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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

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J. Wheeler, Chairman
Committee on Developing a Consumer Product
Safety Standard for Bookmatches
1916 Race St.
Philadelphia, Pennsylvania 19103

Dear Mr. Wheeler:

This is in reply to your letter of December 6, 1974, requesting an advisory opinion concerning the possibility of ASTM developing a standard that contains a performance requirement for bookmatches that can be met only by using a process for which a particular company or individual holds the patent rights.

I see no legal prohibition against the issuance of a performance requirement that, at the present time, can be met only by a patented process. If the requirement is written in performance terms, other interested persons are free to develop a process capable of meeting the requirement. In any event, any requirement developed is subject to subsequent rulemaking activities including notice, comments and opportunity for oral presentations and any person may then raise objections to the proposed requirements for whatever reasons they consider appropriate.

Since I do not consider a performance requirement such as the one described above to be prohibited, your questions number 2 and 3 appear to be academic. However, although no in-depth research has been done on these matters I do not see how the Consumer Product Safety Commission could require mandatory licensing or the suspension or regulation of royalty payments due to patent rights.

Sincerely,

Michael A. Brown
General Counsel

COMMITTEE F-15
ON CONSUMER
PRODUCT SAFETY

Organized in 1973

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6) 2-8660
Patent #

6 December 1974

RECEIVED DEC 1974 Consumer Product Safety Commission Office of the General Counsel

Michael Brown, Esq.
Office of General Counsel
Consumer Product Safety Commission
Washington, D. C. 20207

Dear Mr. Brown:

As you know, ASTM is right now engaged in the business of developing a Consumer Product Safety Standard for Bookmatches, as a selected offeror under Section 7.

In the course of developing the standard, an important legal question arose to which we urgently need your advisory opinion.

The issue is as follows: Suppose ASTM develops a standard containing a performance requirement for the bookmatch (for example, all matches shall extinguish themselves within 10 seconds after being lit). Suppose that a particular company (or individual) holds a patent to the only known process for meeting such a requirement. This raises a number of questions to which we would like your opinion:

(1) Is there any legal prohibition on setting a safety standard when it is only possible to meet such standard by one process which is patented?

(2) Can CPSC, in such a case, require mandatory licensing?

(3) In such a situation, what would be the status of royalty payments? Could they be suspended? Regulated?

We are also attaching a copy of a letter from the Anti-trust Division, U.S. Department of Justice that you might want to consider in answering the three questions raised above.

The first draft of the ASTM standard is scheduled to be drafted before the end of December (since ASTM is required to submit a final proposed standard by February 4.) Therefore, we would like an answer just as quickly as possible.

Sincerely,

J. Wheeler, Chairman
Committee on Developing a Consumer Product Safety Standard For Bookmatches

Department of Justice
Washington, D.C. 20530

MAR 28 1973

Mr. Paul W. Hallman
Deputy Director
Division of Compliance
Bureau of Product Safety
5401 Westbard Avenue
Bethesda, Maryland 20016

Dear Mr. Hallman:

This is in response to your letter of February 21, 1973, in which you requested this Department's views on the antitrust implications of certain actions that the Bureau of Product Safety is contemplating with respect to the match manufacturing industry. You indicate that the Bureau's concern in this area stems from the fact that an estimated 50,000 match-related injuries occur annually, many of which are very serious. Apparently, one Food & Drug Administration study indicated that a large number of the injuries happened to children, and that many of the accidents were related to defects in the matches or in the match container's design.

In your letter to the Department, you mentioned three types of joint industry efforts that the Bureau was considering in its effort to reduce the number of match-related injuries. You suggested that members of the industry might begin a joint advertising campaign aimed at households with young children; that they might develop a set of voluntary safety standards dealing with the design or performance of matches and matchbooks; or that they might give technical information and advice to the Bureau of Product Safety to help the Bureau create a set of mandatory safety regulations, which would then be published in the Code of Federal Regulations. You suggested that any of these projects would require a good deal of consultation and cooperation among the members of the industry, and would perhaps require them to arrive at an industry "position" to be presented at further meetings with Bureau personnel.

You indicated that, on June 15, 1972, you met with members of the match industry to discuss ways of cutting down the number of injuries to children, as well as plans to help improve the general safety of matches. Apparently, the industry's representatives told you that they could not work together on these problems because of the prohibitions contained in a 1946 antitrust Consent Decree that they had entered into with the Department of Justice. United States v. Diamond Match Co., Civil No. 25-397, dated April 9, 1946. Because of the concerns expressed by the match manufacturers, you have requested our views as to whether the antitrust laws or the Diamond Match judgment would forbid any of these projects that the Bureau is contemplating.

The first proposal contemplated that the match producers would join in an industry-wide advertising campaign designed to warn parents with small children against the dangers of matches. We are of the opinion that neither the Diamond Match decree nor the antitrust laws in general would raise any legal obstacles to a joint advertising plan limited solely to warning the public of the safety hazards connected with matches.

The second proposal contemplates that the members of the industry would jointly develop voluntary safety standards for matches and matchbooks. Section 1 of the Sherman Act prohibits concerted actions which may unreasonably restrain trade or commerce. Therefore, the critical question as to whether joint efforts by the match manufacturers to establish voluntary safety standards would violate the antitrust laws is whether the actual standards developed unreasonably restrained trade or commerce. Efforts by the match manufacturers to jointly develop safety standards, in and of themselves, would not violate the outstanding antitrust decree or the antitrust laws. However, until the standards are developed, it is of course impossible for us to determine whether the standards might unreasonably restrain trade. We can, on the other hand, venture certain suggestions which, if adhered to, would lessen the likelihood that the standards would raise serious competitive problems.

The standards should not arbitrarily disadvantage any group of manufacturers. This danger may be lessened if all segments of the industry as well as interested persons outside of the industry are provided the opportunity to participate in the development of the proposed standard. Whenever possible, the standards should be drafted with reference to "performance" rather than design specifications. The use of "performance" standards allows manufacturers to innovate and seek more efficient methods of achieving the goal of the standard -- in this case, improved safety. No attempt should be made to coerce compliance with any voluntary standard. Such action by manufacturers would amount to a private arrogation of public power in violation of the antitrust laws. Finally, it must be stressed that any attempt to use the voluntary standards as part of a price-fixing, market allocation, or other anticompetitive scheme would violate both the antitrust laws and the outstanding decree.

The third course of action contemplated would involve joint industry presentations of technical information and advice to the Bureau to assist the Bureau in developing mandatory safety standards. Neither the antitrust laws nor the outstanding decree prevent the match manufacturers from consulting jointly with a government agency for the purpose of assisting the latter to develop safety standards. The Department believes, however, that the Bureau when attempting to determine the present state of the art or the technical feasibility of a standard should discuss such matters with the manufacturers on an individual basis rather than with the industry as a whole. By acting in this manner the Bureau might find that, by considering a variety of viewpoints, it can develop its mandatory standards from a broader data-base.

Attached to your letter to us was a letter dated February 12, 1973, that the Director of the Bureau of Product Safety sent out to a number of matchstick producers. In that letter the Director invited an industry effort not only to develop safety standards, but also to do research into the product itself, with a view to reducing the safety hazards associated with matches.

Whether an industry-wide joint research effort would unreasonably restrain competition in innovation depends upon an assessment of a number of factual considerations particular to the specific joint research effort. The magnitude of the research problem must be assessed in relation to the individual research capabilities of the members of the industry and the structure of the industry. The effect of the joint research on the opportunities of independent inventors and the incentives of the members of the joint venture must also be considered. For example, the existence of mandatory patent or technology pooling or licensing provisions may in some circumstances reduce member and independent inventor incentives to engage in research.

Since no specific joint research proposal has been agreed upon, we, of course, cannot make any determination as to whether such joint research would raise serious antitrust problems. For your guidance, however, we can make several suggestions. Potential antitrust concerns can be lessened by limiting the joint efforts to what might be considered "basic" as distinguished from "applied" research. Joint research efforts to determine the most dangerous properties of matches and to establish uniform means of testing or measuring such properties would not appear to raise significant antitrust concerns. Once the basic research knowledge has been developed, however, the members of the industry should, in most cases, be required to engage in independent efforts to reduce the basic scientific knowledge to practice.

In sum, concerted research efforts to improve the safety of matches would not violate the outstanding decree. While it is impossible to determine in advance whether any particular joint research effort would violate the antitrust laws, the antitrust concerns can be materially lessened by adherence to the suggestions made above.

I hope this letter has been responsive to your inquiry. If we can be of any further assistance to the Bureau in its efforts to improve the safety of matches, you can count on our cooperation.

Sincerely yours,

Thomas E. Kauper

THOMAS E. KAUPER
Assistant Attorney General
Antitrust Division