Agreements among Competitors: Incidental and Reasonable Restraints of Trade

G.E. Hale
AGREEMENTS AMONG COMPETITORS:
Incidental and Reasonable Restraints of Trade

By G. E. HALE*

By the terms of the Sherman Act1 every contract in restraint of trade is unlawful. But long ago the gloss softened the text and a vague "rule of reason" supplanted the strict letter of the statute.2 In some fields the contours of that rule have been staked with fair

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2. See Standard Oil Company v. United States, 221 U. S. 1, 66 (1911). In Chicago Board of Trade v. United States, 246 U. S. 231, 238 (1918) Mr. Justice Brandeis declared. " . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restraints competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objection-
As to most subjects, however, there are little more than rudimentary guideposts. This paper attempts to delineate a principal type of contract which may restrain trade: the agreement among competitors.

Certain types of competitors' agreements have been studied carefully by courts and observers. There has been much discussion, for instance, of the extent to which competitors may go in gathering and disseminating statistics of prices, production, inventories and the like. But many other arrangements among competing enterprisers have passed almost without critical notice. Perhaps lawyers have generally assumed that such activities were lawful. In any event, the overlooked topics have often been regarded as "reasonable" or "incidental" restraints of trade. While passing mention will be made of the chief types of contracts which have commanded extensive attention in the past, the focus of this paper is upon those forms of agreement which may qualify for the category of reasonable restraints. In so surveying the whole field of competitors' agreements no attempt can be made to discuss any one topic exhaustively. The aim is rather to find general considerations bearing upon the proper relationship of competing enterprises in a free economy.

**Forms of Agreement**

Trade association activities furnish the largest number of examples of agreements among competitors. Perhaps few association actions are governed by formal contracts among members. In anti-trust law, however, a mere course of conduct suffices to switch on the Sherman Act's searching light.

Surveys have shown trade associations to be engaged in a able regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

3. Although it is difficult or impossible to reconcile the decisions, critical comment upon the monopoly aspects of mergers and consolidations has been illuminating. Handler, A Study of the Construction and Enforcement of the Federal Antitrust Laws 46 ff. (TNEC Monograph 38, 1941).

4. See notes 53, 54 infra.


6. See note 141 infra.

7. See American Tobacco Company v. United States, 328 U. S. 781, 809 ff. (1946). In Department of Commerce, Trade Association Activities 48 (1927) it is said: "The very fact of the existence of a trade association indicates the existence of an agreement. . . ."

wide variety of activities. Possibly most persistent is convention holding, to "discuss problems before the industry." They also issue publications, establish business "standards," furnish statistical services, attempt to influence legislation, combat "unfair" competition, secure publicity for their industries, "educate" the public, keep an eye on labor relations, perform technical research, and do a number of other things presently to be set forth.

Loose associations of competitors are no novelty of this age but the modern trade group dates from Mr. Eddy's day. In 1912 he brought out his book, The New Competition, the thesis of which was that competition (regarded as the survival of the fittest) was no longer ethically acceptable and should be replaced by "cooperation." He urged the formation of industry-wide organizations to promote "fair" competition. About the same time "codes of ethics" became popular and many associations promulgated such documents. Both World War I and World War II stimulated trade association activity because the federal government was forced to rely upon industry groups for information and guidance in controlling the domestic economy. After the first war, too, there arose a movement for the elimination of "waste" in industry in which trade associations played an important role. Finally,

11. For a brief history of trade associations consult Judkins, supra note 8, at 2 ff.
13. Id. at 56. Mr. Eddy's program involved the enforcement of honest weights and measures, elevation of standards of sanitation, insistence upon a single price to all customers, frank statements concerning the condition of sales (full disclosure of quality of goods?), a prohibition upon sales below cost and insistence upon truth in advertising.
15. Foth, Trade Associations, Their Services to Industry 21 ff. (1930); Watson, Trade Association Participation in the War, 24 Proc. Am. Trade Ass'n Exs. 56, 58 (1943) (many trade association executives obtained official positions in government agencies); Coonley, Address, 23 Proc. Am. Trade Ass'n Exs. 2, 7 (1943). In Great Britain trade associations assumed, during the war, the function of allocating scarce materials. Mitchell, Organization of Industry: British and American Trade Groups Compared, Dun's Rev. 15, 16 (June 1946).
16. Secretary of Commerce Hoover was perhaps the leader of the "movement."
the N.R.A. experiment was a powerful factor in fostering cooperation among competitors. 17

Apart from organized exchanges, baseball is the industry which has carried agreements farthest. After the “Black Sox” scandal of 1919 the proprietors of professional baseball teams laced themselves into a tight net of restraint. A “commissioner” exercises almost dictatorial powers over the trade and many of the agreements among the proprietors go beyond anything formally attempted in other fields. 18 It should be observed, however, that the competition of baseball is not what it seems: from a commercial point of view, the teams do not compete to win games but are joint producers of an amusement spectacle.

A second and more formalized type of agreement among competitors is the Trade Practice Conference Rule. Often initiated by

17. Anderson, *What Does Industry Expect from Its Trade Organization*, 17 Proc. Am. Trade Ass’n Exs. 50, 51 (1936): “It was part of the theory of the N.R.A. that, so far as possible, the trade associations should set up and administer the machinery for regulating their industries within the requirements of the Act.” Indeed, section 3(a) of the National Industrial Recovery Act itself, 48 Stat. 198 (1933), 15 U. S. C. § 703 (1946) provided: “Upon the application . . . by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry. . . .” See Whitney, *Trade Associations and Industrial Control* 32 ff. (1934); Holbrook, *Price Reporting as a Trade Association Activity*, 35 Col. L. Rev. 1053, 1061 (1935) (N.R.A. used as cloak for establishment of price filing schemes, fixing future prices).

Even prior to the advent of the present Labor regime, trade associations in Britain had assumed a far more positive role than in the United States: “. . . only by concerted action of an industry as a whole has it seemed possible to remove the obstacles that have been thwarting permanent recovery. The mounting inferiority of British producers has forced them to present a united front against the pressure of foreign competition . . . there has emerged a profound modification in the traditional British system of free competition, a development in which the association has played a leading role . . . there are about 50 price-fixing associations in the iron and steel industry alone. Since 1931 the coal industry has been thoroughly regimented under regional boards, which rigidly control prices. In the specialized sections . . . have long been subject to the control of strong associations. . . .” Lucas, *Restrictive Activities of the British Trade Association*, 13 Harv. Bus. Rev. 453 ff. (1935).

18. Baseball’s basic codes are published annually in the *Blue Book* issued by the Heilbroner Baseball Bureau. They are Major League Agreement (National League of Professional Baseball Clubs and American League of Professional Baseball Clubs) Heilbroner 501 (1948); Major League Rules, id. at 507; Major-Minor League Agreement (two major leagues and National Association of Professional Baseball Players), id. at 601; Major-Minor League Rules, id. at 607. Without discussion of their antitrust aspects, the agreements vesting vast discretionary power in the commissioner were sustained in *Milwaukee Association v. Landis*, 49 F. 2d 298 (N.D. Ill. 1931). Additional authorities are cited at notes 59, 60, infra. For a description of a trade association enjoying statutory powers, consult Grant, *The National Association of Securities Dealers: Its Origin and Operation*, 1942 Wis. L. Rev. 597.
trade associations, the rules have long been sponsored by the Federal Trade Commission. In theory, at least, the conferences are attended only by representatives of a given industry, who formulate a code of fair competition for their trade. The Commission then publishes such rules as it approves. As published the rules fall under two headings, Group I and Group II, the difference between the two being that the Commission is not ready to declare a rule falling under the second category a statement of the law as it stands.

Since no provision was made therefor in the Federal Trade Commission Act, publication of the Rules has always constituted a "nonlegal, nonstatutory procedure." Thus the Rules are but "advisory interpretations" of action which the Commission may take under its express powers. And although the Commission itself is charged with the enforcement of a portion of the antitrust laws, its approval of the industry-made agreements affords no immunity from litigation.

22. Group 1 rules are "considered to be unfair methods of competition, unfair or deceptive acts... prohibited under laws administered by the... Commission... and appropriate proceedings will be taken by the Commission to prevent the use of such unlawful practices..." Compliance with Group 2 rules, however, is merely "... considered to be conducive to sound business methods and is to be encouraged and promoted individually or through voluntary cooperation exercised in accordance with existing law. Nonobservance of such rules does not, per se, constitute violation of law. Where, however, the practice of not complying with any such Group 2 rules is followed in such a manner as to result in unfair methods of competition contrary to law, corrective proceedings may be instituted by the Commission as in the case of Group 1 rules." Federal Trade Commission, op. cit. supra note 19, at 113. Query whether the foregoing statement is either correct in fact or sound in policy.
25. Mere approval of an agreement by an executive officer of the government does not, of course, furnish antitrust immunity. See United
Relations with Suppliers

Competitors frequently act in concert to affect their relations with common suppliers of raw materials or services. Many trade associations, for instance, provide their members with detailed data concerning railway tariffs, classifications, rules and embargoes. Such activities lead naturally to a consideration of the level of railway rates. Thus trade associations may bring pressure to bear in order to secure more favorable transportation conditions.

In similar fashion information about insurance is disseminated from trade association offices, perhaps coupled with an attempt to increase the insurance coverage of members of the industry. Again, such activities lead to pressure upon insurance prices and dissatisfied industries have even operated insurance companies of their own.

States v. Socony-Vacuum Oil Corp., 310 U. S. 150, 225 ff. (1940). In Paramount Corp. v. United States, 282 U. S. 30 (1930) one of the Rules was apparently held to constitute a violation of Section 1 of the Sherman Act (see summary of argument at 32); T. P. C. Motion-Picture Industry, rule 1, CCH Trade Reg. Serv. § 2541 (1928); Note, Does the Sherman Act Prohibit the Adoption of Standard Contracts and Arbitration Agreements by Trade Conferences?, 40 Yale L. J. 640, 642 (1931). But cf. Columbia Broadcasting System, Inc. v. United States, 316 U. S. 407 (1942) (statement of intention as to exercise of licensing power in future enjoinable).

Perhaps as a result of the Paramount case, supra, or in the belief that the then existing Trade Practice Conference Rules were sheltering price fixing schemes, the Commission revised all its published codes in 1930-31. See Burns, The Decline of Competition 70 (1936); Gaskill, op. cit. supra note 20, at 120 ff. It has been said that the conferences, "under the unremitting pressure of trade associations," developed into a "device for controlling prices through definitions of 'unfair' and 'discriminatory' price policies." Watkins, Trade Associations, 14 Encyc. Soc. Sci. 670, 675 (1934). See also Kittelle & Mostow, A Review of the Trade Practice Conferences of the Federal Trade Commission, 8 Geo. Wash. L. Rev. 427, 436 ff. (1940).

26. NICB, op. cit. supra note 14, at 259 ff. Nearly a third of the associations responding to a questionnaire were active in this field and some of them gave "service for loss and damage claims" or audited transportation bills. Gott, Association Activities 12 (1938); May, The Trade Association and Its Place in the Business Fabric, 2 Harv. Bus. Rev. 84, 90 (1923).

27. Jones, Trade Association Activities and the Law 169 ff. (1922); 1 N. A. M. A. Cooperator No. 1, 3 (1947). "The FEI has a Traffic Committee composed of representatives of various branches of the industry which meets monthly to consider transportation problems affecting the industry. The minimum weights, classification ratings, etc., applying to farm equipment didn't just happen. They were obtained and retained only by diligent effort of the Institute..." Farm Equipment Institute, A Good Investment—Membership in Your Trade Association 3 (1947).


30. NICB, op. cit. supra note 14, at 12, 249 ff.; Gott, op. cit. supra note 26, at 7 (one-tenth of associations investigated arranging for or supplying insurance protection to members); Kline, supra note 29, at 25 (group rates obtained by associations cut costs).
Perhaps raw materials generally less frequently command the attention of competitors as a group. But some trade associations gather information concerning the availability of supplies and others have gone so far as to set up central buying agencies. Pooled purchasing could, of course, amount to monopsony and it is well established that the anti-trust laws are applicable to buying as well as selling. There remains, however, the question of whether the combination is unreasonable.

It is interesting to note that combined activities of competitors in relation to their suppliers have focused upon railroad and insurance companies. Both railroading and insuring are fixed-price businesses. Rates are set either by agreement of the sellers or by public authority. There is, therefore, at least a degree of monopoly upon the selling side. Thus it is not surprising that no case has been found in which collective bargaining by the buyers has been condemned or challenged.

31. Naylor, op. cit. supra note 28, at 98. This author (at 114) urges the standardization of raw materials by trade associations because it enables members to compare prices in buying.

32. Id. at 169; Gott, op. cit. supra note 26, at 3. Cooperative shipping (pooled cars, etc.) is another activity. Id. at 8.


36. In United States v. National Peanut Cleaners' Association (E.D. Va. No. 109, 15 June 1925) section 4 (5) of the decree permitted the trade association to "handle the insurance of its members, including fire, industrial, indemnity or group insurance." See Jones, op. cit. supra note 27, at 329 (famous Hoover-Daugherty correspondence), NICB, op. cit. supra note 14, at 246. Urging all industry members to carry full insurance may raise the costs of marginal firms. Thus it may influence price competition. Query whether that influence is not salutary. And some activities have been directed at discrimination in rates against individual industry members. Id. at 257. It is also possible, of course, that certain groups of competitors have used their influence upon rate structures in an attempt to cripple marginal firms. Jones, supra note 27, at 178.
Relations with Employees

Labor problems are increasingly important in trade association work. Associations collect and disseminate data concerning hours, wages, working conditions, vacations, hiring and firing techniques, promotion policies and the like. Some associations prepare standard job descriptions and supply advice on negotiations with labor unions.

Slightly more positive is the role of the trade association in employee "welfare" activities. In the vagueness of that term are embraced such matters as collecting and disseminating information regarding health programs, group insurance, employees' thrift schemes and the like. Industry-wide safety campaigns have often been conducted in order to protect employees and reduce insurance rates. Training in safety leads to instruction in other subjects and there are numerous instances in which employers have combined to bring vocational education to their employees or apprentices.

40. Gott, op. cit. supra note 26, at 5. (About 10% of associations replying to query engaged in this field; same number "formulating and promoting industry policies" on this topic.) Section 1 of the rules of the International Association of Garment Workers provided that the employers should promote the welfare of their employees through group insurance, better machinery, promotion by merit, safety campaigns and the like. Lee, op. cit. supra note 14, at 289. Hoover's letter to Daugherty raised a question as to the propriety of such activities. Apparently the Attorney General had no objection thereto. Jones, supra note 27, at 330.
41. Department of Commerce, op. cit. supra note 7, at 123; NICB, op. cit. supra note 14, at 271 ff.; Jones, supra note 27, at 134; Rowden, Enlightened Self-Interest: A Study of Educational Programs of Trade Associations 36 (1937).
42. Kline, supra note 29, at 24.
43. Department of Commerce, op. cit. supra note 7, at 130 ff.; Naylor, op. cit. supra note 28, at 142 ff.; Gott, op. cit. supra note 26, at 4. Laundryowners' National Association conducts an extensive program, including training films to teach routemen how not to annoy housewives, how to sell more services, etc. Rowden, op. cit. supra note 41, at 12 ff. National Institute of Cleaning and Dyeing operates a vocational school, together with a research laboratory, at which students are taught the operation of a dry cleaning plant. Duncan, Trade Association Management 107 (1947). A school for apprentices is conducted by the New York Employing Printers' Association. Gutelius, Right-hand "Men" to Printers: The Industry's Trade Associations, 124 Am. Printer 37, 38 (1947). See also NICB, op. cit. supra
AGREEMENTS AMONG COMPETITORS

In the foregoing fields concerted action by employers seems to have raised little question of legality. But further steps are doubtful. A number of trade associations serve as employment agencies and offer placement services. No doubt such activities are useful to employer and employee alike. They do, however, offer opportunities to deny workers a choice of jobs and to blacklist “undesirable” personnel. Temptations to fix a uniform scale of wages must be difficult to resist. For such reasons the Supreme Court held the employer operated “hiring hall” practice within the prohibitions of the Sherman Act.

The real problem, of course, is industry-wide bargaining. Long ago groups of employers joined to bargain collectively with employees and the practice is now fairly common. No doubt industry-wide bargaining is fostered by the operation of an employment service and by trade associations which formulate and promote industry policies in regard to labor matters. Certainly the

note 14, at 270 ff. Mrs. Rowden, whose work is the only comprehensive and careful study of the subject found, asserted (at 62 ff.) that vocational programs sponsored by trade associations in the public schools were not achieving satisfactory results.

44. Naylor, op. cit. supra note 26, at 135 ff.; Gott, op. cit. supra note 26, at 5 (49 out of 330 associations so engaged). The Lake Carriers’ Association maintained hiring halls for seamen, Department of Commerce, op. cit. supra note 7, at 131.

45. Thus the New York Employing Printers’ Association engages in the placement of “carefully investigated workmen.” Gutelius, supra note 43, at 39. Blacklisting of drunkards, professional malcontents, etc., might be justified but who is to decide that a man falls into such a category?


47. NICB, op. cit. supra note 14, at 265 ff.

48. Id. at 266 ff.; TNEC, op. cit. supra note 26, at 326, 330 ff.; Gott, op. cit. supra note 26, at 5 (38 out of 330 responding associations engaged in collective bargaining); Duncan, op. cit. supra note 43, at 90 (1947 survey showed 53.7% of associations engaged in labor activities generally but only 8% of that 53.7% actually bargaining for members). In addition to the well known cases of coal and railroading, the following examples of industry-wide bargaining have come to light incidentally in this study: printing, fish-packing, building management, stevedoring, lumbering, fur cutting and contracting. Gutelius, supra note 43, at 38; Gottesman, Restraint of Trade—Employees or Enterprisers?, 15 U. of Chi. L. Rev. 638, 656 (1948); Chicago Real Estate Board, Agreement with Chicago Flat Janitors’ Union, section 10, Chicago Real Estate Board Yearbook 366 ff. (1948); San Francisco Stevedoring Company, 8 T. C. 222, 223 (1947); U. S. Tariff Commission, op. cit. supra note 38, at 18; N. Y. Times, July 18, 1948, p. 44, col. 4; Smith, supra note 39, at 57 (joint board to settle jurisdictional disputes).

49. Gott found 67 out of 330 responding associations to be engaged in formulating labor policies, op. cit. supra note 26, at 4.
Fair Labor Standards Act has encouraged the practice. But the real force behind industry-wide bargaining has been labor itself. Unions, permitted—and perhaps encouraged—to do things forbidden others by the anti-trust laws, have often achieved industry-wide status. When a union controls all the workers in an industry, employers are strongly tempted to bargain with it as a group. Whether industry-wide bargaining is lawful has not yet been finally determined. Frequently the National Labor Relations Board treats a group of employers as an appropriate bargaining unit. And the Supreme Court has suggested its approval. Doubts nevertheless remain.


52. “Only an association can deal with the many and complex questions that arise regarding labor. It goes without saying that if employees are organized employers must be . . .” Eddy, op. cit. supra note 12, at 151. See Straus, supra note 39, at 3346, 3363. The dilemma created by labor’s exemption from the antitrust laws is outlined in Gregory, Labor and the Law 242 (1946).

53. E.g., Alston Coal Co., 13 N. L. R. B. 683 (1939); Richard Young Co., 64 N. L. R. B. 733 (1945); Waterfront Association, 71 N. L. R. B. 80 (1946) (see discussion at 109 ff.). See Gregory, op. cit. supra note 52, at 245.

54. National Association of Window Manufacturers v. United States, 263 U. S. 403 (1923). In Apex Hosiery Co. v. Leader, 310 U. S. 469, 503 ff. (1940) the court declared that successful union activity may influence price competition, that to render a labor combination effective it must eliminate competition from non-union made goods and that an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But such an effect upon competition has not been deemed the kind of curtailment of competition prohibited by the Sherman Act. Thereupon, citing the Fair Labor Standards Act, etc., the court continued (at 504, n. 24) : “Federal legislation aimed at protecting and favoring labor organizations and eliminating the competition of employers and employees based on labor conditions regarded as substandard, through the establishment of industry-wide standards, both by collective bargaining and by legislation setting up minimum wage and hour standards, supports the conclusion that Congress does not regard the effects upon competition from such combinations and standards as against public policy or condemned by the Sherman Act.” (Statement not necessary to decision.) Accord, Androff v. Building Trades Employers’ Union, 83 Ind. App. 294, 148 N. E. 205 (1925) (no statute cited); see Hunt v. Riverside Club, 140 Mich. 538, 547, 104 N. W. 40, 44 (1905); Cooke, Combinations, Monopolies & Labor Unions § 126 (2d ed. 1909).

Adverse criticism of organized baseball has focused upon employee relations. Limitations upon the number of players, upon their activities and provisions placing them in a rigid status have been attacked. Standardized contracts with perpetual renewal options upon the part of the employers are also sometimes found objectionable. One court declared that the agreements made the player a chattel, that they established a system of quasi-peonage and that organized baseball constituted as complete a monopoly as could be devised. Other judges, including one sitting in the same court, have taken a more favorable view.

Perhaps the chief argument in favor of collective bargaining upon the part of groups of employers is that it is necessary to meet labor upon an equal footing. Herbert Hoover, as leader of the movement for industrial cooperation, took that position.

That this case prohibited joint bargaining by employers is shown by the fact that the lower court, on remand, found no evidence to support the allegation thereof. Andersen v. Shipowners' Association, 31 F. 2d 539, 542 (9th Cir. 1929). Cf. Industrial Association v. United States, 268 U. S. 64 (1925) (employers attempted to enforce open shop by common agreement; held, not within Sherman Act because activity purely local).

56. Major League rule 4 (a): each team to consist of "not exceeding forty (40) active and eligible players..."

57. Id., rule 18 (b) (participating in exhibition games); rule 20 (e) (players not to own financial interest in any team); rule 2 (f) (players may not count as coaches and vice versa); rule 3 (f) ("bonus" player, whose salary over $6,000 per year subject to special rules of transfer, etc.).

58. Major League rule 3 (a). Restrictive as they may seem, there is, no doubt, much to be said in favor of the rules.

59. American League Club v. Chase, 86 Misc. 441, 149 N. Y. Supp. 6, 12, 17, 19 (1914): bill to enjoin baseball player from working for another in violation of his contract with plaintiff. Held, relief denied because plaintiff party to unlawful combination (agreement with other baseball teams). It is interesting to note that the standardized contract appeared to be the focal point of the court's attack.


be admitted, however, that the practice holds dangerous implications. It may lead to the listing of "legitimate" employers and the boycotting (by labor) of those who cannot be "brought into line" on matters of prices. It may eliminate natural advantages of location enjoyed by some employers. And when labor costs are important in an industry, the temptation to fix prices along with wages must be difficult to resist. Amid such hazards it is not

62. Straus, supra note 39, at 3363 (recalcitrant employers pushed into line; to keep up prices?).

63. Cf. the arguments re the basing point practice. See note 94 infra.

64. Although it may be true that all costs are essentially labor costs, the proportion of gross receipts paid directly to employees varies markedly from industry to industry. A recent compilation (1941-45) shows the following figures for labor cost as a percentage of net sales:

<table>
<thead>
<tr>
<th>Industry</th>
<th>Labor Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>tobacco</td>
<td>5.5%</td>
</tr>
<tr>
<td>petroleum and coal products</td>
<td>5.9%</td>
</tr>
<tr>
<td>food products</td>
<td>7.4%</td>
</tr>
<tr>
<td>beverages</td>
<td>7.5%</td>
</tr>
<tr>
<td>chemicals</td>
<td>10.6%</td>
</tr>
<tr>
<td>nonferrous metals</td>
<td>18.6%</td>
</tr>
<tr>
<td>paper and products thereof</td>
<td>19.1%</td>
</tr>
<tr>
<td>rubber products</td>
<td>22.1%</td>
</tr>
<tr>
<td>leather and products</td>
<td>22.2%</td>
</tr>
<tr>
<td>furniture and finished lumber</td>
<td>22.2%</td>
</tr>
<tr>
<td>cotton textiles</td>
<td>22.2%</td>
</tr>
<tr>
<td>other textile products</td>
<td>22.5%</td>
</tr>
<tr>
<td>apparel and other finished products</td>
<td>22.5%</td>
</tr>
<tr>
<td>autos and equipment</td>
<td>22.9%</td>
</tr>
<tr>
<td>machinery, except electrical</td>
<td>23.1%</td>
</tr>
<tr>
<td>printing and publishing</td>
<td>23.8%</td>
</tr>
<tr>
<td>stone, clay and glass products</td>
<td>24.2%</td>
</tr>
<tr>
<td>iron and steel products</td>
<td>24.3%</td>
</tr>
<tr>
<td>lumber and timber</td>
<td>25.9%</td>
</tr>
<tr>
<td>transportation equipment</td>
<td>26.0%</td>
</tr>
<tr>
<td>electrical machinery</td>
<td>28.4%</td>
</tr>
</tbody>
</table>

Source: 28 Barron's No. 16, 3 (1948). It will be noted that the highest figure shown on the above table is 480% of the lowest.

To check the foregoing tabulation comparable figures (payments to employees as a percentage of gross receipts) were obtained for several representative individual firms as follows:

<table>
<thead>
<tr>
<th>Corporation</th>
<th>Period</th>
<th>Labor Cost</th>
<th>Annual Report Dated</th>
<th>At Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Mills</td>
<td>1947-8</td>
<td>9.2%</td>
<td>30 July '48</td>
<td>2</td>
</tr>
<tr>
<td>National Dairy Prod.</td>
<td>1947</td>
<td>15.8%</td>
<td>4 Mar. '48</td>
<td>8</td>
</tr>
<tr>
<td>Gulf Oil</td>
<td>1947</td>
<td>17.2%</td>
<td>21 Apr. '48</td>
<td>9</td>
</tr>
<tr>
<td>Socony-Vacuum Oil</td>
<td>1947</td>
<td>18.15%</td>
<td>8 Mar. '48</td>
<td>5</td>
</tr>
<tr>
<td>Central &amp; South West</td>
<td>1947</td>
<td>21.6%</td>
<td>7 Apr. '48</td>
<td>5</td>
</tr>
<tr>
<td>Jersey Central Pwr. &amp; Light</td>
<td>1947</td>
<td>23.0%</td>
<td>15 Mar. '48</td>
<td>11</td>
</tr>
<tr>
<td>Am. Home Products</td>
<td>1947</td>
<td>23.3%</td>
<td>5 Mar. '48</td>
<td>11</td>
</tr>
<tr>
<td>Std. Oil Co. (N.J.)</td>
<td>1946</td>
<td>23.4%</td>
<td>21 Apr. '47</td>
<td>8</td>
</tr>
<tr>
<td>Consolidated Ed. of N. Y.</td>
<td>1947</td>
<td>26.2%</td>
<td>24 Feb. '48</td>
<td>5</td>
</tr>
<tr>
<td>Crane Co.</td>
<td>1947</td>
<td>27.5%</td>
<td>25 Mar. '48</td>
<td>7</td>
</tr>
</tbody>
</table>

(Continued on next page)
strange that even friends of trade associations are hesitant to endorse collective bargaining.65

**Relations with Customers**

"Field service"66 among customers of an industry, teaching them to use the products thereof, perhaps with special emphasis upon safety,67 is an activity of trade associations. More restrictive are agreements among merchants limiting the hours during which sales can be made. Such arrangements have usually been held lawful, both here68 and abroad.69 In the well known _Board of Trade_

<table>
<thead>
<tr>
<th>Corporation</th>
<th>Period</th>
<th>Labor Cost</th>
<th>Annual Report Dated</th>
<th>At Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pullman, Inc.</td>
<td>1947</td>
<td>28.2</td>
<td>9 Apr. '48</td>
<td>4</td>
</tr>
<tr>
<td>Am. Viscose</td>
<td>1947</td>
<td>32.4</td>
<td>10 Mar. '48</td>
<td>5</td>
</tr>
<tr>
<td>Allied Laboratories</td>
<td>1947</td>
<td>32.5</td>
<td>19 Feb. '48</td>
<td>8</td>
</tr>
<tr>
<td>Instrnl. Harvester</td>
<td>1946-7</td>
<td>36.0</td>
<td>31 Oct. '47</td>
<td>7</td>
</tr>
<tr>
<td>Barkekers' Trust Co.</td>
<td>1947</td>
<td>39.5</td>
<td>20 Jan. '48</td>
<td>7, 10</td>
</tr>
<tr>
<td>General Electric Co.</td>
<td>1947</td>
<td>39.8</td>
<td>12 Mar. '48</td>
<td>2</td>
</tr>
<tr>
<td>Ches. &amp; Ohio Ry.</td>
<td>1947</td>
<td>42.7</td>
<td>8 Mar. '48</td>
<td>10</td>
</tr>
<tr>
<td>Moore Corp.</td>
<td>1947</td>
<td>48.2</td>
<td>'48</td>
<td>3</td>
</tr>
<tr>
<td>Elgin Natl. Watch</td>
<td>1947</td>
<td>55.0</td>
<td>21 Feb. '48</td>
<td>9</td>
</tr>
</tbody>
</table>

It will be noted that in the foregoing tabulation the highest figure is 600% of the lower. Such comparisons suggest the possibility that industry-wide bargaining might tend more toward price-fixing in some industries than in others, _Compare_ Oliphant's Studies in Securities [sic, number] 220 (1948).


67. Farm Equipment Institute carries on a program to promote safety among farmer customers of the industry. Experience showed that one of the greatest hazards on the farm was the power shaft driving an implement from the "power take-off" of the tractor. So that a brand A implement could be used with a brand B tractor, it was first necessary to standardize the location of the "take-off" on tractors. Then engineers designed a standard cover for the power line to protect farmers from harm. Finally, the Institute promoted the manufacture and distribution of the cover by all manufacturers. Of course "safety" may be used as a cloak: Chicago Automobile Trade Association ran a series of advertisements urging the public not to buy used cars from dealers other than members on the grounds that the "jalopies" sold by unscrupulous (non-member) dealers were a hazard on the highways. Members' cars were described as having passed safety tests. "This campaign is sponsored as a public service. . . ." Chicago Daily News, July 30, 1948, p. 12, col. 1-4.


69. _Deal, Contracts in Restraint of Trade in French Law_, 21 Iowa L. Rev. 397, 428 n. 69 (1936).
case\textsuperscript{70} a limitation upon hours of trading at an organized exchange was sustained. Despite the inconvenience caused a minority\textsuperscript{71} of customers it would seem that the restraints were unobjectionable. They could, of course, be carried to the point of restricting production,\textsuperscript{72} which would surely infringe the statute.\textsuperscript{78}

Credit is a sensitive subject about which there has been considerable litigation. Collection of "ledger sheet information" by a group of sellers who merely release data in response to specific requests is the simplest form of activity. A second step involves periodic circulation of such figures in tabulated form. The third stage involves some element or suggestion of coercion. Either all sellers agree not to extend further credit to the delinquent, or a trade association takes on the activities of a collection service;\textsuperscript{74} or the sellers may even agree not to deal with the debtor at all.

Mere collection of credit data and answering of specific requests appears to be both lawful\textsuperscript{75} and desirable.\textsuperscript{76} Regular publication of credit information does not seem to have been the subject of litigation. It must, however, suggest "discretion" in lending to persons whose credit rating is poor and could be used to

\textsuperscript{70} Board of Trade v. United States, 246 U. S. 231 (1918); Dunkel Oil Corp. v. Anich, (E.D. Ill. No. 905, 10 Nov. 1944) CCH Trade Reg. Serv. ¶ 57, 306 (1944) applied the same rule to filling stations; \textit{cf.} New York Stock Exchg. Rules, c. I, § 2: "Deals upon the Exchange shall be limited to the hours during which the Exchange is open for the transaction of business . . . a fine . . . may be imposed . . . upon any member who shall make any . . . transaction before or after those hours. . . ."

\textsuperscript{71} Presumably self-interest would prevent the practice affecting a large proportion of customers.

\textsuperscript{74} \textit{Cf.} National Window Glass Ass'n v. United States, 263 U. S. 403 (1923).

\textsuperscript{75} See note 121 \textit{infra}.

\textsuperscript{74} Gott, \textit{op. cit. supra} note 26, at 6 (out of 330 trade associations, 28 operated collection services, 53 systematically reported and exchanged credit information and 27 published a credit list or directory); Gutelius, \textit{supra} note 43, at 1. Many associations advocate uniform credit practices. Department of Commerce, \textit{op. cit. supra} note 7, at 110. It is interesting to note that several prepare financial reports concerning their own members, striking comparative statements, balance sheet ratios, etc. Gott, \textit{supra} at 3.

\textsuperscript{75} Cement Manufacturers' Ass'n v. United States, 268 U. S. 588, 599 (1925). In United States v. National Peanut Cleaners' Ass'n, (E.D. Va. No. 109, 15 June 1925) \S 4 (G) of the decree permitted the association to "maintain a credit bureau for the sole purpose of furnishing upon specific request information as to the financial standing of persons and corporations purchasing or attempting to purchase peanuts, but not to create directly or by inference a list or class of so-called legitimate . . . dealers. . . ." Apparently Attorney General Daugherty did not object to this function of trade associations. Jones, \textit{supra} note 27, at 329.

\textsuperscript{76} Podell & Kirsch, \textit{Credit Bureau Functions of Trade Associations}, 1 St. John's L. Rev. 101, 105 ff. (1927); NICB. \textit{op. cit. supra} note 14, at 152 ff. But see Burns, \textit{op. cit. supra} note 25, at 47: "The provision of credit information . . . has developed into efforts to eliminate competition in terms of credit. . . ."
control channels of distribution. When coercion of some sort is involved the authorities are divided. Many judges have approved agreements not to extend credit to a delinquent customer but the Supreme Court of the United States appears to have frowned.

A concerted refusal to extend credit to one already heavily in debt may be efficient: the curb may prevent waste of additional resources in a poorly managed firm. On the other hand, new enterprise frequently needs liberal credit and shutting off the flow of that commodity may impose the death sentence upon a concern. It seems impossible to draw distinctions: an agreement not to extend credit to a dishonest debtor is just as objectionable as any other. For the whole question is whether the debtor is dishonest, or the debt really exists. Honest disputes are common to the course of trade and concerted action by sellers may effectively deprive a customer of his day in court. For such reasons it would seem preferable to entrust most credit activities to commercial

77. "So-called credit bureaus of associations . . . have repeatedly been used as indirect black lists or white lists to control the channels of distribution and prevent direct sales to consumers or others." Jones, supra note 27, at 185. Cf. Department of Commerce, op. cit. supra note 7, at 117 ff.


79. United States v. First National Pictures, 282 U. S. 44 (1930). Accord, Harnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002 (1897); Ferd. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691 (1903); United States v. Alexander & Reid Co., 290 Fed. 924 (S.D.N.Y. 1922). The First National Picture case involved an agreement not to deal with new owners of theatres (without a cash deposit) who refused to become liable for the debts of the vendors. In the lower court the arrangement was found not unreasonable, the court declaring that serious trade abuses had thus been eliminated without any attempt to monopolize. 34 F. 2d 815, 818 ff. (S.D. N.Y. 1929). As pointed out in the brief for the United States in the Supreme Court the effect of the credit agreement was to compel one man to pay the debts of another. See pp. 13, 20. On that basis can one distinguish such cases as United States v. Fur Dressers' Ass'n; see, Kirsh & Shapiro, Trade Associations in Law and Business 178 (1938). See generally Podell & Kirsh, supra note 76, at 106 ff. A concerted refusal to deal with a debtor may have other consequences. McIntyre v. Weinert, 195 Pa. 52, 45 Atl. 666 (1900) (libel); Kirsh & Shapiro, supra at 171 (actionable conspiracy).

80. "A combination fraught with such consequences . . . is necessarily vexatious, harmful and bad on grounds of public policy." Bracken, Trade Organization for the Collection of Debts Due Members by Means of Boycott, 39 Am. L. Reg. (N.S.) 691, 713 (1900). This is the point so badly overlooked in Schulten v. Bavarian Brewing Co., 96 Ky. 224, 28 S. W. 504.
agencies not directly representative of particular groups of sellers.\textsuperscript{81} Competitors may jointly prepare standard forms of contract.\textsuperscript{82} Inevitably such standardization involves a measure of uniformity in terms of sale. Questions of terminology must be agreed upon and standardized contracts may thus freeze definitions.\textsuperscript{83} Many other matters, such as returns of merchandise,\textsuperscript{84} service facilities\textsuperscript{85} and guarantees\textsuperscript{86} are often included. Theoretically a standard contract could be drawn with many blanks to fill in. Rates of discount and the like could thus be inserted by parties to specific transactions. Indeed, several optional clauses could be provided for each part of the agreement, the users to strike out those superfluous to

\textsuperscript{(1894). Cf. Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) (hearing may not be denied because citizen believed not to have a case).}

\textsuperscript{81} Four textile and one automobile trade associations placed credit problems in the hands of a commercial agency. Department of Commerce, \textit{op. cit. supra} note 7, at 120. It is said that the associations are better equipped to deal with credit problems. Podell & Kirsh, \textit{supra} note 76, at 127. But credit activities have sometimes been urged as a means of restricting production. Biddle, \textit{Trade Associations' Part in Bettering Credit}, 11 Proc. Am. Trade Ass'n Exs. 183 (1930).


\textsuperscript{83} Department of Commerce, \textit{op. cit. supra} note 7, at 110. National Hardwood Lumber Association published a "code" which \textit{inter alia}, defined terms, prescribed methods of shipment, means of cancelling orders, etc. Associated Wooden Ware Manufacturers adopted a code of ethics setting forth uniform terms and conditions of sale. Lee, \textit{op. cit. supra} note 14, at 192 ff.


\textsuperscript{85} T. P. C. Hearing Aid Industry, 16 C. F. R. \textsection 159, rule C (group 2), CCH Trade Reg. Serv. \textsection 20,242 (1944).

\textsuperscript{86} T. P. C. Artificial Limb Industry, 11 F. R. 4144, 16 C. F. R. \textsection 165.8, CCH Trade Reg. Serv. \textsection 20,248 (1946).

Rules of the Binders' Board Manufacturers Association set forth the permissible amount of discount (2\%) for payment within 15 days of shipment. Automotive Equipment Association rules specified that interest of not less than 7\% should be charged on overdue amounts. Rules of the Association of Ice Cream Supply Men prohibited "commercial bribery of customers by money, long term credits not in keeping with trade custom, excessive entertaining or any other means." Lee, \textit{op. cit. supra} note 14, at 205, 234, 238 ff.
their needs. As a practical matter, however, such devices do not appear often to be utilized.

In the well known case of Paramount Famous Lasky Corp. v. United States, it appeared that the producers of some sixty per cent of the motion pictures made in the United States agreed upon a standard form of contract to offer to exhibitors. Perhaps the most important feature of the contract required the parties to arbitrate differences between them. If an exhibitor refused to comply with the arbitration requirement, all producers were to boycott him. The contract was held unlawful, the court declaring that the public interest in the maintenance of competition constituted a consideration before which the advantages of such private arrangements must yield.

'Standardized contracts, particularly those which provide a "frame of reference" for individual transactions, must be of great assistance to the orderly march of commerce. As every lawyer knows, a well considered standardized contract (if properly adapted to the situation at hand) can save much confusion and litigation.'

Forms accepted throughout an industry clarify crucial terms of trade. It is possible, however, to use standardized forms for harmful purposes.

88. Id. at 44. An observer declared: "If the language of Mr. Justice McReynolds be taken literally, it is open to question whether the decision prohibits only those standard contract clauses embodying compulsory arbitration or standard contracts in general. At any rate the severely practical result of the opinion is that a vast deal of the constructive work to which trade associations have been devoting their energies for the past decade has been jeopardized. . . ." Note, 40 Yale L. J. 640, 643 (1931). Accord, United States v. Sugar Institute, Inc., 297 U. S. 553 (1936) (elimination of long-term deliveries of sugar); see Fly, Observations on the Antitrust Laws; Economic Theory and the Sugar Institute Decisions, 46 Yale L. J. 228, 249 ff. (1936); United States v. American Tobacco Co., 221 U. S. 106 (1911), 1 D. & J. in A. T. Cases 157, 188 (S.D. N.Y. 1911); United States v. New Departure Mfg. Co., 204 Fed. 107, 1 D. & J. 471, 474 (W.D. N.Y. 1913) (terms of credit); United States v. Kluge, 1 D. & J. 631, 634 (S.D. N.Y. 1917). In United States v. Dried Fruit Ass'n, 4 F. R. D. 1 (N.D. Cal. 1944) the court apparently took the position (at 9) that numerous standardization practices were lawful because not shown to have affected prices. Cf. Columbia Pictures Corp. v. Bi-Metallic Investment Co., 42 F. 2d 873 (D. Colo. 1930) (question raised but not reached). Apparently the Trade Commission once eliminated T. P. C. rules encouraging standardized contracts. Myers, Revision of the Trade Practice Conference Rules by the Federal Trade Commission, 11 Proc. Am. Trade Ass'n Exs. 165, 174 (1930).
89. Foth, op. cit. supra note 15, at 164 ff.
90. Guarantees against price declines may affect price structures. An agreement fixing minimum credit standards may freeze out would-be buyers. NICB, op. cit. supra note 14, at 133-35, 203 ff.; Jones, supra note 27, at 183. Query whether a standard form of contract is usually fair to customers who take no part in its preparation.
One form of standardized terms—the agreement to use the "basing-point" method of computing freight costs—has been the subject of special attention. For many years the Trade Commission has attacked the basing-point practice, finally achieving apparent victory. Interestingly enough, the Commission's triumph was recorded in a decision involving an agreement among competitors to use basing points. Basing point pricing by individuals may still be lawful under some circumstances.

Competitors sometimes seek to narrow channels of distribution. Perhaps most typical is an agreement by wholesalers to boycott manufacturers who sell directly to retailers (the war against the chain stores). In many other ways groups of competitors have sought to restrict markets and to eliminate distributors thought to be undesirable. A conspiracy to boycott for such a

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91. United States Steel Corp., 8 F. T. C. 1 (1924); Montague, Recent Developments in Trade Association Law, 139 Annals 38, 42 (1928) (T.P.C. rules in shirting fabrics industry).
93. The Commission's case against the Cement Institute (note 92 supra) was not based upon section 1 of the Sherman Act over which the Commission has no jurisdiction, but upon section 2 of the Clayton Act and section 3 of the Federal Trade Commission Act.
96. "... if any one ... skips the next logical step [in distribution] and sells over the head of his recognized purchaser to that purchaser's customer, he engages in a practice which is unfair. ... Most [trade] associations bar from association membership concerns which exercise improper functions." Naylor, op. cit. supra note 28, at 101. Rules of the National Association of Retail Grocers contained a strong statement in favor of "established" methods of distribution and against "so-called more direct methods." Rules of Associated Metal Lath Manufacturers: "9. No metal lath salesman shall cooperate in bringing about contracts for the covering of metal lath by other than reputable contractors whose work will be permanent and a credit to the metal lath industry." Of the National
Any understanding affecting the customers of a group of competitors may reduce the service rendered by the parties there-to. The law recognizes competition in service as well as in price. Such competition may be of considerable importance when prices are sticky. On the other hand, if price competition is vigorous, standardization of the other aspects of transactions is desirable in that it facilitates price comparisons.

Control of Competitors

Traders desire to compete on equal terms. Thus efforts to eliminate unfair trade practices may become the subject of concerted action by competitors. When a minority in an industry conducts itself in a manner which appears unfair to the majority, "codes of ethics" are promulgated and other steps taken in an attempt to place all competitors upon a plane.

A first step may consist merely of an effort to enforce existing law. One group, for example, solemnly declared that

Hardware Association: "It is not within the wholesaler's function to quote prices to consumers. All sales to consumers should be made through the legitimate retail merchant." Lee, op. cit. supra note 14, at 257, 223, 252. Note use of the words "recognized," "established," "reputable" and "legitimate": they are typical of attempts to narrow channels of distribution.

97. Handler, supra note 3, at 45 ff. Compare the problem of "clearance" by which a motion picture exhibitor through contract with the distributor protects itself from exhibition of the same film by competing theaters for a limited time. In its latest decisions the Supreme Court indicated that such a clearance arrangement is illegal if established by concerted action among distributors or exhibitors, or by exercise of the bargaining power of a chain of theaters in a monopolistic position, or if the clearance agreed upon between a single distributor and exhibitor is greater in area or duration than is reasonably necessary to protect the interests of the exhibitor. United States v. Paramount Pictures, 334 U. S. 131 (1948); Schine Chain Theatres v. United States, 334 U. S. 110 (1948); cf. Westway Theater v. Twentieth Century Fox Corp., 30 F. Supp. 830 (D.D.C. 1940); St. Louis Amusement Co. v. Paramount Corp., 168 F. 2d 988 (8th Cir. 1948).

98. See United States v. Union Pacific Ry., 226 U. S. 61. 87 ff. (1912) : "Competition between two such [railroad] systems consists not only in making rates . . . but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims." See also United States v. Terminal Railroad Ass'n, 224 U. S. 383, 393 (1912); United States v. Trans-Missouri Freight Ass'n, 53 Fed. 440, 452 (C.C.D. Kan. 1892); Jones, supra note 27, at 260.


100. Controlling "trade practices" is an important activity of trade associations. Within that term is included combatting unfair advertising, development of codes of ethics, trade terminology and the like. Gott, op. cit. supra note 26, at 1, 11 (245 out of 330 associations so engaged). In addition to the instances of control over competitors considered in this section, others ostensibly aimed at protection of consumers are analyzed infra pp. 374 ff.
"Contracts, either written or oral, are business obligations which should be performed in letter and spirit. The repudiation of contracts by sellers on a rising market, or by buyers on a declining market, is equally reprehensible, and is condemned by the industry."\(^{101}\)

However presumptuous and unnecessary an agreement to obey the law may be, no question of its legality appears to have been raised.\(^{102}\)

Protection of trade marks and trade names carries law enforcement only slightly farther. Trade associations operate registers of such symbols and agree not to violate the mark of others.\(^{103}\) Commercial organizations perform a similar function but it is arguable that industry-wide groups can do a better job since their

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101. T. P. C. Southern Mixed Feed Manufacturers, 16 C. F. R. § 27, Rule A (group 2), CCH Trade Reg. Serv. ¶ 20,110 (1931). Cf. T. P. C. Fabricators of Structural Steel, 16 C. F. R. § 26.2, CCH Trade Reg. Serv. ¶ 20,109 (1931) (forbids using methods of erection prohibited by local law). As to the effect of the Sugar Institute case in this field, see Donovan, The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities, 84 U. of Pa. L. Rev. 929, 939 ff. (1936) : "The opinion sustains the view that an agreement to eliminate a practice that is unfair within the meaning of established law ... would not be questioned if limited to the accomplishment of that one purpose." Obviously such resolutions indicate dissatisfaction with our judicial process.


103. Foth, op. cit. supra note 15, at 296 ff.; Jones, supra note 27, at 187 ff.; Gott, op. cit. supra note 26, at 4. Some groups presume to "grant" rights to use marks. Naylor, op. cit. supra note 28, at 129 ff. According to Article 14 of its by-laws (April 7, 1922, as amended) the Board of Directors of the Motion Picture Association of America, Inc., may make provisions: "(a) In relation to the registration with the Association of titles for motion pictures. . . . (b) In relation to the avoidance of harmful conflicting uses of titles; and (c) For the settlement by arbitration or conciliation of disputes in respect of the matters described in (b) above. . . ."


concern is but a single trade. In approaching the field of commercial torts, however, competitors set foot on softer terrain. Commercial bribery, often the focus of group activity, is probably unlawful either at common law or under the Trade Commission Act. No doubt enticement of employees in breach of contract falls in the same category.

But difficulties are surely encountered when traders undertake to provide their own definitions of commercial torts. Efforts to stamp out "style piracy" constitute an example. Women's fashions, whose designs were not protected by patent or copyright, were widely imitated. As a consequence, designers lost part of the benefit of their original work. Accordingly boycotts were organized against the style "pirates." Although several courts approved such protective


109. Motion Picture Association of America, Inc., By-laws, Article 14, T. P. C. Steel Office Furniture Industry, 16 C. F. R. § 21.5, CCH Trade Reg. Serv. ¶ 20,104 (1931). In baseball, major league rule 3 (h) provides: "To preserve discipline and competition, and to prevent the enticement of players... there shall be no negotiations respecting employment... between any player... and any club other than the club with which he is under contract..." Note the prohibition upon all negotiations. Rule 5 (e) fixes a schedule of prices to be paid by a major league club for the assignment of a contract of a player in an inferior league. The figures, grouped by class of club, range from $1,500 to $10,000.


measures, the Federal Trade Commission finally called a halt.112

Style piracy is not an attractive business practice. It would seem preferable, however, to amend the copyright laws rather than to leave protection to private powers. Unofficial groups cannot be permitted to make substantive law.113

Agreements to restrain the "unfair" conduct of competitors lead to enforcement programs.114 Thus a "defendant" may be "tried" and "convicted" without benefit of the judiciary: the guarantees of due process of law are abridged. But that considera-


113. Thus, in the Fashion Guild case, note 112 supra, the Supreme Court stressed that (at 466): "... The combination exercised sufficient control ... to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of said respondents. . . ."

It should be noted that the defendants in the Fashion Guild case had also agreed not to advertise at retail, not to sell at retail, to regulate days for special sales, to restrict discounts and to control fashion shows. At least some of the foregoing agreements were invalid under prior decisions and their existence may have influenced the court.

Another example of dubious action is the campaign against "free" goods. Thus the National Association of Piano Merchants of America, rule 7: "This Association condemns advertising as "FREE" articles included in the purchase price of the instrument, such as bench, scarf, etc."

Rules of National Association of Retail Grocers: "We believe gift schemes, trading stamps and coupons of all kinds are detrimental to good merchandising and deceptive to the public."

Lee, op. cit. supra note 14, at 253, 259; Naylor, op. cit. supra note 28, at 174; cf. Standard Education Society v. F. T. C., 302 U. S. 112 (1937) (Commission's attack on practice approved). "Free" goods constitute a method of price reduction; the "free deal" is particularly used as a method of pricing in monopolistic industries in which the formal price remains fixed. Lyon, The Economics of Free Deals 45 ff. (1933). Until such prices become more flexible the wisdom of prohibiting "deals" must remain open to question.

Rules of the National Association of Piano Merchants of America: "6. This Association condemns advertising of private sales at residence addresses and places not recognized as regular trade locations," Lee, op. cit. supra note 14, at 253. Note the phrase, "places not recognized."

Rules of the National Association of Retail Grocers contained a strong statement in favor of retail price maintenance, Lee, supra at 258. But in United States v. Tennessee Retail Grocers' Ass'n, (M.D. Tenn. No. 10,116, 2 Nov. 1941) § 54 of an indictment alleged that the defendant independent retail grocers had organized a trade association to fix and raise prices, to procure passage of state retail price maintenance legislation and then to 'police' and enforce that measure by threatening prosecution, etc. In United States v. Connecticut Food Council, Inc., (D. Conn. No. 680, 5 Nov. 1941) § 3 (9) of a consent decree enjoined similar defendants from agreeing to "Enforce the Unfair Sales Practices Act through threat of litigation or other coercive activity,..." Cf. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 239 ff. (1937).

114. "As far as possible, associations aim to police their own trades and to discipline their own members." Foth, op. cit. supra note 15, at 118. Apparently the Paperboard Industries Association had an elaborate system of committees and inspectors to enforce its T. P. C. rules. Id. at 122. A National Better Business Bureau was utilized by some industries, especially the advertising trade. Id. at 119.
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tion alone will not condemn group action. For the Supreme Court has announced:

"Designed to frustrate unreasonable restraints they [the anti-trust laws] do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law...”115

Despite the liberality suggested by the foregoing declaration, it is difficult to believe that courts are ready to countenance extensive extrajudicial programs of law enforcement. Perhaps groups of competitors should be empowered to apply simply the penalty of expulsion from a trade association. In view of their tendency to create new substantive rules116 and the requirements of due process suggested above,117 further enforcement powers would seem dangerous.

RELATIONS AFFECTING CONSUMERS

Some activities affecting customers of competitors have been discussed. There remain courses of conduct which may cast burdens not only upon the immediate customers but also upon ultimate consumers as a group. Even those practices which do not directly impinge upon customers may be onerous to the general public.

Several types of agreements are easily disposed of. Agreements not to compete are, of course, invalid unless "ancillary" to another transaction.118 Any sharing of markets or division of territory119

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116. See illustrations cited note 113 supra.
118. As to the scope of ancillary contracts consult Restatement, Contracts § 516 (1933); Handler, Restraint of Trade, 13 Encyc. Soc. Sci. 339 ff. (1934); Kales, Contracts and Combinations in Restraint of Trade §§ 16, 113 (1918). For the origin and scope of the doctrine see Taft, J., in United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 280 ff. (6th Cir. 1898). Cf. Carpenter, Validity of Contracts not to Compete, 76 U. of Pa. L. Rev. 244, 257 (1928); McNair, Agreements in Restraint of Trade, 4 Economica 176 (1924) (Great Britain); Deak, op. cit. supra note 69, at 402 ff.
119. Unreported examples: rules of American Face Brick Association: “Refrain from all further solicitation after a competitor has secured either an adoption or an order. . . .” Lee, op. cit. supra note 14, at 234. Rule 1 (c) of the major leagues (baseball): “To preserve and stimulate competition for the League Pennants and for the World Championship, the circuits thus established shall remain unchanged either by withdrawal from a city, by inclusion of another city, or by consolidation of clubs within a
is similarly beyond the pale.\textsuperscript{120} Agreements to fix prices are unlawful \textit{per se}.\textsuperscript{121} And by reason of the constant efforts of groups of competitors to arrive at an understanding which will lift the burden of free prices\textsuperscript{122} it is equally well established that restriction

city, unless in any case the change is approved by a majority of clubs in each league . . . the circuit of either Major League shall not be changed to include any city in the circuit of the other Major League except by the unanimous consent of the clubs constituting both Major Leagues." Rule 1 (a) of the major-minor leagues: "No territory in which a Minor League franchise is being operated under protection of the Major-Minor League Agreement . . . shall be included in any Major League until such Minor League and Minor League Clubs shall be paid such compensation as shall be mutually agreed upon as just and reasonable compensation for such action."

An observer points out that, perhaps as a result of such agreements, St. Louis and Boston each have two baseball clubs while Detroit has only one. But Detroit has a greater population than the other two cities combined. He concludes that the agreements " . . . enable those who are 'in' baseball . . . to administer the game as a closed corporation, and to exclude at will from their ranks those who are 'out' . . . new team participation or club expansion in the major leagues is a practical impossibility. . . ." Neville, \textit{Baseball and the Antitrust Laws}, 16 Ford. L. Rev. 208, 209 ff. (1947).

\textsuperscript{120} See Apex Hosiery Co. v. Leader, 310 U. S. 469, 497 (1940); International Salt Co. v. United States, 332 U. S. 392, 396 (1947); Handler, \textit{supra} note 3, at 17 ff. Even a labor union cannot combine with employers to exclude competitors from a market. Allen Bradley Co. v. Local, 325 U. S. 797 (1945). "That organized baseball is a monopoly, there can be little doubt," was Neville's conclusion, \textit{supra} note 119, at 211. He relies on \textit{American League Club v. Chase}, \textit{note 59 supra}. But does it involve interstate trade or commerce within the terms of the Sherman Act? See \textit{note 60 supra}.

\textsuperscript{121} See United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 218 (1940); United States v. Bausch & Lomb Co., 321 U. S. 707, 720 (1944); Handler, \textit{supra} note 3, at 9 ff.

\textsuperscript{122} A few random selections will suffice to supplement the reported cases. From 1904 on trade associations in the lumber industry were busy with price-fixing schemes. James, \textit{Restrictive Agreements and Practices in the Lumber Industry}, 13 So. Econ. J. 115, 118 ff. (1946). Rules of the Motorcycle and Allied Trades Association, Inc., provided: "4. The manufacturer should scrupulously avoid price cutting without regard to costs or to the lowering of profits in the industry to dangerous levels."

Lee, \textit{op. cit. supra} note 14, at 275. In August 1939 a non-profit membership corporation was formed under the laws of California called Central California Wineries, Inc. "The purpose of C. C. W. I. was to aid in [633] financing wineries by stabilizing prices in the wine industry."

\textit{Acapo Winery, Inc.}, 7 T. C. 629, 632 ff. (1946). In the hotel business it has been said: "A great deal of the old policies of convention-soliciting has disappeared thanks largely to the firm attitude of the American Hotel Association, which has always disapproved of such practices as special room rates, free suites for association executives and free banquet facilities." American Hotel Association, 21 Operations Bulletin No. 9, 2 (1948).


Borderline cases present problems too numerous to consider here. For example, rule 1 of the Corset Manufacturers' Association of the United States forbade a member to make a "gift" to a customer of a mirror, counter, show case, board or wire sign, etc. Lee, \textit{op. cit. supra} note
of production, joint selling schemes, restraints upon dis-

14, at 242. Trade associations are urged to foster "intelligent cooperative competition" (as the ideal substitute for "cut-throat competition") through exchange of cost data, good fellowship, etc. It has even been suggested that associations should organize branch groups of competitors' salesmen so that they will not believe customers' false tales of price cuts by others and therefore will maintain prices. Naylor, op. cit. supra note 28, at 278 ff. Gott found as late as 1938 that 52 out of 330 associations were engaged in "Cost estimating." "Developing procedures for use in the preparation of cost estimates for bids or otherwise." Op. cit. supra note 26, at 3.

It is not without significance that socialists and economic planners also hold "morbid fears" of a free price system. Jewkes, op. cit. supra note 61, at 112.

Dubious variations are legion. A trade association in the paper container industry fostered an agreement to limit production to five days a week, the sixth being reserved for repairs. A limitation on the length of shifts was also involved. The Secretary of Labor is said to have approved the scheme. NICB, op. cit. supra note 14, at 269 ff. Gott found 12 associations engaged in "Scraping of used equipment. Maintaining organized plans or procedure for scrapping or destroying uneconomic or obsolete machinery, equipment, etc." And 106 active in "Stabilization of Business. Formulating suggestive procedures with reference to the reduction of fluctuations and the adverse effects resulting therefrom." op. cit. supra note 26, at 9. Cf. Drucker, Concept of the Corporation 222 (1946) (approving restrictive activities which tend to smooth out cyclical fluctuations); Jewkes, op. cit. supra note 61, at 46 ff.

Pocahontas Coke Co. v. Powhatan Coal Co., 60 W. Va. 508, 56 S. E. 264 (1906); but cf. Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933), described as "a trip into cartel territory." Levy, The Antitrust Laws and Monopoly, 14 U. of Chi. L. Rev. 153, 173 (1947). Gott found 12 associations engaged in cooperative marketing: "Actually selling commodities or services of the industry through joint action," op. cit. supra note 26, at 7. Flotation of securities by "syndicates" of investment bankers has recently been challenged. United States v. Morgan, (S.D. N.Y. No. 43-737, 1947). In aviation, an industry which enjoys the blessings of governmental supervision, competition raised its head, whereupon: ... the certificated airlines responded to the challenge of the independents by establishing a joint cargo shipping organization, Air Cargo, Inc., which has been sanctioned by the C. A. B. and thereby removed from the purview of the antitrust laws." Note, 57 Yale L. J. 1053, 1070 (1948). Cooperative sale of by-products may also be common. Gutelius, supra note 43, at 39.

Conservation of natural resources has often been encouraged (with a view to limiting production?) Gott, op. cit. supra note 26, at 3. Oil is a good example. In that industry the question of the application of antitrust laws to arrangements for the cooperative exploitation of individual pools has long been active. Myers, Relation of the Federal Antitrust Laws to the Problem of Mineral Conservation, 55 A.B.A. Rep. 672, 674 (1930). An observer recently declared: "It is true that unitization [combining several tracts for single exploitation of an oil field as a joint venture] is a form of cooperative activity, but if its primary and real objectives are the prevention of waste and protection of the correlative rights in the pool rather than the controlling of prices and restricting of competition, it does not seem that such activity is proscribed."


In the export trade group selling was made lawful by the Webb-Pomerene Act, 40 Stat. 516 (1918), 15 U. S. C. §§ 61 ff. (1946). Consult
counts and the like are intolerable. When judges suspect that a plan of cooperation among competitors affects prices they tend to brush aside explanations:

"Pious protestations and smug preambles but intensify distrust when men are found busy with schemes to enrich themselves through circumvention."

Exchanges and Trade Association Statistical Activities

Far more complex are the problems raised by exchange of statistics and “open-price” plans. We should first consider organized exchanges. Members of an exchange formed to facilitate dealings in a particular commodity are subject to rigorous restrictions. Their numbers are limited, non-members are excluded, the time and place of trading are fixed, and it is not uncommon to control the rate of commissions. Somewhat surprisingly, courts look with favor upon such arrangements:

"From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a


128. New York Stock Exchange, Rules c. 1, § 4 (members not to deal on the Floor with non-members); c. 13, § 3 (members not to maintain wire communication with offices of non-members without approval of Exchange); Constitution, Art. 17, § 6 (members not to have connections with rival exchange).

129. Kansas City Board of Trade, Rule 37: "... The board of directors shall have power . . . to establish a time and place of trading among members of this Association. . . ."

130. New York Stock Exchange, Constitution, Article 19, § 1: "Commissions shall be charged . . . upon the execution of all orders . . . and these commissions shall be at rates not less than the rates in this Article prescribed. . . ." Cf. N. Y. S. E., Rules, c. 7, § 6.
general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association.

"The agreement lacks ... every ingredient of a monopoly."\(^{31}\)

An exchange furnishes a rigid structure within which trade in a commodity may move within defined limits. As so confined, competition in the commodity is "purified."\(^{32}\) Incidentally, there is some sacrifice of competition among brokers in their services. That small cost, however, is reckoned well worth the benefits obtained.\(^{33}\)

An intermediate position is occupied by dealers in real estate. Their trading is not confined to a given time and place. But deal-

131. Anderson v. United States, 171 U. S. 604, 616-619 (1898). Dealers at the Kansas City Stockyards formed the Traders' Live Stock Exchange. Membership was open to all. A principal rule of the Exchange forbade dealing with non-members. Facilities for trading were furnished by a stock yards company and apparently non-members were accorded their use on equal terms. Rules of the Exchange compelled members to pay their debts and otherwise to deal honestly. On bill to enjoin operation of the exchange, held, bill should be dismissed. The effect of the expulsion of a member of the Exchange upon trade was considered so slight as not to fall within the Sherman Act (see opinion at 618). Accord, Chicago Board of Trade v. United States, 246 U. S. 231 (1918); State v. Duluth Board of Trade, 107 Minn. 506, 121 N. W. 395 (1909); O'Brien v. South Omaha Exchange, 101 Neb. 729, 164 N. W. 724 (1917) seem; Goddard v. Merchants' Exchange, 9 Mo. App. 290 (1880), aff'd, 78 Mo. 609 (1883) seem; Cuppel v. Milwaukee, 47 Wis. 670, 3 N. W. 760 (1879) seem; see Rice v. Board of Trade, 80 Ill. 134, 137 (1875). But see State v. Wilson, 73 Kan. 334, 346, 84 Pac. 737, 738 (1906) ("... obviously creates a restriction in the full and free pursuit of ... business ... "). Cf. United States v. New England Fish Exchange, 238 Fed. 722 (D. Mass. 1919). In United States v. Swift & Co., 46 F. Supp. 848 (D. Colo. 1942) an indictment alleged that the major meat packers had agreed not to send agents out to farms to buy sheep but to confine purchases to the Denver Union Stockyards. Demurrer sustained. The court could find no harm in channeling transactions into a public market place.


133. See Anderson v. United States, 171 U. S. 604, 619 (1898). Good discussion is found in Chamber of Commerce v. Federal Trade Commission, 13 F. 2d 673 (8th Cir. 1926). While the facts in the case are complex, the effect of the decision was to approve exchange rules fixing minimum commissions and controlling the dissemination of quotations. In reaching those conclusions the court reviewed the history of the Minneapolis Grain Exchange in illuminating fashion (at 688 ff.). The court also discussed the practice of fixing brokers' commissions and concluded flexible commissions would injure the market for grain (at 691 ff.). It was further said that an exchange need not furnish quotations to a rival organization, the purpose of which was to supplant the existing exchange (at 688).
ings are channeled among members of a group\textsuperscript{134} and concessions in commissions are discouraged.\textsuperscript{135} Recently a court has held it lawful for real estate brokers to fix their commissions by agreement.\textsuperscript{136}

A still looser arrangement is found in many trade associations. They collect statistics of sales, shipments, production inventories, schedules, employment, wages, orders, stocks, and costs.\textsuperscript{187} They compute the standard ratios (of profit to sales, sales to inventory, labor costs to sales, current assets to current liabilities) for an entire industry.\textsuperscript{138} Finally, following Mr. Eddy's advice,\textsuperscript{139} they may report prices in specific transactions.\textsuperscript{140} Such "open price" plans take many forms, but their common pattern is some simulation of the organized exchanges upon which where all transactions are immediately made public.

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\textsuperscript{134} National Association of Real Estate Boards, Code of Ethics, Chicago Real Estate Board, Yearbook 145 ff. (1948), Art. 8: "Negotiations concerning property which is listed with one Realtor exclusively should be carried on with the listing broker, not with the owner."

Agreement between Chicago Real Estate Board and Chicago Flat Janitors' Union provides, in section 4, that janitors may not collect rents or manage properties. Chicago Real Estate Board, \textit{id. at} 361 ff. Cf. Article 7 of the national Code of Ethics: "When a Realtor accepts a listing from another broker, the agency of the broker who offers the listing should be respected until it has expired. . . ." \textit{id. at} 145.

\textsuperscript{135} Charter, Chicago Real Estate Board, \textit{op cit supra} note 134, at 143: "7. No member shall solicit properties managed by another member . . . by offering to reduce commissions to a rate less than the owner is paying his present agent, and in no case less than the approved Schedule of Commissions of the Chicago Real Estate Board. . . ."


\textsuperscript{137} Judkins, \textit{op. cit. supra} note 10, at 16. Gott found 236 out of 330 associations engaged in gathering statistics of one kind or another, \textit{op. cit. supra} note 26, at 1, 10. Judkins' figure was only 40\% (at 9). Consult NICB, \textit{op. cit supra} note 14, c. 8. One association collects statistics in four series: (a) monthly business index (orders, shipments, rate of operations, hours worked by shifts); (b) wages and hours; (c) machinery depreciation rates; (d) operating ratios of various departments of the business. National Screw Machine Products Association, \textit{The Story of a Trade Association} 7 (1945).

\textsuperscript{138} Duncan, \textit{op. cit supra} note 43, at 70 ff. The following comment is worthy of note (at 72) : "There is a direct relationship between uniform accounting procedure in an industry and the conduct of financial and operating ratio surveys . . . The results of the survey are more reliable if the data are based upon a uniform accounting procedure."

\textsuperscript{139} Eddy, \textit{op. cit. supra} note 12, at 102, 111.


Apparently a number of trade associations operate an "Exchange Service. Providing facilities for the exchange of excess or no longer needed items. (NOTE: Not a commodity exchange.)" Gott, \textit{op. cit. supra} note 26, at 5.
\end{flushleft}
There has been much litigation and discussion of statistical activities and "open price" plans.141 So long as individual parties to specific transactions are not identified, the data is made freely available to the public and information is confined to completed transactions, the courts have tended to approve. But attempts to use the plans for price fixing purposes have been condemned.142

Mr. Eddy's original argument for the open-price system can scarcely be improved upon. In his view real competition requires knowledge of competitors' activities. Otherwise the race of competition will be run blindly.143 It has also been urged that collec-

141. Consult Handler, supra note 3, at 18 ff.; Donovan, supra note 101, at 931, 938 ff. Colonel Donovan concluded (at 939): "It is now clear that a trade association may distribute current price information where such distribution is for the purpose of advising competitors and others of market conditions and not for the purpose of concertedly fixing or raising prices or curtailing production."

Cf. United States v. Electrical Solderless Institute, (S.D. N.Y. No. 12-217, 4 Jan., 1941), CCH Trade Reg. Serv. p 25,385 (1941); paragraph 3 (c) of consent decree prohibits reporting any but completed transactions; paragraph 3 (i) enjoins defendants from: "adopting . . . any program which adopts methods involving coercion or duress and is designed to compel adherence to plans for the collection and dissemination of statistical information; provided, however, that procedures designed and executed solely to give assurance of the completeness and accuracy of data lawfully collected . . . shall not per se be deemed to involve elements of coercion and duress."

In United States v. W. C. Bell Services, Inc., (D. Colo. No. 380, 27 Oct., 1941), CCH Trade Reg. Serv. p 52,701 (1941), paragraph 4 (c) of a consent decree prohibited compilation of statistical data as to sales, shipments, inventories, costs or prices of retail lumber dealers unless the statistics were fairly ascertained from completed transactions and made available to everyone without revealing any individual firm's actions. Paragraph 4 (d) prohibited the gathering and disseminating of statistics regarding average or typical costs throughout a market or between competing retail lumber dealers. For discussions of the earlier cases and the Hoover-Daugherty correspondence, consult Jones, The Present Legal Status of Open Price Associations, 139 Annals 34 (1928); Jones, supra note 27, at 324.

142. In Tag Manufacturers' Institute, F. T. C. Doc. 4496 (1947), CCH Trade Reg. Rep. p 13,574 (1947), the Commission condemned a price reporting plan whereby each manufacturer filed all his price lists, invoices and "other intimate details of its business." Data were published in such a way that price concessions (from the filed lists) by individual manufacturers were apparent as such (identity of price cutters revealed). A cease and desist order was entered forbidding "Penalizing any seller for failure . . . to exchange . . . information concerning prices in connection with past, present and future transactions . . . Using any price reporting plan tending to deprive the public of the benefit of price competition in the industry." Query whether the courts will sustain the order. Petition for review has been filed. Id. at 13,606. Compare U. S. v. Libbey Owens Ford, (N.D. Ohio No. 5239, 30 Oct. 1948), CCH Trade Reg. Rep. p 62,323 (1948).

143. Eddy, op. cit., supra note 12, at 80 ff. Mr. Eddy's statement deserves examination in the original text. Another good exposition is found in Compton, How Competition Can Be Improved through Association, 11 Acad. Pol. Sci. Proc. 584, 585 ff. (1926). Another Statement: "... when the reports are issued accurately, promptly, and clearly, they will become invaluable. . . . Fair Competition will be created, customers will be better protected both
tion and dissemination of statistics will stabilize business. On the other hand, there is evidence to suggest that the motive for the establishment of statistical and price reporting systems may be to raise or maintain prices. The most thorough study of the subject arrived at no universal conclusions. Suggestions that such activities be carried on by governmental agencies are answered with some persuasiveness to the effect that trade associations can do better work. To the extent that price reporting schemes lure industry into the free markets of organized exchanges, with their unities of time, place and commodity so dear to the advocate of "pure" competition, it is difficult to understand how they can be considered unlawful. But like other devices, they can be used for undesirable purposes.

Agreements Relating to Patents

Patent licenses almost invariably involve cooperation among competitors. Most spectacular are the patent pools in such industries as aircraft and automobile manufacture. Pools, of course, are but general licenses made available to all members.

as to service and price, and everyone will benefit by greater prosperity based on a complete understanding."

Naylor, op. cit. supra note 28, at 277. What does Naylor's assertion mean? Exchange of statistics may also be helpful in that management may thus compare the efficiency of various departments of a business.


145. For example, "... the company executive ... finds figures such as we get out of extreme value to him in gauging his plant as against the industry as a whole ... by these comparisons and the opportunity for them we, in a perfectly legal way, stop a great deal of price cutting."


148. Constantine, Trade Associations and Government Statistics, 42 Am. Stat. Ass'n J. 20, 21 (1947). Constantine asserts the superiority of private work under six headings: 1. The field surveyed by a trade association is usually not limited to its membership. 2. The association keeps up to date on mergers, bankruptcies, etc. 3. Statistical "breakdowns" are adjusted to the needs of industry. 4. Service is rapid. 5. Sampling procedures are better. 6. Associations quickly adapt their methods to changes in conditions.

149. Chamberlin, op. cit. supra note 132, at 7.


151. Trade associations, as such, are not often active in the patent field. Gott, op. cit. supra note 26, at 4.


153. Welsh, Patents and Competition in the Automobile Industry, 13 Law & Contemp. Prob. 260, 269 ff. (1948). Other pools are described in
In the leading case three concerns held conflicting claims to various patents for the "cracking" of gasoline. An agreement among the three released claims of prior infringement and permitted each to use the others' patents. By its terms each of the three could also license outsiders to use any of the pooled patents at agreed royalty rates. Fees thus received from the licensees were to be shared by the three parties in specified ratios. No provision was made for fixing the price or limiting the production of gasoline produced through use of the patents. In the Supreme Court the arrangement was held lawful. An opinion delivered by Mr. Justice Brandeis declared:

"The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices. Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. But an agreement for cross-licensing and division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce." It is difficult to improve upon Mr. Justice Brandeis' statement. Recently the question of whether a licensor may fix the price at which his manufacturing licensee shall sell products made with the patent has been active. In other respects licensing of patents remains unchallenged.

A patent license constitutes a pro tanto reduction of the patent monopoly. Standing alone, therefore, it can hardly be considered a violation of the anti-trust laws. It has all the good effects of

Kirsh, Patent Pools and Cross Licensing Agreements, 20 J. Pat. Off. Soc. 733, 742 (1938). International pools are mentioned in Toulmin, supra note 152, at 151 ff. We cannot pause here to consider the cartel problems suggested by international licenses.

154. Standard Oil Company v. United States, 283 U. S. 163 (1931). The court (at 170 ff.) refused to find that a mere division of royalties was an attempt to monopolize.


standardization of commodities and none of the bad, since it permits the consumer to obtain the commodity in question through another channel but does not restrict his choice. Licenses also tend to reduce the blocking of technical advancement. Observers find much benefit in the patent pools of the automobile and aircraft industries. Despite cries of monopoly, a federal commission concluded that the patent pool in aviation was wholesome:

"It has been alleged with great bitterness... that the Manufacturers' Aircraft Association creates a trust or monopoly and that its effects are wholly evil and restrictive of invention. We are unable to discover any substantial foundation for such complaints..."

It is true that patent licenses have been used as devices to fix prices. And a patent pool can practically compel the membership of an outsider who may be threatened with infringement suits by a mass of consolidated competitors. Such considerations have led some observers to condemn all licenses and pools. Any wholesale outlawry of patent licenses would be similar to a ban upon fireworks: the device, although beneficial if properly employed, would be considered too readily abused. In the absence of more data than has yet been presented such a remedy appears more drastic than is required.

Simplification and Standardization of Products

Simplification and standardization have come to be used as words of art. The former is nearly embraced in the phrase, reduction of variety. Many trade associations have encouraged simplifica-
tion agreements among competitors. “Standardization” indicates an agreement as to the composition, quality and uniformity of a commodity. It is an even more popular activity. Setting of standards of quality leads to the application of grade marks affixed to the product so made uniform. Competitors may thus combine to certify quality by the application of appropriate symbols. It follows that the goods are more fully labeled than would otherwise be the case.

166. Gott, op. cit. supra note 26, at 10; Department of Commerce, op. cit. supra note 7, at 75. Thus the trade rules of the Associated Metal Lath Manufacturers provided: “5. Every manufacturer agrees to abide by the Simplification of Excess Varieties as promulgated in the Department of Commerce...” Lee, op. cit. supra note 14, at 222.


British trade associations have been active in simplification and standardization. Their efforts are often supported by the grant of a special trade mark for uniform goods by the Board of Trade. Langley, Trade Associations in the United Kingdom, 71 Com. Intelligence J. 61, 62 (1944).

168. “Certification. Guaranteeing or affirming that products or services are of a certain recognized standard, identifying the products of the firm producing or distributing products as conforming to standard” by “emblems, quality seals, seals of approval, etc.” Gott, op. cit. supra note 26, at 9; TNEC, op. cit. supra note 21, at 344; Naylor, op. cit. supra note 28, at 125 ff.; Foth, op. cit. supra note 15, at 174.

An interesting account of the adoption of standards to avoid disputes and expensive litigation among dealers is found in Moloney, The Story of the National Cottonseed Products Association 1879-1946, 2 ff. (1946). Definitions of terms used to designate fabrics are contained in National Association of Wool Manufacturers, Regulations for the Labelling of Woven or Knitted Piece Goods, 65 Bulletin (of N.A.W. Mfgrs.) 292 (1936). Inspectors are sent out by some lumber associations to check standards of quality and affix grade marks. Foth, op. cit. supra note 15, at 170.
Standardization may be applied to products in different ways. The term may relate to uniformity of nomenclature. It may indicate an agreement as to quality, performance or dimensions. Sometimes the term affects quantities.

Many branches of the federal government assist standardization activities; many others are engaged in setting standards for their own use. NRA codes frequently provided for standards, labels and grade marks. The War Production Board urged simplification and standardization upon industry. Finally, statutes have specifically provided for standardization.

Recently the authorities were collected and the conclusion reached that while standardization may be part of a price fixing scheme and hence illegal, standardization as such is not within the purview of the statute. Indeed, the Supreme Court has remarked:

169. Jones, supra note 27, at 81. Cf. the activities in standardization of contracts, note 83 supra.

170. Ibid. Trade associations have conducted campaigns in favor of uniform weights and measures. Naylor, op. cit. supra note 28, at 150.


172. TNEC, Consumer Standards, passim (monograph No. 24, 76th Cong. 3d sess. 1941).

173. Id. at 11. Kirsh & Shapiro, op. cit. supra note 79, at 137; Coonley, supra note 15, at 4.


175. Timberlake, Standardization and Simplification Under the Anti-Trust Laws, 29 Corn. L. Q. 301 (1944).

176. Id. at 312 ff., 307, 309 ff. Standardization was questioned in the Hoover-Daugherty correspondence. Jones, supra note 27, at 329. In Berenson v. H. G. Vogel Co., 253 Mass. 185, 148 N. E. 450 (1925), cert denied 269 U. S. 577 (1925) competitors used a common bureau to estimate materials required by specifications submitted for bids. It was held that the activity was not unlawful, the court saying that standardization of trade and engineering practices was not in violation of the anti-trust laws. In a similar case a court declared: “We are unable to find any objection to this feature [standardization of materials computation] . . . We are impressed with the thought that uniformity in the terms and phraseology of bids is a distinct benefit to the builder instead of being an injury.” State v. Carondelet Mill, 309 Mo. 335, 774, 274 S. W. 780, 786 (1925). Cf. NICB, Industrial Standardization 94 (1929). As to the effects of the Sugar Institute case in this field, consult Fly, supra note 88, at 250, 45 Yale L. J. 1339, 1349 (1935). It has been suggested that the Paramount Pictures case cast doubt upon all standardization. Note, 40 Yale L. J. 640, 645 n. 30 (1931).
"The defendants have engaged in many activities to which no exception is taken by the government and which are admittedly beneficial to the industry and to consumers; such as . . . standardization and improvement of the product."\(^{177}\)

Not all activities lumped under the heading of simplification and standardization, however, have been approved by the courts. Exclusion of some competitors from grade-marking systems, has, for instance, drawn fire.\(^{178}\) Simplification itself has been prohibited.\(^{179}\) No doubt such decrees have been motivated by conduct which at least verged upon price-fixing.

From an engineering point of view, simplification and standardization unquestionably promote efficiency.\(^{180}\) Observers have pointed to specific instances in the men's ready-made clothing industry,\(^{181}\) the construction of automobiles\(^{182}\) and the erection of the accepted view is that standardization is only unlawful if used to cloak price fixing. Kirsh & Shapiro, supra note 79, at 144.


178. United States v. National Lumber Manufacturers Ass'n, (D.D.C. No. 11, 262, 6 May 1941), CCH Trade Reg. Serv. § 52,593 (1941), consent decree, paragraph 3 (k) prohibits defendants from "seeking to induce manufacturers of lumber . . . as a means of certifying conformance to standards . . . such as are contained in American Lumber Standards [Simplified Practice Recommendation R 16, Dept. of Commerce, 1924] . . . to apply . . . a common mark or brand owned or controlled or used by the defendants or by an association of manufacturers or distributors . . . unless . . . the use of such mark . . . is available . . . to all manufacturers . . ." Accord, United States v. West Coast Lumbermen's Ass'n, (S.D. Cal. No. 1488-y, 16 April 1941), CCH Trade Reg. Serv. § 52,588 (1941), § 3(1) of consent decree; United States v. Western Pine Ass'n, (S.D. Cal. No. 1389-RJ, 6 Feb. 1941), CCH Trade Reg. Serv. § 52,548 (1941). By paragraph 5 of the consent decree in that case the association was required to make available the services of its inspectors for the "grade-marking, the certification and the re-inspection of lumber produced . . . by non-members . . ." Non-members were also to be permitted to use the association trade mark if they complied with its standards. Cf. United States v. National Retail Lumber Dealers' Ass'n, 40 F. Supp. 448 (D.D.C. No. 406, 3 Jan. 1941), CCH Trade Reg. Serv. § 52,733 (1942), consent decree § 3(h); United States v. Synthetic Nitrogen Products Co., (S.D. N.Y. 1940) CCH Trade Reg. Serv. § 52,700 (1940).


dwellings. By making commodities more homogenous standardization promotes price competition. It tends to break down monopolistic powers of large producers. There is, of course, a curb on consumers’ free choice. But some of the variety to be eliminated is self-generated by manufacturers without specific consumer demand and standardization might cause an abundance more than compensating the consumer for the restriction of his choice. It is the prerequisite to the grade labeling so long urged as beneficial to the ultimate consumer. Certainly standardization of nomenclature, so that all parties to a transaction talk the same language, is inoffensive.

On the other hand, if standardization permits freer price competition, it may also facilitate price fixing. It may foster the practice known as “price leadership.” As suggested above, simplification does deprive the consumer of variety, and the complaint on this score may be important if low priced goods are eliminated.

183. Cooper, The "$5,000 House"—a Challenge, N. Y. Times Magazine 15, 52 ff. (May 9, 1948). Standardization may also simplify distribution. NICB, op. cit. supra note 14, at 185.
185. Thus punch cards manufactured by A may be used in a sorting machine sold by B. Cf. International Business Machines Corp. v. United States, 298 U. S. 131 (1936).
186. NICB, op. cit. supra note 14, at 183.
189. NICB, op. cit. supra note 14, at 187.
190. A friend of associations stated: “By standardizing the product, establishing uniform terms of sale and uniform discounts, and uniform accounting, an industry is in a favorable position to make comparisons of costs and to regulate prices.” Foth, op. cit. supra note 15, at 274; NICB, op. cit. supra note 14, at 185; TNEC, op. cit. supra note 21, at 84; Berge, Speech before Washington Trade Association Executives (May 16, 1945), CCH Trade Reg. Serv. ¶ 54,055 (1945); Comer, Monopoly and Competition, 36 Am. Econ. Rev. 152, 159 (1946) (lumber industry); Foth, op. cit. supra note 15, at 163 (standardized product leads to standardized methods of computing charges—citing case of warehousemen’s association). A suspicious case: “Manufacturers of steel pipe nipples were confronted with the practice of making ... pipe nipples from second-hand or junk pipe, improperly threaded and of insufficient strength. In order to assist in preventing the use of such low-quality nipples, in cases where they were not desired, the manufacturers of this commodity adopted a commercial standard which in general required that nipples must be made only from tested new pipe. ...” Donovan, supra note 167, at 14. For reference to F. T. C. proceedings consult CCH Trade Reg. Serv. ¶ 6380.80 (1948).
Again, when prices are standardized, uniformity of product may destroy the remaining competition in quality.\textsuperscript{193} Perhaps it is significant that socialist standardization has brought about a decline in the quality of goods in Britain.\textsuperscript{194} If consumers are led to believe that goods are uniform the individual producer may lose his incentive to maintain standards of workmanship, let alone improve his wares.

\textit{Joint Advertising and Other Public Relations}

Joint advertising is a term loosely covering several types of vaguely defined cooperation among competitors. Apart from advertising proper, there are "trade promotion," "market development" and "public relations." Possibly the latter term is the more inclusive and should thus be used to describe all the above activities.

"Trade promotion," its proponents assert, is not mere advertising.\textsuperscript{195} It includes market research, advertising and publicity, "field service"\textsuperscript{196} and "education."\textsuperscript{197} It is a major activity of trade associations.\textsuperscript{198} "Merchandising"\textsuperscript{199} and "market development"\textsuperscript{200} are somewhat synonymous terms not unrelated to "trade promotion." "Public relations," however, as indicated above, suggests the field as a whole.\textsuperscript{201}

Cooperative advertising itself is an old\textsuperscript{202} and widespread phenomena.\textsuperscript{203} While many instances of such activity can be cited, there is room for doubt as to whether it looms large in relation to advertising by individual firms.\textsuperscript{204} For public relations as a whole

\begin{footnotesize}
\begin{enumerate}
\item 193. NICB, \textit{op. cit. supra} note 14, at 187 ff.; Kirsh & Shapiro, \textit{op. cit. supra} note 79, at 149. As suggested above (note 178) allowance of "certifications" only to members might constitute an attempt to boycott. Duncan, \textit{op. cit. supra} note 43, at 129.
\item 194. Jewkes, \textit{op. cit. supra} note 61, at 222.
\item 195. Gott, \textit{op. cit. supra} note 26, at 11.
\item 197. \textit{Ibid.} The author also lists technical and scientific research under the heading, an indication of how loosely categories are defined in this field.
\item 198. Gott, \textit{op. cit. supra} note 26, at 1, 11; TNEC, \textit{op. cit. supra} note 21, at 319 ff.
\item 199. Foth, \textit{op. cit. supra} note 15, at 218 ff.
\item 200. Gott, \textit{supra} note 196, at 127.
\item 201. Gott, \textit{op. cit. supra} note 26, at 1, 8. Included under the heading were public accident prevention, supplying information, "education," publicity, sanitation.
\end{enumerate}
\end{footnotesize}
all media are used. Displays in newspapers and magazines, motion pictures, expositions and contests are employed. Personal calls have been used to influence the public. Perhaps most successful, however, is the "promotion," which involves a combination of media.

Several reasons are given for the use of joint advertising. Some producers may be too small to advertise individually; new industries may wish to present their commodity to the public and old ones to combat popular prejudices. Elimination of slack seasons has been an objective.

Because programs of the foregoing types are vaguely defined it is possible to assert that they are educational in nature. Such claims may stretch the normal meaning of the term, "education": "The word [education] is applied with utmost equanimity to

204. An observer has said: "The fact that the total volume of advertising placed by trade associations has been large over a period of years tends to obscure the fact that most association advertising campaigns have been small, and relatively short-lived." Lockley, Trade Associations as Advertisers, 8 J. Mar. 189 (1943). The list of associations which have advertised over twenty years, however, is long. Id. at 190 ff.

205. Agnew, op. cit. supra note 202, at 129 ff. American Iron & Steel Institute publishes a bi-monthly magazine, Steelways, the purpose of which is "to foster a better understanding of the steel industry . . ."


208. Id. at 133 ff. (gas industry ran contest among architects for designs using gas appliances, etc.). Cf. Noble, Presentation of Prizes in the American Trade Association Executives Award Contest, 21 Proc. Am. Trade Ass'n Exs. 1, 3 ff. (1940) (Douglas Fir Plywood Association ran advertising campaign directed at architects).


210. An "eighteen day diet" of grapefruit is a good example of a clever "promotion." But the word has a broad application. It includes such stunts as "Better Homes Week," "Raisin Week," etc., etc. Gott, supra note 196, at 129 ff. The essence of the "promotion" is that it involves use of several media. Thus a program designed to combat the decreasing use of wool involved publicity (causing an increased mention of the word "wool" in fashion magazines, etc.), fashion design (encouraging the use of woolen fabrics in creation of new fashions), education (exhibits for schools, etc.) and merchandising (motion picture film showing retailers how best to sell woolen goods, etc.). Besse, Report to Wool Manufacturers: Wool Promotion, 65 Bull. Nat. Ass'n of Wool Mgrs. 255, 256 ff. (1936). Use of a trade mark for standardized goods may constitute part of a promotion. U. S. Tariff Commission, op. cit. supra note 38, at 18.

211. NICB, op. cit. supra note 14, at 237 ff.; Agnew, op. cit. supra note 202, at 90. An interesting case is that of the coffee grinders, whose cooperative advertising was designed to overcome the prejudice against coffee created by the crusade of C. S. Post, vendor of the substitute, "Postum." Id. at 34.

212. Id. at 106 ff.
the most blatant lobbying and the most insidious publicity. There is no differentiation between education and propaganda in the minds of many association executives. . . ."\textsuperscript{213}

On the other hand, some cooperative activities of competitors bear a close resemblance to secondary and collegiate instruction. Thus the American Meat Institute conducts an Institute of Meat Packing at the University of Chicago, offering courses both by correspondence and to students in residence in the production and marketing of livestock, meat plant management, use of meat by-products and the like.\textsuperscript{214} Many similar examples could be given.\textsuperscript{215} And even the dissemination of biased information may be considered of some educational value.

Every authority indicates that cooperative advertising activities are lawful. Attorney General Daugherty wrote to Secretary of Commerce Hoover:

"I can see no objection to cooperative advertising designed to extend the markets of the particular article produced . . . by the members of an association. . . ."\textsuperscript{216}

The Supreme Court has referred to such practices as "admittedly beneficial to industry and consumers."\textsuperscript{217} Any curb on cooperative promulgation of propaganda would, of course, verge upon constitutional prohibitions.\textsuperscript{218}

It seems likely that joint advertising encourages standardization of product.\textsuperscript{219} But as set forth above, standardization alone is not objectionable. There are some hints that cooperative publicity has aimed at control of prices. One observer suggested that it

". . . tends to promote the beneficial ends of the trade associa-

\begin{itemize}
  \item \textsuperscript{213} Rowden, \textit{op. cit. supra} note 41, at 3.
  \item \textsuperscript{214} Duncan, \textit{op. cit. supra} note 43, at 109 ff.
  \item \textsuperscript{215} Another case: "The Irradiated Evaporated Milk Association alone has over one hundred and fifty publications, many of them written especially for physicians, dentists, nutritionists, nurses, teachers and social workers who demonstrate the use of low-cost nutritious food to home workers with small food budgets." Rowden, \textit{op. cit. supra} note 41, at 38. Mrs. Rowden describes several educational efforts in detail (at 73 ff.).
  \item \textsuperscript{216} Reprinted in Jones, \textit{supra} note 27, at 332, 330, 334.
  \item \textsuperscript{217} Maple Flooring Association v. United States, 268 U. S. 563, 566 (1925). In United States v. National Peanut Cleaners' Ass'n, (E.D. Va. No. 109, 15 June 1925), paragraph 4 (4) of the decree permitted the association to "advance or promote the use of peanuts by research, publicity, advertisement and similar activities." See also Appalachian Coals, Inc. v. United States, 288 U. S. 344, 366 ff. (1933).
  \item \textsuperscript{218} Cf. Thornhill v. Alabama, 310 U. S. 88 (1940) (statute prohibiting picketing invalid as interference with freedom of speech).
  \item \textsuperscript{219} Agnew, \textit{op. cit. supra} note 202, at 10. An observer has declared that few of the trade associations which advertise "represent industries which deal in branded products." Lockley, \textit{supra} note 204, at 190.
\end{itemize}
tion movement as a whole—to rationalize the free functioning of competitive forces through constructive cooperation."

Such a statement can be read to indicate a viewpoint favorable to monopoly conditions. But there is little real evidence of such an effect resulting from joint advertising.

A distinction might be drawn between cooperative advertising promoting one commodity at the expense of another (such as promoting concrete as opposed to asphalt road building materials) and publicity which merely seeks to promote a commodity's share of the national income (campaign in favor of sending flowers on anniversaries, etc.). In the last analysis, however, such distinctions probably are but matters of degree: one who sends flowers may not send candy. In addition, it is hard to say why cement makers should not enjoy the privilege of pointing out the advantages of concrete roads.

To believers in Emerson's adage of the better mousetrap, the whole concept of "public relations," as presently practiced, may be nauseating. The old fashioned notion that merit should advertise itself still has its adherents. But we cry in a sea of brochures and bulletins whose flood rises even from such sources as our institutions of higher learning. It would therefore appear that we must defend ourselves against an offensive war of public relations waged by groups of competitors, deriving such education as we may from the struggle.

**Cooperative Lobbying**

"Government relations" is the euphemism for the lobbying in which trade associations so often indulge. Almost every conceivable economic and social group has operated a lobby so that it is not surprising that organizations of competitors do so. Call it merely "watching legislation" or what you will, trade associa-

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220. NICB, *op. cit. supra* note 14, at 244. Cf. Jones, *supra* note 27, at 166. It is said that, in the greeting card industry, one purpose of cooperative advertising was to raise both the quality of the product and prices. Agnew, *op. cit. supra* note 202, at 111.

221. Apparently the "public relations" work of the National Electric Light Association (subsequently re-organized as the Edison Electric Institute) aroused antagonism after a Federal Trade Commission investigation brought its program to light. Judkins, *op. cit. supra* note 10, at 18.


223. Rowden, *op. cit. supra* note 41, at 60 ("educational" programs are frequently of some value as education).

224. Gott, *op. cit. supra* note 26, at 1, 6 (267 out of 330 associations so engaged; 206 represented industry or trade before legislative and administrative bodies).


tions have been “no small factor in swelling the tide” of statute law.

“Safeguarding the interests of members of the industry” in tariff matters is an ancient focus of cooperative lobbying, one observer quaintly remarking

“... our producers cannot be expected to place themselves at the mercy of destructive competition, and the association has the responsibility of protecting its members’ interests.”

Taxes are perhaps the second most frequent subject of lobbying with protection against government competition following close behind. Other common subjects include freight rates, insurance rates and “fair trade” legislation. It is worth noting that trade associations have sometimes pushed the adoption of bills drawn by the National Conference of Commissioners on Uniform State Laws, an activity at least partially altruistic in character. Another matter worthy of attention is that officers of the executive branch of the government use groups of competitors as means to secure the adoption of programs which they sponsor for industry and trade.

Lobbying may be defensive or offensive in character. An interesting example of defensive lobbying is afforded by the vending machine industry. Legislators (and the public generally) did not distinguish automatic vending machines (for candy, drinking cups and the like) from games of chance (slot machines). Restrictive legislation and discriminatory taxes thus threatened the ruin of vending machines. A campaign by a group of competing vending machine operators has done much to free this form of merchandis-

227. Foth, op. cit. supra note 15, at 76. Cf. National Association of Manufacturers, op. cit. supra note 167, at 13. In Great Britain, “The conduct of discussions and negotiations with government departments is considered to be the most common specific object of trade associations. Some associations were even founded at the request of government departments. Government encouragement has been most pronounced in war time. . . .” Langley, supra note 167, at 62.


231. Id. at 6. Such lobbying is truly defensive in character.

232. Jones, supra note 27, at 239; Department of Commerce, op. cit. supra note 7, at 135, 139 ff. Cf. note 27 supra.


234. Berge, supra note 190.

235. Foth, op. cit. supra note 15, at 83 ff. Apparently the National Automobile Chamber of Commerce has been active in procuring the adoption of uniform vehicle laws. May, supra note 26, at 89.

ing from the toils of legislation.\textsuperscript{237} By way of illustrating offensive action, there may be cited the instance alleged by an assistant attorney general in which an association of lumbermen attempted to procure the passage of legislation which would require use of products bearing its trade mark, thus keeping non-member competitors out of the market.\textsuperscript{238}

It is widely assumed that groups of competitors may lawfully cooperate in lobbying activities.\textsuperscript{239} Recently, however, two courts have made disturbing statements on the subject. In the first case, concerning a group of brewers, the court declared:

"... the indictments charge appellants with conspiring to influence ... state policy and with combining to police the enforcement of state laws. Certainly if this were all they were accused of it would not be enough; for in the light of the Twenty-First Amendment conduct of that sort would not constitute a federal offense, notwithstanding it might otherwise be indictable as an unlawful conspiracy under the Sherman Act. We know of no reason why brewers, like other people, may not jointly advocate state legislation. ..."\textsuperscript{240}

It will be noted that the statement first intimates that lobbying might be within the Sherman Act if not sheltered by the Twenty-First Amendment. Then it proceeds, in the next sentence, to suggest that any competitors may combine to lobby. Two years later another court was guilty of an equally confusing assertion:

"... participating ... in legal proceedings before public boards

\textsuperscript{237} Greene, Why an Association? 7 ff., 10 (1946); 1 N. A. M. A. Co-Operator No. 2, 3 (1948). Part of the history of the cottonseed interests' battle against taxes on oleomargarine is told in Moloney, \textit{op. cit. supra} note 168, at 4 ff. Defensive lobbying is common. Thus in the Charter of the Chicago Real Estate Board it is declared: "Authority is hereby granted to the Board of Directors to create a Property Owners Bureau ... the purpose of which shall be to create and foster an organization ... to act unitedly in securing relief from discriminatory legislation and taxation." Illinois (21 Feb. 1883) reprinted in Chicago Real Estate Board, \textit{op. cit. supra} note 134, at 105, 107.

\textsuperscript{238} Berge, \textit{supra} note 190. There is nothing to indicate that groups of competitors use lobbying methods different from other groups. Possibly using suppliers to put pressure on legislators is a novel technique. Cf. 1 N. A. M. A. Co-Operator No. 2, 3 (1948) (vending machine operators secured aid of peanut and tobacco growers in blocking discriminatory state taxation). For orthodox methods consult Duncan, \textit{op. cit. supra} note 43, at 76 ff.

\textsuperscript{239} Apparently Attorney General Daugherty took no exception to lobbying. Jones, \textit{supra} note 27, at 330. In United States \textit{v.} National Peanut Cleaners' Ass'n, (E.D. Va. No. 108, 15 June 1925), paragraph 4 (2) of a decree permitted the association to "maintain a tariff bureau or committee and a traffic bureau or committee for the purpose of appearing before and communicating with any federal body ... to assist or protect the American industry from disadvantages by foreign importations, and assisting the peanut industry in transportation and tariff matters."

\textsuperscript{240} Washington Brewers' Institute \textit{v.} United States, 187 F. 2d 964, 968 (9th Cir. 1943), \textit{cert. denied}, 320 U. S. 776 (1943).
and commissions... fostering the enactment of state laws restrictive upon competitive methods of transportation. Separately and abstractly considered, activities of that character are within the lawful right of every citizen. But when they are done in concert to further the designs of a conspiracy and combination denounced by express statute, they lose their detached character and become tainted with the illegality of their objective."

Did this court say that lobbying by a group of competitors is lawful if it is lawful? Or did it suggest that only defensive lobbying is valid?

Not long ago the Congress undertook to regulate lobbying generally at its doors. Possibly that action can be taken as a declaration that lobbying is inevitable, if not beneficial. But constitutional limitations may have prevented more vigorous repression.

There is, of course, a case for trade association lobbies. They supply large amounts of information to legislatures and executive officers. In the other direction, they keep track of the voting records of legislators and check unbridled executive power. But it must be admitted that legislative activities may become "as oppressive to the public as direct price fixing." Damage wrought the public interest by high tariffs, manipulation of the currency by the silver interests and the like is too well known to require enumeration. Perhaps it is safe to assert that every offensive victory gained by a lobby involves cost to consumers—every special privilege casts a burden on the backs of the masses. Defensive lobbies are less obnoxious. Unfortunately, however, it is difficult to draw a sharp distinction between offensive and defensive conduct. A Trailer Coach Manufacturers' Association meets with state, county and local officials in regard to the formulation or amendment of zoning laws. Obviously the purpose is to encourage a welcome

243. "Congress shall make no law... abridging... the right of the people... to petition the Government for a redress of grievances." Constitution of the United States, First Amendment.
244. E.g., U. S. Tariff Commission, op. cit. supra note 38, at 13.
246. Foth, op. cit. supra note 15, at 82.
247. Chicago Journal of Commerce, Sept. 4, 1948, p. 1, col. 5. During the late war the OPA granted an increase of ½ cent per pack in the price of cigarettes at retail. For mechanical reasons vending machine operators could not take advantage of the change. A group of operators then put pressure on OPA and secured a full 1 cent increase for their own use. Hodgson, N. A. M. A. on the Map 1, 3 (1947). Offensive or defensive?
for trailers and eliminate restrictions upon them. But is the action offensive or defensive? Every deviation from rules of general application suggests a special privilege. But modern "welfare" legislation becomes more and more particularized, bearing upon specific trades and businesses. To the extent that it does so, the line between the offensive and defensive lobby is blurred.

"Protection" of Consumers Against Themselves

Competitors sometimes appoint themselves guardians of the public interest. They seek to safeguard consumers from their own ignorance, gullibility, stupidity and immorality. No doubt the motive of the competitors is merely to improve the standing of their industry in the eyes of the public. But what they do is to prevent the transaction of business which consumers are willing and ready to do.

Thus competitive groups may seek to protect their customers from fraud and deceit. Organized exchanges are set up explicitly to maintain the integrity of dealers. Among the objects of association of the New York Stock Exchange are

". . . to furnish . . . facilities for the convenient transaction of their business by its members; to maintain high standards of commercial honor and integrity among its members. . . ."248

Members failing to meet their obligations are disciplined249 and those engaging in fraudulent practices may be expelled.250 When a trade loses public confidence by reason of dishonesty practiced by its members, the reputable dealers are apt to form a trade association to raise standards. Apparently such a move was recently made in the radio servicing business in New York City.251

From general codes of ethics groups of competitors may move to an attack upon specific types of conduct. Misrepresentation of quality, for instance, is frequently condemned by agreement of competitors. In the watch industry a trade practice conference carefully defines trade terms, such as "waterproof," and declares that misrepresentation of products (misuse of the terms) is an

249. Id., Art. 16, § 1.
250. Id., Art. 17, §§ 1, 3. Art. 16, § 4, provides that a member, suspended because insolvent, must settle with his creditors and apply for reinstatement within one year, or his membership shall be disposed of. Article 14 of the Code of Ethics of the National Association of Real Estate Boards provides: "A Realtor should not buy for himself property listed with him, nor should he acquire any interest therein, without first making his true position clearly known to the listing owner." Chicago Real Estate Board, op. cit. supra note 134, at 145 ff. (1948).
unfair trade practice.\textsuperscript{252} Recently the rayon industry—perhaps with Trade Commission prodding—carried the notion of misrepresentation to the extreme of a positive requirement of labeling: it was declared an unfair trade practice to sell rayon without disclosure of the identity of the fabric.\textsuperscript{253} "Unethical" advertising, such as that employing contests or premiums, has similarly been prohibited by group action.\textsuperscript{254} Stock exchanges scrutinize closely the issues to be traded thereon and admit only the reputable.\textsuperscript{255} "Realtors" discourage the introduction of persons of different race into a community.\textsuperscript{256}

As set forth above, courts have generally looked with favor upon organized exchanges.\textsuperscript{257} Their rules, designed to uphold the integrity of trade, have met with judicial approval.\textsuperscript{258} Were it not, therefore, for the decision in the American Medical Association case, it would seem that the legality of combinations to suppress fraud and misrepresentation was assumed.

In American Medical Association v. United States\textsuperscript{259} the Supreme Court disapproved a boycott by a group of physicians against a cooperative organization called Group Health. Physicians employed by that corporation were systematically excluded from the
staffs of hospitals controlled by members of the Association. As a result, their patients could not secure hospital care. The boycott was held unlawful. It will be noted that the effect of the decision was to prevent a group of physicians from joining together to discourage what they considered unethical acts, such as the practice of medicine by a corporation. Perhaps the decision was sound. It is one thing to permit members who have freely and voluntarily joined an exchange to discipline themselves. It is quite another to allow some competitors to lay down rules for all. After all, legislatures and courts are the duly appointed authorities for making and enforcing laws.

Frequently groups of competitors take action designed to promote public safety and health. They promulgate sanitary measures to be observed by their members and set standards of safety for general compliance. In the field of safety perhaps the most important work is done by Underwriters' Laboratories, Inc. That organization, sponsored by the National Board of Fire Underwriters, tests, inspects and approves devices and materials in relation to insurance risks. A more common example is found in the food business. Recently medical journals suggested that newly developed insecticides might poison human beings consuming the crops upon which the chemicals had been sprayed. Apparently alarmed at the prospect of liability and public disapproval, the National Canners' Association and the Grocery Manufacturers of America sought the cooperation of the Agricultural Insecticide and Fungicide Association in eliminating such health hazards. Possibly the canners and grocers threatened the insecticide makers with a cry for increased governmental regulation of the use of chemicals upon crops.

One decision held that protection of public health and safety did not justify continuance of a system of distribution which had

260. Miller v. Hennepin County Medical Society, 124 Minn. 314, 144 N.W. 1091 (1914).

261. Trade practice rules of Biscuit and Cracker Manufacturers' Association: "3. To maintain a high standard of cleanliness and sanitation in connection with all operations and in all buildings where good products are manufactured or stored." Lee, op. cit. supra note 14, at 233; Greene, Are You a "Jack" or a "Bill"? 1 N. A. M. A. Co-Operator No. 1, 6 (1947) (attempt to persuade operators of vending machines to exercise sanitary precautions).


been used for illegal price maintenance. But it is difficult to see any harm in a cooperative activity limited to protection of public health and safety. And if competitors are forbidden to take direct action they may simply use their combined strength to lobby for the passage of additional legislation with the same effect. Legislation is the proper form of public regulation. But it might be difficult to put every health and safety caution into a code. And it may be desirable that tentative safety suggestions be promulgated in a more experimental form than statutes normally permit.

Competitors tread upon less solid ground when they undertake to curb speculation. Organized exchanges discourage bucket shops, chiefly by preventing the dissemination of quotations to other than bona fide dealers. They also provide for the profitless settlement of transactions arising out of "corners." But they go farther: some exchanges place limits upon prices arrived at in legitimate transactions entered into in full compliance with their own rules. And trade associations may exercise physical controls over economic activity deemed undesirable. Thus the Association of American Railroads has declared an "embargo" on all shipments to certain areas during a period of emergency. During the period following the war individual steel firms held prices under free market levels. It thus was necessary for firms to ration or "allocate" steel to their customers. Legislation sponsored by Senator Taft made it lawful for groups of competitors jointly to exercise such rationing authority.

Courts have approved crusades against bucket shops. They have refused to compel exchanges to furnish quotations to pro-

265. New York Stock Exchange, Constitution, Art. 10, § 1 (3d) (b); Id., Rules, c. 12, § 11 (1).
266. Id., Constitution, Art. 3, § 7. Rules of the Commodity Exchange, Inc., of New York City provide (§ 408): "The Board of Governors may . . . close the Exchange for trading or for all business . . . suspend trading in any commodity . . . suspend trading for any delivery month or months for any commodity . . . ."
267. Rules of the Minneapolis Grain Exchange (§ 418 [c]) provide: "When in the opinion of the Board of Directors an emergency exists, the Board shall have power from time to time to . . . prohibit trading . . . in any or all Futures Contracts at prices more than a specified limit above or below the average closing prices of the preceding business day."
prietors of gambling establishments.\textsuperscript{271} An agreement among members of the cement industry designed to prevent speculation by their customers was also sustained.\textsuperscript{272} Even direct control of prices by exchanges has been found lawful under exceptional circumstances.\textsuperscript{273}

Direct price fixing is worthy of closer examination. During the price "holiday" of 1946, when one price control statute had expired and the president and the congress had failed to agree upon another, values of grain for future delivery rose rapidly on the Chicago Board of Trade. Cargill held contracts requiring Board members to deliver grain at the former (controlled) low prices. "Long" on grain futures, it was about to reap a rich reward for its prudence in negotiating those transactions when the Board issued a regulation requiring Cargill to accept settlement of its contracts at the former "ceiling" figures. Cargill sued the Board for treble damages. In a weak opinion, which sought to distinguish price fixing (admittedly unlawful) from the mere "settlement" of outstanding contracts, the Circuit Court of Appeals denied recovery.\textsuperscript{274} Even if the action of the Board had not amounted to price fixing (which it undoubtedly did) it would seem difficult to justify such private enactment and enforcement of price control measures.\textsuperscript{275}

An interesting case in New York was decided the other way. Pirnie, Simons & Company engaged in the business of selling a low-priced "portfolio" of stocks of corporations listed on the New York Stock Exchange. As little as one share each of various stocks was included in the "package," but the sale was \textit{bona fide} in every respect. Alleging that the sale of such "portfolios" encouraged speculation by persons of small means and caused unwarranted expense to transfer agents, the Exchange adopted a rule prohibiting its members from dealing with the sellers of

\textsuperscript{271} Cement Manufacturers' Ass'n v. United States, 268 U. S. 588, 603 ff. (1925).
\textsuperscript{272} Cargill, Inc. v. Board of Trade, 164 F. 2d 820 (7th Cir. 1947), \textit{cert. denied}, 333 U. S. 880 (1948).
\textsuperscript{273} Cargill, Inc. v. Board of Trade, 164 F. 2d 820 (7th Cir. 1947), \textit{cert. denied}, 333 U. S. 880 (1948). \textit{But cf.} Sugar Institute v. United States, 297 U. S. 553, 593 (1936) (holds illegal an agreement among competitors eliminating "long term contracts" for delivery of sugar, allegedly speculative upon part of their customers). In Fosburgh v. California & Hawaiian Refining Co., 291 Fed. 29 (9th Cir. 1923) a restraint upon alienation was held justified by a desire to cooperate in governmental food conservation measures.
\textsuperscript{275} The \textit{Cargill} case is discussed in 16 U. of Chi. L. Rev. 144 (1948). This discussion outlines the exceptional circumstances which may be thought to justify the decision.
"packages" priced at less than $500 or who included in the portfolios less than five shares of any one stock or whose commissions thereon exceeded ten per cent of market quotations. Enforcement of the rule was enjoined, the court declaring in an extended opinion that the governors of the Exchange had no authority thus to "protect" investors against themselves.276

Exchanges should be allowed to halt "corners," for they are monopolistic in character. Perhaps they should be permitted to prevent use of their quotations for gambling purposes. Curbing speculation is another matter. Even socialist planners admit that the speculator serves useful purposes.277 And whatever legislative limits on speculation might be desirable, certainly private parties should not undertake to control short term investments. By the same token, rationing by groups of competitors can scarcely be reconciled with a free enterprise system.278

Finally, self-appointed guardians of the public interest may attempt to censor literary and theatrical performances. In this field the greatest activity apparently takes place in relation to the production and exhibition of motion picture films. An organization properly known as the Motion Picture Association of America, Inc.,279 and popularly as the "Hays office"280 is the vehicle of cooperative action. Its membership is made up of motion picture producers and distributors.281 Exhibitors, constituting the other important segment of the industry, have never belonged.282 Members may be expelled for acts prejudicial "to the best interests of the Association"283 and they may also withdraw voluntarily on twelve

277. Thus it has been said: "Hostility to speculation is mistaken and arises in part from identifying productive or competitive speculators with aggressive or monopolistic speculators." Lerner, The Economics of Control 94 (1944).
279. A New York corporation. Until 17 December 1945, the title was Motion Picture Producers and Distributors of America, Inc. Inglis, Freedom of the Movies 90 (1947). Its alter ego is the Association of Motion Picture Producers, Inc., with offices in Hollywood (as opposed to New York). The description of these organizations here is but a hasty summary of Miss Inglis' authoritative study, sponsored by the Commission on the Freedom of the Press.
280. After Will Hays, former Postmaster General and first president of the organization.
281. Distributors, however, are only eligible for membership if engaged in that business in 8 or more states of the U. S. Motion Picture Association of America, Inc., By-Laws, 1, 3.
282. Inglis, op. cit. supra note 279, at 91. "Some small producing companies belong . . . No small company has ever been refused membership because of its size." Ibid.
283. By-Laws, 16. Notice and hearing are prescribed. An expelled
months' notice. Its charter states the objects of the Association in the following terms:

"Second. The object for which the corporation is to be created is to foster the common interests of those engaged in the motion picture industry in the United States, by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and the general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions, and by other lawful and proper means."

It is easily established that the Association and its activities are founded upon lengthy experience. From 1909 to 1922 the National Board of Review operated a voluntary service for the censorship of films, the purpose being to make censorship by public officers unnecessary. So strong was the agitation against allegedly immoral films, however, that in 1921 the state of New York enacted a statute providing for official censorship. Threatened with restrictive legislation in other states, the leaders of the industry forsook the Board of Review and founded the present association in 1922. A court has found:

"From its inception in 1922 the defendant [association] endeavored to improve the moral quality of motion picture entertainment and advertising and at the same time to increase the demand for and support of decent motion pictures. . . . These measures were effective and restored the motion picture industry in the public esteem. The demand for local censorship laws, which had been strong prior to defendant's formation, abated."

During the period prior to 1930 the industry's self-regulation program was partly incorporated in a trade practice conference.

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284. Id. at 15.
285. Motion Picture Producers and Distributors of America, Inc., Certificate of Incorporation, at "Second" (New York, § 12 Membership Corporation Law, 10 March 1922).
286. Inglis, op. cit. supra note 279, at 75 ff. In 1922 the Board claimed that "all the producers in the National Association of the Motion Picture Industry have agreed to submit their pictures and abide by the Board's decisions. The Board views approximately 99 per cent of the total number of films exhibited." Id. at 80.
287. Id. at 86.
288. Id. at 87 ff. A Congressional investigation was pending at the time. From the start, the "Hays office" was supported by the major producers. Id. at 89.
Apparently the depression induced producers to violate the voluntary agreements which had theretofore characterized industry censorship. Films were produced which aroused the ire of pure-minded folk, especially churchmen. An organization named the Legion of Decency was formed to boycott disapproved pictures and it succeeded in forcing the producers into a program of compulsory censorship.\footnote{Hughes Tool Company v. Motion Picture Ass'n, 66 F. Supp. 1006 (S.D. N.Y. 1946) finding of fact No. 6; Inglis, op. cit. supra note 279, at 120 ff.} Every indication points to the reluctance of the producers to accept controls.\footnote{Id. at 96, 111 (1947).}

At present the power of censorship is founded upon provisions of the Association's by-laws. Those by-laws permit the Association's directors to regulate the content of motion pictures and advertising.\footnote{By-Laws, 14: "The Board of Directors, in pursuance of the Association's purpose to establish the highest possible moral and artistic standards of motion picture production, may from time to time make provisions in relation to the observation and maintenance of accepted standards of morality and good taste in the content of motion pictures and for the adherence to all applications and interpretations of such standards, and all such provisions so made... shall be binding upon the members.... The Board of Directors may from time to time make provisions in relation to the observation and maintenance of ethical and fair representation and good taste in the advertising of motion pictures and for the adherence to all applications and interpretations of such standards, and all such provisions so made and for the time being in force shall be binding upon the members...." Hughes Tool Company v. Motion Picture Ass'n, 66 F. Supp. 1006 (S.D. N.Y. 1946) finding of fact No. 4.} The directors exercised their powers by creating a Production Code Administration (popularly known as the "Breen Office") to which producer members agreed to submit their work.\footnote{Id. at 139 ff. In practice, scripts are submitted prior to production of the film proper.} Distributor members of the Association agreed not to handle films which did not bear the P.C.A. seal of approval.\footnote{Inglis, op. cit. supra note 279, at 143.} As a result of the foregoing arrangements films passed by the P.C.A. constitute the vast majority of the commercial entertainment motion pictures exhibited in the United States.\footnote{Id. at 153. Independent producers have "voluntarily" submitted to censorship in order to obtain distribution. There is some feeling that they are more strictly censored than members of the Association. Id. at 187 ff.} All plays reaching the New York stage are reviewed by P.C.A. representatives and "a negative opinion means that the play has little chance of reaching the screen without such drastic changes as to make the use of the title virtually a fraud upon the public."\footnote{Id. at 153.}
Censorship appears also to be exercised by groups of competitors in the broadcasting and perhaps the baseball industries.

Only one decision involving the validity of such censorship has come to light. In 1946 a direct attack was made upon the agreements providing for control of motion picture content. But a district court refused to enjoin their enforcement, declaring that if any restraint were involved, it was a reasonable one. It should be noted, however, that the conduct of the plaintiff (producer) in the case had been so lacking in propriety that any judge would have been prejudiced against him. In addition, the decision could have been reached purely on the grounds that the plaintiff, a member of the Association, was bound by his voluntary agreement (notwithstanding its alleged illegality). It would seem possible that an exhibitor, not connected with the major producers or distributors, might succeed in pushing the Association out of its present seat of authority.

In this day and age the very notion of censorship is repugnant to many minds. And the idea of private parties combining to prevent the filming of interesting books and plays is hardly appealing. Such self regulation is not even subject to judicial review. The control is not exercised for altruistic purposes: industries which assume guardianship over public morals do so for their own good. A somewhat comparable situation has arisen in Great Britain in that the "planners" make decisions for consumers. They compel the workingman to buy milk for his child rather than ale.

298. It appears that the National Association of Broadcasters instituted a "system of self-regulation designed to make further government regulation or control unnecessary . . . Its code included industrial regulation requirements as to the broadcasting of controversial public issues, religious and current news broadcasts . . . The self-imposed restraint caused some loss in revenue, but won wide public approval." Noble, supra note 208, at 5. Apparently, however, the "code" is lacking in enforcement procedures and is less important than the controls exercised by the Federal Communications Commission, the "networks" and advertisers. Note, 57 Yale L. J. 275, 292 n. 89 (1947).

299. Major league rule 15 (a) : "Any player who violates his contract or reservation or who knowingly participates in a game with or against a Club containing or controlled by ineligible players or a player under indictment for conduct detrimental to the good repute of professional baseball, shall be considered an ineligible player . . ." 300. See Hughes Tool Company v. Motion Picture Ass'n, 66 F. Supp. 1006, 1013 (S.D. N.Y. 1946).

301. The plight of the independent exhibitor (after years of anti-trust actions against the major units in the industry) is portrayed in Fortune, Aug., 1948, p. 95.

302. Inglis, op. cit. supra note 279, at 112.

303. Id. at 174.
AGREEMENTS AMONG COMPETITORS

for himself. Exception has been taken to such planning.304 But at least the “planners” are officers of an elected government.

As a practical matter, however, it appears that our choice is limited. If private parties do not control the content of motion pictures, the political demand for official censorship will be too strong to resist.305 Here arises an interesting speculation: how far should matters of political necessity affect policy judgments? Apparently the Commission on the Freedom of the Press felt that political forces could not be overlooked and that the evils of private control were less onerous than the weight of official suppression.306 Nevertheless a court might be tempted to strike a blow for freedom.

ACTIVITIES APPARENTLY ONLY OF INTERNAL INTEREST

There remain a number of things which groups of competitors do without apparent effect upon outsiders. That is, the action in and of itself, seems not to affect non-members. Thus trade associations supply their members with a steady stream of information, publishing bulletins, reports, trade directories and the like.307 Financial practices of the industry are studied308 and members are advised concerning technical matters.309 Among the latter are questions of law: many trade associations render services to their members by disseminating digests of decisions and legislation.310 Others go so far as to retain counsel and broadcast his advice.311

305. Inglis, op. cit. supra note 279, at 173.
306. Id. c. 5 ff. Miss Inglis herself seemed to reach much the same conclusion. Id. at 180. It is true that centralized self-control in the motion picture industry is more efficient than cutting by local censors. Id. at 176.
307. Judkins, op. cit. supra note 10, at 13. Registers of customers and suppliers are among trade association publications. Gott, op. cit. supra note 26, at 1, 6 ff. Cf. note 97 supra. One association has published more than 110 bulletins on such subjects as bankruptcy, child labor, consumer cooperatives, consumer standards, food and drugs, housing, industrial regulation, labor disputes, monetary reform, social security, taxation and wages. American Retail Federation, What is the American Retail Federation? 7 (1938).
309. Many associations engage in “Expert service. Rendering scientific, technical engineering, or management consulting services through specialists.” Id. at 3.
310. Foth, op. cit. supra note 15, at 84; Gutelius, supra note 43, at 37.
311. Gott, op. cit. supra note 26, at 7. Thus, information regarding tax problems is made available to members. Id. at 10. One association stated: “The Institute retains a well-known firm of attorneys whose services include rendering of opinions from time to time on legal questions of common interest to the membership. The opinions are furnished without charge to member companies.” The propriety of such action has been questioned. Donovan, Trade Association Administration and Protection Under the Anti-Trust
Of course trade journals perform much the same functions.

Trade associations have often urged their members to adopt uniform accounting procedures and have furnished assistance in the creation of such systems. Although admittedly helpful to small firms which could not alone afford the study necessary to adapt general principles to a specific industry, the promotion of uniform accounting has often given rise to suspicions of price-fixing. As a result, the practice has not always been favored in the courts.

Competitors join forces to support industrial research projects. Market analysis, or commercial research, has been the

Law, 30 Geo. L. J. 149, 150 ff. (1941). Canon of Ethics No. 35 of the Chicago Bar Association provides: "A lawyer may accept employment from any organization, such as a . . . trade association, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs."


313. NICB, op. cit. supra note 14, at 230.

314. Prior to the NRA, many cost accounting systems were "mere instrumentalities for controlling the prices in an industry." Kirsh & Shapiro, op. cit. supra note 79, at 80; Note, 57 Yale L. J. 391, 403 ff. (1948). It has been said that "... a better knowledge of costs inevitably leads to stabilization of prices." Foth, op. cit. supra note 15, at 272. Instances are given in which a manufacturer has been "educated" not to cut prices after installing uniform cost accounting. Halligan, The Relation of Uniform Cost Accounting to Competition, 139 Annals 74, 75, 79 (1928). One advocate of cost accounting said: "Destructive competition is due . . . to a lack of knowledge of individual manufacturing costs. Correct costs mean fair competitive prices." Naylor, op. cit. supra note 28, at 187. And "... the main objects of the National Retail Monument Dealers' Association are to improve the character of cemetery memorials and to establish a standard selling price, not by legislation, but by a system of education as to correct factory costs." Id. at 100. Note the use of the word "education." In the code of ethics of the Advertising Specialty Association it was provided: "We, each, pledge ourselves to the adoption . . . of a comprehensive . . . cost system to the end that capricious and senseless variations . . . in price may be eliminated. . . ." Lee, op. cit. supra note 14, at 191. In Great Britain "a number of [trade] associations have adopted uniform methods of cost accounting. This arrangement may to some extent serve the purpose of preventing under-cutting." Langley, supra note 167, at 64.


316. TNEC, op. cit. supra note 21, at 301; Department of Commerce, op. cit. supra note 7, at 67 ff.; NICB, op. cit. supra note 14, at 221 ff. Some associations coordinate the individual research of members. Gott, op. cit. supra note 26, at 8.
subject of similar programs. Thus the Portland Cement Association studies the heat insulating values of concrete; the Society of Automotive Engineers sponsored a mass attack upon the problem of engine "knocking"; bituminous coal producers jointly designed a new type of furnace (allegedly smokeless) to consume their fuel; and the Dry Milk Institute discovered a wholly new product, several million dollars worth of which has been sold.

While part of the research is in or near the realm of pure science, it is rarely wholly altruistic. The American Dairy Association, for example, sponsored studies which demonstrated that "butter is better" (more food value in butterfat than in vegetable fat).

Although some question has been raised as to the legality of joint research, the Supreme Court has recently pronounced its blessing:

"The development of patents by cooperating units of an industry through organized research groups is a well known phenomenon. However far advanced over the lone inventor's experimentation this method of seeking improvement in the practices of the arts and sciences may be, there can be no objection, on the score of illegality, either to the mere size of such a group or the thoroughness of its research." It is difficult to quarrel with that conclusion. In many instances joint research may be more efficient. And it may improve competition by destroying trade secrets. A distinction can be drawn between research which merely reduces costs within an industry and developments designed to improve competitive relationships as against another group of producers. But the effects of the two are probably similar. Again, joint research doubtless promotes standardization of product. But there is little legal objection to that.

327. See note 176 _supra_.

327. See note 176 _supra_.

327. See note 176 _supra_.
Trade associations frequently sponsor arbitration of commercial disputes. Apparently little difficulty is encountered so long as the disputes concern only association members. An attempt to bind outsiders to arbitrate differences may lead to embarrassment.

**Conclusions**

This hasty survey of facts and law cannot assume to reach detailed conclusions. Each case, as the "realists" so tiresomely assert, must stand upon its own merits. But perhaps a general survey may suggest a frame of reference for individual problems. And possibly the hazarding of a few principles may serve to counteract the specious pleading of the "merits" of specific cases and to outline general considerations of public welfare with which decisions should be consistent.

In declaring that the solution of problems must depend largely upon a detailed consideration of facts—and particularly of the effects of the trade practice under consideration—price, of course, is the point of focus. An effect upon prices is the touchstone in determining the legality of activities of groups of competitors. No matter for what purpose competitors are organized, some members are apt to favor schemes for lifting the burden of free prices. If the group can successfully resist that pressure, it has done much to demonstrate its fitness to survive.

Much, perhaps, but not all. For if private organizations attempt to make and enforce laws, then their activities should be scrutinized.

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328. Foth, op. cit. supra note 15, at 89 ff.; Naylor, op. cit. supra note 28, at 148 ff. In baseball, major league rule 22(b) states: "All disputes between players and clubs shall be referred to the Commissioner and his decisions shall be accepted by all parties as final." The players, of course, are not parties to the agreements among the baseball clubs. Cf. rules of Hardwood Manufacturers' Institute. Lee, op. cit. supra note 14, at 196 ff.

329. NICB, op. cit. supra note 14, at 280 ff.


332. Restatement, Contracts § 515(c). In Apex Hosiery Co. v. Leader, 310 U. S. 469, 50 ff. (1940) it was said: "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."


with care. Government simply cannot abdicate its role of law giver. Nor can it brook competition with its citizens in that regard. On the other hand, if agreements affect only the (voluntary) parties thereto, it is difficult to find fault with them. And some restriction of outsiders (as in the case of organized exchanges) may be justified by attempts to perfect a primary market. One observer likens such reasonable restraints to levees which cause a stream to run to the sea in an orderly manner; he contrasts them to dams, which stop its flow.335

There remains the larger issue of the role of groups of competitors in a democracy. We know that organization breeds power and power is dangerous. In some instances we may distinguish offensive from defensive combinations. An agreement to defend an industry from outside attack (such as a proposal to burden it with a special tax) can be supported more easily than an aggressive scheme (such as a drive to raise tariff rates). Many trade association activities, however, take both offensive and defensive parts. Their purpose is to allay public distrust and disfavor by currying confidence and friendship. Thus restrictive legislation is avoided before it is proposed. Offensive and defensive programs merge in the preventive war of "public relations."

It may be dangerous, too, to assume that every "defensive" group is harmless. To strengthen the position of weak interests is an invitingly simple method of checking abuses of the strong. And it has much political appeal. Thus the National Labor Relations Act was avowedly designed to balance bargaining power of employers and employees.336 Equalizing measures, however, lead to more of the same. As one group increases its bargaining power, its opponents seek to do likewise. Organizations snowball and gather strength. As they grow bigger and stronger the groups pose vast questions for economic and political democracy.337 The end, of course, is totalitarianism. And yet, while our economy remains but partly free, it is difficult to deny the unorganized the special privileges enjoyed by those already joined together.

335. Department of Commerce, op. cit. supra note 7, at 48 ff.
336. Section 1 of the National Labor Relations Act declared: "... The inequality of bargaining power between employees who do not possess full freedom of association ... and employers who are organized in the corporate or other forms of ownership association substantially burdens ... commerce ... by preventing the stabilization of competitive wage rates. ..." 49 Stat. 449 (1935); 29 U. S. C. § 151 (1946). As to the Norris-LaGuardia Act, see Columbia River Packers' Ass'n v. Hinton, 315 U. S. 143, 145 (1942). Cf. § 6 of the Clayton Act and the Capper-Volstead Act, note 124 supra.
337. Feller, Public Policy of Industrial Control in Public Policy 130, 137 (Friedrich ed. 1940).
Since the days of Adam Smith there has been a school of thought which regards any cooperation among competitors as a conspiracy against the people. One observer, for example, tartly remarked:

"The generic purpose of trade associations is in some way to allay the rigors of trade competition, in order to assure or increase profits."  

The fact that trade associations form focal points for economic planning, their prominent role in the NRA experiment and the favor shown them by socialists lends support to such a viewpoint. Trade associations played a strong role in fascist Italy, enjoying broad legislative powers. Those who dread the spread of particularist "welfare" legislation and economic planning therefore deem it desirable to nip all joint activities of competitors in the bud. Their program calls only for security for the individual as such, not for his vocation, and trade associations represent organized occupations. They seek a government equally inactive, preferring to limit the role of the state in the economy to the maintenance of the demand side of the market.

338. The famous remark is: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." 1 Smith, The Wealth of Nations 134 (6th ed. 1793). "... it has been axiomatic that a trade association will fix prices if it can—and has done so whenever it could." 8 Fortune 2 [sic] 39 (1933).

339. Watkins, supra note 25, at 671. Professor Watkins made similar comments upon industrial "institutes." Watkins, supra note 140, at 48. Another student commented upon trade associations as follows: "It is not the general advice and assistance to the members, but the desire for industrial control, which is the driving force behind the whole movement. Legislative, statistical and technical aid may be helpful to business men, but the elimination of over-production and price cutting is vital. The real core of the trade association movement has lain in its attack on free competition. ..." Whitney, op. cit. supra note 17, at 38.


341. Association of Cotton Textile Merchants, op. cit. supra note 82, at 28 (trade association and NRA personnel the same).


343. Anselmi, Trade Associations and Corporations in Italy, 31 Int. Lab. Rev. 6, 7 ff. (1935). Even prior to the advent of the Labor regime, Britain was badly afflicted with price-fixing trade associations. Prager, Trade Associations in Great Britain, 3 Agenda, 137, 142 ff. (1944); Jewkes, op. cit. supra note 61, at 37.


346. Robbins, op. cit. supra note 304, at 83. This is not an anti-enterprise point of view: "It should be the business man who clamours ... for the control of monopoly. Only in that way can he forestall the socialist who
We cannot, however, overlook the benefits of private action. Practically speaking, many activities will be undertaken anyway, our only choice being whether they shall be done by groups of competitors or by government. Private action is more responsive to actual needs; it lifts a load from the taxpayer and places it in hands responsive to changing conditions. To encourage government to undertake many such functions might be to invite the creation of a vast bureaucracy which could easily deviate into particularist controls over the physical movement of men and goods. As Mr. Hoover declared:

"Any collective activity can be used as a cloak for conspiracy against the public interest, as can any meeting of men engaged in business, but it does not follow because bricks have been used for murder that we should prohibit bricks." Perhaps Mr. Hoover’s simile of bricks is imperfect. If an object is sufficiently dangerous, we do prohibit it. On the other hand, we should be foolish to expect that government can undertake all our burdens without placing freedom in peril. In any event, we must see our problems in their entirety. As the master artist said,

"... virtue can be essentially but the virtue of the whole, the wayside traps set in the interest of muddlement and pleading but the cause of the moment, of the particular bit in itself, have to be kicked out of the path!"

advocates nationalization as the cure for private monopoly. Jewkes, op. cit. supra note 61, at 57. It should not be confused with the advocacy of strict controls over monopolistic business practices combined with approval of governmental restraints of trade. E.g., Landis et al., Report in Stocking & Watkins, Cartels or Competition? 403, 441 ff. (1948).

347. Oliphant, supra note 8, at 382 ff. semble; Roberts, supra note 140, at 559.

