

ORIGINAL

Decision No. 85670

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

M.E.L.'s Sewing & Vacuum Center,
Complainant,

v.

General Telephone Company of
California,

Defendant.

Case No. 9763
(Filed July 1, 1974;
amended August 19, 1974)Tannenbaum, Neiman, and Billet, by Paul L. Stanton,
Attorney at Law, for Edwin Alan Lytton and
Mary E. Lytton, dba M.E.L.'s Sewing & Vacuum
Center, complainants.Albert M. Hart, H. Ralph Snyder, and Mary L. Sullivan,
Attorneys at Law, for General Telephone Company
of California, defendant.O P I N I O N

The original complaint in this proceeding was filed on July 1, 1974. It was amended on August 19, 1974. The amended complaint alleges that complainants, husband and wife doing business as M.E.L.'s Sewing & Vacuum Center, are the sole and exclusive authorized sales and service dealer for Bernina sewing machines in Orange County, California, with the right to use the Bernina sewing machine trademark and it is further alleged that the 1972 Huntington Beach and Laguna Beach telephone directories published by General Telephone Company of California (General) list other sewing machine dealers and repair agencies in such a way as to indicate they are also authorized sales and service dealers. It is alleged that this erroneous advertising has worked to complainants' disadvantage and the complaint prays for credit in the sum of \$6,370.20 which is the sum complainants paid General for advertising in the 1972 directories.

General filed an answer on September 3, 1974. A public hearing was scheduled and held before Examiner Fraser on July 17, 1975 in Los Angeles. The portion of the amended complaint which refers to the 1974 telephone directories was withdrawn by complainants during the hearing. The matter was submitted on the date of hearing. The following facts were developed through testimony of Mary Lytton. Complainants have been in business since 1959. They have been the exclusive dealer for Bernina sewing machines in Orange County since 1960. A second dealer was certified in early 1972 but his authority was canceled effective August 1, 1972. The witness stated that some time after the other dealer was canceled she telephoned General and advised one of its sales personnel that complainants had the exclusive franchise to sell or repair Bernina sewing machines in Orange County. She was in turn advised by the telephone representative that no other dealers in the area would be allowed to use the trade name Bernina. She then agreed to take yellow page directory advertising in the 1972 Huntington Beach and Laguna Beach telephone directories.

Exhibit No. 2 is a letter from the foreign headquarters of the Bernina Company. Exhibit No. 4 is a copy of a registration issued by the United States patent office. Both documents confirm that the name Bernina in capital letters is the registered trademark and Exhibit No. 2 notes that only authorized dealers are authorized to use this name. Exhibit No. 5 was placed in evidence by complainants. It is page 198 of the 1972 Laguna Beach phone book which includes an ad of one of complainants' competitors including the name Bernina with the names of many other manufacturers of sewing machines. Exhibit No. 6 is page 199 of the same phone book. It lists a smaller ad of the same company which includes the statement "Sells all makes and models for less". Exhibit No. 7 is page 200 of the same phone book. It has a listing by complainants' competitors with the

statement "Sells all makes and models for less", it also lists complainants' names with a black square containing a sewing machine outlined in white with the word Bernina in the square under the white outline. It is alleged that both of complainants' stores should have been included under this official trademark. Both stores are listed, but only one is in the box with the trademark. Exhibit No. 8 consists of five pages from the yellow section of the Huntington Beach telephone directory. Complainants object to the listing of two authorized dealers from outside of their area in this directory, also to statements in some of the advertisements that a dealer "sells all makes and models for less" and to the name Bernina being listed with other sewing machines under statements such as "large selection in stock" or "sales, service, and repairs". The fourth page of this exhibit has complainants and two other dealers listed under the official Bernina trademark consisting of the black box with the white outlined sewing machine. The other two dealers are not authorized to handle Bernina products. Several other entries in Exhibit No. 8 listed the name Bernina along with other models of sewing machines with statements such as "we repair all models" or "we sell all makes and models". One of the complainants testified that the defective advertising in the 1972 telephone books as described caused a serious decline in complainants' business during late 1972 and 1973 when these books were current. Complainant further testified 270 sewing machines were sold in 1971, 240 in 1972, and only 212 in 1973 when these phone books were being used. Complainant testified that she notified a representative of General in November 1972 of the errors in the 1972 directories. These errors were partially corrected in the 1973 directories, and were completely correct in the 1974 books. Complainant further testified that damage has resulted when people call other dealers and purchase Bernina sewing machines for less than the authorized selling price.

Complainants are informed of these deals when the customer returns to ask about the guarantee on a new machine, which is not applicable when the Bernina is sold by other than an authorized dealer. Thus both complainants and customer are affected by misleading information or advertising. Complainants requested that the Commission order defendant to rebate all or a substantial portion of the \$6,673.20 paid for directory advertising in the 1972 Laguna Beach and Huntington Beach telephone directories.

A witness for General testified that complainants were listed under the black box trademark of Bernina which they were entitled to as an authorized dealer. He testified the owner of a trademark or tradename can notify the telephone directory company by letter of those dealers who are entitled to use their mark. But in fairness to all, the directory company cannot take an order from one dealer that demands the trademark be refused to someone else. It was noted that General's tariffs expressly state that the company has no responsibility for copy furnished by advertisers. It is also traditional to allow a dealer to use a brand name in describing the particular article or machine that he services, repairs, or sells. To enforce a contrary rule would render much advertising completely useless. Statements such as "sales, service, repair", or "repair on all makes" or "sales and service" are favored since they indicate to the reading public whether a repair service is available and whether secondhand machines are sold. The witness suggested that a credit of \$2.00 per month be allowed for an overcharge made on the 1972 Laguna Beach directory and \$12.75 a month for the error in the 1972 Huntington Beach directory. The latter credit is prompted by an error made on directory page 548 which is a part of Exhibit No. 8 where two unauthorized dealers were listed with complainants

under the Bernina official trademark. He noted that complainants were charged \$17 per month for listing their two stores under the Bernina trademark and an additional \$17 for the trademark itself; the witness recommended a credit of 25 percent (\$4.25) on the first charge and 50 percent (\$8.50) on the second; for a total of \$12.75 per month.

The witness testified that the employee who placed complainants' advertisement in the 1972 phone book is no longer employed by General and his location is not known. If a local dealer calls a telephone sales agent to advise he has the sole and exclusive right to use a trademark, General's agent would first check to determine if a list of authorized dealers has been provided by the owner of the trademark. If there was no list, the caller would be advised and told that restrictions on a trademark can be imposed or enforced solely by the owner of the trademark, or his designated agent. He testified further that the example provided illustrates General's standard operating procedure. The witness had no other knowledge of conversations complainant had with General's representative.

Discussion

General has provided everything required under its tariffs. No tariff violation has been alleged nor has it been proven (with the two minor exceptions noted) that unauthorized dealers were listed under the Bernina box trademark. It would seriously curtail all directory advertising if all statements describing sales, service, or repairs provided had to be approved by all other dealers before publication.

Findings

1. Complainants were the only authorized Bernina sewing machine dealer in Orange County during 1972 and 1973.

2. Complainants allege they suffered serious business loss and their position as a Bernina sewing machine dealer was jeopardized by the advertising on sewing machine sales and service in the 1972 Laguna Beach and Huntington Beach telephone directories.

3. A telephone directory company is only responsible to the owner of a tradename or trademark for its use.

4. An advertiser who is the authorized representative of a name brand product cannot order the directory publishing company to alter or suppress the advertising of another dealer.

5. There has been no proof that General has violated any provisions of its tariff.

6. Complainants are entitled to a credit of \$24 (or \$2 per month) on the 1972 Laguna Beach telephone directory because of an overcharge and \$153 (or \$12.75 per month) on the 1972 Huntington Beach directory because two unauthorized dealers were listed under the Bernina trademark, for a total credit of \$177.

Conclusions of Law

1. General should pay the complainants the sum of \$177.
2. All other relief requested should be denied.

O R D E R

IT IS ORDERED that:

1. General Telephone Company of California shall pay complainants the sum of \$177.

2. All other relief requested by complainants is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 13th
day of APRIL, 1976.

President
William J. ...
...
...
Commissioners

Commissioner D. W. Holmes, being necessarily absent, did not participate in the disposition of this proceeding.