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J. Thomas McCarthy

TRADEMARKS, ANTITRUST AND THE FEDERAL TRADE COMMISSION*

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I would like to make it clear that I speak for myself and myself only. While I am consultant to the Federal Trade Commission regarding its generic name cancellation program, I do not speak for the Commission. The Federal Trade Commission is able to more than adequately present its views in other forums. The fact that I do not speak for the FTC will soon become quite obvious, for I strongly disagree with the wisdom of some of the positions the FTC has taken: for example, the position that the brand loyalty of a trademark can be properly relied upon to find illegal monopolization under Section 2 of the Sherman Act and that compulsory trademark licensing is a proper remedy in antitrust cases. On the other hand, I agree with and endorse other positions of the FTC: namely, its program to exercise its powers granted by the Lanham Act to petition the Trademark Board to cancel the federal registration of terms believed to be generic names of products or services. Before outlining the reasons for my disagreement and agreement with the FTC on these points, I feel it necessary to discuss the unfortunate animosity and antipathy that some members of the trademark bar feel towards the FTC as a federal agency.

The FTC, as a federal prosecuting, litigating and rule-making agency, has been given certain powers by Congress over the years since 1914, and the United States Supreme Court has generally supported most cases of the FTC's exercise of those powers. Ten years ago, the American Bar Association recommended to President Nixon that because the FTC had become so lethargic and moribund, it either activate itself or face the prospect of total abolition by Congress.[1] Faced by this blis-

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1. ABA COMMISSION TO STUDY THE FTC, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969).

tering criticism of its inactivity, the FTC as an agency has roused itself into action and Congress has granted it additional procedural powers in the past five years. In view of this history, I have great difficulty understanding how some attorneys can criticize the FTC in general for using its powers by an active program of antitrust enforcement and consumer protection. Certainly, to criticize individual positions taken by the FTC on specific issues is not only appropriate, but is the responsibility of the bar. But simply to damn the FTC to perdition, as I have heard some attorneys do, is not responsible or constructive criticism.

Some seem to view the relationship between trademark owners and attorneys on the one hand and the FTC on the other, as a religious war where informed debate on differences in philosophy is irrelevant. Some think that the FTC can do nothing right. Closed-minded sweeping condemnations of the FTC can serve only to make the Trademark Bar look foolish and self-indulgent. Crying wolf whenever the FTC undertakes *any* action which impacts in any way on trademarks will have the same result as it did when the little boy did see a wolf eating his sheep. It is my fondest hope that the trademark bar will stop, look and analyze FTC positions before jumping to conclusions. That is exactly what we want the FTC to do before taking action which will impact on trademarks: so let us provide a good example.

Having gotten that off my chest, let me set forth the reasons why I disagree with some positions of the FTC and agree with others. If I were addressing the policy makers of the FTC, I would say, "I have bad news and good news." The bad news is that you are very wrong and misinformed as to the competitive impact of trademark ownership per se and as to compulsory trademark licensing as an antitrust remedy. The good news is that I think that a selective and careful exercise of your power to petition to cancel registrations under the Lanham Act serves the cause of fair competition and does no violence to trademarks.

For several years, FTC prosecutors have sought compulsory trademark licensing as a remedy in the wake of finding an antitrust violation. This remedy has been sought in both the *Breakfast Cereal* case[2] and in the *ReaLemon* case.[3] The *Breakfast Cereal* case is still at trial after almost three years. Administrative Law Judge Harry Hinkes has retired and the FTC has ordered a new judge appointed to the case. Thus, the future of the

2. *In re* Kellogg Co., No. 8883 (FTC filed April 26, 1972). *See* [1970-1973] Trade Reg. Rep. (CCH) ¶ 19,898; [3] Trade Reg. Rep. (CCH) ¶ 21,495 (Dec. 8, 1978) (order re replacement of ALJ).

3. *In re* Borden, Inc., No. 8978 (FTC filed July 2, 1974).

Cereal case is in limbo at this time. In August, 1976, another administrative law judge in the *ReaLemon* case found that Borden's ReaLemon subsidiary had unlawfully monopolized the "processed lemon juice" market by means of geographically discriminatory pricing. The ALJ ordered Borden for ten years to grant a license of the mark ReaLemon to any competitor at a one-half of one percent royalty. On appeal, the full Commission on November 7, 1978, affirmed the finding of monopolization but rejected the remedy of compulsory licensing.[4]

On the issue of monopolization, the Commission recognized that ReaLemon started out with a "natural" monopoly simply because it created the market by being the first to market a bottled lemon juice. But the Commission felt that ReaLemon had taken steps designed to "ensure that that monopoly position would not be lost or eroded." However, by virtue of being there first, was not a continuing monopoly position of from 75 to 89% inevitable because Borden was able to establish strong consumer preference for its trademark? In discussing this "inevitability" or "thrust upon" defense, Judge Learned Hand stated almost 35 years ago that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[5] The Commission found that ReaLemon's continuing dominant market position was not achieved by normal competitive means but by two "unfair" or "artificial" means: (1) price discrimination; and (2) promotion of its trademark. While the Commission could have decided the liability issue on price discrimination behavior alone, it appeared to go out of its way to continually refer to the trademark as an artificial source of market power. The Commission stated that ReaLemon's marketplace advantage was not attributable to a superior product, but rather that "ReaLemon is distinguished from its competitors only by the strength of its trademark." In the context of the whole opinion, it seems clear to me that the word "only" designates the trademark as an artificial and unnatural source of market position. This is clear to me because of statements such as this: that ReaLemon's market position "was rooted largely in its successful and spurious product differentiation that enabled it to command a substantial price premium over essentially identical offerings of other sellers. . . ." The Commission also referred to the "imaginary superiority" which the trademark gave to the product. That is, the Commission focused on the physical aspects of the product as compared to its competitors,

4. *In re* Borden, Inc., [3] Trade Reg. Rep. (CCH) ¶ 21,490 (FTC Nov. 7, 1978) (cease and desist order); P.T.C.J. (BNA) No. 406, D-1 (Nov. 30, 1978).

5. United States v. Aluminum Co. of Am., 148 F.2d 416, 430, 65 U.S.P.Q. 6, 19 (2d Cir. 1945).

dismissing as "imaginary" product superiority as viewed by consumers. Commissioner Pitofsky agreed that "pronounced brand loyalty is a barrier to entry."

This is not a new viewpoint: that trademarks are not a natural and essential element of the competitive process, but rather are a necessary evil, to be dismissed as "irrational" or "imaginary." It has been forwarded by some economists for several decades. In my opinion, it is very wrong and paternalistic to refuse to take consumer demand as a given and to second-guess it by characterizing demand based on brand loyalty as "irrational" or "imaginary." The Commission appears to be building upon the theory that the only relevant and natural form of consumer demand is that which is based upon the "intrinsic" value of hardware: a painting by Picasso is only $10.98 worth of oil and canvas; a vial of perfume is only 98¢ worth of scented alcohol; and a bottle of processed lemon juice is only a combination of chemicals. But, as Alvin Toffler noted, each product goes to market packed with a "psychic load" of intangible and non-utilitarian psychological factors and expectations.[6] A digital computer would not buy a Picasso painting or a vile of perfume and would not have any brand loyalty because it is not a human being with a human desire for predictability of product and peace of mind. To dismiss as "irrational" your human demand for ReaLemon brand lemon juice because you feel more confident in the kitchen with it than with another brand, is to say that humans should act more like computers. It is to say that we should reorganize our economic system through the antitrust laws on the assumption that computers are, or should be, creating consumer demand. In sum, I find the Commission's analysis of the contribution of brand loyalty to the finding of illegal monopolization both disturbing and disappointing.

A brighter spot in the Commission's majority holding is the finding that, under the circumstances of the case, compulsory trademark licensing is too drastic a remedy. On the other hand, the Commission quite clearly felt that it had the power later on in this or future cases to turn to compulsory trademark licensing as an acceptable remedy. On this I think the Commission is quite wrong. I have set forth at great length in an article in the Trademark Reporter[7] the reasons why I think compulsory trademark licensing may be merely a euphemism for what in practice will be an improperly punitive confiscation of private property.

6. A. TOFFLER, FUTURE SHOCK 63 (1970).

7. McCarthy, *Compulsory Licensing of a Trademark: Remedy or Penalty?*, 67 T.M. Rep. 197 (1977). *See also* Palladino, *Compulsory Licensing of a Trademark*, 68 T.M. Rep. 522 (1978).

Trademarks are now a form of constitutionally protected free speech, subject to the least restrictive alternative rule of remedies.[8] I can envision no circumstances in which other remedies will not be less restrictive than compulsory trademark licensing. For the reasons set forth in my article, I have concluded that compulsory trademark licensing is a sloppy and imprecise antitrust remedy since no one can predict with accuracy its competitive effect upon a market. It is unworkable, self-defeating, illegal and probably unconstitutional.

But simply because the majority of the FTC in one case rejected it on the facts does not mean that the spectre of compulsory trademark licensing has passed from the scene. To the contrary, it appears to be picking up more adherents. In the so-called "no fault" monopolization proposal submitted by the FTC to the National Antitrust Commission, compulsory trademark licensing is proposed to be incorporated in a new antitrust statute.[9]

In the *ReaLemon* decision, Michael Pertschuk, Chairman of the FTC, dissented, saying that the remedy prohibiting certain pricing practices was not sufficient and that "some form of trademark relief" should also be ordered. By this he meant either compulsory licensing or a prohibition on use of the trademark. Chairman Pertschuk's dissent is based upon his view that "[t]he power inherent in the ReaLemon trademark and the price premium it permitted, are the root of Borden's monopoly power." From this he deduced that the trademark "serves not merely as an identifier of the lemon juice sold under that name, but provides respondent with a mechanism to control prices and entry in the processed lemon juice market, and acts as a formidable barrier to entry." Chairman Pertschuck relied on and quoted from a book review written in 1977 by Professor Scherer

8. In Friedman v. Rogers, 99 S. Ct. 887 (1979), a majority of seven justices upheld as against a first amendment challenge a Texas statute prohibiting the use of trade names by professional optometrists. In passing, Justice Powell for the majority noted that while the FTC must follow a least restrictive alternative rule as to deceptive trademarks, "there is no First Amendment rule, comparable to the limitation on § 5, [of the FTC Act] requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Id.* at 895 n.11. Justice Blackmun specifically disagreed, noting that "[c]orrected falsehood, however, is truth." *Id.* at 902. Thus, it is not entirely clear whether, in the false advertising context, the first amendment requires a least restrictive alternative approach to commercial speech and trademarks.

9. *See* Statement by Alfred F. Dougherty, Jr., Director, Bureau of Competition, FTC, to the National Commission for the Review of Antitrust Laws, Oct. 17, 1978.

of Northwestern University.[10] Professor Scherer's thesis is that trademarks confer monopoly power which permits anti-competitive price premiums for products with a "well-received brand image." Professor Scherer's recommendation is that "powerful trademarks could be opened up to competitive licensing at the stroke of a judicial pen." He briefly recognized the legal and economic problems involved, but concluded that "in numerous cases the social benefits would outweigh the costs." One of the benefits he listed was that under compulsory licensing, consumers would be deprived of the source identification function of a trademark and would therefore have to spend additional time and effort in determining product quality. To Professor Scherer "it might add spice to life." To me, it is the height of intellectual arrogance for government to deprive the busy working person of the informational value of a trademark and tell that person that they ought to spend more time investigating the "real" quality of the things they buy and not rely upon the "irrational" drawing power of a trademark. In Professor Scherer's balance sheet, there is apparently no place to enter the time and effort saved consumers by the informational value of trademarks and advertising. With more and more American households having two working spouses in order to keep pace with inflation, Americans have less and less time to spend agonizing over each of hundreds of purchasing decisions they make. And if consumers do not want the information of advertising or the aura provided by heavily advertised brand names, then some companies can make a great deal of money by supplying only the physical product at a lower price.[11] But Professor Scherer would deprive the consumer of that choice, because in his opinion, brand loyalty is not a sensible kind of purchasing decision. Again, we are back to the computer ideal of the consumer. Professor Scherer posits that more low-income than high-income consumers pay a price premium for "the dubious superiority of Wonder Bread over private-label alternatives." But this kind of apocryphal evidence reveals an imagined intellectual superiority. For every low-income consumer that Professor Scherer can find that pays a few cents more for Wonder bread than for "Jolly Markets" private label bread, one can find a high-income consumer that pays a $5,000.00 price premium for the so-called "imagined" superiority of a Mercedes automobile. The point is that no busy working person in our society has hours to spend agonizing over every purchase at the supermarket or elsewhere. Everyone is too

10. Scherer, Book Review, 86 YALE L.J. 974, 997-1000 (1977) (The Posnerian Harvest: Separating Wheat from Chaff).

11. *See* BORK, THE ANTITRUST PARADOX 318 (1978).

busy trying to earn the money to make a purchase in the first place. And if in fact consumers begin to buy "Jolly Markets" private label brand bread in droves and it eventually achieves a dominant position in the market, will Professor Scherer and Chairman Pertschuk then recommend that an antitrust action be brought and Jolly Markets be forced to license its trademark to the now-failing Wonder bread people?[12]

The fallacy of this approach seems self-evident to me because it is based on an essentially undemocratic thesis: the consumer *should* not want what he or she wants. While I am not in agreement with some of Professor Bork's theories of antitrust law, I am in complete accord with his statement that "[t]he contempt for advertising which is de rigueur in certain strata of our society is based on invincible ignorance of the functions it serves and the reasons it is presented to the public as it is."[13]

I cry "wolf" as to the FTC analysis of trademarks in the *ReaLemon* case because I see the wolf attacking the strongest and healthiest sheep. But now comes the good news I have for the FTC: it is both legal and appropriate for it to seek cancellation of trademark registrations of terms which probably have become generic—that is, have become a "non-trademark." My analogy may be strained, but here I see the wolf going after a fellow wolf in sheep's clothing. I do not cry "wolf!" because I do not think that generic non-trademarks should masquerade as trademarks on the principal register. Removing the statutory presumptions of validity for terms which the public uses to name a genus of products is a proper and valuable function of the FTC. It is pro-consumer and pro-democratic because it merely presents to the Trademark Board the basic issue of trademark law: do consumers in fact use this term to identify and distinguish the goods of one seller or do they apply the term to name the goods of all sellers of that product? No one is attempting to tell consumers what they should think or buy. Rather, the FTC merely presents the issue: what in fact do consumers think?

Under section 14 of the Lanham Act, the FTC is empowered to petition to cancel registrations on the principal register on certain enumerated grounds. One of these grounds is if "the registered mark becomes the common descriptive name" of an

12. The FTC's Economics Bureau has proposed a "Theoretical and Empirical Study of the Effectiveness of Patent and Trademark Licensing as Antitrust Remedies." P.T.C.J. (BNA) No. 416, A-2 (Feb. 15, 1979). The BNA opines that this may indicate either second thoughts or that the FTC is girding itself for future battles. *Id.*

13. *Id.* at 317.

"article or substance."[14] The words "common descriptive name" mean the same thing as "generic name."[15] A generic name is the very antithesis of a trademark.[16] Whether a given term is generic or a trademark is entirely in the hands of the consuming public. Judge Learned Hand in the *Aspirin* case put it succinctly. "The single question, as I view it, in all these cases, is merely one of fact: What do buyers understand by the word for whose use the parties are contending?"[17]

In some cases, a finding of genericness can be laid at the door of a company which introduces a new product with no other name for it but that term which the company considers to be its trademark.[18] The *Aspirin* case is the classic example. In other cases, the company uses the term in advertising in such a way as to encourage consumers to name and ask for the product by using the term the company thinks is its trademark. But the test is not so much what the seller does as what the public thinks. The real question is not so much what the seller's advertising input is but what is its impact on buyers. As Judge Augustus Hand remarked in the *Cellophane* case, "It therefore makes no difference what efforts or money the DuPont company expended in order to persuade the public that 'cellophane' means an article of DuPont manufacture. So far as it did not succeed in actually converting the world to its gospel it can have no relief."[19]

On May 31, 1978, the FTC exercised its power under section 14 of the Lanham Act and petitioned to cancel the registration of Formica on the ground it had become a generic name and was no longer entitled to registration as a trademark. The registration in issue was for Formica, described as "laminated sheets of wood, fabric or paper impregnated with synthetic resin and consolidated under heat and pressure, for use on table tops, furniture and wall panelling." This registration was originally issued in 1946 under the Trademark Act of 1905, alleging use since 1928. In 1947, four days after the Lanham Act became effective, regis-

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14. 15 U.S.C. § 1064(4).

15. *In re* G.D. Searle & Co., 360 F.2d 650, 149 U.S.P.Q. 619 (C.C.P.A. 1966); *see* Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 189 U.S.P.Q. 759 (2d Cir. 1976).

16. *See* 1 McCarthy, Trademarks & Unfair Competition § 12:1 (1973). The test of trademark or generic significance in a term turns on majority usage. *Id.* at § 12:2(c).

17. Bayer Co. v. United Drug Co., 272 F. 505 (D.N.Y. 1921).

18. *See, e.g.*, Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 39 U.S.P.Q. 296 (1938) ("Shredded Wheat"); Surgicenters of Am., Inc. v. Medical Dental Surgeries Co., 196 U.S.P.Q. 121 (D. Or. 1976) ("Surgicenter").

19. Du Pont Cellophane Co. v. Waxed Prods. Co., 85 F.2d 75, 30 U.S.P.Q. 296 (2d Cir. 1936); *see* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 579, 138 U.S.P.Q. 349, 351 (2d Cir. 1963).

trant Formica Corporation (a subsidiary of American Cyanamid Co.) filed a section 12(c) affidavit claiming the benefits of the Lanham Act. The registration was republished and in 1953 section 8 and 15 affidavits were filed to continue the registration and obtain incontestability. The registration was renewed in 1966.

The registrant moved to dismiss the FTC's petition, claiming that the FTC had the power to petition to cancel only registrations *originally* registered under the Lanham Act, not pre-Lanham Act registrations which were later republished under the Lanham Act. Essentially, registrant argued that a 1905 Act registration which has been republished under the Lanham Act is not a "mark registered on the principal register established by" the Lanham Act. Both the FTC and the Formica Corporation extensively briefed the issue, delving into the legislative history of the relevant sections of the Act.

On November 8, 1978, the Trademark Trial and Appeal Board denied the registrant's motion to dismiss and upheld the power of the FTC to petition to cancel a 1905 Act registration that has been republished under the Lanham Act.[20] One basis for the decision was that a mark republished under the Lanham Act enjoys all the benefits of the Act and therefore should be subject to all of the same detriments. The Board noted that there is only one Principal Register: there should not be subclasses of registration on the Principal Register according to when and how the mark came to be on the register. Thus, the Board held that "[a] mark which is republished is thenceforth as much on the Principal Register as though it had been originally registered thereon." Formica Corporation petitioned the Court of Customs and Patent Appeals for writs of mandamus and prohibition to reverse the Board's decision. Early in 1979 the CCPA denied the writs.[21]

Recently, articles have appeared in the press with titles such as "Trademarks Under Fire,"[22] in which trademark attorneys are quoted as including the *Formica* case as part of "an unprecedented attack on trademarks." An editorial in the Wall Street Journal lumped together both the *ReaLemon* and *Formica* cases as constituting parts of the FTC's "name-robbing campaign."[23] A similar theme was sounded by William Ball of

20. Federal Trade Comm'n v. Formica Corp., 200 U.S.P.Q. 182 (T.M.T.A.B. 1978).

21. Formica Corp. v. Lefkowitz, 590 F.2d 915, 200 U.S.P.Q. 641 (C.C.P.A. 1979); *see* P.T.C.J. (BNA) No. 414 (Feb. 1, 1979).

22. DUN'S REVIEW, Sept. 1978 at 104.

23. Wall St. J., March 13, 1979, at 22, col. 1.

New York in an article in the Trademark Reporter.[24] In my opinion, one should not talk about the *ReaLemon* and *Formica* cases in the same breath. I don't see how they have anything to do with one another, unless one subscribes to the "religious war" concept that nothing the FTC does can be proper. Even Mr. Ball in his article conceded that:

> It is highly unlikely that any support could be mustered among trademark owners or practitioners for the proposition that a mark which has truly become a generic term should nevertheless continue to be regarded as a valid trademark, with its owner entitled to maintain his rights to the exclusive use thereof.[25]

The only coherent criticism I have heard of the FTC's exercise of its power to petition to cancel is that a challenge based on genericness should be left to private litigation rather than government agency litigation. This is a legitimate point which requires analysis. First, I think the FTC properly carries out its consumer protection and procompetitive function by presenting for decision by the Trademark Board and the courts the question of genericness. Both business firms and attorneys and most courts regard a registration as important and valuable property.[26] A company which holds a trademark registration for "semiconductor," or "diesel" or "wallpaper" has a false and unfair advantage in the marketplace. The registration and assertion of a generic term as a trademark deprives consumers and competitors of the right to use the very name of the product, obviously distorting the informational value of advertising and consumer purchasing decisions. The FTC has a proper interest in removing such artificial roadblocks from the free marketplace of commercial speech. Potential competitors or firms already in the market are deprived of the right to tell customers the name of the product, to the obvious detriment of free and open competition.

Secondly, why should government action be necessary? Why not let private litigation weed out the generic names? Certainly the trademark bar has no moral compunctions about suing or defending a suit based on the claim of genericness. The reason why registrations of probably generic terms continue to grace the files of the Patent and Trademark Office is that no competitor or potential competitor wants to undertake the tremendous expense of litigation over genericness.[27] To have

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24. Ball, *Government Versus Trademarks: Today-Pharmaceuticals, ReaLemon and Formica-Tomorrow?*, 68 T.M. Rep. 471 (1978).

25. *Id.* at 491.

26. The CCPA noted the "respect in which businessmen hold certificates of Federal registration." De Walt, Inc. v. Magna Power Tool Corp., 289 F.2d 656, 129 U.S.P.Q. 275 (C.C.P.A. 1961).

27. In 1966 Formica Corp. opposed registration on NEW-MICA by

standing to raise the issue, a firm might have to first invest in advertising which used the term in a clear generic sense.[28] A healthy litigation fund had better be on hand for immediate use. And why should I be a martyr for the cause? My lawyer tells me it will take years and many thousands of dollars to litigate and maybe we will win and maybe we will lose. Why should I bear all the cost and grief while, if I win, my competitors and those waiting in the wings get a free ride without the expense? This is a variation of the economic theory of the "free ride." For example, no one fisherman will pay to build a lighthouse because once built, every competitor will get a "free ride" by using the lighthouse.[29] And in a society of humans, not angels, the fishermen won't all agree to chip in and pay "equally" for the lighthouse. So they turn to government to build the lighthouse and require everyone to pay for it in taxes. That's what government is for: to do the things that need to be done for everyone's benefit but for which no one person will pay the whole expense, because no one person can charge for it. There is no way for one fisherman to charge for the use of the lighthouse and no way for one competitor to charge others for the expense of successfully challenging the registration of a generic name. If one large fishery cooperative decides it will pay to build a lighthouse on its own, fine: there is no need for government action. If a company decides that it can justify to its stockholders the expense of raising genericness in litigation, fine: that's one less thing for the FTC to do. But to say that we obviously don't need any more lighthouses because the privately constructed ones are all we need and therefore government should stay away is not logical. It is not logical to state that because no competitor has successfully challenged the registration of an arguably generic term, therefore consumers do not use it as a generic term.

Our society has already made its policy choice because Con-

Newnan Corp. As a defensive gesture, Newnan counterclaimed to cancel a "formica" registration on the ground of genericness. Newnan did not conduct a customer survey and relied upon evidence of "formica" usage (in lower case letters) in advertisements by furniture retailers and fabricators and the like. The Board held that Newnan had not carried its burden of proof on the counterclaim. Formica Corp. v. Newnan Corp., 149 U.S.P.Q. 585 (T.M.T.A.B. 1966). While the Board held that NEW-MICA was not confusingly similar to "formica" the CCPA reversed on Formica Corporation's appeal and found likelihood of confusion. 396 F.2d 486, 158 U.S.P.Q. 104 (C.C.P.A. 1968).

28. A competitor probably has standing to petition to cancel on the ground of genericness without actual use of the term if it proves it is engaged in the sale of goods of which the registered mark is allegedly generic. *See* J. Kohnstam, Ltd. v. Louis Marx Co., 280 F.2d 437, 126 U.S.P.Q. 362 (C.C.P.A. 1960).

29. The "lighthouse" example is discussed in P. SAMUELSON, ECONOMICS 49 n.3, 160 (10th ed. 1976).

gress almost 35 years ago in the Lanham Act gave the FTC the statutory power to petition to cancel registrations on the ground of genericness. To argue that the FTC should not exercise this power is to argue that it should not use its statutory power, the very basis for the ABA criticism ten years ago. Few persons seriously argue that we should disband the Antitrust Division of the Department of Justice because private litigation should be the only source of antitrust enforcement. This kind of "let private litigation do it all" argument runs directly counter to what the vast majority of Americans have believed for 200 years is a proper function of government: to prosecute civil and criminal suits for the benefit of its citizens where one citizen cannot afford the costs of enforcing the law.

My comments as to the propriety of FTC generic cancellation actions are, and must be, qualified by the caveat that such FTC petitions must be carefully and selectively chosen and researched in advance. From my association as consultant to the generic name program of the FTC, I can assure the Trademark Bar that such is the case. A great deal of research, preparation and study goes into a decision whether to file such a petition. Many persons at all levels of the FTC must approve before such a case is even filed. I will do all I can do to make my voice heard to recommend a sensible, balanced and selective use by the FTC of section 14 of the Lanham Act. This program is merely a small part of the activities of the FTC and as Commissioner Paul Rand Dixon said, "I do not want to give you the impression . . . that we at the FTC are spending large quantities of time hunting for trademarks to attack."[30]

I serve as a consultant to the FTC in regard to its generic name cancellation program because I want to contribute what I can to an informed and balanced program of FTC use of its cancellation power. It does not serve the cause of trademarks and the competitive system to have generic terms masquerade as trademarks on the Principal Register. The FTC generic name program is not an attack on trademarks: if it is an attack on anything, it is a challenge to generic names which pass themselves off as trademarks. I urge the trademark bar to be selective in its criticism of the FTC. Give it kudos when it is right and brickbats when it is wrong.

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30. Dixon, *Trademarks, the F.T.C. and the Lanham Act*, 68 T.M. Rep. 463, 469 (1978).

Additional Reading:

W.J. LIEBELER, SHOULD THE FEDERAL TRADE COMMISSION'S ACTIVITIES BE STRENGTHENED AND ENLARGED? IN THE ATTACK ON CORPORATE AMERICA 289 (1978 McGraw-Hill).