popularly known as the Lanham Act. These provisions (Lanham Act, secs. 5 and 45) cover the not uncommon situation of one company using another company's trademark, service mark, and so forth, with the latter's permission, and under the latter's control as to the nature and quality of the goods or services in connection with which the first company uses the mark. Such relationships may exist, not only as between a licensor and licensee but also as between aparent corporation and its subsidiary, or between a component supplier and a finished-goods manufacturer. There are many important commercial relationships now existing which rest on the foundation of the related-company sections.

These provisions are declarative of the common law as it existed for years in this country prior to the Lanham Act. They are simple. They work, and work well. They protect the public, by requiring the trademark owner to control the nature and quality of his permittee's goods or services to the extent they bear his mark; thus the public is secure against shoddy goods masquerading under a mark that is known for quality.

Quality control notice

The first proposal of the April 16 amendment-substitute would add to these useful, uncomplicated related company provisions the requirement that the goods or services in connection with which the permitted mark is used must display a notice, telling the public that the quality of these goods or services is controlled by the registrant of the mark, or by the applicant if he is still in the stage of applying to register his mark.

The burdensome and vexatious character of this notice requirement may not be immediately apparent, nor the fact that it is impossible to meet in many cases. Consider, for example, the tiny paper tags that are attached to finger rings; there is scarcely enough room on them now to include the trademark, the circle-R registration notice, and a bare minimum of other necessary matter. Where could room be found to display the voluminous text that this new proposal would require? An ordinary mattress has vast areas on which to show all manner of displays. But many valuable products of commerce do not have such expanses of available space, such as the neckband label of a sweater.

More important, there seems to be no demonstrated need for such a notice, no essential end to be served by it, and no group which would benefit from it.

Certainly the buying public is not going to be interested in or helped by such a notice. The thing the buyer relies on is the guarantee of quality which the well-known trademark on the product gives him. His protection in that reliance lies in the simple and effective quality control provisions that already exist in the Lanham Act, including the specific prohibition against any misleading of the public. The new notice cannot give the public anything more than the Trademark Act already affords, in full and adequate measure.

No doubt the subcommittee understands that the trademark law in this country does not and never has required a trademark owner to identify himself as such where he uses his mark. The mark alone is enough; its owner may be anonymous. Why should there be any change in this rule when the owner permits someone else to use his mark?

An important and substantive objection to the notice provisions is that they impose an extremely heavy penalty on the trademark owner for an offense which he did not commit. A discontented or recalcitrant licensee can destroy the trademarks rights of his licensor simply by omitting the required notice from his labels.

The severity of the penalty—loss of registration—seems to be wholly disproportionate to the relatively trifling inconvenience to customers which might (but has not been shown to) arise from omission of the notice.

Other objections partake of the nature of quite serious doubts, rather than factual statements.

For example, we ask whether the notice supersedes or in any way affects warranties expressly limited by the manufacturer (licensee) but not even proper to the licensor? What is the impact of this section on the delicately balanced warranty obligations between maker, wholesaler, jobber, and retailer? Does it create a new right of action in the consumer?

Would this bill create a new field of product liability? We do not know. We question whether it was intended to do so, but the mere fact of its enactment may afford a basis for a contention that this must have been the intent.

Use restrictions

Part (3) of the April 16 proposal would permit the imposition of restrictions upon the "mode and place of use" of a mark which one company allows another to use, provided that the restrictions do not result in "an unreasonable restraint of trade in, or monopolization of, the general class of goods or services in connection with which such mark is used."

This is a modified version of what was proposed in the original text of this same bill as a new section 5(k) for the Lanham Act. That section 5(k) would have given carte blanche for any desired restrictions which related companies might wish to impose as to "mode and place of permitted use" of the trademark.

The present proposal would expressly permit such restrictions only when they do not result in monopolization or unreasonable trade restraint, in short, if they do not violate the antitrust laws—which, we respectfully suggest, may be a better way to phrase it than the presently suggested text. This addition appears to have been a concession to the objections of the Department of Justice to the original proposal.

But the form of this concession may suggest that a new and special immunity is intended. We question whether it is really necessary or desirable to enact a statute which may be merely declarative of what the law is and has always been understood to be.

Respectfully submitted.

THACHER H. FISK, *President.*

SLUMBERLAND PRODUCTS CO.,
Woburn, Mass., May 29, 1962.

Subject: S. 14396.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on Judiciary, Old Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: We have been following the "trade newspaper" reports on S. 14396 covering action which has been proposed by the large franchising chains in our industry. The purpose appears to be that of legalizing certain acts which the Department of Justice claims are illegal.

Under ordinary circumstances, we would not be writing to your honorable committee on a matter which concerns one segment of our industry. However, we feel that the picture presented to you of our industry may be a "false" one. This letter of protest, at least, should be entered on the record. Therefore, the management of this company has directed that there be forwarded such a letter urging this bill be defeated in keeping with the recommendations of the Federal Trade Commission and the U.S. Department of Justice.

Our purpose in urging defeat of this proposed legislation is threefold:

(*a*) It provides a "favored status" to one portion of an industry.

(*b*) It provides congressional sanction to the lessening of competition.

(*c*) It discriminates against the small regional independent manufacturer.

It seems odd that the major justification for this proposed legislation is a claim that such permission (to fix territories, prices, etc.) is necessary to protect the "small operator" from the "big operator."

Actually, as a result of the banding together of these franchise-holding regional manufacturers into the equivalent of national "cartels" or "trusts," the small independent regional operator has been backed up against a wall.

Statistics available in our national association or in the Federal Trade Commission should reflect the rapid demise of "small" independent bedding manufacturers during the past 5 years. This attrition, plus the loss of income to many manufacturers, including ourselves, is due in the main to the growth and practices of these manufacturers, who have banded together for the purpose of advertising and promoting in concert.

Yet, if the Congress passes this proposed legislation, the number of manufacturers will continue to dwindle, and the power of the industry (including the creation of an industry image by the advertising of these national chains) will continue to become concentrated in even fewer hands.

We respectfully urge that the present structure of the industry be maintained without any interference from the Congress which would provide a position of advantage through legislation to one segment of the industry; and that the Department of Justice and Federal Trade Commission not be restricted, by congressional action, from any attempt to weed out from our industry's present structure those practices which limit or eliminate fair competition.

Your courtesy in consideration of this letter is deeply appreciated.

Very truly yours,

SUMNER B. TAPPER, *Vice President,*

LAW OFFICE, SIGMUND TIMBERG,
Washington, D.C., May 31, 1962.

Re substitute bill S. 1396.

Hon. JAMES E. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: The clerk of the committee has been good enough to send me the comments of the Department of Justice and of the Small Business Administration with respect to the amendment in the nature of a substitute intended to be proposed by Senators McClellan and Hart to S. 1396.

I am happy to note that the Justice Department no longer views S. 1396 as a measure designed to give trademark owners or licensees an immunity or exemption from the antitrust laws. This eliminates the main objection which the Department had advanced in its June 22, 1961, report on the original bill.

However, without any legal or logical basis responsive to my letter of July 10, 1961, and statement of May 16, 1962, the Department persists in the erroneous and unsubstantiated assertion that S. 1396 relate to pricefixing. The evidence at the hearings held by the subcommittee made it clear that both the manufacturing licensees and their retail outlets were continually subject to intensive price competition, and that no relief from such competition was expected. In fact, the continued existence of vigorous price competition is one of the strong reasons why territorial limitations can, in proper circumstances, be in the public interest.

Appended to the Justice Department's report is an interesting statement by Assistant Attorney General Loevinger on Senate Joint Resolution 159, the so-called quality stabilization act bill, which details at considerable length the harmful effects which pricefixing has on the national economy. Since S. 1396

does not relate to and in no way condones pricefixing, this statement on another bill is not relevant to and cannot conceivably assist the committee in evaluating the merits of S. 1396.

The only germane argument advanced by the Justice Department in opposition to substitute bill S. 1396 is one of litigation convenience, and involves a disputed interpretation of the judicial rule of per se antitrust violation. As set forth with clarity in the report of the Small Business Administration on the substitute bill, the view of the Justice Department is that, once an allocation of exclusive sales territories is established, "no further evidence is needed to show that it produced any of the effects on competition which the (Sherman) Act was designed to prevent." This predilection of the Justice Department for trying territorial limitation cases by summary procedures would, if indiscriminately followed by the courts, foreclose cooperating small businesses from showing that their cooperative arrangements are designed to promote competition and are necessary to counteract "the effects on competition which the act was designed to prevent." The approach of the Justice Department places exclusive emphasis on the procedural speed with which antitrust decisions are to be reached, rather than on the competitive implications of those decisions and the substance of the antitrust policy to curb trade restraints and to stem the undue concentration of economic power.

The limited area of cooperative trademark use to which S. 1396 applies is one where the Small Business Administration recognizes that firms may be forced out of business. It is therefore especially to be hoped that this committee will decline to subordinate the substantive requirements of a sound antitrust policy to considerations of administrative expediency, and will report out substitute S. 1396 favorably.

May I express my deep appreciation of the most fair and patient hearing given us by Senator Hart, with the assistance of the able staff of the committee.

Sincerely yours,

SIGMUND TIMBERG.

WONDER-REST CORP.,
Milwaukee, Wis., May 25, 1962

Re S. 1396.
Hon. CLEMENT J. ZABLOCKI,
U.S. Representative, House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE ZABLOCKI: According to a recent press release, hearings on Senate bill, S. 1396, are currently being conducted by the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights under the chairmanship of Senator McClellan. According to this same release these hearings will be kept open until about the middle of June for the filing of additional statements.

We are vitally concerned that this bill receive favorable action in the subcommittee and ultimately brought to the floor of both Houses and passed—the quicker the better. Passage of this bill will enable small manufacturers like ourselves to band together with other manufacturers of like size to manufacture and market our products under licensed trademarks in assigned territories. This is the only possible way that we small manufacturers can compete with the big nationwide firms.

Here in Wisconsin we have a very special interest in securing this right to market our brand names in assigned territories because Wisconsin has just a very few small size bedding firms and the State is literally flooded with bedding products of all qualities by the big out-of-State manufacturers in Minnesota, Illinois, and Indiana. We feel strongly that we are entitled to this sensible and equitable protection to help us stay in business and meet our payroll and tax obligations and, possibly, God willing and if we work hard enough even grow a little.

We would deeply appreciate it, Representative Zablocki, if you would take an interest in this bill and work for it in our behalf; first, by making our views known to Senator McClellan, and, second, by giving it your active support when it reaches the House floor.

Yours very truly,

JOHN L. MORTIMER,
Executive Vice President.

ROYAL BEDDING CO., INC.,
Buffalo, N.Y., June 13, 1962.

HON. THADDEUS J. DULSKI,
House Office Building, Washington, D.C.

DEAR MR. DULSKI: You perhaps are aware that hearings are now being held on a bill which is of extreme importance to bedding manufacturers like ourselves. We are referring to Senate bill S. 1396. This is a trademark bill which would permit owners of trademarks and trade names to assign exclusive territories to their licensee. We are a member of such an organization—the Restonic Corp. We operate under a Restonic franchise in our area and we have spent considerable sums of money to establish the name in our area.

As a member of this group we are in a position to compete with national bedding companies and the large national organizations are prevented from monopolizing the local markets. This bill will protect the small manufacturer and will give him an opportunity to sell to the retail trade on an equal footing with the other bedding companies in our industry.

We urge you to express our views to Senator McClellan and his committee and we very much appreciate your cooperation in this effort.

Sincerly,

WARREN W. ROSING, *Vice President.*

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