

In the Matter of

CERTAIN BRAIDING MACHINES

Investigation No. 337-TA-130

**Unreviewed Initial
Determination**



USITC PUBLICATION 1435

OCTOBER 1983

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

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This is an initial determination issued by a Commission administrative law judge (presiding officer) that was not reviewed by the Commission. The initial determination has, therefore, become the Commission determination in this investigation on the issue of violation of section 337. See section 210.53(h) of the Commission's Rules of Practice and Procedure, 47 Fed. Reg. 25134, June 10, 1982 and 48 Fed. Reg. 20225, May 5, 1983; to be codified at 19 C.F.R. § 210.53(h).

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 UNITED STATES INTERNATIONAL TRADE COMMISSION
 Washington, D.C.

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)
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INITIAL DETERMINATION

Pursuant to the Notice of Investigation in this matter (47 Fed. Reg. 42845-46, September 29, 1982), this is the Presiding Officer's initial determination under Rule 210.53 of the Rules of Practice and Procedure of this Commission, 19 C.F.R. 210.53. The Presiding Officer hereby determines, after a review of the briefs of the parties and of the record developed at the hearing, that there is no violation of Section 337 of the Tariff Act of 1930, as amended,^{1/} in the unauthorized importation into the United States, and in the sale of certain braiding machines by reason of common law trademark infringement, false designation of origin, and passing off with the effect and tendency to destroy or to injure substantially an industry, efficiently and economically operated, in the United States.

* * * * *

NOTE: The following abbreviations are used throughout this Initial Determination:

- Tr. means Official reporter's transcript.
- Numbered exhibits are identified by the proffering party:
 Complainant (CX); Respondent (RX); Commission Investigative Attorney (SX); Administrative Law Judge (ALJX); CPX refers to Physical Exhibits of the complainant .
- (C) means confidential information subject to the protective order herein.

1/ 19 U.S.C. 1337, hereinafter Section 337.

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PROCEDURAL HISTORY

New England Butt Co., a division of Mossberg Industries, Inc., 304 Pearl Street, Providence, Rhode Island 02907, filed a complaint and its amendments on August 18, 1982, and September 10 and September 13, 1982, respectively, pursuant to Section 337, alleging unfair methods of competition and unfair acts in the importation of certain braiding machines into the United States, or in their sale, by reason of alleged common law trademark infringement, false designation of origin, and passing off. The complaint further alleged that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

The complaint requested that the Commission conduct expedited temporary relief proceedings and issue a temporary exclusion order, as well as temporary cease and desist orders, and after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

The Commission, on September 24, 1982, ordered that pursuant to subsection (b) of §337, an investigation be instituted to determine whether there is reason to believe that there is a violation or whether there is a violation of subsection (a) of §337 in the unlawful importation of certain braiding machines into the United States, or in their sale, by reason of alleged common law trademark infringement, false designation of origin, and passing off, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission instructed the presiding officer to give expeditious consideration to the request for temporary relief. The

Notice of Investigation was issued and published in the Federal Register on September 29, 1982. (47 Fed. Reg. 42845-46). An amended Notice of Investigation, reflecting complainant's request for temporary relief, was issued on October 8, 1982, and published in the Federal Register on October 14, 1982. (47 Fed. Reg. 45988).

The following parties were named as respondents in the Notice of Investigation:

Kokubun Inc.
Nakajimacho
Hamamatsu, Japan

Mr. George Sabula
Box 163-A
McEntire Road, Route 1
Tryon, North Carolina 28782

By notice of November 2, 1982, filed with the Commission Secretary, complainant New England Butt Co. withdrew its request for a temporary exclusion order.

A prehearing conference was held on February 7, 1983, and the final hearing commenced on February 8, 1983, before the presiding officer to determine whether there is a violation of §337 as alleged in the complaint and Notice of Investigation. Appearances were made by counsel for complainant, the Commission investigative attorney, and respondents Kokubun, Inc. and George Sabula. The hearing concluded on February 11, 1983.

The issues have been briefed and proposed findings of fact submitted by the participating parties. The matter is now ready for decision.

This initial determination is based upon the entire record of this proceeding including the evidentiary record compiled at the final hearing, the exhibits admitted into the record at the final hearing, and the proposed findings of fact and conclusions of law and supporting memoranda filed by the parties. I have also taken into account my observation of the witnesses who appeared before me and their demeanor. Proposed findings not herein adopted, either in the form submitted or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting each finding.

FINDINGS OF FACT

The Administrative Law Judge adopts the following Findings of Fact to the extent they are consistent with this opinion.

Jurisdiction

1. Service of the Complaint and Notice of Investigation was perfected on all respondents. (ALJX 1).

Parties

2. Complainant New England Butt Co. (New England Butt) is a corporation of the state of Rhode Island with its principal place of business at 304 Pearl Street, Providence, Rhode Island 02907. Established in 1842, New England Butt became a division of Wanskuck Company in 1948. Wanskuck Company has been known as Mossberg Industries since September 1982. New England Butt is engaged in the manufacture and sale of textile equipment, including the braiding machines at issue in this investigation. (Gustafson, Tr. 182; SX 2).
3. Respondent Kokubun, Inc. (Kokubun) is a Japanese corporation with its principal place of business at 2635, Nakajima-Cho, Hamamatsu 430, Japan. Kokubun is engaged in the manufacture of braiding machines which are exported to the United States. (SX 5).
4. Respondent George Sabula d/b/a Sabula Associates (Sabula) has its principal place of business at McEntire Road, Route 1, 163-A, Tryon, North Carolina 28782. Sabula is engaged in the importation into and sale in the United States of braiding machines manufactured by Kokubun in Japan. (SX 3).

Product In Issue

5. The product in issue in this investigation is a bench-mounted maypole-type braiding machine used in the textile trade to produce braided material. Braiding machine models will vary according to the type of braid manufactured by the machine. (SX 2).
6. A maypole braider is so-called because of the similarity between the path traced by bobbin carriers on a braiding machine and that of dancers around a maypole. (RX 6, Forward, p. 10).
7. Modern braiding machines are of four principal types: soutache, tubular, flat, and special, all of which are manufactured by New England Butt Company. (Gustafson, Tr. 227; RX 6, p. 1).
8. Specifically at issue in this investigation are New England Butt's Number 2 braider with thirty-three carriers or less and three models of the cord machines. (Gustafson, Tr. 227, 250; CX 2).
9. Seventy-five to eighty percent of the braiding machines New England Butt manufactures are Number 2 braiders in the range of up to and including thirty-three carriers. (Gustafson, Tr. 106; CX 2).
10. The size of a braiding machine is determined by the number and size of bobbin carriers used thereon. (RX 6, pp. 16-17).

Common Law Trademark

Functionality

11. The table (A)* of the New England Butt Co. No. 2 type braiding machine functions to provide the serpentine track on which the carriers move: The table's circular shape achieves an economy in cost for providing support for the circular path on which the bobbin carriers travel. If the table of the braiding machine were made in a wider shape, fewer braiding machines would fit on a bench of a given size. (Gustafson, Tr. 65, 184-85; Gustafson, RX 3, pp. 26-27).

12. The function of the vertical apron or horn gear guard (B) of the No. 2 type braiding machine of New England Butt Co. is to prevent injury to persons by preventing contact with the gears of the base group and to prevent oil expulsion from the gears. (Gustafson, Tr. 65-66, 188; Gustafson, RX 3, p. 37).

13. The legs (C) and the raised configuration of the braiding machine are essential to provide clearance for the pulley below the table. The footed legs are necessary for bolting the machine to a bench. Otherwise, the vibration of the machine would be prohibitive to the braiding operation. Other shaped feet have been used on former New England Butt models, but were discarded. (Gustafson, Tr. 187).

* The alphabetical designations used herein may be found in CX 70.

14. The three vertical uprights, D(1), D(2) and D(3), function to support the overhead mechanism or superstructure of the braiding machine. New England Butt, at one time, used cast iron bars for D(1), D(2) and D(3) in its superstructure. However, these were replaced by finished steel bars which offer greater rigidity, allow easier cleaning, and give a neater appearance to the braiding machine. (Gustafson, Tr. 68-69, 192; Gustafson, RX 3, p. 38; CX 8, p. 10).
15. The drive pulley (E) functions to transmit power to the gears of the braiding machine. (Gustafson, RX 3, p. 39).
16. The vertical drive shaft (F) functions to transmit power to the overhead mechanism of the braiding machine. (Gustafson, Tr. 72; Gustafson, RX 3, pp. 41-42).
17. The change gears (G) function to change the speed at which the braided material is pulled through the machine during operation. (Gustafson, Tr. 74; Gustafson, RX 3, p. 42).
18. The change gear guard or change gear housing (H) functions to prevent injury to anyone by preventing contact with the change gears. (Gustafson, Tr. 75; Gustafson, RX 3, pp. 44-45).
19. The function of the crank handle (O) on the vertical drive shaft is to enable the operator to operate the braiding machine by hand. (Gustafson, Tr. 84; Gustafson, RX 3, p. 42).
20. The shipper handle (I) functions to engage a clutch which transmits power from the drive pulley to the moving mechanisms of the braiding machine. (Gustafson, Tr. 76; Gustafson, RX 3, p. 46).

21. The location of the driving system -- drive pulley (E), shipper handle (I), crank handle (O), change gears (G), and vertical drive shaft (F) -- on the right side of the superstructure of the machine provides ease and economy of operation for the majority of operators who will inevitably be right handed people. (Sabula, Tr. 488-89).
22. The latch guide (J) functions to protect against injury from contact with the pulley and drive gear and also functions to provide a guide for the latch. (Gustafson, Tr. 77).
23. The left hand crossbar support (K) functions to support the rear horizontal crossbar and the horizontal drive shaft. (Gustafson, Tr. 79).
24. The right hand bracket (L) functions to support the rear horizontal crossbar and horizontal drive shaft and to support the vertical drive shaft. (Gustafson, Tr. 80).
25. The function of the sickle-shaped bracket (M) is to support a knurled or grooved roll which is part of the overhead mechanism. (Gustafson, Tr. 81).
26. The horizontal support bar (N) functions to support the take-up mechanism. (Gustafson, Tr. 83).
27. The horizontal drive shaft (P) functions to support rolls or sheaves of the overhead mechanism and transmit power to the superstructure. (Gustafson, Tr. 86-87).

28. The worm gear bracket (Q) functions to support the worm gear shaft and the vertical drive shaft. (Gustafson, Tr. 87-88).
29. The worm gear guard (R) functions to enclose the worm gear mechanism for safety purposes. (Gustafson, Tr. 89).
30. The New England Butt B10 maypole braiding machine has been painted green (S) since approximately 1958. (Gustafson, Tr. 90).
31. The support bracket (T) functions to support the upper mechanism and to connect the rear upright with the small brace bar. (Gustafson, Tr. 90-91).
32. The L-shaped casting or pulley arm (U) functions to support the drive pulley and its shaft and to provide a seat for the vertical drive shaft. (Gustafson, Tr. 92).
33. The braiding machine's casting numbers (V) are located in the interior of the right-hand support bracket. (Gustafson, Tr. 93).
34. The superstructure of the New England Butt braiding machine was the subject of a patent which expired in 1938. The patent describes the present superstructure of the New England Butt braiding machine and specifies three vertical support shafts (D(1), D(2) and D(3)) which are removably mounted to accommodate alternative take-up rollers and a removable cross bar. This is the minimum number which could support the braiding machine overhead and provide the essential rigidity and resistance to vibration. This patent is used in an advertising brochure to describe the New England Butt superstructure. (Gustafson, Tr. 190-92; Sabula, Tr. 490; RX 41).

35. The latch guide (J), change gear guard (H) and horn gear guard (B) are three features emphasized as having particular safety advantages in a 1951 advertising brochure. (Gustafson, Tr. 219; CX 15).
36. Most customers for Kokubun 2D braiding machines have stated that they desire the parts to be interchangeable with the parts of the No. 2 type of New England Butt Co. braiding machines. (Sabula, Tr. 487; Hirota, Tr. 604).
37. As early as March, 1966 customers of Atlantic Braiding Machinery Co. insisted on exact duplications of New England Butt Co. braiding machines. (CX 30).
38. No other manufacturer of braiding machines except Kokubun makes a braiding machine that performs the same function as the B10-16 machine of New England Butt Co. and is sold in the United States at a price competitive with that of the B10-16. (Gustafson, Tr. 212).
39. The No. 2 type of braiding machines manufactured by New England Butt Co. and the Kokubun 2D machines are simpler and less expensive than the braiders manufactured by Steeger, Herzog, Ratera, Lesmo and J.B. Hyde. (Gustafson, Tr. 116-18; Gustafson, CX 6, 112).
40. The speed at which a braiding machine can operate is an important consideration to a manufacturer of braided products. (Gustafson, Tr. 212).
41. The braiding machines of Ratera run much faster and are much higher priced than the braiding machines of New England Butt Co. (Dennehy, Tr. 397).

42. The braiding machines of J.B. Hyde Company are individually motorized and run at a higher speed than New England Butt Co. braiders. (Dennehy, Tr. 398).
43. The braiding machines of Steeger are much more expensive than the braiding machines of New England Butt Co. and they are sold in units of approximately twenty machines, complete with motor and table. (Dennehy, Tr. 398).
44. Customers prefer the Kokubun 2D type braiding machine to the Kokubun STL type braiding machine because the double thick plate of the 2D machine gives longer wear and lends itself to a higher speed of operation. (Sabula, Tr. 526-27).

Distinctiveness

45. The maypole design of braiding machine was invented in Germany about 200 years ago. (Gustafson, Tr. 182; RX 6).
46. New England Butt Co. has made no major design change in its maypole braiding machines during the hundred years it has manufactured these braiders. (Gustafson, Tr. 182).
47. Many models of maypole type braiding machines are marketed in the United States; the particular configuration of New England Butt's braiding machine is similar to that of other maypole braiding machines. (RX 11-14, 17-28; CX 8, 10, 12-14).
48. More than twenty companies manufacture braiding machines around the world, including several which make exact copies of Kokubun 2D braiding machines. (Hirota, Tr. 609-10; RX 12, 26, 27).

Secondary Meaning

49. New England Butt Co. was founded in 1842 and has manufactured a maypole-type braiding machine since 1884. (Gustafson, Tr. 23, 182; SX 2).
50. The configuration of complainant's braiding machine has remained virtually unchanged over the last one hundred years. (Gustafson, Tr. 182).
51. New England Butt's most popular model of braiding machine is its model B10-16. (Gustafson, Tr. 109-10).
52. New England Butt has manufactured and shipped as many as 4,000 braiding machines in one year. (Gustafson, Tr. 111).
53. Thousands of New England Butt braiding machines are in use throughout the United States and the world; 60,000 braiders are in use in Rhode Island alone. (Gustafson, RX 3, p. 54).
54. Prior to 1981 New England Butt Co. had no advertising budget for its braiding machines and spent relatively little money on advertising. (Gustafson, Tr. 220, 265; Dennehy, RX 5, pp. 49-50).
55. In 1981, an advertising budget of \$4,000 was established for complainant's braider division. (Dennehy, RX 5, p. 50).
56. The braiding machine division currently expends approximately \$5,000-\$6,000 per year on fliers, brochures, handouts, magazine ads, catalogs printed in both English and Spanish, and appearances at trade shows. (Gustafson, Tr. 113-14; Dennehy, Tr. 439).

57. New England Butt participated in the textile trade shows held in 1962, 1972, and 1982. The 1982 textile show was held in Greenville, South Carolina. (Gustafson, Tr. 220).
58. New England Butt participated in the wire trade convention in 1981. (Gustafson, Tr. 220).
59. New England Butt Co. did not begin to advertise its braiding machines until after Kokubun began to import its 2D braiding machines into the United States. (Dennehy, Tr. 375, 415).
60. In the braiding machine industry as a whole, very few ads are placed in American trade magazines by either American or European manufacturers. Europeans do, however, advertise heavily in European trade journals. (Gustafson, Tr. 444).
61. New England Butt Co. has never emphasized in its advertising or promotional efforts the twenty-two allegedly nonfunctional features which make up its claimed distinctive appearance, nor has it advertised that those features identify New England Butt as the source of the machine. (Gustafson, Tr. 218; Dennehy, Tr. 415-16).
62. New England Butt Co. has emphasized in its advertising and promotional literature the safety functions of the change gear guard and the horn gear guard. (Gustafson, Tr. 218-19).
63. At least as recently as 1969, New England Butt Co. published Catalog No. 56 depicting New England Butt Co. braiding machines which have design features different from those of its No. 2 type braiding machines manufactured today. (Gustafson, Tr. 28-29; CX 8; Gustafson, RX 3, pp. 29-33; CPX 1).

64. The New England Butt catalog shows pictures of the subject goods, but does not emphasize, in graphics or text, the allegedly unique features that allow the buyer to identify New England Butt Co. (Dennehy, Tr. 416).
65. Complainant's own witnesses do not agree among themselves on which features are essential. Mr. Dennehy reduced the number of essential features of the claimed trademark of the New England Butt machine to: the shipper handle (I), table/upper plate (A), legs (C), crank handle (O), stop motion, and the carriers. Mr. Gustafson, vice president of New England Butt, stated that the table/upper plate (A), the legs (C), and the crank handle are not an essential part of the subject braiding machines' unique appearance. (Dennehy, Tr. 413-14, 418; Gustafson, Tr. 234, 236, 240, 431-32).
66. Carriers are an indispensable part of the braiding machine, and Mr. Dennehy in his deposition testified that the carriers are distinctive. At trial Mr. Dennehy testified that he did not believe a customer could identify the New England Butt configuration based on the carriers alone. On cross examination by the Commission investigative attorney, Mr. Dennehy stated that carriers were part of the distinctive appearance of the New England Butt machines. (Dennehy, RX 5, p. 18; Dennehy, Tr. 418, 431-32).
67. Not all New England Butt Co. braiding machines of the No. 2 type have all of the design features in which New England Butt Co. claims trademark rights. (Gustafson, Tr. 103).

68. The current No. 2 type of New England Butt braiding machine does not look identical to the No. 2 type of New England Butt Co. braiding machines depicted in the 1946 sales brochure. (Gustafson, Tr. 32; CX 14; CPX 1).
69. The cord machines made by New England Butt Co. do not carry all of the twenty-two features which comprise the allegedly distinctive appearance of the B10-16 and related braiding machines. (Gustafson, Tr. 227).
70. New England Butt Co. braiding machines having more than thirty-two carriers are distinguishable from the machines in issue in that they have long legs rather than short, only one upright shaft rather than four, a center drive rather than a side drive, and no drive pulley or shipper handle. (Gustafson, Tr. 104; CX 8, p. 8).
71. Some of complainant's braiding machines are sold without any top, which includes the cross shaft, crossbar support and brace bar. (Dennehy, Tr. 430).
72. Some New England Butt braiding machines, those sold primarily as harness braiders, are changed physically to meet the needs of the customer. (Grelle, RX 38, p. 22).
73. The advertisements of New England Butt Co. braiding machines are directed solely to the electrical wire braiding business, although this constitutes only 20% of complainant's braiding machine sales. (Dennehy, Tr. 376-77, 415).

74. The advertisements of New England Butt Co. depict a machine having legs different from those found on the subject braider, and a large capstan wheel on the top, unlike the machine in issue. (CPX 1; Dennehy, Tr. 375).
75. In the past three years, complainant has run ads in Wire Journal, Wire Technology, and Insulation & Circuits. (Dennehy, Tr. 376).
76. No user of braiding machines has said that he could see by looking at a New England Butt Co. braiding machine that it is manufactured by New England Butt Co. (Dennehy, Tr. 395).
77. Omitted.
78. No customer has stated that the allegedly unique design features of the No. 2 type of New England Butt Co. braiding machine enable the customer to identify New England Butt Co. as the braider's manufacturer. (Gustafson, Tr. 221; Dennehy, Tr. 414-15).
79. No customer has identified a New England Butt Co. braiding machine machine as having been manufactured by New England Butt Co. based upon the pattern marks on parts of the overhead structure. (Dennehy, Tr. 414-15).
80. No customer has said that the appearance of the handle on a New England Butt Co. braiding machine enabled him to identify the machine as being made by New England Butt Co. (Dennehy, Tr. 414).

81. Atlantic Braiding Machinery Co. made four types of braiding machines, the first type and the fourth type of which were very similar to the No. 2 type braiding machine manufactured by New England Butt Co. (Sabula, Tr. 460-63).
82. In 1966, at the request of a customer, Atlantic Braiding Machinery Co. made a braider that was very similar to New England Butt's No. 2 braiding machine. (Sabula, Tr. 463).
83. Similarities between the Atlantic Braiding Machine Co.'s type four braider and complainant's No. 2 braider include: the plate configuration and overall head configuration; and the overall appearance, consisting of the three vertical uprights, the vertical drive shaft, the crossbars, the brackets, and the worm gear and change gear assemblies. (Dennehy, Tr. 432; CX 10).
84. Differences between the Atlantic braider and the New England Butt braider include the shipper handle and the drive system. (Dennehy, Tr. 413; RX 37).
85. A number of the parts for Atlantic Braiding Machinery Co.'s fourth type of braiding machine were interchangeable with New England Butt's No. 2 braider. (Sabula, Tr. 508).
86. Atlantic braiding machines are still in use in the United States. (Sabula, Tr. 472).

87. Approximately 30% of the 3,500 to 5,000 braiding machines sold by Atlantic Braiding Machinery Co. before it went out of business were of the fourth type that looked very similar to the machine in issue. (Sabula, Tr. 464; CPX 1).
88. Most of the fourth type of the Atlantic braiding machines were sold in the United States. (Sabula, Tr. 464-65).
89. In about 1965, Atlantic Braiding Machinery Co. entered into a business relationship with Kokubun whereby Kokubun made parts for Atlantic braiding machines. (Sabula, Tr. 467).
90. In 1966 Kokubun began to make parts for the fourth type of braiding machine of Atlantic Braiding Machinery Co. (Sabula, Tr. 468).
91. Atlantic sent parts and prints of the fourth type of braiding machine to Kokubun for duplication and mass production. (Sabula, Tr. 469).
92. Kokubun supplied Atlantic with the base group, which included everything between the top plate and the bottom plate of the braiding machine. (Sabula, Tr. 469).

Likelihood of Confusion

93. Kokubun has been manufacturing maypole-type braiding machines since 1922. (Hirota, Tr. 590).
94. Kokubun began to manufacture and sell 2D braiding machines directly to United States customers in about 1970. (Hirota, Tr. 601).
95. The Kokubun braiding machine sold directly to United States customers after the demise of Atlantic Braiding Machinery Co. was of almost exactly the same structural design as the Atlantic braider. (Hirota, Tr. 601).
96. Kokubun has approximately fifty patents on components or parts for braiding machines and has developed, among other things, a special stop motion device and a ceramic braid former. (Sabula, Tr. 521).
97. Kokubun has never had a sample New England Butt braiding machine or drawing thereof in Kokubun's plant in Japan. (Hirota, Tr. 636).
98. The interchangeability of parts between New England Butt and Kokubun braiding machines is an advantage to the user of the machine. Customers have requested that Kokubun machine parts be interchangeable with New England Butt parts. (Gustafson, Tr. 209; Hirota, Tr. 604).
99. The name of Kokubun is located on the change gear guard and appears in stickers glued to the cross shaft and the upright shaft of each

Kokubun braiding machine, and a "Made in Japan" sticker is also affixed to each Kokubun machine. (Sabula, Tr. 474; Hirota, Tr 603-04; RX 15).

100. When Mr. Sabula sells braiding machines, he fully discloses the fact that they are manufactured by Kokubun in Japan, and the machine will be shipped directly from Japan to the purchaser. No representation is made by Mr. Sabula that the machines are manufactured by New England Butt. Kokubun makes no representation that their machines originate with new England Butt. (Hirota, Tr. 603; Sabula, Tr. 474-78).
101. Mr. Sabula's business cards, letterheads and sales brochures clearly identify that he is the United States agent for Kokubun braiding machines. (Sabula, Tr. 473).
102. A small secondhand market exists for braiding machines in the United States. (Gustafson, Tr. 170).
103. Sales of new New England Butt braiding machines in the United States are conducted by New England Butt only. (Gustafson, Tr. 157).
104. All sales inquiries or requests for quotations on New England Butt Co. braiding machines are received at its offices in Providence, Rhode Island and are processed there by Mr. Dennehy, the sales manager, or by his assistant. (Gustafson, Tr. 42; SX 2, p. 3).
105. All persons selling New England Butt Co. new braiding machines operate from complainant's plant in Rhode Island; there are no outside salesmen for New England Butt Co. braiding machines in the United States. (Gustafson, Tr. 222).

106. George Sabula, doing business as Sabula Associates, sells new braiding machines made only by Kokubun. (Sabula, Tr. 459).
107. No one in the United States sells new braiding machines of both Kokubun and New England Butt Co. (Gustafson, Tr. 222).
108. An exclusive sales agent for Kokubun, George Sabula, personally makes all sales of Kokubun braiders in the United States through mail, by telephone and through personal contacts. (Sabula, Tr. 569-70).
109. George Sabula regularly discloses to potential customers that he is the agent for Kokubun, and his letterhead and business cards indicate that fact. (Sabula, Tr. 473-74).
110. George Sabula has advertised the 2D line in the Davidson Textile Blue Book and also mails brochures and flyers to customers. (Sabula, Tr. 579).
111. Mr. Sabula conducts his business by personal contact, by telephone, and by mail. Mr. Sabula generally carries out his business by taking orders and having the machine shipped directly to the purchaser from Japan. The customer pays any customs duties when the machine arrives. (Sabula, Tr. 570-73).
112. Every customer to whom George Sabula has sold Kokubun braiding machines has known that the machines were manufactured by Kokubun. (Sabula, Tr. 477).

113. Approximately 40-50% of Sabula's customers obtain a letter of credit to purchase Kokubun braiding machines, which constitutes about 90% of Kokubun's actual unit sales in the United States. (Sabula, Tr. 478).
114. Braiding machine customers may be either experienced or unsophisticated clients who are initiating a business. (Gustafson, Tr. 174; Dennehy, Tr. 343-45).
115. The number of one-time, unsophisticated customers may vary between 5-25% of New England Butt's business. On the average, less than 10% of New England Butt's customers are first-time purchasers. (Dennehy, Tr. 345).
116. Braiding machines sold in the used market are generally identifiable by a person knowledgeable in braiding machines. (Gustafson, Tr. 170).
117. Most sales of New England Butt machines are made to sophisticated industrial buyers who may buy several at one time. (Dennehy, Tr. 343).
118. The Kokubun braiding machine can be distinguished from the New England Butt Co. braiding machine by the Kokubun name and name plates and by the unique stop motion device on the front of the Kokubun machine. (Sabula, Tr. 479-80; Gustafson, Tr. 223).
119. The take-off support arm on the rear vertical upright of the 2D Kokubun braiding machine is different from the two brackets located on the same upright on the No. 2 type of New England Butt Co. braiding machine. (Sabula, Tr. 491).

120. Because Kokubun braiding machines are finished with a single-point tool while New England Butt Co. braiding machines are finished with a grinding machine, a person can tell the Kokubun machine from the New England Butt Co. machine by its surface qualities. (Gustafson, Tr. 151-52).
121. In addition to labels, the Kokubun braiding machine has features which are different from the New England Butt machines. These features are the stop motion, the material construction of the change gear guard, the take-off support arm, the take-off rolls, the ceramic former, the worm gear guard, and the fact that the parts are in metric units rather than English units. (Sabula, Tr. 479-80, 491-92, 515, 572; Gustafson, Tr. 223).
122. Many braiding machine owners have both complainant's and respondents' braiders, which are placed side-by-side in the workroom. When a number of machines are mixed together in a workroom, there may be trouble telling them apart. (Perrotta, RX 37, pp. 32-33).
123. If a braiding machine operator owns both New England Butt and Kokubun braiding machines, he may interchange, or cannibalize, parts between the two. It may be that the user after interchanging the parts will not be able to distinguish the origin of these parts. (Gustafson, Tr. 167; Dennehy, Tr. 359, 364; Sabula, Tr. 487-88).
124. It becomes difficult to distinguish between machines in operation because they become dust-covered and dirty. (Dennehy, Tr. 362).

125. If the change gear guards are in place, there is no confusion between a New England Butt machine and a Kokubun machine because the brand name is easily read on the change gear guard. However, these guards are often removed when the machine is in use. (Gustafson, Tr. 165, 221; Dennehy, Tr. 355).
126. There has been no instance of actual confusion on the part of a purchaser of a Kokubun braiding machine who mistakenly thought he was buying a New England Butt Co. braiding machine. (Gustafson, Tr. 221; Dennehy, Tr. 448).
127. A few Kokubun parts have been returned to New England Butt Co., but no Kokubun braiding machines have been returned to complainant for repairs. (Gustafson, Tr. 168; Dennehy, Tr. 363; SX 2, Answer 21).
128. There is no evidence indicating inferior performance of the Kokubun braiding machine. (Gustafson, Tr. 278).
129. A metallurgist concluded that the quality of Kokubun braiding machine castings was superior to that of New England Butt Co. braiding machines. (Sabula, Tr. 484).
130. Almost all models of New England Butt Co. braiding machines are sold with the words "NEW ENGLAND BUTT CO., Providence, Rhode Island" affixed to some portion of the braiding machine. (RX 34, Interrogatory No. 12).
131. The Kokubun braiding machine is labeled in three places with the name Kokubun. Those places are: the cover of the change gear guard, the cross shaft, and the upright shaft. (Sabula, Tr. 474; Hirota, Tr. 603-04; RX 15; CPX 2).

132. If the change gear guards are in place in both a No. 2 type New England Butt Co. braiding machine and a Kokubun 2D braiding machine, there is no difficulty in determining the manufacturer of each machine. (Gustafson, Tr. 221).

Laches

133. New England Butt Company's sales manager learned in the late 1960's that Kokubun was importing 2D-type braiding machines into the United States through a Canadian sales agent. (Dennehy, Tr. 427).
134. In 1971 Kokubun was offering for sale its model 2D braiding machines and stating that their parts were interchangeable with Butt Number 2 braiders. (Gustafson, Tr. 145; CX 50).
135. Conrad Jarvis Manufacturing Company of Providence, Rhode Island purchased about fifty 2D Kokubun braiding machines with 44 carriers prior to 1970 or 1971. (Sabula, Tr. 561; Dennehy, Tr. 366).
136. Hickory Industries has owned 100 Kokubun number 2D braiding machines since about 1976. (Sabula, Tr. 495).
137. Kokubun made direct sales to United States customers during the 1970's. (Hirota, Tr. 601; SX 6, p. 2).
138. John Gustafson learned from a New England Butt customer, Western Filament, in May or June of 1981, that it was considering the purchase of a substantial number of Kokubun braiding machines. (Gustafson, Tr. 44-45).
139. New England Butt Co. learned of substantial Kokubun sales of its 2D braiding machines at least as early as late spring or summer 1981. (Gustafson, Tr. 154-55).
140. New England Butt Co. had some knowledge of Kokubun's importation of braiding machines about five or six years ago. (Gustafson, Tr. 226; Gustafson, RX 3, p. 55).

141. New England Butt Company's sales manager learned of the marketing of Kokubun 2D type braiding machines while attending the craft show in Atlanta in 1980 after George Sabula had become Kokubun's representative. (Dennehy, Tr. 366, 436).
142. New England Butt Co. never complained to Atlantic Braiding Machinery Co. about Atlantic's manufacture of a braiding machine that was closely identical to the New England Butt Co. No. 2 braiding machine. (Sabula, Tr. 472).
143. Kokubun began to work with Atlantic Braiding Machinery Co. in about 1965. (Hirota, Tr. 594).
144. Atlantic requested Kokubun to make parts for a braiding machine like the New England Butt Number 2 braider. (Hirota, Tr. 596).
145. After initially manufacturing carriers for Atlantic, Kokubun began to make the entire base group of braiding machines for Atlantic, including the top plate, the bottom plate, the horn gears, the legs, the drive pulley, the clutch plate, and the stop motion device. (Hirota, Tr. 597-98).
146. Kokubun began to make the complete base group for Atlantic braiding machines in early 1968. (Hirota, Tr. 599).
147. After Atlantic went out of business, Kokubun sold braiding machines in North America through a sales agent, Arlen Mills of Canada. (Hirota, Tr. 600).

148. The base group made by Kokubun for Atlantic Braiding Machinery Co. is almost identical, except for the drive pulley, to the current Kokubun 2D braiding machine. (Hirota, Tr. 600-01).
149. The assets of Atlantic Braiding Machinery Co. were purchased by New England Butt Co. or its parent company, Wanskuck Company. (Gustafson, RX 3, p. 20).
150. New England Butt Co. purchased the inventory, tooling and drawings of Atlantic Braiding Machinery Co. (Dennehy, RX 5, p. 9).

Importation and Sale

151. Kokubun exports its 2D-16 braiding machines to the United States through a Japanese trading company, Toyoda Tsusho Kaisha Ltd., 4-3-11, Minamisenba, Minamiku, Osaka, Japan, and Toyoda America, Inc., One World Trade Center, New York, New York 10048. (CX 69, Interrog. No. 4).
152. Toyoda Tsusho Kaisha Ltd. receives letters of credit or other documents from either Sabula Associates, Toyoda America, Inc. or the ultimate buyer of the braiding machines. Shipment may be to any United States port. The importation process is handled by either Sabula Associates, Toyoda America, Inc. or the ultimate buyer, and transportation to the final destination is arranged by the importer. There is no warehousing within the United States. (CX 69, Interrog. No. 6).

153.

(C)

Domestic Industry

Definition

154. The braiding machines in issue are manufactured at New England Butt's facilities at 304 Pearl Street in Providence, Rhode Island, where all manufacturing has occurred since the company's inception. Approximately 12,000 square feet of floor space is devoted to the manufacture of these machines. New England Butt has not licensed any other company in the United States to make the braiding machines in issue. (CX 2; Gustafson, Tr. 157).

Efficient and Economic Operation

155. There are fifteen machinists and assemblers and two supervisors at New England Butt employed in the manufacture of braiding machines. Approximately ten of the machinists and assemblers are involved in the production of the braiding machines in issue. Seventy-five to eighty percent of New England Butt's braider production consists of the machines in issue. (Gustafson, Tr. 106, 148, 254-55, 281).

156. New England Butt's braider sales occur under the supervision of John Dennehy, the braider sales manager. A sales trainee has been working with Mr. Dennehy for approximately one year. Generally, all of the sales or requests for quotations are received at one central location, New England Butt headquarters. Mr. Dennehy and his assistant reply to these quotes, develop customer contacts, travel, and perform any engineering work that may be required for the sale of braiding machines. (Gustafson, Tr. 42).

- 1' The work force that manufactures the braiding machines in issue consists of machinists and assemblers. The machinists have in most cases been at New England Butt for a number of years, some for as many as thirty or thirty-five years, and they operate a variety of pieces of equipment in the plant. The assemblers are totally responsible for the assembly of the braiding machines. The ratio of supervisors to employees in the braider area is two to fifteen. (Gustafson, Tr. 157-58).
158. At New England Butt's Rhode Island plant, there are two principal salespersons and two additional part-time salespersons involved in the sale of braiding machines. (Gustafson, Tr. 221-22).
159. New England Butt's sales of braiders are nationwide. John Dennehy, sales manager of the Braiding Machine Division at New England Butt, travels throughout the United States contacting potential customers for braiders. (Gustafson, Tr. 275-76; Dennehy, Tr. 339).
160. Mr. Dennehy states that the three most important features in his sales efforts are longevity of the machines, price, and delivery time. (Dennehy, Tr. 417; Dennehy, RX 5, p. 20).
161. It is not unusual for New England Butt to make a sale of 200 sixteen-strand braiders to one customer. (Gustafson, Tr. 276).
162. Braiding machine parts that are manufactured in large quantities, generally in lot sizes of 500 to 1000 pieces, are produced on automated equipment utilizing new technology. All of the parts which are manufactured in large quantities are so made on incentive systems. Smaller-sized braiding machines are assembled under the incentive rules as well. (Gustafson, Tr. 159).

163. Many units are tooled in areas where there might be multiple machines involved, and, in those areas, the operator may operate as many as four or five machines at one time. (Gustafson, Tr. 159, 160).
164. New England Butt has invested approximately one-half million dollars in tooling equipment related to its braiding machine operation! (Gustafson, Tr. 160).
165. To expedite delivery of its braiding machines, New England Butt has instituted a computerized system that handles financial matters, generates bills of material, and provides for the expeditious entry of an order. (Gustafson, Tr. 161).
166. New England Butt guarantees the parts, material and workmanship of its braiding machines for a period of twelve months after the machines are shipped. Machine parts may be replaced at no charge by New England Butt well beyond the twelve-month period. (Dennedy, Tr. 371; Gustafson, Tr. 168).
167. New England Butt strives to give its customers complete service by inter alia providing engineering services, assisting in plant layout, and supplying drawings. (Dennehy, Tr. 448).
168. New England Butt's braiding machines have a good durability record. When the tennis shoe craze started approximately fourteen years ago, many people resurrected their New England Butt 44 carrier shoelace braiders that they had not used in years and put them back in use. Many New England Butt machines also appear later in the secondhand market. (Dennehy, Tr. 353).

169. New England Butt has a quality control program under the supervision of the foreman of the assembly department. Before the machines are shipped out, each machine is inspected and test run to check its operation. (Gustafson, Tr. 162, 253; Dennehy, Tr. 369, 379).
170. There have been few braiders returned to New England Butt. In one instance, when a machining error was made, New England Butt rebuilt every machine, paid all the shipping expenses, and satisfied the customer. (Gustafson, Tr. 257-58; Dennehy, Tr. 370-71).
171. New England Butt has not spent significant amounts on advertising over the last few years. Because of complainant's widespread reputation for quality, advertising has not been essential for its sales. New England Butt's advertising is typical of other braiding machine companies. In American trade journals, there are very few ads for braiding machines. (Dennehy, Tr. 395-96, 444).
172. New England Butt's advertising program for its braiding machines consists of distributing catalogs and brochures printed in both English and Spanish and showing its machines at textile shows. The most recent show at which New England Butt exhibited its machines was in Greenville, South Carolina, in 1982 where it had a booth and exhibited four of its machines. (Gustafson, Tr. 113-14).
173. In the last three years, New England Butt has advertised in three different publications: Wire Journal, Wire Technology, and Insulation and Circuits. The pictures in these advertisements show a braider set up to apply shielding to electrical conductors. (Dennehy, Tr. 376-77).

174. The model B10-16 braiding machine has been complainant's most popular machine for the last few years. New England Butt sold 398 of these machines in 1977, 792 in 1978 and 930 in 1979. In 1980, sales dropped to 360 machines, with 408 sold in 1981 and 185 sold in 1982. (Gustafson, Tr. 109-10; SX 2).

175.

(C)

Injury

Substantial Injury

176. Sales of braiding machines manufactured by New England Butt have fluctuated due to changes in the demand for braid generally, changes in certain fashions in the garment industry, and changes in economic conditions. For example, sales of New England Butt's No. 16 strand braiding machine increased significantly in 1978 and 1979 when macrame was very popular. Demand for flat braiding machines has been at reduced levels in recent years. (Gustafson, Tr. 224, 225; Dennehy, Tr. 345).

177.

(C)

178. Seventy-five to eighty percent of the braiding machines New England Butt manufactures are of the models in issue in this investigation. (Gustafson, Tr. 106).

179. New England Butt's sales of braiding machines peaked in 1979-80 and have diminished since that time, as have the contribution margins (profits) on certain sizes in the smaller models (33 carriers or less). (Gustafson, Tr. 146-47).

180. Kokubun charges approximately \$450-480 f.o.b. an east or west coast port for its 2D-16 braiding machine. New England Butt charges \$700-\$800 for its comparable B10-16 braiding machine. (SX 4; Gustafson, Tr. 149; Dennehy, Tr. 387-88).
181. In March 1980, Sabula began importing into and selling in the United States the 2D-16 braiding machine manufactured by Kokubun in Japan. (Gustafson, Tr. 145, 244; SX 3).
182. Mr. Gustafson states that New England Butt began to feel the presence of Kokubun in the competitive market in the last two years. The first indication that Kokubun braiding machines were being actively sold in the United States occurred at a craft show in Atlanta in 1980. (Gustafson, Tr. 155; Dennehy, Tr. 366).
183. When, in May or June 1981, John Gustafson, New England Butt's vice president, called on Western Filament, a regular customer in Los Angeles, he learned that the customer was entertaining the idea of purchasing 200 Kokubun braiding machines. (Gustafson, Tr. 44, 45, 139-40).
184. Mr. Dennehy estimates that since 1980 New England Butt has lost a third of its braider business (33 carriers or less) to Kokubun. (Dennehy, Tr. 409).
185. New England Butt has lowered its price for the braiding machines in issue from approximately \$750 to approximately \$600-\$650, depending on the type of equipment on the machine. This price cut has reduced complainant's profit margin substantially. (Dennehy, Tr. 410, 435-38; Gustafson, Tr. 271).

186. In response to competition from Kokubun, New England Butt lowered its price for certain models through manufacturing changes. At first the prices were lowered only for quantity purchased. This was done by building certain popular models in very large numbers without sales orders, reducing machining costs, and assembling multiple units at the same time. In 1981 when complainant and respondents were competing for an order, complainant lowered its price twenty percent. In early 1982, complainant lowered the list prices further. New England Butt's price for the 16 carrier braiding machine, at present, is 25% less than it was in 1980. (Dennehy, Tr. 437-38, 445).
187. Complainant has taken reduced profits on several models in order to stay in the marketplace. (Dennehy, Tr. 409).
188. At present, there is a reduction in the New England Butt work force of 10%. Normally, there are approximately ten machinists and assemblers working on the assembly of braiding machines in issue. One of these persons has been moved to work on braiders not in issue in this investigation. (Gustafson, Tr. 148, 254-55, 281).
189. New England Butt lost sales to Kokubun for the supply of braiding machines to Ocean State Company in Rhode Island because it could not meet the \$450 Kokubun price without suffering a loss. (Dennehy, Tr. 446).
190. The following companies have recently purchased the Kokubun version of New England Butt's B10-16 braider: (1) Ocean State Cordage, Pawtucket, RI - 200 machines at \$450 each, f.o.b. Boston; (2) Pepperell

Braid Co., East Pepperell, MA - 125 machines at \$450 each, f.o.b. Boston; and (3) Luxury Braid, Elizabeth, NJ - 50 machines at \$450 each. (SX 2).

191. The following is a list of sales lost to Kokubun from September 1980 to date:

<u>Name</u>	<u>Number sold</u>	<u>Model</u>	<u>Unit Price</u>	<u>Total Loss Sales</u>
Conrad Jarvis	10	B10-8	\$650	\$ 6,500
Glencairn Mfg.	10	B10-8	650	6,500
Pepperell Braid	36	B10-16	725	26,100
Nylon Net	100	B10-16	725	72,500
Western Filament	150	B10-16	725	108,750

(SX 2, 3).

192.

(C)

193.

(C)

Tendency to Substantially Injure

194.

(C)

195.

(C)

196. Since 1980, in developing the United States market for Kokubun 2D machines, Kokubun has sent its personnel to, and has participated in, trade shows in the United States involving braiding machines and has prepared catalogs and brochures displaying the 2D machine for distribution in the United States. (Hirota, Tr. 613).

197.

(C)

198. Mr. Sabula is the exclusive sales agent of Kokubun in the United States. He makes sales through personal contact, telephonic contact or by mail. The only new braiding machines he sells are Kokubun machines. He also sells a small quantity of used machines with other brand names including New England Butt machines. (Sabula, Tr. 570).

199. Mr. Sabula has placed advertisements twice in a textile publication and tries to have a mailing once every three or four months. He also sends out brochures and fliers that Kokubun supplies. There are approximately 200 to 250 names on his mailing list. Mr. Sabula also spends quite a bit of time traveling and calling on customers. (Sabula, Tr. 579; SX 3).
200. Mr. Sabula is presently operating at about half his capacity for the sale of Kokubun braiding machines in the United States. If he had more staff, Mr. Sabula feels that Kokubun could supply the whole domestic market. (Sabula, Tr. 571-72).
201. Mr. Sabula keeps an inventory of no more than five Kokubun braiding machines at any one time. Generally, he takes orders and has the machines shipped directly to a customer from Japan. (Sabula, Tr. 573).
202. Thirty to forty percent of Sabula's sales of braiding machines are of the 2D type of braiding machines; twenty to thirty percent of this amount are sales of the 2D-16 braider. (Sabula, Tr. 494).

OPINION

The subject of this investigation is a braiding machine, a device used in the textile trade to produce braided material. Although the size and configuration of a braiding machine will vary depending upon the type of material and desired braid, the machines in issue are "maypole" bench model braiders. Generally speaking, the maypole braider is capable of producing four types of braid, soutache, flat, tubular, and "special", which output is determined by the number and size of its bobbins as well as the thread braided on the machine.

The maypole braiding machines manufactured by complainant New England Butt are marketed under the designation "Number 2" or "B10". Complainant alleges the existence of a common law trademark right in the overall appearance of its Number 2 machines, as comprised by twenty-two separate features, which trademark New England Butt contends is being infringed by the importation by respondent Kokubun, Inc. of its "2D" line of braiding machines. The allegations of false designation of origin and passing off, to the extent they are subsumed within the elements of the alleged trademark, are also proffered by New England Butt as unfair acts or methods of competition within the meaning of section 337. (Prehrg. Conf., Tr. 43-52).

Common Law Trademark

Complainant contends that a protectable interest lies in the overall appearance of its "Number 2" or "B10" braiding machine, which configuration New England Butt describes by identifying twenty-two features thereof. (Gustafson, Tr. 55-57). Each of these components is deemed by complainant to be essential to the distinctive overall appearance of the subject braiders.

In order to prevail in its claim of common law trademark infringement, New England Butt must show by a preponderance of the evidence of record: (1) the existence of a common law trademark in the overall appearance of complainant's braiding machine by virtue of its nonfunctionality, distinctiveness and secondary meaning; and (2) infringement of that trademark by respondents' imported braiding machines by reason of the likelihood of confusion among purchasers of the goods. Certain Novelty Glasses, Inv. No. 337-TA-55 (1979); Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-87 (1981) (Games I); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108 (1982) (Vacuum Bottles).

Functionality

The concept of a product's functionality has been expressed historically in terms of its utility. In re Dennison Mfg. Co., 5 U.S.P.Q. 316 (C.C.P.A. 1930); Sparklets Corp. v. Walter Kidde Sales Co., 42 U.S.P.Q. 73 (C.C.P.A. 1939). More recently, the Court of Customs and Patent Appeals^{1/} has recognized the dual aspects of functionality: de facto functionality as

^{1/} The Court of Customs and Patent Appeals has been consolidated with the Court of Claims as of October 1, 1982, and is now known as the Court of Appeals for the Federal Circuit (CAFC).

used in the lay sense, and de jure functionality as indicating whether a certain product or feature may be legally recognized as an indication of source. In re Morton-Norwich Products, Inc., 213 U.S.P.Q. 9, 13 (C.C.P.A. 1982) (Morton-Norwich). For the purpose of determining de jure functionality, the design of the product or feature in issue, in the sense of its appearance, is always the focus of inquiry; thus, although certain products or features may indeed be utilitarian, the analysis must go further and examine the degree of design utility in the subject product or feature. Id. at 13, 14. The public policy underlying this notion, as enunciated by the Court of Customs and Patent Appeals, resides not in the right to copy slavishly articles which are not protected by patent or copyright, but the need to copy those articles, which is more properly termed the right to compete effectively. Id. at 14. Indeed, in the Court's view, even the earliest cases, which discussed protectability in terms of exhaustion of possible packaging forms, recognized that the real issue was whether the effect would be to gradually throttle trade. Similarly, more recent cases discuss functionality in light of competition, suggesting that the question in each case is whether protection against imitation will hinder the competitor in competition. Id. at 14.

Keeping in mind that functionality is determined in light of utility, which is analyzed in terms of design superiority, and rests upon the foundation "essential to effective competition," id. at 15, the Court referred to a number of factors, both positive and negative, which aid in that determination. These factors include whether an expired utility patent exists disclosing the utilitarian advantage of the design, whether the utilitarian advantages of the design have been touted by its originator

through advertising, whether there are alternative designs available, and whether a particular design results from a comparatively simple or cheap method of manufacturing the article. Id. at 15, 16. Applying these criteria to the case at bar as discussed below,^{2/} I conclude that each individual feature of the New England Butt braiding machine, as reflected in the article's overall appearance, is de jure functional.

(a) Table or top plate^{3/}

The table appears almost elliptical and protrudes toward the right side of the braiding machine in the drive area. (Gustafson, Tr. 64). Consisting of three elements, the rim, the style, and eight quoits, this top plate or table functions as the serpentine track upon which the carriers move. (Finding of Fact 11). Mr. Gustafson, a New England Butt official, testified that the table could be designed alternately in the shape of a square with no effect on this part's function. (Gustafson, Tr. 65).

Upon cross-examination, however, Mr. Gustafson admitted that the table's circular shape achieves an economy in the cost of manufacturing to the extent that less cast metal is needed, as opposed to the additional metal necessary in a non-circular design. (Gustafson, Tr. 185). Moreover, a different table shape, resulting in a wider front appearance of

^{2/} The Commission investigative attorney focuses on the machine's take-up method only as representative of the alleged trademark, citing inconsistencies in record testimony and evidence. (Post-hearing Brief of the Commission Investigative Attorney, pp. 8-9). In order that this opinion reflects accurately the record evidence and consistent with the mandate of the Commission's reviewing authority, Coleco Industries, Inc. v. U.S. International Trade Commission, 197 U.S.P.Q. 472 (C.C.P.A. 1978), each feature of the claimed trademark is discussed herein.

^{3/} The alphabetical designations used herein are those adopted by complainant in testimony at the hearing and are shown on CX 70.

the braiding machine, would hinder the placement of braiders side by side on a bench in the typical braiding room. (Finding of Fact 11).

(b) Apron or horn gear guard

The apron or horn gear guard extends from the top plate to the bottom plate and prevents persons from making contact with a series of gears. (Finding of Fact 12). Although this part is constructed from sheet metal, complainant's witness testified that this mechanism could be a screen in the shape of a square. (Gustafson, Tr. 66).

It appears, however, that the apron functions additionally to hold oil expelled by the moving gears underneath the table. To the extent that this use requires a non-porous container, the utilization of a screen as an alternative design may be inappropriate. (Gustafson, Tr. 188-89).

(c) Legs

Generally speaking, the legs of the Butt maypole braiding machine are short and tapered with a round description and foot. (Finding of Fact 13). The legs are bolted to the base group of the machine and when a braider is installed in a factory, the legs are fastened to the bench. Described as supporting the braider's base group, the legs could be inter alia connected to form a double-foot leg. (Gustafson, Tr. 68). The record indicates that the legs also raise the braiding machine sufficiently above the bench so that the lowest moving parts can operate freely. (Gustafson, Tr. 186).

(d) Three vertical upright posts

The New England Butt upright posts are cylindrical in shape and manufactured of cold-rolled steel; they support the overhead mechanism of the braiding machine. Mr. Gustafson testified, rather uncertainly, that it might be possible to produce a braiding machine with only two vertical posts and that these posts could be manufactured from other materials. (Finding of Fact 14; Gustafson, Tr. 69).

(e) Drive pulley

The drive pulley, located on the right side of the braider, is a casting machined with a face gear. Admitting that this device is "totally functional", Mr. Gustafson also agreed during cross-examination that the placement of this mechanism on the braider's right side may in part have been affected by the fact that this location aids the right-handed machine operator. (Findings of Fact 15,21; Gustafson, Tr. 194, 195).

(f) Drive shaft

A cylindrical, vertical shaft mounted on the right side of the braiding machine, the drive shaft extends to the bottom of the machine where it is fastened onto the pulley arm. This part extends vertically to the top of the braider through the worm gear bracket where it operates in conjunction with a worm and gear mechanism to drive the upper portion of the braiding machine. (Finding of Fact 16; Gustafson, Tr. 71-72). It appears that a change in the height of this shaft could affect the utility of the braider, depending upon the height of a particular machine operator. (Gustafson, Tr. 197-98).

(g) Change gears

The change gears are mounted on the cross shaft and the shaft extending through the worm gear bracket; these gears regulate the speed at which material is pulled through the machine during the braiding operation. (Finding of Fact 17). The change gears could be located on the left side of the braiding machine, but only if the whole drive, i.e., the vertical drive shaft and drive pulley, were so moved. (Gustafson, Tr. 201-02).

(h) Change gear housing/guard

The change gear housing or guard is a pear-shaped structure encapsulating the change gears so as to prevent injury to a machine operator. (Finding of Fact 18). The record indicates that the shape of the housing is dictated by the contours of the change gears and further, that a square-shaped housing requires additional metal for its manufacture. (Gustafson, Tr. 202-03).

(i) Shipper handle

The shipper handle is located on the drive side of the braiding machine and works in conjunction with the latch and clutch assembly; when a machine is started, the shipper handle is raised, thereby energizing or engaging a clutch which in turn enables the machine to operate. (Finding of Fact 20). Although alternate shapes for this part may be feasible, the shipper handle must remain "smooth to the touch" since it is operated by a human hand. (Gustafson, Tr. 204).

(j) Latch guide

The latch guide is mounted on the drive side of the braider and is fastened by a bolt to the bottom plate of the machine. Its function is two-fold: to protect one coming in contact with the gear assembly against injury; and to serve as a guide for the latch. (Finding of Fact 22). Described as "waterfall-shaped" by complainant's counsel, this element may assume a different form as long as its protective function is maintained. (Gustafson, Tr. 78).

(k) Left cross guard support

The left crossbar support rests on top of the left upright shaft and braces the rear crossbar and the horizontal drive shaft. (Finding of Fact 23). It appears possible to design this part with a different shape or material without affecting its primary support function. (Gustafson, Tr. 79-80).

(l) Right-hand bracket

Functioning in a manner similar to the left cross-bar support previously discussed, this element is characterized by an appendage extending forward which aids in supporting the drive shaft. (Finding of Fact 24). Mr. Gustafson testified that this part could assume a different shape or be constructed with various materials with no detriment to its function. (Gustafson, Tr. 81).

(m) Sickle-shaped bracket

Extending from the rear brace bar and over the horizontal drive shaft, the sickle-shaped bracket supports a portion of the overhead mechanism. (Finding of Fact 25). Although alternate designs for this element are a possibility, any design should include the curve of the sickle-shape so as not to interfere with the cross shaft. (Gustafson, Tr. 82-83).

(n) Horizontal support bar

This bar is cylindrical and formed of cold-rolled steel. Again, alternate shapes and materials were posited as feasible for this structure. (Finding of Fact 26; Gustafson, Tr. 83-84).

(o) Crank handle

The crank handle is the means by which one may manually operate a braiding machine. It is supported on the end of the upright shaft with a knob on one extension from the shaft. An extension on the other side of the braider acts as a counterweight while the machine is in operation. (Finding of Fact 19; Gustafson, Tr. 84). Even though this handle could possibly be made to resemble a wheel, a handle or knob remains necessary for ease of handling. (Gustafson, Tr. 199).

(p) Cross shaft

The cross shaft is cylindrically-shaped, extending from the right-hand support across the braider to the left-hand support. This mechanism picks up the drive from the change gears and sends the drive across the

machine. Because this shaft must be cylindrical in order to perform its function, no substantial design alternative appears feasible. (Finding of Fact 27; Gustafson, Tr. 86-87).

(q) Worm gear bracket

The worm gear bracket is supported on the rear upright and extends forward to the front of the braiding machine. This mechanism supports a shaft on which a worm gear is mounted. (Finding of Fact 28). It may be possible to fashion this part in a rectangular shape without affecting its function. (Gustafson, Tr. 89).

(r) Worm gear guard

The worm gear guard is a safety device which encloses this particular gear mechanism. (Finding of Fact 29). Complainant's witness testified as to possible alternate configurations and materials for this device, i.e., a rectangular structure made from sheet metal. (Gustafson, Tr. 89-90).

(s) Color

The New England Butt B10 maypole braiding machine has been painted green since approximately 1958. (Finding of Fact 30). In this connection, it has been held that the "mere color" of an article may have some functional value, Norwich Pharmacal Co. v. Sterling Drug, Inc., 271 F.2d 569, 572 (2d Cir. 1959); moreover, color may be part of a trademark where it is used in a particular manner, although, generally speaking, color or colors used as mere surface decoration cannot be monopolized by a claim to trademark rights therein. Plastilite Corp. v. Kassnar Imports, 508 F.2d 824 (C.C.P.A. 1975).

The record indicates that braiding machines are usually of two colors: vista green, presumably a lighter shade of green than that utilized by complainant; and "machine tool grey." (Gustafson, Tr. 208). This information tends to lend some credence to the notion that the choice of certain colors for machine tools may be dictated in part by utilitarian concerns, although record evidence on this point is lacking. Cf. Application of the Pollak Steel Co., 314 F.2d 566 (C.C.P.A. 1963) (use of color deemed functional although evidence showed it was customary in trade to identify producers according to color).^{4/}

(t) Brace bar support

The brace bar support is a rectangular-shaped post mounted on the top of the braider's rear upright shaft and connected with a small brace bar. (Finding of Fact 31). This element functions to support the braiding machine's upper mechanism. There is testimony of record suggesting an alternate square configuration for this device. (Gustafson, Tr. 91).

(u) Pulley arm

The pulley arm is an L-shaped casting which supports the drive pulley and its shaft and also provides a "seat" for the vertical drive shaft. (Finding of Fact 32). This mechanism must be on the same side of the

^{4/} Although not specifically argued by the parties herein, it is noted that one court recently relied on the doctrine of "aesthetic functionality" in determining that the color "John Deere green" was not capable of protection under §43(a) of the Lanham Act. Observing that an inquiry concerning aesthetic functionality focuses on the extent to which the design feature is related to the utilitarian function of the product or feature, the court discussed the fact that farmers desire to match the color of their loaders to that of their tractors in concluding that the doctrine of aesthetic functionality was applicable to the case. Deere & Co. v. Farmhand, Inc., 24 P.T.C.J. 417 (S.D. Iowa June 30, 1982).

braider as the drive; thus, its only alternative location is on the left side of a braiding machine, but only if the entire drive mechanism were moved to the left. (Gustafson, Tr. 93; see also p. 46, supra).

(v) Casting numbers

Casting marks are found in the interior of the right-hand support bracket. (Finding of Fact 33). Complainant proffers no further argument with respect to this feature; presumably, it considers these markings nonfunctional to the extent they could be placed at alternate locations on the braiding machine.

The superstructure of the New England Butt maypole braiding machine is the subject of an expired utility patent, U.S. Letters Patent 1,389,672, issued to Littlefield on September 6, 1921. (Finding of Fact 34; RX 41). The inventor describes the device as an improved braiding machine frame

comprised of a plurality of standards mounted on the body portion of the machine on which standards is removably and adjustably mounted one or more crossbars arranged to support a portion of the operating mechanism of the machine in such a way that the mechanism is readily removable and the parts thereof interchangeable.

(RX 41, col. 1, l. 12-20). The advance in the art represented by the subject device is explained in part as simplifying and lessening "the cost of construction of the different styles of [braiding] machines as all of the parts are rendered removable and interchangeable and any style of take-up or take-off head or mechanism may be applied thereto." (Id. at col. 3, l. 58-64). To the extent this patent describes the superstructure of the current New England Butt braiding machine, it is evidence of that mechanism's functionality. Morton-Norwich, 213 U.S.P.Q. at 15; In re Shenango Ceramics, Inc., 150 U.S.P.Q. 115 (C.C.P.A. 1966).

Moreover, a review of complainant's advertising brochures and catalogs suggests that New England Butt promotes the utilitarian features of the maypole braider to its customers. (Finding of Fact 35). The fact that the design originator touts the utilitarian advantages of its product through advertising has been considered to be further indicia of an article's functionality. Morton-Norwich, 213 U.S.P.Q. at 15 and cases cited therein.

Further, notwithstanding evidence concerning alternate arrangements of various braiding machine elements, complainant has not demonstrated on this record the existence of viable alternatives to the braiding machine's overall design. Generally, the record shows that each feature was designed for reasons of economy and efficiency. Accordingly, alternative designs are not commercially feasible by reason of their inefficiency or by reason of the addition of needless materials cost to the production of the subject braiding machines. (See pp. 44-52, supra; see also Findings of Fact 11-34).

Finally, as noted previously, the keystone of the functionality analysis rests upon the effect of the alleged trademark's protection on competition. See e.g., Truck Equipment Service Co. v. Fruehauf Corp., 191 U.S.P.Q. 79, 85 (8th Cir. 1976) ("the question in each case is whether protection against imitation will hinder the competitor in competition"); In re Teledyne Industries, Inc., 696 F.2d 968 (Fed. Cir. 1982) (effect on competition is the "decisive consideration"). As one court has noted, "Our society is better served if...functional designs...remain available for use among competitors. To the extent this causes a modicum of confusion of the public, it will be tolerated." In re Water Gremlin Co., 208 U.S.P.Q. 89, 91 (C.C.P.A. 1980).

Unrebutted record evidence in the instant case shows that the subject design features and overall configuration of New England Butt's B10 braiding machine, also found on the Kokobun 2D braider, are required by competitive conditions in the marketplace. For over fifteen years, United States customers of now-defunct Atlantic Braiding Machinery Co. and presently, Kokubun have required that braiding machine parts be interchangeable with those of the Butt Number 2 braider. (CX 30; Findings of Fact 36, 37; Sabula, Tr. 487; Hirota, Tr. 609). Further, it appears that only New England Butt and Kokubun currently offer functionally equivalent machines at a competitive price. (Findings of Fact 38-44; see pp. 89-90, infra). Thus, one may conclude that it is competitively necessary for Kokubun to imitate the design features and overall configuration of the New England Butt braiding machine in issue.

Based on the foregoing cumulative evidence of record, I conclude that complainant has not carried its burden of demonstrating that the design features of the New England Butt Number 2 braiding machine, as embodied in the braider's overall appearance, are de jure nonfunctional.

Distinctiveness

A product design or feature is inherently distinctive if it is arbitrary or fanciful. 1 J. McCarthy, Trademarks and Unfair Competition, §11:2 (1973). A fanciful mark is a word which is coined for the express purpose of functioning as a trademark (see Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-105 (1982) (Games II) ("Pac-Man"), while an arbitrary mark consists of a word or symbol which is in common usage in the language, but which is applied arbitrarily to the goods in question in such a way that it is not descriptive or suggestive. McCarthy, supra at §11:2. Complainant New England Butt contends that the overall configuration of its maypole braiding machine is inherently distinctive because the features of the subject machine are "arbitrary" and "not dictated by the function of the element." (Complainant's Post-Hearing Brief, p. 36).

The record evidence concerning this issue indicates that braiding is an ancient art. In fact, an early historical example of braid forming may be found in a scene of English villagers dancing around a maypole and forming a braid of colored streamers which hang from the top of the pole. (CX 6, p. 1). Although contemporary braiding machines produce quality braid with the aid of modern techniques and improved materials, the basic design of the maypole braider has remained unaltered for the past two hundred years. (Id.). A review of the various photographs, catalogs, and brochures of several braiding machine manufacturers in this record discloses a basic similarity between these machines and New England Butt's Number 2 braider. (Finding of Fact 47). Further, as noted in the course of the preceding

discussion concerning the "functionality" of the alleged trademark, none of the claimed features of the subject braiding machine appears to be utilized for the sole purpose of a trademark or to be unrelated to the purpose or use of the braider. (See pp. 44-52, supra).

For the foregoing reasons, I conclude the complainant's alleged trademark, characterized by the overall appearance of the New England Butt Number 2 braiding machine, does not possess the fanciful and arbitrary qualities requisite to establish inherent distinctiveness.

Secondary Meaning

Although complainant has failed to prove the inherent distinctive-ness of its trade dress, New England Butt may show that the overall appearance of its braiding machine nevertheless is distinctive by demonstrating that the alleged trademark has acquired secondary meaning in the marketplace. To prove secondary meaning, complainant must establish that the appearance of the subject braiding machine has come to be associated in the minds of purchasers with New England Butt as its single source. McCarthy, supra at §15:2; Vacuum Bottles, supra. The party attempting to prove secondary meaning must show that "the primary significance of the [trademark or trade dress] in the minds of the consuming public is not the product but the producer." Kellogg Co. v. National Biscuit Co., 39 U.S.P.Q. 296, 299 (1938). It is not necessary, however, that the identity of the product's source be known to the public. Novelty Glasses, supra.

Secondary meaning may be proved by direct and circumstantial evidence. McCarthy, supra at §15:10. Direct evidence, i.e., the actual testimony of buyers of braiding machines as to their state of mind, must be adduced through a testifying witness, by affidavit, or by a consumer survey conducted by a qualified expert in a professional manner. Certain Vacuum Bottles, supra, CD at 9. In recent cases, the Commission has considered the following circumstantial evidence as relevant in determining whether a particular trade dress has acquired secondary meaning: (1) length and manner of the use of the trade dress; (2) sales levels; (3) the nature and extent of advertising and promotion of the mark or features; and (4) evidence of copying of the trade dress by a junior user. Certain Miniature, Battery-

Operated, All-Terrain Wheeled Vehicles, Inv. No. 337-TA-122 (1982) (RD) (Toy Vehicles); Cube Puzzles, supra; Vacuum Bottles, supra; Novelty Glasses, supra.

Moreover, complainant must show in the instant case that the configuration of its braiding machine has achieved secondary meaning separate and independent from any word marks that appear on the braiding machine at the time of sale. Vacuum Bottles, supra, CD at 10-13.

The record lacks valid direct evidence of secondary meaning. No prospective purchasers appeared during this investigation, nor were affidavits submitted attesting to a customer's state of mind with respect to the sale of the subject braiding machines. In lieu of such evidence, Mr. Dennehy, Sales Manager of New England Butt's Braiding Machine Division, testified that some customers have commented to him that the appearance of the braiding machine told the customer that the braiding machine came from New England Butt. (Dennehy, Tr. 392-94). The record also indicates that complainant's sales personnel have the opinion that "customers refer to this style of braider (whether made by complainant or by Kokubun) as a 'Butt machine.'" (SX 2, Answer 17).

Generally speaking, little weight is accorded to the testimony of an employee of the owner of the alleged trademark because of the potential risk that the perceptions conveyed are colored by bias. Novelty Glasses, supra, CD at 9; see also Major Pool Equipment Corp. v. Ideal Pool Corp., 203 U.S.P.Q. 577, 584 (D. Ga. 1979). For this reason, Mr. Dennehy's comments with respect to the customers' state of mind are of little probative value. Furthermore, Mr. Dennehy's testimony that the trade appearance of

the New England Butt braiding machine has achieved secondary meaning was contradicted upon cross examination. In answer to questions propounded by respondents' counsel, Mr. Dennehy testified that he did not know of anyone who has said to him that the person could "see by looking at the machine that it is a Butt machine." (Dennehy, Tr. 395). This statement was confirmed by the deposition and trial testimony of Mr. Gustafson, complainant's vice president and general manager. (Gustafson, Tr. 221).

Additionally, Mr. Dennehy was able to name only one customer, Miami Laces of Florida, who purportedly identified a braiding machine as one manufactured by New England Butt based upon its physical appearance. (Dennehy, Tr. 393-94). Although there exists no precise number of buyers necessary to show secondary meaning, it is generally accepted that complainant must show that a "substantial part" of the buying class has come to associate the trademark configuration with the producer. McCarthy, supra at §15:13.

Direct evidence as to the state of mind of the prospective buyer also may be adduced from properly conducted consumer surveys. McCarthy, supra at §15:10; Zippo Manufacturing Co. v. Roger Imports, Inc., 137 U.S.P.Q. 413 (S.D.N.Y. 1963). Complainant offered into evidence a survey entitled "New England Butt Confusion Study" (CX 3A), which fails to meet the criteria set forth by the Commission in recent investigations for the proper conduct of a consumer survey. (See pp. 74-78, infra). Accordingly, the subject survey carries no weight on the issue of secondary meaning.

New England Butt also relies on circumstantial evidence in support of its claim to secondary meaning in the form of the length of time that

complainant's braiding machines have been on the market; advertising; sales; and evidence of alleged copying by Kokubun, although complainant primarily alleges that secondary meaning has been achieved based upon its exclusive use of the subject trade appearance over a long period of time and upon substantial sales of its braiding machines. (SX 2, Answer 18). Similarly, the Commission investigative attorney draws an inference of secondary meaning based upon complainant's exclusive and continued use of the subject braiding machine over the last one hundred years, arguing that "buyers necessarily associated the maypole braiding machine and its configuration with the one source, New England Butt." (Posthearing Brief of the Commission Investigative Attorney, p. 11).

The record demonstrates that New England Butt was founded in 1842 and has manufactured a maypole-type braiding machine since 1884. (Finding of Fact 49). The configuration of complainant's braiding machine has remained virtually unchanged over the last one hundred years. (Finding of Fact 50). New England Butt Co. has sold a substantial number of braiding machines over its long history (Finding of Fact 52); thousands of New England Butt braiding machines are in use all over the United States and the world. (Finding of Fact 53).

New England Butt has expended relatively little money and effort to promote its braiding machines. The braiding machine division of New England Butt engaged in only token advertising until 1981, at which time it was given an advertising budget of \$4,000. (Findings of Fact 54-55). The braiding machine division currently spends approximately \$5,000 to \$6,000 per year on fliers, brochures, handouts, magazine ads, catalogs printed in

both English and Spanish, and appearances at trade shows. (Finding of Fact 56). New England Butt participates inconsistently in the annual textile shows, appearing only three times in the last twenty years, most recently at the Greenville, South Carolina textile show in 1982, and at one wire trade convention in 1981. (Findings of Fact 57-58).

Complainant argues that its advertising behavior is persuasive evidence of secondary meaning because it is typical of the American braiding machine industry as a whole. (Dennehy, Tr. 444). Pertaining to the sufficiency of the complainant's advertising expenditures, the Commission investigative attorney states that the "modest advertising expenditures...are commensurate with the fact that the product and its configuration are well established in the minds of the public." (Post-hearing Brief of the Commission Investigative Attorney, p. 11).

The arguments of New England Butt and the Commission investigative attorney fail to consider the nature and extent of complainant's advertising in determining its impact upon the acquisition of secondary meaning. The purpose of this analysis is to determine whether the consuming public has come to associate the appearance of the subject braiding machine, represented by the model B10-16, with New England Butt Co. In this connection, one court noted, "it must be remembered that the question is not the extent of the promotional efforts, but their effectiveness in altering the meaning of [New England Butt's trade dress] to the consuming public." Major Pool Equipment Corp. v. Ideal Pool Corp., 203 U.S.P.Q. at 584.

Complainant's vice-president testified that New England Butt has never emphasized the allegedly unique trade appearance of its braiding machines

in its sales brochures or advertisements. (Finding of Fact 61). In addition, although the New England Butt catalog shows pictures of the subject braiding machines, no attempt has been made, either through graphics or text, to emphasize these "unique" features as a means of identifying New England Butt Co. (Id.; see Vacuum Bottles, supra, CD at 14; cf. In re Interstate Bakeries Corp., 153 U.S.P.Q. 488 (T.T.A.B. 1967) (checkered gingham package design specifically touted in product advertising).

Moreover, the record indicates that complainant's description of the allegedly unique features of its braiding machine has not been consistent. For example, Mr. Dennehy's hearing testimony contradicted his deposition testimony with respect to the inclusion of the shipper handle and the carriers in the description of the distinctive parts of the braiding machine. (Findings of Fact 65, 66). Further, it appears that not all braiding machines sold by New England Butt contain the allegedly distinctive parts; some of complainant's braiding machines are sold without the cross shaft, crossbar support, or brace bar. (Findings of Fact 67, 71). Other braiding machines are changed physically to meet the particular needs of a customer. (Finding of Fact 72).

In this connection, the Commission investigative attorney states that "what it is that complainant claims is distinctive about the braiding machines must be clarified before a conclusion can be reached regarding the state of mind of consumers as to the origin of products. If complainant has trouble in defining the distinctiveness, so also may consumers. Certain Vacuum Bottles, supra, p. 14." (Posthearing Brief of the Commission Investigative Attorney, p. 9; see Findings of Fact 65-66). Without

promotional materials that specifically emphasize the alleged unique features, and in light of the discrepancy as to the definition of these features, no secondary meaning can be inferred on this record based on the content of complainant's advertising.

Similarly, the extent of complainant's advertising does not permit an inference of secondary meaning. Record evidence indicates that New England Butt's braider division has advertised solely in wire market trade magazines and not in publications designed to reach the general cordage business. (Finding of Fact 73). Although complainant has run ads in three wire trade journals over the past three years, the wire market constitutes only 20% of New England Butt's sales of braiding machines. Id. Thus, the scope of complainant's advertising suggests a limited exposure of the claimed trademark among a large portion of complainant's braiding machine customers.

As noted previously, complainant must further show the acquisition of secondary meaning by the configuration of its product separate and independent from secondary meaning attributable to any word marks that appear thereon. Vacuum Bottles, CD at 10-14; see also In re Johnson & Johnson, 129 U.S.P.Q. 371 (T.T.A.B. 1961) (no trademark because lack of evidence indicating that Johnson and Johnson promoted or advertised its particular configuration separate and apart from the word mark); In re Mogen David Wine Corp., 152 U.S.P.Q. 539, 595 (C.C.P.A. 1967) ("there is nothing to indicate that the container has been promoted separate and apart from the word mark 'MOGEN DAVID'").

In the present investigation, no evidence has been introduced which shows that complainant emphasized its trade appearance as a means of

identifying the braiding machine with New England Butt Co. Consequently, the record circumstantial evidence of longevity, sales, and advertising is not sufficient to demonstrate that the appearance of complainant's braiding machines has achieved secondary meaning in the minds of the buying class apart from the words "New England Butt Co." which appear on every braiding machine manufactured by complainant.

Finally, complainant and the Commission investigative attorney argue that secondary meaning should be inferred from evidence presented to show that Kokubun allegedly copied the trade appearance of New England Butt's braiding machines. Relying upon Novelty Glasses, supra, complainant asserts that a presumption of secondary meaning exists where there is a deliberate and close imitation of the senior user's trade dress. (Complainant's Posthearing Brief, p. 24). Recently, however, the Commission explained that copying raised a presumption of secondary meaning in Novelty Glasses only because respondent's imitation of complainant's glasses was "so close" and because there was "strong evidence of passing off." Vacuum Bottles, supra, CD at 16. The Commission in Vacuum Bottles concluded that copying should be considered properly as evidence of secondary meaning, rather than as a presumption thereof. Id. at 17, citing Ideal Toy Corp. v. Plawner Toy Mfg. Corp., 685 F.2d 78 (3d Cir. 1982).

Complainant maintains that Kokubun's 2D braiding machine is a deliberate and close imitation of complainant's B10-16 braider, based upon visual similarity and the use of identical pattern numbers on three parts of each machine. The evidence indicates that in 1966 Kokubun entered into an agreement with Atlantic Braiding Machinery Co. according to the terms of

which Kokubun was to manufacture in Japan certain parts for Atlantic's braiders, whose appearance was very similar to that of the No. 2 type New England Butt braider. (Dennehy, Tr. 413, 432; Sabula, Tr. 508; CX 10, 30; RX 37). In relation to the agreement, Atlantic sent Kokubun copies of New England Butt machine parts and asked Kokubun to duplicate them so that the parts would be interchangeable with complainant's machines. (Hirota, Tr. 604; CX 44). Respondent declares that "Kokubun's 2D braiding machines were not the result of copying complainant but instead evolved with minor changes from the type 4 machine of Atlantic Braiding Machinery Co." (Respondents' Reply Brief, p. 5). Although respondent did not copy directly complainant's braiding machine, Kokubun admits that the Atlantic braiding machine upon which Kokubun's 2D machine is modeled consists of parts duplicated from complainant's braider. It is therefore reasonable to infer that Kokubun's 2D machine is substantially a copy of complainant's No. 2 type braider.

However, a finding of copying alone is not sufficient evidence from which to conclude that secondary meaning has been acquired, for such an analysis requires that all pertinent factors be viewed in context. Artus Corp. v. Nordic Co., Inc., 213 U.S.P.Q. 568, 572 (W.D. Pa. 1981). Accordingly, the cumulative effect of this examination, based upon record evidence and the circumstances of the case, guides the presiding officer. Thus, for the foregoing reasons, and upon careful consideration of the record, I conclude that complainant has not established a factual foundation, based upon a preponderance of the evidence, from which an inference may be drawn that the trade appearance of the New England Butt braider has acquired secondary meaning separate and apart from any secondary meaning attributable to the identifying words which appear on the subject braiding machine.

Likelihood of Confusion

In determining whether a likelihood of confusion exists, that is, whether there is a likelihood that purchasers will be misled or confused as to the source of the goods in question, the Commission has relied on the criteria set forth in Restatement of Torts §729:

- (a) the degree of similarity between the designation and the trademark or trade name in
 - (i) appearance;
 - (ii) pronunciation of the words used;
 - (iii) verbal translation of the pictures or designs involved;
 - (iv) suggestion;
- (b) the intent of the actor in adopting the designation;
- (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other;
- (d) the degree of care likely to be exercised by purchasers.

Games I, supra at 9. See also Games II, supra; Vacuum Bottles, supra; Toy Vehicles, supra, RD at 90. Consumer survey evidence may also be indicative of a likelihood of confusion. Zippo Manufacturing Co. v. Rogers Imports, Inc., 137 U.S.P.Q. at 413.

In order to determine whether the articles in question are similar in appearance so as to cause confusion, the relevant inquiry has been described as being nothing more than the subjective "eyeball" test. McCarthy, supra at §23:7. Thus, a mark should not be viewed in its various component parts and then compared with the corresponding parts of the conflicting mark. Rather, one must view the overall impression or appearance of the subject articles, and while recognizing that there may be differences between them, if the overall impression is essentially

the same, it is probable that the marks are confusingly similar. In re Triple R Mfg. Co., 168 U.S.P.Q. 447 (T.T.A.B. 1970).

Applying the "eyeball test" to the braiding machines at hand to determine the impression created by the mark as a whole, it is clear that the braiding machines manufactured by complainant and respondent are virtually identical. (See CPX 1, CPX 2). Although Kokubun's braider differs from complainant's machine in certain respects, these differences are de minimus when viewed in the context of the braiders' overall appearance.

An intent by the junior competitor to injure or confuse is a subsidiary test with respect to the likelihood of confusion, i.e., the good faith intentions of an infringer are no defense to a finding of liability. McCarthy, supra, at §22:30. Hence the cases emphasize a likelihood of confusion as the primary inquiry, with intent, if proven, relevant to the analysis. Id. at §23:32.

In the instant case, Kokubun's admission that it copied certain parts of New England Butt's braider at the behest of Atlantic is not persuasive evidence of intent to injure complainant. The record indicates that Kokubun is a well-established, reputable manufacturer of braiding machines, in business since 1922. (Finding of Fact 93). After the demise of Atlantic Braiding Machinery Co., Kokubun began to manufacture a braider adapted to the demands of United States braiding machine purchasers. (Findings of Fact 94, 95). In creating its braiding machine for the American market, Kokubun borrowed liberally from the braider

formerly marketed by Atlantic. (Findings of Fact 89-92). Further evidence of independent development by Kokubun may be found in the fact that Mr. Hirota holds patents on Kokubun's stop motion lever and its former. (Finding of Fact 96). Moreover, it appears that at no time did Kokubun have a sample machine or drawing of the New England Butt braider in its Japanese plant from which it could copy the overall appearance of complainant's machine. (Finding of Fact 97; Cf. Toy Vehicles, supra at 86, 91). Thus it seems that Kokubun entered the United States market to fill the void left by Atlantic, and not to "reap where one has not sown", that is, to build upon the work and reputation of New England Butt. See, e.g., Aetna Casualty & Surety Co. v. Aetna Auto Finance, Inc., 123 F. 2d 582 (5th Cir. 1941).

Furthermore, the record reveals efforts by respondents to avoid confusion. Kokubun's braiding machines are clearly labeled as to their—source on the horizontal shaft, the change gear housing, and the vertical post. (Finding of Fact 99). Neither Kokubun nor Sabula has ever stated, nor led a customer to believe, that the Kokubun braiding machine is made by New England Butt Co. (Finding of Fact 100). Additionally, in his contacts with prospective buyers, Sabula uses calling cards, letterheads, and brochures that clearly identify Kokubun and Sabula as Kokubun's United States agent. (Finding of Fact 100). In sum, complainant has not substantiated its allegation that respondents have intended to injure or confuse.

A further factor in an analysis of likelihood of confusion is the relation in use and manner of marketing between the competing sellers of the article in issue. In this regard, products will be sufficiently similar to create a likelihood of confusion if they fall within the same

general market, or appeal to essentially the same class of purchasers. Exquisite Form Industries, Inc. v. Exquisite Fabrics of London, 183 U.S.P.Q. 666, 672 (S.D.N.Y. 1974). This inquiry has been characterized as "recreating the marketplace in the courtroom." McCarthy, supra at §23:17.

As noted in the injury section of this opinion, the New England Butt B10 braiding machine and the Kokubun 2D braider are functional equivalents and compete directly in the marketplace. (See pp. 89-90, infra). The manner in which the subject goods are marketed, however, suggests the absence of a likelihood of confusion.

Record evidence discloses that braiding machines are not sold through local retail outlets. Although there exists a small secondhand market for these machines (Finding of Fact 102), the vast majority of prospective buyers must contact the sales representative of a particular braiding machine manufacturer in order to procure a braider. (Findings of Fact 104,108). Whether by telephone, letter, or in person, extensive consultations then take place to determine the specific needs of the customer. The ultimate purchase is usually effected through the sales representative. (Findings of Fact 103-111).

Notwithstanding that the general manner in which a customer purchases a braiding machine is similar without regard to a particular manufacturer, the nature of the specific purchasing arrangement varies. Excluding the secondhand market from this analysis, a potential purchaser cannot choose a braider without the help of an authorized sales representative. Mr. Dennehy and his assistant represent New England Butt, and Mr. Sabula is Kokubun's

United States' representative; neither person sells new braiding machines manufactured by the other company. (Finding of Fact 107).^{5/} Additionally, in the course of his consultations with clients, Mr. Sabula uses calling cards, letterheads and brochures that clearly identify his affiliation with Kokubun. (Finding of Fact 101). Further, the record indicates that about 40-50% of Sabula's customers, which represents about 90% of Kokubun's actual unit sales in the United States (Finding of Fact 113), utilize letters of credit in their transactions, an option not available to the New England Butt purchaser.

The departure in this investigation from the typical confusion scenario is highlighted when the facts of the instant case are contrasted with the types of marketing methods found to be confusing in past §337 cases. In these situations, the ultimate purchaser bought the goods through a retailer or wholesaler and had no direct contact with the manufacturer. In addition, most retailers and wholesalers carried both complainant's and respondents' products, which contributed to the confusion on the part of the potential buyer. Cf. Toy Vehicles, supra; Cube Puzzles, supra.

The degree of care likely to be exercised by purchasers is closely related to a discussion of similar marketing strategies, for a discerning buyer may not be confused by similar products sold in a similar manner. The concept of the "reasonably prudent buyer" has emerged from cases, although this notion has been difficult to quantify. See generally McCarthy, supra at §23:27 and cases cited therein. The

^{5/} The record indicates that Mr. Sabula sells a small quantity of used braiding machines. (Sabula, Tr. 570).

standard of care used to judge confusion may vary with the type of consumer to whom the product is usually sold. Id. at §23:28. In making purchasing decisions regarding "expensive goods" purchased infrequently, the reasonably prudent consumer standard is elevated to the stricter standard of the discriminating, sophisticated purchaser. Id. Where the relevant buyer class is composed solely of professional or commercial purchasers, the standard of confusion must be adjusted to the "reasonably prudent expert." Id. at §23:29.

In the instant investigation, several degrees of customer sophistication are apparent. Braiding machine customers may range from those buyers with great expertise to unsophisticated clients who are initiating a business. (Finding of Fact 114). For the purpose of this analysis, two factors dictate that the higher standard of the sophisticated customer is most appropriate. First, on the average, less than 10% of New England Butt's customers are first-time purchasers. (Finding of Fact 115). Second, most of these unsophisticated purchasers enter the market as the result of the desire to take advantage of a "fad" item whose production requires the use of a braiding machine. For example, many one-time customers bought braiding machines during the popularity of macrame, between 1976 and 1979. (Dennehy, Tr. 343-44). At present, however, the influence of the unsophisticated purchaser appears to be at an ebb as a result of current industry cycles. (See pp. 91-92, infra).

It is commonly accepted that the professional industrial buyer may be less likely to regard a mark as confusing. McCarthy, supra at §15:13. Consequently, the real issue is whether complainant has proven that the sophisticated buyer would find the subject goods to be confusingly similar.

On the basis of this record, I find that the reasonably prudent professional braiding machine buyer would not be confused at the time of purchase for the following reasons: (1) the separate and distinct channels of distribution inhibit confusion on the part of the buyer; (2) the clear labeling on the change gear guard of the name and location of each manufacturer specifies the source of the goods; and (3) the expertise of the sophisticated buyer would enable him to notice relatively easily the differences in the configuration of complainant's and respondents' braiding machines. These differences in appearance include the stop motion device, the takeoff support arm on the rear vertical upright, the surface finishing of the tables, and the casting. (Findings of Fact 118, 120, 121). The combination of these factors leads me to believe that a sophisticated buyer would not be confused as between a New England Butt and Kokubun braiding machine of the type in issue. This conclusion is buttressed by the fact that complainant has admitted to the absence of confusion at the time of purchase. (Gustafson, Tr. 221; Dennehy, Tr. 448).

The foregoing analysis with respect to a likelihood of confusion has centered on whether the prospective purchaser was confused at the time the goods are purchased. Complainant alleges, however, that there is a potential for likelihood of confusion after the purchase of the subject braiding machines, when certain machine parts are "cannibalized" and it becomes difficult to distinguish between complainant's and respondent's dust-covered braiders. (Findings of Fact 123, 124). A review of the applicable precedent and commentaries indicates that the relevant question generally in a determination of likelihood of confusion is whether a purchaser was confused or likely to be confused at the time he acquired his interest and considered

the purchase. Aerojet-General Corp. v. Cincinnati Screen Process Supplies Inc., 172 U.S.P.Q. 114, 118 (S.D. Ohio 1971); McCarthy, supra at §23:17; but see Levi Strauss & Co. v. Blue Bell, Inc., 208 U.S.P.Q. 713, 718 (9th Cir. 1980) ("Wrangler's use of its projecting label is likely to cause confusion among prospective purchasers who carry an even imperfect recollection of Strauss' mark and who observe Wrangler's projecting label after the point of sale") (emphasis in original). Consequently, evidence concerning the post-sale scenario is of limited value for the purposes of this analysis.

Consideration must be given to any evidence of "actual confusion" offered by complainant, for although it is not necessary to show actual confusion in order to prevail on a claim of likelihood of confusion, courts often view evidence of actual confusion as the best evidence of likelihood of confusion. Toy Vehicles, supra, RD at 94; Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.P.Q. 623, 638 (7th Cir. 1976).

An examination of the record in this case discloses no evidence of actual confusion. Indeed, several of complainant's employees testified that they knew of no occasion where a customer mistakenly bought a Kokubun machine instead of a New England Butt braider. (Gustafson, Tr. 153; Sabula, Tr. 472; SX 2, Answer No. 20).

Similarly, there is little evidence with respect to returns to New England Butt of Kokubun parts or machines. The record indicates that Kokubun parts have been returned to New England Butt in a few instances, but that no Kokubun braiding machines have been sent to complainant. (Finding of Fact 127). Evidence of actual confusion of a very limited scope may be dismissed as de minimus. McCarthy, supra at §23:2. Consequently, this evidence of actual confusion is not persuasive.

Additionally, complainant offers as evidence of actual confusion a survey entitled "New England Butt Confusion Study." (CX 3A). The survey was conducted by Northeast Field Facts, Inc., a market research corporation engaged in raw data collection, located in Framingham, Massachusetts. (CX 3A; McDonald, Tr. 286). This organization has examined a wide range of consumer products as well as "professional type" goods. (McDonald, Tr. 334).

The survey at issue was conducted by mail and consisted of a cover letter, a questionnaire, and a color photograph of either a New England Butt or Kokubun braiding machine. (CX 3A; McDonald, Tr. 293). Each questionnaire received a code number which indicated whether a photograph of complainant's braider or respondent's braider was attached thereto. (McDonald, Tr. 293). Included in the package was a postage-paid return envelope to facilitate the return of the questionnaire. (McDonald, Tr. 294). Two samples of the survey were mailed over an approximate two week period. (Id.). Respondents were chosen from among a list of New England Butt braiding machine customers supplied by complainant. (McDonald, Tr. 300; RX 42). The results of the survey, as tabulated by Northeast Field Facts, Inc., indicate that out of ninety-three questionnaires mailed, sixty-one were returned, of which fifty-two were "usable." (See McDonald, Tr. 298-99). Of twenty-three respondents shown a picture of a Kokubun braider, only three persons identified the machine as such, while eighteen persons incorrectly identified the photograph as depicting a New England Butt braiding machine. Of the twenty-nine respondents receiving a photograph of complainant's braider, twenty-three persons correctly identified the machine's manufacturer; the remaining six responses identified various sources or were undecided. (CX 3A).

Properly conducted surveys demonstrating a purchaser's mental associations with respect to a particular trade dress are widely accepted by courts as evidence of secondary meaning. Zippo Mfg. Co. v. Rogers Imports, Inc., 137 U.S.P.Q. at 413; Anheuser-Busch, Inc. v. Bavarian Brewing Co., 120 U.S.P.Q. 420 (6th Cir. 1959); Union Carbide Corp. v. Ever-Ready, Inc., 188 U.S.P.Q. at 623. Generally speaking, a survey is conducted in accordance with accepted principles of survey research if the following criteria are met: (1) the proper universe is selected and examined; (2) a representative sample is drawn from the universe; (3) a fair and correct method of questioning the interviewees is used; (4) the persons conducting the survey are recognized experts; (5) the data gathered is accurately reported; (6) the sample, the questionnaire, and the interviewing are in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys; (7) the sample and the interviews are conducted independently of the attorneys in the case; and (8) the interviewers are adequately trained in the field and have no knowledge of the litigation or the purposes for which the survey is to be used. McCarthy, supra at §32:53; see also Judicial Conference of the United States, Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 429 (1960). Applying these criteria to the survey at issue, I conclude that the "New England Butt Confusion Study" was not conducted according to accepted survey methodology and thus is of no value in assessing a likelihood of confusion under the facts of this investigation.

The survey universe is that segment of the population whose characteristics are relevant to the mental associations at issue. Id. at §32:47. As noted previously, the survey respondents in the instant case

were chosen from a customer list supplied by New England Butt, and Stephanie McDonald, the principal survey taker, admitted that she had no idea what the real universe of braiding machine purchasers includes and, in any event, that the universe surveyed was not the total universe of such customers. (McDonald, Tr. 312, 328). Moreover, the universe or sample chosen was never defined, thereby precluding any projection of the survey results on the entire class of braiding machine purchasers. (See Sorenson, Tr. 694-98).

The manner in which the survey questions were phrased further undercuts the study's credibility. The main question of the survey, "Who do you think is the manufacturer of this machine?" (see McDonald, Tr. 315), was not followed by a "probe" question seeking the reason for the previous answer. Consequently, one has no way of knowing whether or to what extent any considerations at issue in this investigation affected respondents' answers. (Sorenson, Tr. 682-83).

Further, the subject questions and photograph as presented in the survey do not represent a realistic braiding machine purchasing situation. (See pp. 68-70, supra). To the extent the survey evinces confusion, it is only confusion as between photographs. (McDonald, Tr. 322-23). In this respect, one court noted the following:

[T]he issue is whether the goods would be confused by a prospective purchaser at the time he considered making the purchase. If the interviewee is not in a buying mood but is just in a friendly mood answering a pollster, his degree of attention is quite different from what it would be had he his wallet in his hand. Many men do not take the same trouble to avoid confusion when they are responding to sociological investigators as when they spend their cash.

American Luggage Works, Inc. v. U. S. Trunk Co., Inc., 116 U.S.P.Q. 188, 190 (D. Mass. 1957).

Although there is no information in the record suggesting that Northeast Field Facts, Inc. tabulated the survey responses incorrectly, Ms. McDonald testified that the subject answers were not validated. (McDonald, Tr. 304). Notwithstanding the conflict between validation and a respondent's anonymity, (id.; see also Sorenson, Tr. 708-09), the lack of any such procedure in the instant case makes it impossible to conclude that the person to whom the questionnaire was sent, i.e. a particular braiding machine company employee, personally completed the questionnaire. (See Sorenson, Tr. 664); see also Sheller Globe Corp. v. Scott Paper Co., 204 U.S.P.Q. 329, 334 (T.T.A.B. 1979) ("validity checking would seem to be an essential ingredient of any mail survey").

Finally, and perhaps most seriously, unaccountable bias was introduced into this survey with the first sentence of the cover letter as follows: "Northeast Field Facts is an independent market^{re} research firm that has^e been contracted to collect data for a pending court case." (CX 3A). Most commentators and experts in the field appear to agree that neither the survey taker nor the interviewee should be aware that the study is being conducted for purposes of litigation. (Sorenson, Tr. 662); McCarthy, supra at §32:53; A. H. Seidel, What the General Practitioner Should Know About Trademarks and Copyrights 106 (4th ed. 1979). Moreover, the record indicates that prior to the survey, New England Butt distributed a press release concerning its involvement in the instant investigation. (Dennehy, Tr. 425). Thus, the common knowledge within the trade concerning these proceedings, together with the language of the cover letter, and the fact that the letterhead and return envelope were addressed to a New England location, suggest that factors unrelated to the pictured braiding machine's appearance may have influenced responses to the survey.

For these reasons, the "New England Butt Confusion Study" presents no conclusions upon which one may rely for the purpose of assessing the likelihood of confusion as between New England Butt and Kokubun braiding machines.

Complainant further contends that New England Butt's established reputation for quality could be injured if a confused customer were to blame New England Butt for its dissatisfaction arising from the inferior quality of a Kokubun braider. Complainant's vice president, Mr. Gustafson, admitted at deposition and at trial that he knows of no customer who has blamed complainant for the alleged quality deficiency of respondent's machines. (Gustafson, Tr. 223). Moreover, there is no evidence of record supporting the allegation that respondent produces goods of inferior quality. (See p. 93, infra). For these reasons, complainant's argument lacks foundation and is not persuasive on the ~~issue~~ issue of confusion. =

Finally, no likelihood of confusion is apparent on this record because the subject goods at time of purchase are clearly labeled with the name and location of the manufacturer.^{6/} (Finding of Fact 130). Commission precedent indicates that confusion is negated by the clear and prominent labeling of the goods, even where the products under investigation are nearly identical. Certain Steel Toy Vehicles, supra, RD at 48, CD at 31; Vacuum Bottles, supra, CD at 27. Here, the words "New England Butt Co., Providence, Rhode Island" are affixed prominently to the change gear guard. (See CPX 1). The name Kokubun is located on its change gear guard and appears in stickers glued to the cross shaft and the upright shaft of respondent's braider. (Sabula, Tr. 474; Hirota, Tr. 603-04; RX 15; CPX 2).

^{6/} A de minimus number of custom braiders are sold by New England Butt Co. without change gear guards. (Finding of Fact 130).

Accordingly, based upon the foregoing considerations and upon careful analysis of the record evidence, I find that there exists no likelihood of confusion as between the braiding machines of complainant and respondent.

False Designation of Origin

Those elements which establish common law trademark infringement also constitute a prima facie case of false designation of origin. Games I, supra at 12. Having determined that complainant may not claim a common law trademark in the overall appearance of its Number 2 braiding machine, it follows that New England Butt has not established a prima facie case of false designation of origin with respect to those braiding machines imported and/or sold by respondents Kokubun and Sabula.

Passing Off

The Commission has defined the term "passing off" in prior decisions to include two distinct types of activity. Earlier cases refer to passing off in a broad sense so as to include conduct prohibited by §43(a) of the Lanham Act, 15 U.S.C. §1125(a). In these investigations, the Commission applied the traditional criteria for trademark infringement; thus, a complainant established passing off by demonstrating functionality, distinctiveness and/or secondary meaning, and likelihood of confusion. See Certain Steel Toy Vehicles, supra; Certain Surveying Devices, Inv. No. 337-TA-68 (1980). More recently, however, non-statutory allegations of passing off have been resolved in accordance with common law principles. In this sense, the Commission has determined that the essential component of a

claim of passing off lies in an act of deception, beyond mere copying, which induces someone to purchase the product of another and requires real proof that respondent subjectively and knowingly intended to confuse buyers.

Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 (1981) (Stoves); Vacuum Bottles, supra; Cube Puzzles, supra.

Under either theory, complainant here has failed to adduce evidence sustaining a claim of passing off. For the reasons by which New England Butt failed to establish the existence of a common law trademark and false designation of origin, passing off does not lie.^{7/} Additionally, record evidence contains no support for the claim that respondents Kokubun and/or Sabula deliberately and intentionally attempted to pass off Kokubun braiding machines as New England Butt braiders. (Prehrg. Conf., Tr. 44-45, 48; Sabula, Tr. 476; Hirota, Tr. 603).

Based on the foregoing, I conclude that respondents Kokubun and Sabula have not engaged in passing off and so, with respect to this issue, have not committed an unfair act or method of competition within the meaning of section 337.

^{7/} As noted during the prehearing conference, the allegation of passing off, as set forth in the Notice of Investigation, appears to be bottomed in common law. (See Prehrg. Conf., Tr. 45-49).

Laches

Section 337 permits respondents to raise all pertinent defenses in an investigation, to wit: "All legal and equitable defenses may be presented in all cases." 19 U.S.C. §1337(c). In this regard, respondents Kokubun and Sabula maintain that the equitable defense of laches should bar complainant from obtaining relief in the instant case. (Respondents' Post-Trial Brief, pp. 37-40).

Although there appears to be a division among the legal authorities as to whether a charge of laches, if proved, can have a prospective effect, the Commission has not precluded the applicability of this defense in section 337 investigations. See Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60 (1979), RD at p. 34 and cases cited therein. Rather, the Commission has considered the merits of this issue on a case-by-case basis, bearing in mind that section 337 does not require that the unfair acts be discovered by a certain time. Reclosable Plastic Bags, Inv. No. 337-TA-22 (1977); Certain Inclined-Field Acceleration Tubes and Components Thereof, Inv. No. 337-TA-67 (1980).

Respondents' laches argument is based upon record evidence establishing that Kokubun, through now-defunct Atlantic Braiding Machinery Co. (Atlantic), began selling the accused braiding machines in the United States in the mid-1960's, and that complainant was aware of such sales at the time they were made. (Finding of Fact 133). Kokubun and Sabula assert that the nonfeasance of New England Butt through the 1970's justified respondents' decision to embark upon a more ambitious marketing scheme in the United States (See Sabula, Tr. 496; Hirota, Tr. 616), and that the imposition of relief in these proceedings would damage the goodwill established by Kokubun with respect to its entire braiding machine line.

Generally speaking, laches requires proof of: (1) lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense. Costello v. United States, 365 U.S. 265, 282 (1961). On the basis of this record, an excess of fifteen years' nonfeasance on its face appears unreasonable, but a party may escape the stigma of this lapse by establishing a legal reason in excuse of its delay. General Electric Co. v. Sciaky Bros., Inc., 187 F. Supp. 667, 673 (E.D. Mich. 1960). In this connection, it is noted that before requesting the Commission to institute a §337 investigation, a prospective complainant must mobilize information with respect to each element constituting a violation of §337, one of which is substantial injury or threat thereof to the domestic industry. The record in this case discloses that Kokubun's United States imports of the subject braiding machines were sporadic through the 1970's. (Finding of Fact 153). Moreover, a New England Butt official testified that complainant has only recently detected "injury" in the §337 sense. (Gustafson, Tr. 155; Finding of Fact 182). Thus, for these reasons, and bearing in mind the absence of any time requirement for bringing a §337 action, complainant has demonstrated the existence of a legal excuse for its delay.

In analyzing the potential prejudice accruing to Kokubun, one finds that the record does not support the conclusion that Kokubun built up its 2D braider business, or its braiding machine business in general, in reliance on New England Butt's inaction. See University of Pittsburgh v. Champion Products, Inc., 686 F. 2d 1040 (3rd. Cir. 1982). As noted with respect to the functional aspects of the alleged trademark, respondent began manufacturing substitute parts for Butt braiders and eventually,

the 2D braiding machine, at the behest of Atlantic in order to satisfy customer demand for interchangeability among parts and machines. (Findings of Fact 36, 37, 144). Therefore, the ability to compete effectively in the marketplace may be more properly assumed to be the historical impetus for Kokubun's commercial growth. Additionally, Kokubun's assertions of prejudice to its entire business is mitigated in part by record evidence establishing that the New England Butt Number 2 braider and Kokubun 2D braiding machine, which constitutes only 30% of respondent's product line, subsist essentially by themselves in the lower-priced segment of the domestic market. See pp. 89-90, infra). Thus, it appears possible that any unfairness or prejudice to Kokubun in the marketplace may be ameliorated to some degree by the relative isolation of the accused product in the stream of commerce.

For the foregoing reasons, I find insufficient evidence to sustain respondents' charge of laches in this case.

Importation and Sale

In order to prevail in a section 337 action, complainant must establish that respondents have imported and sold the accused goods in the United States. 19 U.S.C. §1337(a).

Record evidence demonstrates that Kokubun exports its 2D-16 braiding machines to the United States through Toyoda Tsusho Kaisha Ltd., a Japanese trading company, and Toyoda America, Inc. (Finding of Fact 151). Generally, Toyoda Tsusho Kaisha Ltd. receives letters of credit or other documents from respondent Sabula, Toyoda America, Inc., or the ultimate buyer of the braiding machines; the importation procedures in the United States may be handled by anyone of these individuals. (Finding of Fact 152).

Kokubun began exportation of the accused goods to the United States in 1969 with the sale of ten units. No further activity occurred until 1975, when respondent exported thirty braiding machines to the United States. Importation continued in 1976, 1978, and 1980 through 1982, resulting in a total of 1097 Kokubun 2D-16 machines received in the United States during this period. (Finding of Fact 153).

Based on the foregoing, I find that the named respondents have engaged in importation and sale of the subject braiding machines in the United States within the meaning of section 337.

Definition

In cases wherein trademark infringement and false designation of origin constitute alleged unfair acts or methods of competition, the Commission has defined the relevant domestic industry for purposes of section 337 as that portion of complainant's business devoted to the exploitation of the concerned trademark, which exploitation includes the manufacture, distribution, and sale of the subject articles. Games I, supra; Stoves, supra; Vacuum Bottles, supra; Games II, supra.

The record in this investigation indicates that New England Butt has been engaged in the continuous manufacture of the braiding machines in issue in Providence, Rhode Island, for over one hundred years. Complainant's total manufacturing facilities and sales operations related to the subject matter of this investigation are located in the United States. (Finding of Fact 154).

Thus, there exists a domestic industry in this investigation consisting of those portions of complainant New England Butt's facilities devoted to the manufacture, distribution, and sale of the subject braiding machines.

Efficient and Economic Operation

Section 337 requires proof by complainant that the domestic industry is "efficiently and economically operated". The Commission has analyzed

certain indicia to determine efficient and economic operation. Among these criteria are: (1) successful sales campaigns and promotions; (2) an effective quality control program; (3) separate space and facilities specifically for the production of the subject goods; and (4) profitability of the relevant product line. In-the-Ear Hearing Aids, Inv. No. 337-20, TC Pub. No. 187 (1966); Certain Spring Assemblies and Components Thereof, and Methods of their Manufacture, Inv. No. 337-TA-88 (1981); Pump Top Insulated Containers, Inv. No. 337-TA-59 (1979); Certain Slide Fastener Stringers and Machines and Components Thereof, Inv. No. 337-TA-85 (1981).

As noted previously, complainant has continuously manufactured and sold the braiding machines in issue for over one hundred years. (Finding of Fact 154). New England Butt sells this product nationwide with the aid of one principal salesman and a part-time sales staff. (Finding of Fact 158). Sales personnel travel throughout the United States to solicit sales, receive customer complaints, and render design and engineering assistance. (Finding of Fact 159).

New England Butt has supplied a significant portion of the domestic demand for braiding machines throughout its history, and has the capacity to meet current and projected market demand for the subject product. (SX 2, Interrog. No. 6a).

Complainant advertises its braiding machines through the distribution of catalogs and brochures, advertisements in trade journals, and appearances at trade shows. (Finding of Fact 172). Complainant's relatively modest advertising budget appears typical of the braiding industry and also reflects the fact that New England Butt enjoys a widespread reputation for quality. (Finding of Fact 171).

As part of its quality control program, New England Butt inspects and runs each machine before it is shipped to the customer. (Finding of Fact 169). Additionally, complainant guarantees the parts, material, and workmanship of its braiding machine for a period of twelve months after the machines are shipped. After this period, parts are often replaced at no charge to the customer. (Finding of Fact 166). New England Butt braiding machines are known generally for their good construction and durability, and few machines are returned for mechanical defects. (Findings of Fact 168, 170).

The work force manufacturing the braiding machines in issue consists of two supervisors and fifteen machinists and assemblers operating a variety of pieces of equipment. Approximately 12,000 square feet of floor space is devoted to the manufacture of these machines. (Findings of Fact 154, 155). All of the facilities and most of the capital equipment of New England Butt were purchased many years ago. The capital goods are operated and maintained in a manner which sustains the productive life of complainant's manufacturing facilities. (Findings of Fact 162, 164).

All parts for complainant's braiding machines are manufactured on the New England Butt site in large quantities on an incentive system. (Finding of Fact 162). Through the years, New England Butt has invested approximately \$500,000 in equipment relating to braiding machine production. (Finding of Fact 164).

(C)

Upon review of the foregoing record evidence, I conclude that the relevant domestic industry in this investigation is efficiently and economically operated.

Injury

To prevail under §337, complainant must prove not only that respondents committed the unfair act alleged, but that respondents' unfair act caused substantial injury, in effect or tendency, to the domestic industry. Past Commission determinations have emphasized the separate nature of the injury and unfair act requirements; each element requires independent proof. Certain Drill Point Screws for Drywall Construction, Inv. No. 337-TA-116 (1983); PFTE Tape, Inv. No. 337-TA-4 (1976), RD, p. 17. The issue, therefore, is whether New England Butt has demonstrated the requisite measure of harm to its domestic production facilities that manufacture and sell the subject braiding machines.

Factors the Commission has considered in reaching injury determinations include: (1) lost sales; (2) lost customers; (3) decrease in domestic production; (4) unemployment in the domestic industry; (5) underselling; (6) reduction in complainant's prices; (7) lost profits; (8) increased levels of market penetration by imports; and (9) substantial foreign capacity to increase exports. Certain Reclosable Plastic Bags, supra; Certain Roller Units, Inv. No. 337-TA-44 (1976); and Certain Rotatable Photograph and Card Display Units, Inv. No. 337-TA-74 (1980).

Substantial Injury

(a) Lost Sales and Customers

Complainant and the Commission investigative attorney proffer several instances of sales and customers lost to respondents Kokubun and Sabula as evidence of substantial injury to the domestic industry. Record evidence illustrates sales lost by New England Butt to respondents from September 1980 to date as follows: Ocean State Cordage; Pepperell Braid Co.; Luxury Braid; Conrad Jarvis; Glencairn Manufacturing; Nylon Net; and Western Filament. These accounts represent an estimated total loss to complainant of \$221,700 (Findings of Fact 190, 191), an apparently significant amount when viewed in light of the fact that since 1977 complainant's annual sales have not exceeded 1,000 units, a single unit price ranging from \$650-\$800. (Finding of Fact 185).

Respondents maintain, however, that the presence of other competitors in the marketplace militate against a finding that New England Butt has suffered substantial injury as a result of the activities of Kokubun and Sabula. In this connection, information of record shows that New England Butt enjoys an approximate 19% share of the domestic market for braiding machines, the rest of the market being divided as follows: Wardwell (U.S.) 48.5%; Kokubun 9.8%;^{8/} Steeger (Germany) 8.7%; Ratera (Spain) 4.7%; and Hyde (U.K.) 3.5%. (RX 32; see also CX 6). These figures, however, represent market share for the total braiding machine industry, including the machines at issue in this investigation.

^{8/} In answers to interrogatories propounded by the staff, Kokubun estimated its market share with respect to the accused machines to be approximately 5%. (CX 5, Interrog. No. 25).

There is conflicting record evidence as to whether these non-party manufacturers compete with New England Butt and Kokubun in the sale of the subject Number 2, bench-model braiders. For example, one of complainant's witnesses testified to lost sales of the Butt B10-16 braiding machine to Ratera, Hyde, and Steeger. (See Dennehy, Tr. 396-98). Moreover, Mr. Hirota, Kokubun's director, testified that in addition to the European companies previously mentioned, there exist companies in Taiwan, Korea, and India manufacturing the so-called maypole braiding machines (Hirota, Tr. 609), although the record lacks evidence regarding sales in the United States of such braiders.

On the other hand, the record suggests that generally speaking, the New England Butt and Kokubun machines at issue in this investigation are simpler and less expensive than the braiding machines produced by the other actors in the marketplace, specifically, the European producers. (CX 6). According to this theory, the relevant market consists of two segments, a lower-priced market, serviced principally by New England Butt, Kokubun, and perhaps Wardwell, and a higher-priced tier, populated predominately by the remaining market members. (Id.; Gustafson, RX 3, pp. 111-13; Gustafson, Tr. 230-33).

Analyzing this disparate information in view of the total record developed in this proceeding, it appears reasonable to conclude that the Butt B10-16 and Kokubun 2D-16 machines are principal competitors, with a few sales to such accounts by the "upper tier" companies. Thus, although one may not conclude that every sale lost by complainant is a sale lost to respondents, it seems, on the basis of this record, that a majority of New England Butt's lost sales of its B10 braider were sales gained by Kokubun and Sabula. (Findings of Fact 190, 191).

(b) Declining Domestic Production and Employment

A decline in domestic production of the product in issue may be a further indication of injury to complainant. Testimony of record discloses that a portion of New England Butt's braiding machine facilities have been idled to the extent that there has been some reduction in the relevant work force and that the facilities have not been operating at full capacity. (Gustafson, Tr. 254, 255).

Upon further examination of this phenomenon, however, it appears that braiding machine sales have fluctuated historically as a result of shifts in demand for the braided product. For example, the popularity of macrame crafts in 1978-1979 resulted in a surge of braiding machine sales during this period. (Dennehy, Tr. 420). The record also indicates that braiding machine sales are affected by trends in the fashion industry, high interest rates, and the current conditions of the United States economy. (Dennehy, RX 5, pp. 30-31; Gustafson, Tr. 224).^{9/} Indeed the sales figures submitted by complainant evince a rough six year cycle in the demand for braiding machines. (CX 5). Although it has been held that the ability of complainant to adjust to the cyclical nature of its industry may be impaired by foreign imports, see Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60 (1979), p. 16, the impact of these factors on the operations of New England Butt, particularly with respect to the article at issue, is unclear on this record.

^{9/} It appears that current economic conditions may have had a greater effect on complainant's other lines of braiding machines, rather than the product under consideration in this investigation. (Gustafson, Tr. 280).

Additionally, there is evidence suggesting a trend in the braiding machine industry concerning the utilization of flat braiders instead of round braiding machines, i.e., the accused goods. (Sabula, Tr. 492-93). It is possible to convert round braiders into flat braiding machines by changing the gears and number of carriers (CX 6, p. 77; Gustafson, RX 3, pp. 103-104), although the general result of such conversion appears to be a decreased demand for round braiding machines. (Sabula, Tr. 493; Gustafson, Tr. 225).

Moreover, the presence of a relatively active secondhand market for braiding machines complicates the evaluation of the effect of trends and cycles on the demand for braiding machines in general. (See Dennehy, Tr. 352-53). Thus, to the extent that each of these factors may have in some way affected complainant's domestic production of the machines in issue, it is not apparent that New England Butt's recent manufacturing downturn can be ascribed solely to the activities of respondents.

(c) Underselling, Reduced Prices, and Lost Profits

There is record evidence demonstrating underselling by respondent Kokubun in the United States market. Kokubun sells its 2D-16 braiding machines at an average price of approximately \$450-\$480 f.o.b. United States port (SX 4), while New England Butt charges between \$700-\$800 for its comparable B10-16 braider. (Findings of Fact 180,185). In response to this foreign price competition, complainant has lowered its selling price to approximately \$600-\$650 per machine. (Finding of Fact 185).

As a consequence of its lowered selling price, complainant states a declining profit level for its braiding machine lines. (See SX 2,

Interrog. No. 7). Because New England Butt has presented profitability statistics in the aggregate only, i.e. no separate figures regarding the braiders in issue, the effect of declining profitability on the domestic industry is unclear. The Commission investigative attorney has attempted to extrapolate information relevant to the domestic industry by calculating 75% of complainant's profits as emanating from the production of the subject braiders. (See Posthearing Brief of the Commission Investigative Attorney, p. 30). As noted by the staff, the nature of these summary figures and the fact that there is record evidence suggesting that all lines of complainant's braiding machines have suffered declining sales (see p. 91 n. 9, supra) render this information of limited value for the purposes of the analysis herein.

Finally, complainant alleges injury to its reputation based on the "inferior quality" of Kokubun's braiding machines. (Complainant's Post-Hearing Brief, p. 31). Simply stated, there is no evidence supporting the contention that respondent's machines are manufactured with inferior materials, operate ineffectively, and thus cause injury to the reputation of New England Butt. Indeed the testimony of record is directly to the contrary. (See Gustafson, Tr. 167-68, 222-23; Hirota, Tr. 607-09).

Based upon review of the foregoing, I conclude that despite information concerning third party competitors in the marketplace and the cyclical nature of the braiding machine industry, evidence presented by complainant with respect to lost sales and underselling demonstrates on this record that New England Butt has suffered substantial injury within the meaning of §337 as a result of the importation of the accused braiding machines by respondents Kokubun and Sabula.

Tendency to Substantially Injure

The Commission investigative attorney places great reliance upon respondents' plant capacity and intentions with respect to the United States market to show a tendency toward future injury. In Certain Methods For Extruding Plastic Tubing, Inv. No. 337-TA-110 (1982) (Plastic Tubing), the presiding officer recognized four factors which demonstrated with sufficient likelihood the substantial capacity of foreign manufacturers to increase importation of infringing reclosable plastic bags into the United States. Complainant introduced ample evidence of: the probable operation of current facilities at full capacity; the availability of space for plant expansion; the accessibility of machinery, materials and labor for expansion; and the explicit intention of the foreign manufacturers to expand production for export to the United States. Plastic Tubing, RD at 117-122.

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Respondent Sabula is Kokubun's exclusive agent in the United States and conducts his business through personal contacts, by telephone, and through the mail. (Finding of Fact 198). Mr. Sabula advertises in a textile publication and sends brochures supplied by Kokubun to customers on his mailing list, which consists of 200-250 names. (Finding of Fact 199). This respondent estimates that he is operating at only "half capacity" in terms of Kokubun sales and that with additional staff, he could enable Kokubun to supply the entire domestic demand for the subject braiding machines. (Finding of Fact 200).

Although the foregoing activities of respondents illustrate a commitment to the United States market, such conduct may be contrasted with the behavior exhibited in Plastic Tubing, supra, wherein foreign manufacturers of infringing reclosable plastic bags expressly articulated their intentions to increase capacity in anticipation of the impending expiration of an ITC order excluding said bags from the United States. Further, respondents' relative ambivalence concerning the domestic market may be explained by the fact, as noted previously, that there exists a slump in United States braiding machine sales caused by factors independent of the New England Butt/Kokubun competitive relationship. (See pp. 91-92, supra). In this connection, Kokubun's importations of the subject machines show that in 1980, 221 machines were imported into the United States, a high of 421 units were imported in 1981, but only 241 2D-16 braiding machines were imported through November 1982.

Although an analysis of tendency to injure within the meaning of §337 is by nature a prospective inquiry, Commission precedent makes clear that the supporting information must constitute more than conjecture, to wit:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this investigation and the parties named in the Notice of Investigation.
19 U.S.C. §1337(b).
2. Complainant New England Butt Co. has not established a common law trademark in the overall appearance of its braiding machine.
(See pp. 42-79, supra).
3. Common law trademark infringement is an unfair act or method of competition under 19 U.S.C. §1337(a). In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955); Games I, supra.
4. The elements establishing common law trademark infringement constitute a prima facie case of false designation of origin. Games I, supra.
5. Respondents Kokubun and Sabula have not engaged in conduct constituting false designation of origin. (See p. 79, supra).
6. False designation of origin is an unfair act or method of competition under 19 U.S.C. §1337(a). Games I, supra.
7. Respondents Kokubun and Sabula have not passed off Kokubun braiding machines as New England Butt braiding machines. (See pp. 79-80, supra).
8. Passing off is an unfair act or method of competition under 19 U.S.C. §1337(a). Certain Airtight Cast-Iron Stoves, supra.

9. There is a relevant domestic industry in the manufacture, distribution, and sale of the New England Butt braiding machine in issue. (See p. 85, supra).
10. The relevant domestic industry is efficiently and economically operated. (See pp. 85-88, supra).
11. The domestic industry is substantially injured but there exists no tendency to substantially injure the domestic industry. (See pp. 88-96, supra).
12. There is no violation of Section 337. 19 U.S.C. §1337(a).

INITIAL DETERMINATION AND ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion and the record as a whole, and having considered all the pleadings and agreements presented orally and in briefs, as well as proposed findings of fact and conclusions of law, it is the Presiding Officer's DETERMINATION that there is no violation of Section 337 in the unauthorized importation and sale in the United States of America of the accused braiding machines.

The Presiding Officer hereby CERTIFIES to the Commission the Initial Determination, together with the record of the hearing in this investigation consisting of the following:

1. The transcript of the hearing, with appropriate corrections as may hereafter be ordered by the Presiding Officer; and further,

2. The Exhibits accepted into evidence in the course of the hearing, and the exhibits proffered by the Administrative Law Judge, as listed in the Appendix attached hereto.

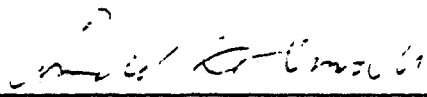
The pleadings of the parties are not certified, since they are already in the Commission's possession in accordance with Commission Rules of Practice and Procedure.

Further, it is ORDERED that:

1. In accordance with Rule 210.44(b), all material heretofore marked in camera for reasons of business, financial, and marketing data found by the Presiding Officer to be cognizable as confidential business information

under Rule 201.6(a) is to be given five year in camera treatment from the date this investigation is terminated; and further

2. The Secretary shall serve a copy of the public version of this Initial Determination upon all parties of record and the confidential version upon all counsel of record who are signatories to the protective order issued by the Presiding Officer in this investigation.

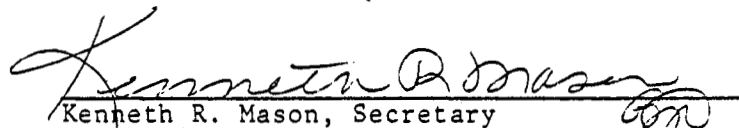


Judge Donald K. Duvall
Presiding Officer

Issued: May 6, 1983.

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached INITIAL DECISION (PUBLIC VERSION) was served upon Patricia Ray, Esq., and upon the following parties via first class mail, and air mail where necessary, on May 13, 1983.


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