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ACTION Introduced by Mr. Maguire

MINIMIZING GOVERNMENT INTERFERENCE: A BILL TO AMEND THE LANHAM ACT OF 1946

(Mr. MAGUIRE asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. MAGUIRE. Mr. Speaker, today I am introducing legislation that will restrict the authority of the Federal Trade Commission to apply for the cancellation of registered trademarks under the Federal Trademark Cancellation Act of 1946, solely on the ground that the name of the product or substance is generic.

At present, the Lanham Act permits the Federal Trade Commission to engage in one of the most clear examples of regulatory overkill. The Federal Trade Commission is permitted to petition for the revocation of a firm's trademark merely because what was once a distinctive word has degenerated into common usage. In effect, the FTC can penalize the firm for the skill with which it has popularized its product's name. In an industry where there is no evidence of monopoly, in an industry where there is no evidence of restraint of trade, in an industry where there is no evidence of insufficient competition, the Federal Trade Commission can blithely move to revoke a firm's trademark merely because it is generic—without justification or showing of procompetitive purpose.

The legislation I am introducing today does not preclude the FTC from using genericness as an element of a broader action against a trademark. But it does establish a safeguard which prevents the FTC from using genericness itself as a reason to revoke a trademark.

The Federal Trade Commission's historic mandate is to root out abuses of market power and enhance the role of competition and the informed consumer as regulators of the marketplace. Where marketplace forces are deficient, they move to declare unfair methods of competition unlawful. Over the last year, the rate of inflation has increased by 9.9 percent. Since January, we have seen this figure increase sharply to 1.2 percent per month. With conservative estimates placing the cost of antitrust violations at $150 billion annually, vigorous and productive enforcement of the laws insuring the integrity of marketplace forces can be an effective Government tool for restraining the inflationary spiral.

The budget for the Federal Trade Commission is $64.9 million for 1979. This comparatively small sum is intended by Congress to be expended for the purpose of maintaining competition, protecting consumers by providing useful information to reduce consumers' difficulties in locating economical and reliable products, and for the analysis of economic data relevant to policymaking decisions for procompetitive purposes.

With respect to restraining those inherently uncontrollable inputs to inflation, the Federal Trade Commission's role in maintaining competition is most significant. And certainly, there are several recognizable industries which could benefit from increased competition. Interestingly, these industries are both major contributors to the inflationary spiral and central to the conduct of our commerce. The energy, automobile, steel, and rubber industries come to mind in this regard.

It would therefore maximize the effectiveness of the FTC to shape its decisionmaking policy to concentrate its energies on those sectors of the economy which stand to benefit from competition the most. It would stand to reason that the Federal Tradfe Commission should be promoting competition in those industries where pricing practices result in the greatest increases in the Consumer Price Index. When the Commission fails in these endeavors, Congress must act to examine the Commission's legislative mandate, to insure that the FTC is focusing directly on those anticompetitive forces which contribute to the rate of inflation we are experiencing and which can limit the impetus of our markets to respond fully to consumers' needs.

It is with these thoughts in mind that I am introducing legislation to amend the Lanham Act. Presently, the Federal Trade Commission is free to petition the Commissioner of Patents for cancellation of a trademark solely on the ground that it has become the "common descriptive name of an article or substance." (15 U.S.C. 1064) While cancellation of a trademark that has become a common descriptive name is far from a novel proposition, the Commission has not in the past sought cancellation solely on this ground. Consequently, until this past year, Congress has never been in a position to evaluate the utility, practicality or desirability of the Commission moving to deny trademark protection when the trademark has come to be understood by the public as a description of a type of product, rather than serving to identify and distinguish the product of one seller from similar goods sold by others: However, with an action filed by the Commission against the trademark held by Formica, Inc. for their decorative plastic, high-pressure laminate, there is ample, objective evidence to conclude that there is no pro-competitive purpose served by permitting the Commission to sue on the ground that the trademark has become generic. In fact, I have concluded that, absent of any other indices of anticompetitive behavior, practices or advantage, it is pernicious for the Commission to sue a corporation solely on this basis.

In the annual report of the Federal Trade Commission (1978), the FTC discusses its utilization of procompetitive remedies:

> C. Innovative remedies: An order to "cease and desist" may not always be the most effective way to ensure protection of the public interest. In 1978 the Commission applied several new and frequently innovative remedies:

On May 31, 1978, the Commission filed a petition with the United States Patent and Trademark Office seeking to cancel the Formica trademark, registration No. 421,496 on the ground that this mark has become a descriptive name or generic term with respect to decorative plastic laminates used on countertops, tabletops and the like.

The action taken by the FTC is the first experiment by the Generic Trademark Project run by the Denver Regional Office. They have established case selection criteria for determining which industries are susceptible for trademark revocation actions:

First. Industries where product standards are uniform;

Second. Existence of a price premium;

Third. The products cannot be tested by the consumer;

Fourth. Low brand name recognition of products other than the product in question; and

Fifth. Lack of a readily available, alternative generic name.

In the Formica case, it is clear that these criteria are not particularly helpful in determining whether Formica, Inc., has an anticompetitive edge through the popularity of its trademark, nor is it clear that these criteria are inclusive enough for making such a determination in other industries.

MARKET SHARE

Regardless of the commonality of the usage of the term "Formica," it would surely be a measure of anticompetitiveness if the Formica share of the high-pressure laminate market were unwieldy, or if Formica were overwhelmingly dominant in the field. Neither is the case. I have graphed below, information obtained from the largest firms in the field, from the office of marketing or sales. Running vertically is a list of the major firms in the decorative plastics industry. Running horizontally is a listing of what the captioned firms estimate the dominant manufacturers' share of the market is. You can see that there is very little variation among the estimates and unanimous consent that Formica has only a slight edge.

FIRMS IN THE DECORATIVE PLASTICS INDUSTRY ESTIMATE THEIR MARKET SHARES: 1978

[Estimates—In percent]

Firms	Formica	Nevamar	Wilsonart[1]	Laminart	Pionite
Formica: American Cyanamid	38.6	33	33	33	35
Pionite: Libbey-Owens-Ford	13.8	11-12	11	15	10
Micarta: Westinghouse	8.3	9	12	9	9
Nevamar: Chagrin Valley	12.6	12	12	12	10
Consowold: Consolidated Paper		9	7	7	7
Wilsonart: Dart Industries		24-25	25	21	26
Laminart: Eagle-Picher Industries			3	3	3

[1] More than 100 percent.

In addition, Formica has provided estimates of its share of the market over the last 9 years. These figures, again, indicate leadership, not monopoly:

Formica's estimate of its own market share

[In percent]

1970	33.4
1971	32.1
1972	34.7
1973	31.2
1974	34.8
1975	36.2
1976	35.6
1977	39.1
1978	38.6

But what is so ludicrous about this case is that the division of the market among the major producers is not a factor in the FTC's action. The Commission, in a letter to Senator WENDELL FORD by the regional director of the Denver office, asserted that they interpreted the Lanham Act to state that there was a "substantial public interest involved in avoiding the perpetuation of protected trademark status for generic words." So, regardless of the size of the firm and its share of the market, the Federal Trade Commission has opined that they must act to revoke the trademark.

CONSUMER PROTECTION

The product manufactured by Formica, Inc., Pionite, Micarta, Nevamar, Consoweld, Wilsonart and Laminart is sold almost exclusively to fabricators. It is sold on the retail market only a small percentage of the time. Martin Friedman, president of Formica, Inc., estimated in an article printed in the Bergen Record, Hackensack, N.J., "Only 5–7 percent of our sales are to consumers." Don Krog, vice president and general manager of Laminart and a past-chairman of the National Electrical Manufacturers Association, decorative plastics section, confirmed Mr. Friedman's assertion. Now managing a competitor of Formica, Mr. Krog agrees that very little business in the industry is devoted to retail, consumer sales.

They maintain that their products, as intermediate goods which are fabricated into finished products, are identified—by price, by color selection, by durability and by reputation—by knowledgeable wholesalers who can distinguish between the major producers' goods.

Thus, the argument that divestiture of Formica's trademark will benefit consumers is dubious at best. The vast majority of laminate is bought at the contractor level by purchasers motivated by more practical considerations than the simple allure of a trademark.

MARKET CHARACTERISTICS

The existence of a popular trademark in the laminate field is clearly not a barrier to entry. What makes the plastics field so difficult to enter is the capital-intensive character of this industry which is based on petrochemicals. The capital-intensive structure of the industry is confirmed when you look at the owners of the predominant firms: American Cyanamid, Libbey-Owens-Ford, Westinghouse, Consolidated Paper, and Dart Industries. Hence, the key to entry into the market is not the popularity of the trademark but the capital and the management capabilities of the firms doing the producing.

Another indication of an anticompetitive advantage is the existence of a price premium. The question here is whether, by virtue of their purported trademark advantage, Formica can not only seduce customers into buying their product, but can charge these unsuspecting customers a price premium as well. Few of Formica's competitors are underselling Formica's product. Fabricators, represented by the National Association of Plastics Fabricators, claim that Formica is competitively priced. Yet, the Federal Trade Commission has suggested that consumers will save $50 million as a result of Formica losing its trademark. This is difficult to believe.

Formica, Inc. has about a 35-percent share of the $400 million laminate market. Thus, the FTC is asserting that fully one-third of Formica's price is due to its competitive advantge granted by its trademark. With the product costing 35 cents per square foot, this argument strains credulity. Informal market figures indicate that 18 cents of this figure is directly attributable to materials. Thus, to obtain this one-third figure, the Federal Trade Commission must believe that overhead, labor, marketing, administration and profit comprise only 5 cents of the cost of decorative plastics. This is absurd.

I or my staff have spoken with high-level management personnel of the major producers in the decorative plastics industry. Not a single one of them wants Formica's trademark revoked. They have worked as hard as Formica, Inc., to make their products known to the fabricators who purchase them. It would not be competitively advantageous for them to adapt the Formica name for their products and they frankly support their competitor Formica as it resists the FTC in its pursuit of their mark.

Insofar as the Formica case is concerned, it is demonstrable that neither the public nor the industry is being served by the FTC's assault on Formica. This conclusion has led me to question whether, as a matter of policy and law, the Commission should have the authority to institute this type of action.

The ultimate question in this case is, do we want to prevent the FTC from ever moving to revoke a trademark solely on the ground that it has become generic? I think the answer is yes. Anyone familiar with American industry will agree that serious blockages to free market behavior occur in monopolistic or oligopolistic situations, where firms engage in predatory pricing practices, where there is collusion, where there is restraint of trade, and so forth. Serious inhibitions to commerce do not merely occur when a trademark becomes popular.

The legislation I am introducing today does not obviate the usage of evidence that the trademark has become generic by the Federal Trade Commission as an element of an accusation of anticompetitive advantage. It is merely an affirmation of what the Formica case has taught us; the genericness of a trademark is not, in itself, indicative of competitive advantage. It does not serve the public interest to invoke this section of the Lanham Act to promote competition when the Federal Trade Commission could and should be using more effective measures to promote competition.

I would therefore urge my colleagues, Mr. Speaker, to actively support this legislation, in hopes that its ultimate value will be in the redirection of the Federal Trade Commission's activities away from such gratuitous forays. There is much to be done to reduce inflation and promote competition. These are tasks that Congress created the Federal Trade Commission to pursue.