

In the Matter of

CERTAIN CANAPE MAKERS

Investigation No. 337-TA-146

**REMEDY, PUBLIC INTEREST,
AND BONDING**



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UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

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COMMISSION ACTION AND ORDER

Background

A complaint was filed with the Commission on March 24, 1983, by LK Manufacturing Corp. alleging unfair acts and methods of competition in the importation and sale of certain canape makers. On April 27, 1983, the Commission ordered that an investigation into the allegations of the complaint be instituted pursuant to section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). The investigation was to determine whether there is infringement of the claim of U.S. Letters Patent Des. 268,318 (a design patent), the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The respondents named in the notice of investigation were S. Rossi Co. (Rossi was subsequently dismissed), Wecolite Company, Inc., Hoan Products Ltd., Rowoco, Mid-West Housewares, Inc., and Cooks Tools Ltd. All of the respondents are domestic companies. None of the respondents have participated in the investigation and all are in default.

On June 21, 1983, an evidentiary hearing was held at which complainant LK Manufacturing Corp. offered prima facie evidence that Wecolite Company Inc., Hoan Products Ltd., Rowoco, and Cooks Tools Ltd. had violated section 337 by

the importation and sale of infringing canape makers. No rebuttal evidence was offered. The Commission investigative attorney cross-examined the inventor on the issue of patent validity. Subsequently, the presiding officer found that the patent in controversy was valid and infringed, and that the unlawful importation of canape makers has caused substantial injury to the relevant domestic industry and has a tendency to cause substantial injury to that industry.

Complainant sought a temporary exclusion order and a permanent exclusion order, and the evidentiary hearings on temporary and permanent relief were combined. The presiding officer issued an initial determination (ID) concerning temporary relief on July 15, 1983, and an ID concerning permanent relief on July 21, 1983. In the latter ID, she determined that there has been a violation of section 337 in the unauthorized importation and sale of certain canape makers.

On August 16, 1983, the Commission determined to vacate as moot the ID on temporary relief and to not review the ID on permanent relief, thereby allowing the latter ID to become the Commission determination on violation of section 337.

Complainant and the investigative attorney filed written submissions concerning remedy, the public interest, and bonding. No submissions were received from respondents.

Action

Having determined that the issues of remedy, the public interest, and bonding are properly before the Commission and having reviewed the written

submissions filed on remedy, the public interest, and bonding and those portions of the record relating to those issues, the Commission on October 7, 1983, determined to issue a general exclusion order prohibiting entry into the United States, except under license, of canape makers that infringe the claim of U.S. Letters Patent Des. 268,318. The Commission also determined that the public interest factors enumerated in section 337(d) (19 U.S.C. § 1337(d)) do not preclude issuance of a general exclusion order, and that the bond during the Presidential review period should be in the amount of 206 percent of the entered value of the imported canape makers.

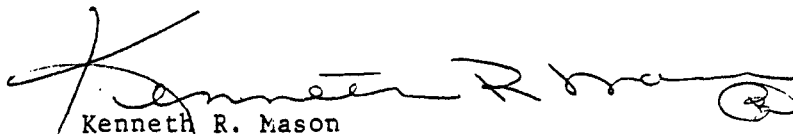
Order

Accordingly, it is hereby ORDERED THAT--

1. Canape makers which infringe the claim of U.S. Letters Patent Des. 268,318 are excluded from entry into the United States, except under license of the patent owner, for the remaining term of the patent;
2. The articles ordered to be excluded from entry into the United States shall be entitled to entry under bond in the amount of 206 percent of the entered value of the subject articles from the day after this order is received by the President pursuant to subsection (g) of section 337 of the Tariff Act of 1930, until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after the date of receipt of this action;
3. Notice of this Action and Order shall be published in the Federal Register;

4. Copies of this Action and Order, and the Opinion of the Commissioners, shall be served upon each party of record in this investigation; and
5. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 211.57).

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: October 20, 1983

COMMISSION OPINION

The Commission has determined not to review the administrative law judge's initial determination on violation pursuant to Commission rule 210.53(h) and the notice published in the Federal Register on May 5, 1983 (48 Fed. Reg. 20226). The only issues remaining to be resolved in this investigation are remedy, public interest, and bonding. ^{1/}

Remedy

General exclusion order

We determine that the appropriate remedy in this investigation is a general exclusion order. The facts of this investigation satisfy the criteria set forth in Certain Airless Paint Spray Pumps and Components Thereof ^{2/} for the issuance of a general exclusion order. In Spray Pumps, the Commission noted that it had an obligation to balance complainant's interest in complete protection from unfair trade with the inherent potential of a general exclusion order to disrupt fair trade. ^{3/ 4/} Since Spray Pumps the Commission has required that a complainant seeking a general exclusion order must prove both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which the Commission might

^{1/} In this opinion, ET = transcript of evidentiary hearing before the administrative law judge; SX = Staff Exhibit.

^{2/} Inv. No. 337-TA-90, USITC Pub. 1199, Nov. 1981; 216 USPQ 465.

^{3/} Id. at 18.

^{4/} It should be noted that in Spray Pumps the Commission did not issue a general exclusion order because the facts of the case did not satisfy the criteria set forth.

reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles. 5/

With respect to a widespread pattern of unauthorized use of complainant's patented invention, there is evidence on the record that respondents Wecolite, Hoan, Rowoco and Cooks Tools have sold infringing canape makers in the United States. 6/ In addition, respondent Wecolite has imported canape makers from Taiwan. 7/ Furthermore, there is evidence that one Taiwanese manufacturer, not a respondent in this investigation, is exporting infringing canape makers to the United States. This manufacturer is * * *. 8/

The Commission noted certain "business conditions" in Spray Pumps that warrant issuance of a general exclusion order. These business conditions are: (1) an established demand for the patented product in the U.S. market; (2) the availability of marketing and distribution networks in the United States; (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article; (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or (5) the cost to foreign manufacturers of retooling their facilities to produce the patented article. 9/

5/ Spray Pumps at p. 18.

6/ Confidential Staff Exhibit 4 (SX-4).

7/ Id.

8/ SX-4 * * * is the only foreign manufacturer/exporter of infringing canape makers presently known to the Commission. We expect that if infringing canape makers from other foreign sources appear in the U.S. market, complainant will be able to supply the U.S. Customs Service with the names of the foreign manufacturers/exporters involved.

9/ Spray Pumps at p. 19.

There is evidence on the record that canape makers of the type involved in this investigation have been very popular items in the U. S. market, which would satisfy the first "business condition" of Spray Pumps. ^{10/} With regard to the second condition, the importer and wholesalers in the United States constitute available marketing and distribution networks in the United States. There is evidence on the record that Hoan, Rowoco and Cooks Tools purchased the canape makers in issue from Wecolite, and that Wecolite imported the canape makers from * * * ^{11/} The final three conditions are satisfied by evidence that the subject canape makers are made of an inexpensive plastic material and can easily be copied ^{12/} and that canape makers can be easily produced on a large scale because they are small, inexpensive, and involve few parts. ^{13/}

Therefore, we determine that a general exclusion order is the most appropriate remedy in this investigation.

The Public Interest

The Commission may issue an exclusion order only after considering the effect of such exclusion order upon the public health and welfare, competitive conditions in the U. S. economy, the production of like or directly competitive articles in the United States, and U. S. consumers. Because of the nature of the product involved, we conclude that an exclusion order

^{10/} See SX-4.

^{11/} See SX-10 (ET 2, 3).

^{12/} ET at 17-22.

^{13/} Id. at 17-22.

will not have an adverse effect on the aforementioned public-interest factors. Moreover, complainant has stated that it is capable of producing enough canape makers to satisfy domestic demand and that it can adequately distribute its product throughout the United States. ^{14/}

Bonding

During the Presidential review period, the infringing articles must be allowed to enter the United States under a bond prescribed by the Commission. The bond should be set at "the amount which would offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation of the article." ^{15/} A bond of 206 percent should offset the competitive advantage currently enjoyed by respondents. The figure is derived from the * * * average price of complainant's single canape maker and the * * * average price of Wecolite's single canape maker. ^{16/} These prices are believed to be representative of the sales transactions involving canape makers.

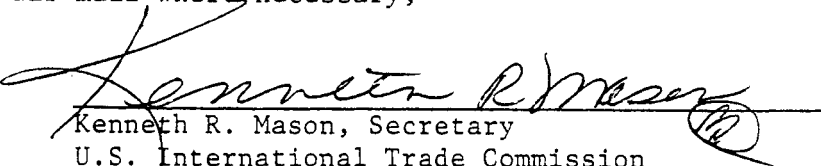
^{14/} See ET 33-34.

^{15/} S. Rep. No. 1298, 93rd Cong. 2d Sess. 198 (1974).

^{16/} See ET 37, 45-47.

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF ISSUANCE OF EXCLUSION ORDER, was served upon the following parties via first class mail, and air mail where necessary, on October 21, 1983.


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