Unfair Trade Practices -- Tying Contracts -- Magazine Distributors Forcing Publications on Distributors

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NOTES

Unfair Trade Practices

TYING CONTRACTS—MAGAZINE DISTRIBUTORS FORCING PUBLICATIONS ON RETAILERS

Introduction

In 1956, a Joint Legislative Committee of the New York State Legislature convened "to determine if the statutory law of New York was adequate to deal with the sale of magazines containing suggestive material which fall within the twilight zone between that which is pornographic and that which is not." The concern of the New York Legislature merely echoes the concern expressed by parents, educators, and law enforcement agencies as to what can be done to limit or extinguish the sale of obscene literature to the youth of the country; literature which is now blatantly displayed and disseminated through the public newsstands. One of the major problems to be considered by the committee was the use of "tying" contracts, or restrictions, by the magazine distributors. Under this type of contract, the retailer has no right to determine what magazines he will buy, and is pressured into accepting the pulp issues ("tied" product) in order to obtain the more desirable ("tying" product) publications.

The operation is successful because the distributor has a monopoly. Given a choice I believe most retailers would reject questionable publications, and this would substantially reduce the objectionable material now available. It was to this end that I suggested the contract between the distributor and the retailer should be examined in the light of our anti-trust statutes both Federal and State. The presence of just such a problem was the moving force behind the passage of a New Jersey law that subjects a magazine distributor to criminal prosecution if he utilizes tying contracts to force a retailer to accept obscene literature. Former Assemblywoman Emma Newton, who introduced the bill in the legislature, reported that a common defense offered by the retailers, accused of handling obscene literature, was that they had neither ordered nor desired such publications, but rather had been forced to accept and offer for resale various items of the distributor's choice in order to obtain for resale the desired items handled by the same distributor.

1 Letter from Henry P. DeVine, Assistant District Attorney, Nassau County, New York, to the Notre Dame Lawyer, Nov. 28, 1956, on file in Notre Dame Law Library.

2 These contracts are alternatively described as "tying" or "tie-in" contracts. Also, depending on the individual preference of the court and the particular factual situation, these contracts are additionally termed "restrictions", "sales", or "agreements."

3 See note 1 supra.


5 Letter from William M. Lanning, Senior Assistant to Counsel, Law Revision and Legislative Services, State of New Jersey, to the Notre Dame Lawyer, Feb. 20, 1958, on file in Notre Dame Law Library.
It should be noted that the spokesman for the New York Joint Committee\(^6\) talked of "twilight zone" pornography, apparently referring to those publications which, though suggestive, probably could not be confiscated nor the publisher or distributor prosecuted under the applicable federal or state obscenity statute.\(^7\) The skirmish line is drawn in the area of obscenity legislation and perhaps someday a statute will evolve whose standards will be so clear and easily ascertainable that all "obscene" literature will be treated as obscene.\(^8\) But until this situation truly exists, it is incumbent on the American people generally, and the legal profession particularly, to militate against this seemingly endless flow of smut into the channels of public consumption in any manner legally available. This Note will consider one of the possible means to such an end — the prohibition of tying restrictions between the magazine distributor and his retail outlet. It is true that if tying restrictions can be prohibited, such prohibition will be equally effective even when no pornographic literature is involved. But because these restrictions are utilized primarily, if not solely, to force a sale of pornographic literature, this Note will be particularly directed at the forced sale of such literature.

\[\text{The Nature and Scope of the Problem}\]

In an effort to determine the use that is made of tying contracts on a national level, questionnaires were sent to various state retail druggist associations throughout the country, to many of the druggist associations servicing the larger cities, and to some independent drugstore and newsstand operators. Most of the replies indicated that tying contracts were not used in the replyer's market area, and some made specific reference to conscientious cooperation extended by the distributors in helping to keep smutty literature off the newsstands. However, a sufficient number replied that tying contracts were used in their area, illustrating that this questionable selling method merits national concern.\(^9\) One reply stated that not only were tying contracts in general use in the large metropolitan area where he was located, but that it is common knowledge that they are used in all sections of the United States.\(^10\)

A formal contract need not be entered into by the distributor and retailer to fit within the definition of "tying" contract, it being sufficient if the distributor forces the retailer to purchase a second (or tied) article

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\(^6\) See note 1 supra.


\(^9\) The problem has become serious enough to cause specific prohibitive legislation in fifteen states. See note 74 infra.

\(^10\) Letter from Waller and Waller, attorneys for National Association of Retail Druggists, to the Notre Dame Lawyer, Dec. 12, 1957, on file in Notre Dame Law Library.
in order to obtain the dominant (tying) product. The various methods used by the distributor in forcing his full line on the retailer are strikingly illustrated by the letters, written by victims of these pressure tactics, which were sent to a House Committee that convened in 1952 to study the over-all problem of obscene literature.

Although there may be more than one distributor in any given market area, the publishers do not have their lines handled by competing distributors. Consequently, while there may be competition for the sale of magazines and pocketbooks generally, each distributor has a monopoly in the particular lines he handles. And, as is often the case, if one distributor handles all or many of the fast-selling weekly or monthly periodicals, he can use this monopoly to force the retailer to accept the pulp publications and hobby magazines which the retailer would otherwise purchase elsewhere or simply refuse to buy. Certainly if the "tied" books or magazines could be sold on the basis of their quality content, tying contracts would serve no purpose whatsoever.

**Tying Contracts Under Section 3 of the Clayton Act**

The legality of tying agreements has been the subject of adjudication ever since the passage of the Sherman Anti-Trust Act in 1890. The results of the early cases prosecuted under the Act emphatically show that the Supreme Court's primary concern was to protect the individual supplier's freedom to contract, and only manifestly coercive selling through the use of monopolistic power would be stopped. However, in 1914 Congress enacted the Clayton Act which, both by its express language and by judicial interpretation, broadened the area of tying restriction illegality.

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13 For a general description of how magazines are distributed on a national level, see the testimony of Samuel Black, Vice President, Atlantic Coast Independent Distributors Association, in Hearings, supra note 8, at 34-38.
14 Standard Oil Co. v. United States, 337 U.S. 293 (1949): "In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one." Id. at 306. See also, MILLER, UNFAIR CONTRACT, A STUDY IN CRITERIA FOR CONTROL OF TRADE PRACTICES 194 (1944).
19 Section 3 of the Clayton Act reads:

   It shall be unlawful for any person engaged in commerce, . . . to lease or make a sale or contract for sale of . . . commodities, whether patented or unpatented, . . . on the condition . . . that the lessee or purchaser thereof shall not deal in the . . . commodities of a competitor . . . where the effect of . . . such condition . . . may be to substantially lessen competition or tend to create a monopoly. . . . 38 STAT. 731 (1914), 15 U.S.C. § 14 (1952).
20 United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922), where the Court held certain tying restrictions violative of § 3 of the Clayton Act which just four years earlier had been declared not within the provisions of § 1 of the Sherman Act. See note 17 supra.
But notwithstanding the broad competitive limitations found in section 3 of the Clayton Act, there still remained the requirement of lessening or possible lessening of competition resulting from such tying restrictions before any action could be brought against the vendor. This is illustrated by a 1949 decision in which the Supreme Court issued sweeping dictum that "trying agreements serve hardly any purpose beyond the suppression of competition." This statement is dictum only because the issue before the Court was one of exclusive dealing arrangements, but the opinion gives clear recognition to the fact that section 3 restrictions apply both to tying clauses and exclusive dealing arrangements. The issue before the Court was stated to be:

... Whether the requirement of showing that the effect of the agreement "may be to substantially lessen competition" may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.

The same issue had been before the Court on several prior occasions and an apparent diversity arose as to the necessary lessening of competition standard to be applied in cases involving tying contracts and those deciding the validity of requirements contracts. In Standard Fashion Co. v. Magrane-Houston Co., the Court interpreted section 3 to mean that requirements contracts were not prohibited unless it could be shown that they would "probably" lessen competition; yet seven days later, in a case involving tying restrictions, the Court intimated that the mere presence of dominance in the market for the tying product was sufficient to find a lessening of competition as envisioned by section 3. The Court's recognition of this dual standard became manifest in the Standard Oil case:

Since these advantages of requirements contracts may often be sufficient to account for their use, the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses, especially where use of the latter is combined with market control of the tying device. (Emphasis added).

Perhaps the most important decision in the way of defining what will constitute a section 3 lessening of competition is International Salt Co. v. United States. The defendant leased his patented machines for the utilization of salt products on the condition that the lessee use in them

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22 Courts appear to use "exclusive dealing" and "requirements" contracts interchangeably.
24 337 U.S. at 299 (1949).
27 337 U.S. at 307 (1949).
salt supplied solely by the defendant. The Court, without determining the defendant's proportion of the business of supplying such machines, and deeming as irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition, held that as long as the volume of business in the tied product affected is not "insignificant or insubstantial"\(^{29}\) such restrictive leases are violative per se of section 3 of Clayton Act. When this decision is compared with the one rendered twenty-five years earlier in *United Shoe Machinery Co. v. United States*,\(^{30}\) where apparently the seller or lessor must have occupied a dominant position in the market for the tying device before tying restrictions would be held illegal, it is obvious that courts have greatly extended the area of illegality covered by section 3.

It has been suggested\(^{31}\) that the comparatively liberal standards for finding the requisite lessening of competition as postulated in the above two cases merged to form the nucleus of the standard described in *Times-Picayune Publishing Co. v. United States*.\(^{32}\) Though again the Court could speak of the Clayton Act's tying clause only through dictum,\(^{33}\) the language used leaves little doubt as to the conditions necessary before a section 3 violation will be found:

> From the "tying" cases a perceptible pattern of illegality emerges: when the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred. (Emphasis added).\(^{34}\)

In attempting to apply this "perceptible pattern of illegality" to the common factual circumstances surrounding the use of tying restrictions by magazine distributors, several possible objections must be overcome. First, the cases that most strongly state the Court's stand on "tying" restrictions are concerned with the tying of an unpatented article to a patented device.\(^{35}\) A mere reflection on the express language of section 3, "whether patented or unpatented," should provide a satisfactory answer to such an objection.\(^{36}\) Also, several federal courts of appeals have

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\(^{29}\) *Id.* at 396.

\(^{30}\) 258 U.S. 451 (1922).

\(^{31}\) See note 23 *supra* at 1175.

\(^{32}\) 345 U.S. 594 (1953).

\(^{33}\) Involved in this case was the legality of a publishing company's actions in allowing advertisers to purchase only combined insertions appearing in both its morning and evening papers, not in either separately. A substantial part of the opinion is dictum because for some unexplained reason the government sought to enjoin such actions under §§ 1-2 of the Sherman Act. The fact that the Court focused part of its opinion on defining and clarifying § 3 of the Clayton Act is a strong indication that it intended this dictum to be treated as authority for subsequent § 3 questions.

\(^{34}\) 345 U.S. at 608-09 (1953).


\(^{36}\) Patented articles apparently had to be expressly included in the wording of the Act because the decision in *Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912) upheld the validity of a contract which tied unpatented commodities to a patented device.
found illegality under section 3 even without a patented tying device.\textsuperscript{37}

The next question that might be raised is whether the tied product must be used in conjunction or together with the tying device before the agreement becomes illegal. Although the vast majority of the cases involving tying agreements which have been before the courts have been decided on this particular factual situation,\textsuperscript{38} this can easily be explained in that the lessor or seller of a highly desirable machine or other mechanical device, whether patented or not, has an ideal situation in which to force the purchase of the subsidiary product used in connection with the tying device. There is very little in the statutory language, in judicial decisions,\textsuperscript{39} or in logic to show that the framers of the Clayton Act intended to make such a spurious distinction. Certainly the Supreme Court in \textit{Times-Picayune} indicated that it would not interpret section 3 so narrowly, and in fact did recognize that the tying restriction utilized by the publisher\textsuperscript{40} was a type that could be enjoined through the provisions of section 3. Also, a committee appointed by the Attorney General to study the anti-trust laws described the type of arrangement between the magazine distributor and his retailer as "full-line forcing" and expressed the opinion that this business practice was embraced by the general text of section 3.\textsuperscript{41}

Finally, before any tying restriction can be held illegal there must exist the necessary present or potential lessening of competition or the possible creation of a monopoly.\textsuperscript{42} In areas where there are no competing distributors, this requisite would seem difficult to meet, for the effect on competition is not readily ascertainable, and the distributor already has a monopoly in both the tying and the tied products.\textsuperscript{43} But in areas where independent distributors, or perhaps small publishers, are attempting to sell their lines, any use of tying restrictions seems open to immediate attack on the basis of two Supreme Court decisions, even without a

\textsuperscript{37} Judson L. Thompson Mfg. Co. v. FTC, 150 F.2d 952 (1st Cir.), cert. denied, 326 U.S. 776 (1945); Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942). Although it appears as if the Supreme Court has never held a tying agreement violative of \textsection 3 of the Clayton Act without a patented product as the tying device, its opinion in Northern Pac. Ry v. United States, 356 U.S. 1 (1958), expressly rejected such a distinction when \textsection 1 of the Sherman Act was involved, and left no doubt that it would also reject this distinction when such an action is brought under \textsection 3. Cf. United States v. Griffith, 334 U.S. 100 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). See text at notes 19-20 \textit{supra}.

\textsuperscript{38} See cases cited in Standard Oil Co. v. United States, 337 U.S. at 300 (1949).

\textsuperscript{39} The definition of "tying contract" in Judson L. Thompson Mfg. Co. v. FTC, \textit{supra} note 37, appears to consider such a contract illegal only when the commodities are to be used together.

\textsuperscript{40} See note 33 \textit{supra}.

\textsuperscript{41} \textit{REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS} 138 (1955).

\textsuperscript{42} See note 19 \textit{supra}.

\textsuperscript{43} The fact that the distributor has a monopoly in the tied product makes this particular tying restriction rather unique. The requisite competition foreclosure can still occur because any other distributor, though not competing for the sale of a particular line of publications, nevertheless is fighting for a place on an already crowded newstand.
showing that these distributors were foreclosed from any substantial
market. The language of the Court in both Times-Picayune Publishing
Co. v. United States and Standard Oil Co. v. United States shows a
marked tendency to infer a lessening of competition anytime a complete
market control of the tying product is proved. In fact, Justice Frank-
furter's statement in the Standard Oil case that if illegality is to exist
under section 3 "some sort of showing as to the actual or probable
economic consequences of the agreements" must be made "in the
absence of a showing that the supplier dominated the market" lends
weight to the argument that in market areas where there is actual or
potential competition for publication sales, courts may consider such
an inference irrebuttable.

The Liquor Cases

This suggested position of the Supreme Court regarding tying agree-
ments receives added support from two cases decided under section 5
of the Federal Alcohol Administration Act. In Distilled Brands, Inc.
v. Dunigan, a liquor wholesaler who sold imported scotch, then in
great demand, to retailers only if they took proportionate amounts of
rum, was found guilty in the administrative hearing of violating the
"exclusive outlet" and "tied-house" provisions of the act. On appeal, the

44 337 U.S. at 302 (1949).
45 Id. at 304. Although the Court seemed to hold that the seller must both
dominate the market for the tying product and restrain a substantial volume of
commerce in the tied product before an action could be successfully brought under
§ 1 of the Sherman Act, its subsequent decision in Northern Pac. Ry. v. United
States, 356 U.S. 1 (1958), affirming 142 F. Supp. 679 (1956), indicates that
dominance of the tying market is no longer necessary for a finding of illegality
under § 1, and that primary attention should be focused on the amount of com-
petition restrained in the tied product.
46 This inference principle may exist only in the courts, and not in hearings
before the Federal Trade Commission. In Insto-Gas Corp., 3 CCH TRADE REG.
Rep. ¶ 25,188 (FTC 1954), the Commission, though recognizing the abstract
proposition that "tying agreements serve hardly any purpose beyond the suppression
of competition" nevertheless maintained that tying contracts, without more, are
not illegal per se. Though Insto-Gas did not have a monopoly in the tying product,
and thus is distinguishable from the problem under discussion, the Commission was
emphatic in its unwillingness to find guilt in any case without some evidence showing
actual or potential competitive injury. This unwillingness was re-emphasized in a
subsequent hearing involving Insto-Gas. The examiner, while recognizing that
there was necessarily some lessening of competition caused by Insto-Gas' restrictive
leases, nevertheless held that the record did not afford an adequate basis for an
informed determination as to whether such leases substantially lessened competition.
Insto-Gas Corp., 3 CCH TRADE REG. Rep. ¶ 26,610 (FTC 1957). Most likely this
divergence of treatment afforded tying restrictions results from a recognition by the
FTC that it is an expert body and has been given all the necessary means to make a
thorough investigation before deciding that a particular business method sub-
stantially lessens competition. This the courts cannot do, so they must rely on this
inference principle in most cases. For a discussion of the import of the Commission
decision when viewed with the Standard Oil case see Kintner, The Revitalized
(1955).
48 222 F.2d 867 (2d Cir. 1955).
Second Circuit affirmed the agency decision, and stated that this type of tying sale restrained commerce in a twofold way. The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market.  

The court further considered and rejected petitioner's argument that the statutory prohibition should apply only when such a tying sale prevented the retailers with whom it dealt from buying any whisky or rum from other wholesalers, and not when it only reduced their purchase of other rums. Thus the factual situation is strikingly similar to the one existing where there is more than one distributor of publications in any market area. Both distributors have monopolies in both the tying and the tied products. And although the quoted language might be stretched to include as illegal even those tying sales which were not shown to have foreclosed competition, but were merely coercive in nature, the decision at least stands for the proposition that partial foreclosure or interference in the sale of any similar product will be sufficient grounds for a finding of illegality.

Because this case was decided under the Federal Alcohol Administration Act it has, standing alone, no real significance for purposes of resolving the problem under discussion. But when read in conjunction with a subsequent opinion delivered by the Supreme Court in a similar case, the combined language becomes highly influential in affording reasonable grounds for conjecture as to future judicial treatment of tying agreements or restrictions. The Court, reversing the court below, held that here, as in the Distilled Brands case, the wholesaler violated the "exclusive outlet" and "tied-house" provisions of the Act. Mr. Justice Douglas, speaking for a unanimous Court, cited a House Report to show that Congress, by passing the Alcohol Act, intended to prohibit trade practices that were similar to those prohibited by the anti-trust laws. Continuing, the Court said that:

The tie-in sales involved here seem to us to run afoul of that policy, since the retailer is coerced into buying distilled spirits he would otherwise not

49 Id. at 869.
50 It is appropriate to note that the reason the distributor resorted to tying sales was because he could buy scotch from the importer only if he bought a proportionate amount of rum. This is one of the major reasons why publication distributors are forced to use tying contracts. Unwanted publications are forced onto them, and in order to keep their stock down, they force their unwanted publications onto the retailer. See testimony of Robert C. Woods, Hearings Before the Select Committee of the House on Current Pornographic Materials, 82d Cong., 2d Sess., 321-24 (1952).
51 The court uses two cases decided under § 3 of the Clayton Act as sole case support for its affirmance of illegality: Standard Oil Co. v. United States, 337 U.S. 293 (1949); International Salt Co. v. United States, 332 U.S. 392 (1947).
55 Here too the Standard Oil and International Salt cases, along with United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) and Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944), are used by the Court to illustrate the type of situation held to be illegal under the antitrust laws.
have purchased at that time, and other sellers of the products are to that extent excluded from the market that would exist when the demand arose.65

Thus, in unmistakeable language, the Supreme Court has laid down a new criterion for determination of illegality under section 3 of the Clayton Act. If this trade practice violates the business policies engendered by the Federal Alcohol Administration Act, then a similar practice by magazine distributors should be equally violative of the Clayton Act, for both laws prohibit the same trade practices in parallel areas of business activity. Not only do both Acts condemn such a tying sale when there is a present lessening of competition, but the statutory prohibition extends even to those instances where other sellers of similar, but not identical, products are at least partially excluded from a future market.

Tying Contracts Under Section 5 of the Federal Trade Commission Act

Congress, in 1914, passed the Federal Trade Commission Act66 as the first of its double-barrelled attack against unfair competition.67 Section 5 of the Act, as amended,68 reads in part: “Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.” By both Congressional intent and judicial approval the Federal Trade Commission was authorized to strike down trade practices not included in either the Sherman or Clayton Acts.69

With such apparent power vesting in the FTC, a Commission order requiring a party to cease and desist from utilizing tying restrictions would seem to have no difficulty receiving immediate approval of the reviewing court, especially since tying contracts were one of the specific practices intended to be prohibited by the act.70 But in 1920, the Supreme Court, in affirming an annulment of a Commission order, held that the refusal of dealers to sell cotton “ties” unless the prospective purchaser would also buy the “bagging” to be used with the ties was plainly insufficient to show an unfair method of competition within section 5 of the Act.71 Even when the Court was presented with practices considered contrary to public morals, it had to find the requisite injury to competition before affirming a Commission cease and desist order.72 Thus, without more, the early application of the FTCA offered no greater chance of effectively stopping tying restrictions than did the early application of section 3 of the Clayton Act.

56 355 U.S. at 26 (1957).
58 The Clayton Act was passed nineteen days after the Federal Trade Commission Act.
61 See 51 Cong. Rec. 14090, 14097-98 (1914).
63 FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934). The Court demanded this showing of competitive injury, despite its apparent awareness of the broad trade restrictions included within the provisions of the Act.
But something did occur, in the form of the 1938 Amendment to the FTCA, which has changed the entire complexion of judicial interpretation of section 5. To the original denouncement of "unfair methods of competition in commerce" was added "unfair or deceptive acts or practices in commerce." This was immediately interpreted to mean that the Federal Trade Commission now could have jurisdiction over trade practices which prior to the amendment could not conceivably be classified as unlawful. The Third Circuit, though reversing a Commission order, stated:

It was for the purpose of clothing the Commission with jurisdiction to act in respect of unfair acts or practices in commerce regardless of their effect upon competition that the Amendment of 1938 was offered and enacted.

The court recognized that this jurisdiction would lie only if the unfair practice affected the public interest, but emphasized that competition no longer need be affected before a Commission order would be affirmed. The committee report, cited by the court as authority, is highly significant in determining what void in the FTCA was intended to be filled by the amendment. Recognizing that courts had so construed the act as affording protection to competitors primarily and the consumer only incidentally upon proof of competitive injury, the Report reads:

By the proposed Amendment to § 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as to those which are unfair to competitors. In other words, this amendment makes the consumer who may be injured by an unfair trade practice of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

One important limitation is placed on the Commission's jurisdiction: before an act or practice in commerce can be restrained, it has to be such as is performed or perpetrated by one materially engaged in the trade affected by the offenses, whether or not there is competition.

When this new, judicially-approved standard of jurisdiction is applied to the present problem, the following seems apparent. Where tying restrictions are used in competitive market areas, section 5 is certain to be an effective weapon in halting the use of tying restrictions in the publications field, for even under section 3 of the Clayton Act these restrictions are highly susceptible to successful prosecution, and section 5 at least includes violations of the Clayton Act. Even in areas where the distributor's monopoly is complete, and presumably outside the scope

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65 Scientific Mfg. Co. v. FTC, 124 F.2d 640, 643 (3d Cir. 1941).
66 Accord, Wolf v. FTC, 135 F.2d 564 (7th Cir., 1943); Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941).
68 Id. at 3.
69 In Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941), the Commission's cease and desist order was overruled because petitioner, who published and distributed pamphlets alleging that aluminum used for cooking was dangerous, was not engaged or financially interested in the cooking utensil trade. Compare with Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941). See Globe Cardboard Novelty Co. v. FTC, 192 F.2d 444 (3d Cir. 1951).
of the Clayton Act, there is valid reason, because of the 1938 Amendment, to expect the FTC to issue cease and desist orders anytime tying restrictions are under Commission investigation. It is difficult to conceive that the Commission, once it undertook an investigation, would not determine that such trade practices were contrary to the public interest, for a twofold interest seems involved: If the retailer succumbs to the pressure tactics, a serious question of public morals arises; and if the retailer refuses the smut literature and consequently does not receive the popular magazines, the public is inconvenienced in purchasing such magazines, and in some instances deprived of the opportunity altogether. Also, the use of tying contracts in the magazine distribution trade necessarily fulfills the requisite of being "perpetrated in the trade affected" for the distributor has a vital financial interest in the trade.

Since the Federal Trade Commission has fertile grounds for a finding of illegality, the major obstacle to any effective use of the FTCA seems to be in interesting the Commission sufficiently for them to initiate action, for under the act they are the only ones that can do so. Once a finding of illegality is made, it is highly unlikely that a court will upset the finding on appeal.

**Direct Prohibition on the State Level**

Although the Federal Government has apparently deemed it unnecessary to prohibit specifically the use of tying devices in the magazine distribution business, research has disclosed fifteen states that have thought the problem serious enough to prohibit this type of tying restriction under penalty of criminal prosecution. These statutory prohibitions can be divided into six distinct categories. (1) Two states make it a criminal offense for a distributor to refuse to sell statutorily unobjectionable publications to a retailer unless such retailer also purchases publications which are prohibited from sale to minors under the same or another section of the statute. (2) Three states determine unlawfulness under the same test employed in the first category, excepting that the retailer need only reasonably believe that the publications are prohibited under the section dealing with the sale of obscene literature to minors. This type of statute would appear to be more readily acceptable to the courts, for it precludes the necessity of a judicial determination that certain literature was obscene within the meaning of the statute, 

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71 *Cf.* FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934), where it was decided that the sale of devices which encouraged gambling by children was contrary to public policy and morals.

72 Scientific Mfg. Co. v. FTC, 124 F.2d at 640 (3d Cir. 1941).


75 Md. ANN. CODE art. 27, § 422 (1957); Va. CODE ANN. § 18.113.1(b) (Supp. 1956). Idaho also has a similar statute, *Idaho CODE ANN.* § 18-1509 (Supp. 1957), but its significance is limited because of the broad language of the Idaho statute listed in note 81 infra.

76 *Fla. STAT. ANN.* § 847.01(6) (Supp. 1957); *Mont. REV. CODES ANN.* § 94.3601(3) (Supp. 1957); *Okla. STAT. ANN.* tit. 21, § 1038 (1958).
as long as they could find that the retailer was not acting unreasonably in believing that such literature was prohibited by statute. (3) Four states make it a misdemeanor for any person to require, as a condition to a sale of any publication, that the purchaser or consignee also purchase any other article, book, or publication which he reasonably believes to be obscene. The standard in these statutes allows a great deal of discretion on the part of both the retailer and the judiciary, for presumably obscenity statutes do not prohibit every publication that could reasonably be held to be obscene. (4) Two states make it a criminal offense if a magazine distributor refuses to sell to a retailer any publication unless the retailer accepts other publications which are obscene, lewd or lascivious. Although these statutes do not include a standard for determining what is obscene, the courts can, and undoubtedly will, rely on the state obscenity statute in reaching any decision. (5) One state makes a distributor criminally liable if he requires a retailer, as a condition to the purchase of periodicals, to accept material known by the distributor to be lewd, obscene or indecent. (6) Four states make it unlawful for any magazine distributor to require a retail dealer to purchase any particular publication in order to obtain from the distributor any other publication. It is highly significant that under this last grouping there is no necessity for the distributor, the retailer, or the court to apply any standard of obscenity before determining whether a particular tying restriction comes within the prohibitions of the applicable statute. There can be no defense that the tied publications were not obscene within the meaning of the statute, nor that the retailer was unreasonable in his determination that certain publications were obscene within the meaning of the statute or otherwise. Undoubtedly all of these

78 Ill. Ann. Stat. c. 38, § 472a (Smith-Hurd Supp. 1957); N.J. Stat. Ann. § 2A:115-3.1 (Supp. 1957). Under the Illinois law, the retailer must refuse to sell or attempt to sell the obscene literature before the distributor's subsequent refusal to sell other publications is unlawful, while the New Jersey statute holds that the mere refusal by the retailer to accept delivery of the obscene literature is sufficient to make the tying restriction unlawful. This distinction is important because the Illinois retailer, having been legally coerced into accepting this literature, may attempt to sell it in order to alleviate storage problems or to avoid the trouble of sending it back to the distributor for refund.
81 See cases cited in note supra for examples of magazines that were not considered statutorily "obscene."
laws have in some degree halted the sale of obscene literature. But to really eliminate the forced purchase of “twilight zone” trash the Idaho, New Jersey and Texas laws seem ideal, for there is in them, at least implicitly, a recognition that these tying restrictions can both restrain trade and corrupt morals.

**Conclusion**

The primary difficulty in approaching and analyzing the problem of tying restrictions in the magazine distribution business arises from the lack of adequate market data from which to make any conclusive determination concerning the scope of use of this practice. Although the dictum in *Times-Picayune Publishing Co. v. United States* and *Standard Oil Co. v. United States* indicates that the effect of tying restrictions on competition would have to be *de minimis* before avoiding the restrictions of section 3 of the Clayton Act, there exists a formidable obstacle to their suppression in that individual retail newsdealers are unlikely to incur the expense of litigation in instituting any civil action against the distributor. And, although both section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act afford the Federal Trade Commission sufficient basis for launching effective action against such tying practices, as yet no action in this area has been taken, and unless the problem becomes manifestly acute the Commission might well feel there are more important trade practices that deserve its attention.

Still, the very fact that at least fifteen states have passed laws directly limiting, and in some instances prohibiting, the use of tying restrictions in this particular business area lends considerable weight to the argument that this problem has become nationally significant. What apparently has been regarded as relatively unimportant by federal authorities has caused specific prohibitive legislation on the state level. If this use of tying restrictions has created a morals problem of sufficient gravity in at least fifteen states to require direct statutory prohibition, the assumption appears valid that the same problem exists presently, or will exist in the near future, in many of the remaining states. Consequently, state legislation, patterned after the Idaho and Texas statutes, appears to be the best available method of smothering in its incipiency any attempted use of tying restrictions in the publications trade.

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82 Illinois State Senator Arthur J. Bidwill, who co-sponsored ILL. ANN. STAT. c. 38 § 472a (Smith-Hurd Supp. 1957), stated that since the passage of the law there have been very few complaints about obscene literature from religious or parental sources. Letter to *Notre Dame Lawyer*, Mar. 3, 1958, on file in Notre Dame Law Library.

83 Idaho expressly recognizes this dual result in *Idaho Code Ann.* § 48-119 (Supp. 1957), which reads:

> It is the intent and purpose of the legislature in enacting the foregoing (§ 48-118) that there be no restraint of trade in the magazine business, and that the public and retail dealers handling magazines and periodicals be free from having to purchase, sell or read the type of magazine which tends to degrade, debase, or be immoral or suggestive by way of pictures, title, or words.”

84 345 U.S. 594 (1953); 337 U.S. 293 (1949).

85 See note 74 *supra*.

86 See note 81 *supra*. 
such a statute for support, local civic, educational and religious groups can vocally encourage prosecutive action against any violator. There is no reason for any state to wait until tying devices become a real menace before acting. Even those states which presently have some type of statutory prohibitions would do well to re-evaluate this legislation to determine whether it is effectively curbing the use of tying restrictions. Certainly there will always exist those degenerate dealers who eagerly peddle any type of obscene literature that is legally available. But some protection must be afforded both the public and those retailers who, by means of economic coercion, are forced to accept magazines unfit for public consumption. Since the federal agencies refuse to accept this custodial responsibility, the burden falls squarely on each state to enact direct prohibitive legislation, thereby making a major advance in the continuing battle against obscenity.

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