

In the Matter of

CERTAIN SINGLE HANDLE FAUCETS

Investigation No. 337-TA-167

**Unreviewed Initial
Determination**



USITC PUBLICATION 1606

NOVEMBER 1984

UNITED STATES INTERNATIONAL TRADE COMMISSION

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United States International Trade Commission
Washington, D.C. 20436**

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

_____))
In the Matter of))
_____))
CERTAIN SINGLE HANDLE FAUCETS))
_____))

Investigation No. 337-TA-167

COMMISSION ACTION AND ORDER

Introduction

The United States International Trade Commission has concluded its investigation under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, of alleged unfair methods of competition and unfair acts in the unauthorized importation of certain single handle faucets into the United States, or in their sale, by the owner, importer, consignee, or agent of either, the alleged effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission's investigation concerned complainant's allegations of (1) common-law trademark infringement, (2) registered trademark infringement, (3) false designation of manufacturing source, (4) palming off, and (5) false advertising.

This action and order provides for the final disposition of investigation No. 337-TA-167 by the Commission.

Background

A complaint was filed with the Commission on September 16, 1983, and supplemented on October 7, 1983, alleging, inter alia, the unfair methods of competition and unfair acts enumerated above. On October 12, 1983, the Commission determined to institute an investigation into those allegations to

determine whether there is a violation of subsection (a) of section 337 and published notice thereof. 48 Fed. Reg. 49106 (Oct. 24, 1983).

On July 24, 1984, the Commission's presiding officer issued an initial determination (ID) finding a violation of section 337 with regard to common-law trademark infringement, registered trademark infringement, and false representation of manufacturing source and a finding of no violation with regard to the other alleged unfair acts. The Commission determined not to review the ID and published notice thereof. 49 Fed. Reg. 34314 (August 29, 1984). Accordingly, the ID became the Commission's determination as to violation of section 337. 19 C.F.R. § 210.53(h). In the same notice, the Commission requested submissions on the appropriate relief to be issued, on the public interest factors (19 U.S.C. §§ 1337(d)), and on the amount of bond during the 60-day Presidential review period (19 U.S.C. § 1337(g)).

Action

Having reviewed the record in this investigation, including the ID and the submissions on relief, the public interest, and bonding, the Commission determined that --

1. The appropriate relief is an exclusion order pursuant to 19 U.S.C. § 1337(d) excluding from entry into the United States --

- (i) ball design handles for single handle faucets (including complete or partial single handle faucet assemblies incorporating such handles) whose configuration is the same as or confusingly similar to the trademarked ball design handle, except under license from the trademark owner;

- (ii) ball design handles for single handle faucets (including complete or partial single handle faucet assemblies incorporating such handles) which bear the trademark "DELTA" or colorable imitations thereof (including but not limited to the term "Atled"), except under license from the trademark owner;

(iii) packaging for ball design handles for single handle faucets (including packaging for complete or partial single handle faucet assemblies incorporating such handles), whether or not such packaging contains ball design handles, which bears the trademark "DELTA" or colorable imitations thereof (including but not limited to the term "Atled"), except under license from the trademark owner; and

(iv) packaging for ball design handles for single handle faucets (including packaging for complete or partial single handle faucet assemblies incorporating such handles), whether or not such packaging contains ball design handles, which bears a depiction of a single handle faucet including the trademarked ball handle design.

2. The public interest factors enumerated in subsection (d) of section 337 of the Tariff Act of 1930 do not preclude the issuance of the exclusion order referred to in paragraph 1 above.
3. The bond provided for in subsection (g)(3) of section 337 of the Tariff Act of 1930 during the period this matter is before the President shall be in the amount of 150 percent of the entered value of the imported ball design handle, provided that if the imported ball design handle is incorporated into a complete or partial single handle faucet assembly the bond shall be in the amount of 150 percent of the entered value of the said faucet assembly, and provided further that if the imported packaging for such ball design handles or such faucet assemblies does not contain such handles or faucet assemblies, the bond shall be in the amount of 150 percent of the entered value of the imported packaging.

Order

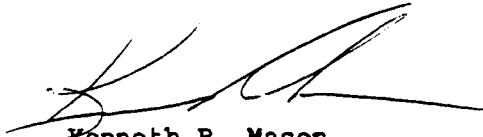
Accordingly, it is hereby ORDERED THAT --

1. Ball design handles for single handle faucets (including complete or partial single handle faucet assemblies incorporating such handles) whose configuration is the same as or confusingly similar to the trademarked ball design handle (as illustrated in attachments A and B hereto and made part hereof by reference) are excluded from entry into the United States, except under license from the trademark owner;
2. Ball design handles for single handle faucets (including complete or partial single handle faucet assemblies incorporating such handles) which bear the trademark "DELTA" or colorable imitations thereof (including but not limited to the term "Atled") are excluded from entry into the United States, except under license from the trademark owner;

3. Packaging for ball design handles for single handle faucets (including packaging for complete or partial single handle faucet assemblies incorporating such handles), whether or not such packaging contains such ball design handles or such faucet assemblies, which bears the trademark "DELTA" or colorable imitations thereof (including but not limited to the term "Atled"), is excluded from entry into the United States, except under license from the trademark owner;
4. Packaging for ball design handles for single handle faucets (including packaging for complete or partial single handle faucet assemblies incorporating such handles), whether or not such packaging contains such ball design handles or faucet assemblies, which bears a depiction of a single handle faucet including the trademarked ball handle design (as illustrated in attachment C hereto and made part hereof by reference) is excluded from entry into the United States, except under license from the trademark owner;
5. The articles to be excluded from entry into the United States pursuant to paragraphs 1 through 4 of this Order shall be entitled to entry under bond in the amount of 150 percent of the entered value of the imported ball design handle from the day after this order is received by the President pursuant to 19 U.S.C. § 1337(g) until such time as the President notifies the Commission that he approves or disapproves, but, in any event, not later than 60 days after the date of receipt, provided that if the imported ball design handle is incorporated into a complete or partial single handle faucet assembly the bond shall be in the amount of 150 percent of the entered value of the said faucet assembly, and provided further that if the imported packaging for such ball design handles or such faucet assemblies does not contain such handles or faucet assemblies, the bond shall be in the amount of 150 percent of the entered value of the imported packaging;
6. The Secretary shall publish notice of this Action and Order in the Federal Register;
7. The Secretary shall serve copies of this Commission Action and Order and the Commission Opinion in support thereof upon each party of record to this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury; and

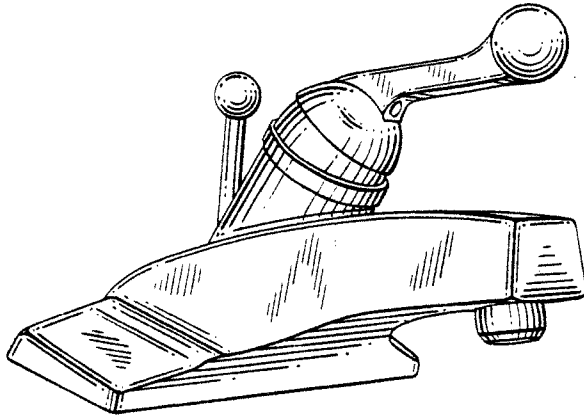
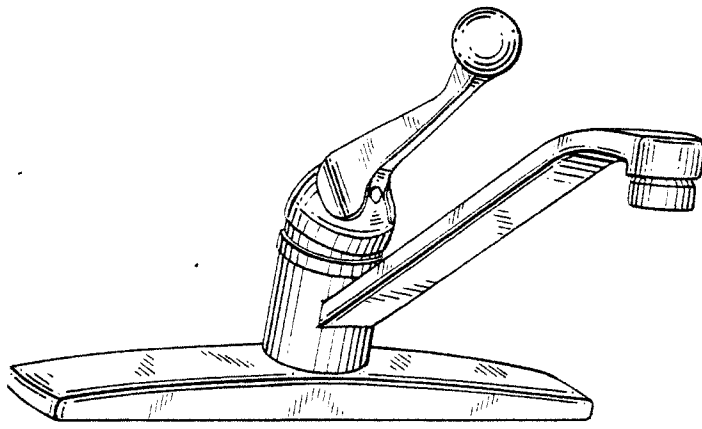
8. The Commission may amend this order in accordance with the procedure described in 19 C.F.R § 211.57.

By order-of the Commission.

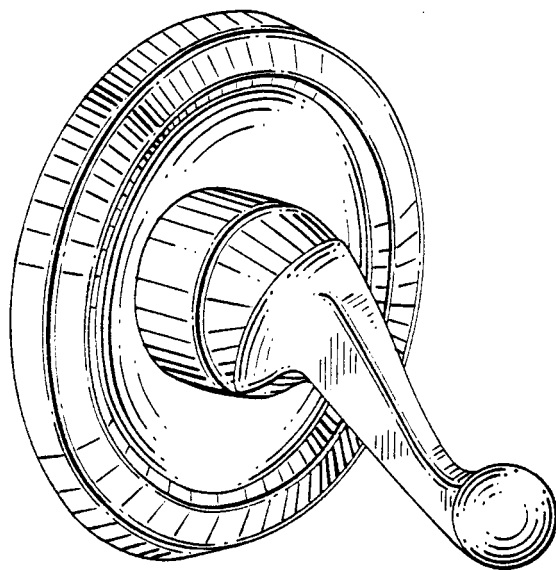
A handwritten signature in black ink, appearing to read 'K. R. Mason', written over a horizontal line.

Kenneth R. Mason
Secretary

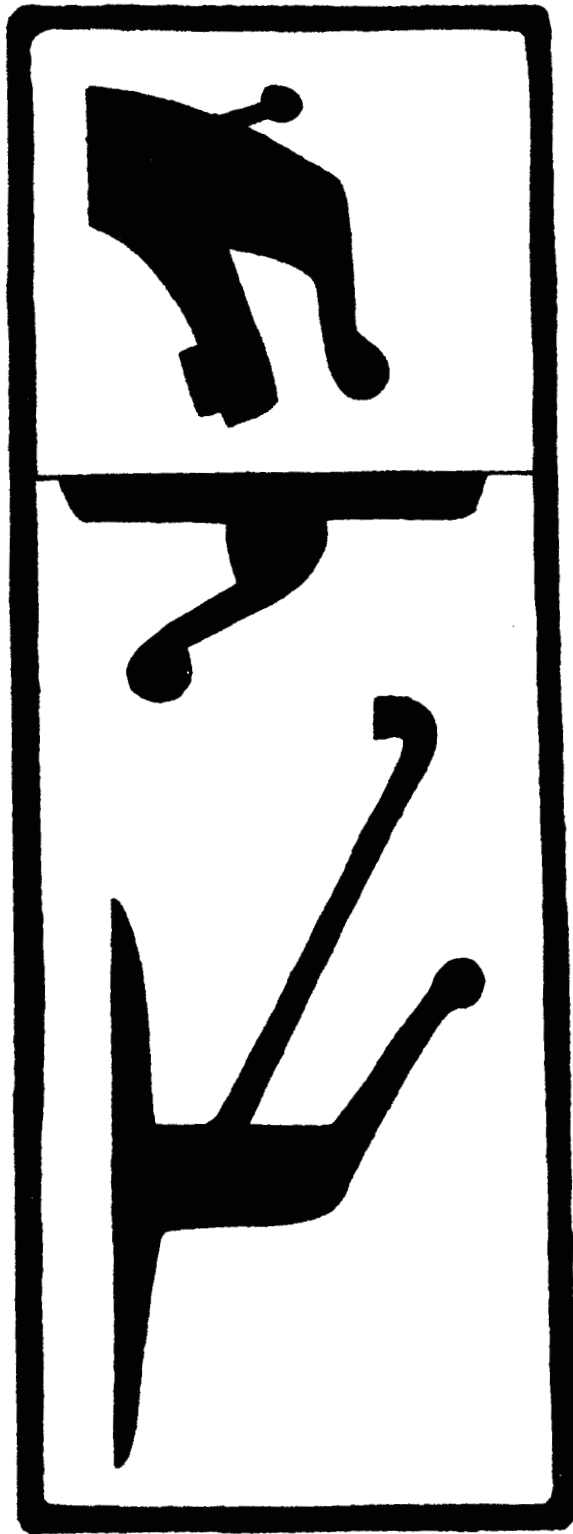
Issued: October 24, 1984



Attachment A



Attachment B



Attachment C

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of)
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CERTAIN SINGLE HANDLE FAUCETS)
)
)

Investigation No. 337-TA-167

COMMISSION MEMORANDUM OPINION ON REMEDY,
THE PUBLIC INTEREST, AND BONDING

Introduction

On September 16, 1983, Masco Corporation of Indiana (complainant) filed a complaint under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) alleging unfair methods of competition and unfair acts in the importation of certain single handle faucets, or in their sale, by reason of alleged common-law trademark infringement, registered trademark infringement, false representation of manufacturing source, palming off, and false advertising. On October 12, 1983, the Commission instituted an investigation into the allegations of the complaint and published notice thereof. 1/ 48 Fed. Reg. 49106 (Oct. 24, 1983).

1/ The complaint and notice of investigation named six respondents: Globe-Union Industrial Corp.; Yi Fon Hygienic Fixture Company Ltd.; Strong Hardware Co., Ltd.; Noble General Trading Co., Ltd.; Charles Laurel Co., Inc.; and Laurel International. Everpromotion Industrial Co., Ltd., later was joined as a party respondent. See 49 Fed. Reg. 1433 (January 11, 1984). On the basis of a settlement agreement and consent agreements, the investigation was terminated as to respondents Charles Laurel Co., Laurel International, Globe Union, and Yi Fon. See 49 Fed. Reg. 24459 (June 13, 1984).

A Commission administrative law judge (ALJ) issued an initial determination (ID) on July 24, 1984, that there is a violation of section 337. The Commission determined not to review the ID and published notice thereof (49 Fed. Reg. 34314, Aug. 29, 1984). That notice also requested public comments on remedy, the public interest, and bonding, the only issues remaining to be resolved in this investigation.

Remedy

We have determined that general exclusion order is the appropriate remedy in this investigation. The violation of section 337 found to exist can best be remedied by a carefully tailored general exclusion order.

An exclusion order is the most effective means of ensuring that articles that infringe a valid trademark do not find their way into United States commerce. Certain Plastic Food Storage Containers, Inv. No. 337-TA-152, USITC Pub. 1563 at 3 (Aug. 1984). Moreover, exclusion orders generally are preferred to cease and desist orders in trademark cases. Plastic Food Storage Containers, supra, at 3. See also Certain Heavy-Duty Staple Gun Tackers, Inv. 337-TA-137, USITC Pub. 1506 (1984); Certain Sneakers with Fabric Uppers and Rubber Soles, Inv No. 337-TA-118, USITC Pub. 1366 (1983); Certain Cube Puzzles, Inv No. 337-TA-112, USITC Pub. 1334 (1983).

Issuance of an exclusion order, however, is not automatic. In Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. 1199 at 18 (1981), we stated that --

it is incumbent upon the Commission to balance a complainant's interest in obtaining complete protection from all potential foreign infringers through a single investigation with the inherent potential of a general exclusion order to disrupt legitimate trade.

Spray Pumps, supra, at 18. The Commission therefore requires that, in order to obtain a general exclusion order, there be both (i) a widespread pattern of unauthorized use of the protected article and (ii) business conditions from which it can be inferred that manufacturers other than the named respondents may attempt to enter the U.S. market with infringing articles. 3/ Id. See Certain Window Shades and Components Thereof, Inv. No. 337-TA-83, USITC Pub. 1152 at 11-12 (1981). The evidence of record in this investigation meets these tests.

Not only have the remaining respondents solicited sales in the United States, but entities not named as respondents have recently solicited sales of single handle faucets bearing complainant's trademarked ball handle design. Moreover, products of unknown origin that appear to infringe the trademark were discovered in the United States late in this investigation. ID at 63-64. As noted by the ALJ, this is "explicit proof that someone is still importing the accused imitation products." ID at 64.

There is likewise evidence that the known Taiwanese manufacturers alone can produce at approximately half complainant's annual capacity. Little time or capital is required to tool up for the production of such faucets and there is actual tooling in existence in Taiwan. ID at 63-64. See Certain Molded-in Sandwich Panel Inserts and Methods for Their Installation, Inv. No. 337-TA-99, USITC Pub. 1246 at 21, 22 (1982); Food Storage Containers, supra, at 4. Foreign manufacturers have a low cost of production. Tooling for single

3/ While Spray Pumps, supra, involved unfair acts based on patent infringement, the standards regarding remedy set forth therein are equally applicable to investigations involving other unfair acts, including common-law trade infringement.

handle faucets is inexpensive and one respondent (since terminated) took only five months to prepare to ship quantities of infringing faucets to the United States. ID at 27. Thus, it is evident that there is substantial capacity to produce these products overseas, and the importations that have occurred demonstrate that other parties are infringing or are about to infringe the subject trademarks.

Finally, the nonsettling respondents to this investigation have defaulted and we cannot know what activities they may be engaged in at present. We see no reason to reward their default by assuming that they have ceased producing and exporting the infringing articles to the United States. Moreover, the fact of default is itself indicative of the probable futility of cease and desist orders; the refusal to obey Commission process to date suggests there would be continued disobedience in the future.

Thus, the appropriate relief in this investigation is a general exclusion order. We therefore turn to the items that the exclusion order must address in order to remedy the unfair acts found in this investigation.

With regard to common-law trademark infringement, the ALJ found that complainant's mark resides in the ball design of the faucet handle. Therefore, our exclusion order is directed at ball design handles. Such handles are excluded from entry into the United States whether they are imported separately or as component parts of complete or partial single handle faucet assemblies.

The evidence demonstrates that packaging for imports infringing the ball design handle include depictions of the ball design handle and that this itself is confusing to customers. Therefore, we exclude packaging that

depicts a faucet bearing such ball design handle, regardless of whether the packaging is imported separately from a handle or from a faucet assembly.

With regard to registered trademark infringement, we exclude handles, faucet assemblies, and/or packaging bearing the trademark "DELTA" or colorable imitations thereof, including but not limited to the term "ATLED." ^{4/}

Public Interest

We find no public interest factors, within the meaning of section 337(d) that preclude the issuance of a general exclusion order in this investigation.

Bonding

Pursuant to section 337(g)(3), during the 60-day Presidential review period, infringing products must be entitled to entry under bond. That bond is to be set so as to offset any competitive advantage resulting from the unfair methods of competition and unfair acts. S.Rep. 1298, 93rd Cong. 2d Sess. 198 (1974). Both complainant and the investigative attorney recommend a bond of 150 percent of the entered value of single handle faucets, as that represents the differential in wholesale prices charged by complainant and by one of the now-terminated Taiwanese respondents.

In this investigation, no party has suggested an appropriate bond for the ball design handle alone, even though this would be an appropriate measure in

^{4/} The ALJ also found false designation of manufacturing source as an unfair act in this investigation. However, as the elements of proof of common-law trademark infringement constitute prima facie evidence of false designation of origin or false representation of manufacturing source, Sneakers, supra; Certain Coin-Operated Audio-Visual Games and Components Thereof, Inv. No. 337-TA-87 at 9 (1981), the remedies given for trademark infringement will also remedy false representation.

light of the unfair acts. See Food Storage Containers, supra, at 11. Likewise, no party has suggested an appropriate bond for packaging that contains infringements of the word marks, even though this would also be an appropriate measure. Because of this, and because there is no evidence that either the packaging or the handles are imported separately, we have determined to set the bond for packaging imported separately, for handles imported separately, or for either when imported in conjunction with faucet assemblies at 150 percent of the entered value of the articles concerned.

This is an initial determination issued by a Commission administrative law judge that the Commission determined not to review. 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 (19 C.F.R. § 210.53(h)) and the notice published in the Federal Register on August 29, 1984 (49 Fed. Reg. 34,314).



PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

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In the Matter of

OFFICE OF THE SECRETARY
DOCKET/UNITC

CERTAIN SINGLE HANDLE FAUCETS)

Investigation No. 337-TA-167

INITIAL DETERMINATION

John J. Mathias, Administrative Law Judge

Pursuant to the Notice of Investigation in this matter (48 Fed. Reg. 49106-07, October 24, 1983), this is the presiding officer's initial determination under Rule 210.53(c) of the Rules of Practice and Procedure of this Commission. (19 C.F.R. 210.53(c)).

The presiding officer hereby determines that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. §1337, hereafter Section 337), in the importation of certain single handle faucets into the United States, or in their sale. The Complaint herein alleges that such importation or sale constitutes unfair methods of competition and unfair acts by reason of alleged: (1) common law trademark infringement; (2) false representation of manufacturing source; (3) palming off; (4) infringement of registered trademark No. 668,880 by certain of the respondents; and (5) false advertising by certain of the respondents. It is 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 following abbreviations are used in this Initial Determination:

Tr. - Official Transcript of Oral Argument
herein of June 1, 1984.
CPX - Complainant's Physical Exhibit
Comp. Exh. - Complaint Exhibit
SX - Staff counsel exhibit
FF - Finding of Fact

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APPENDIX: A

List of Exhibits Received at Show Cause Hearing

Complainant's Physical Exhibits: CPX A, CPX B, CPX C.

Complainant's Documentary Exhibit: CX 1



PROCEDURAL HISTORY

On September 16, 1983, Masco Corporation of Indiana, 55 East 111th Street, Indianapolis, Indiana 46280, filed a complaint with the U.S. International Trade Commission pursuant to Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). A supplement to the complaint was filed on October 7, 1983. The complaint and supplement allege unfair methods of competition and unfair acts in the importation of certain single handle faucets into the United States, or in their sale by reason of alleged (1) common law trademark infringement by all proposed respondents; (2) false representation of manufacturing source by all proposed respondents; (3) palming off by all proposed respondents; (4) infringement of registered trademark No. 668,880 by proposed respondents Charles Laurel Co., Inc., Laurel International, Yi Fon Hygienic Fixture Co., Ltd.,^{1/} Strong Hardware Co., Ltd., and Noble General Trading Co., Ltd.; and (5) false advertising by proposed respondents Globe-Union Industrial Corporation, Charles Laurel Co., Inc., Laurel International, and Yi Fon Hygienic Fixture Co., Ltd. It was further alleged that the effect or tendency of these unfair acts and unfair methods of competition is to destroy or substantially injure an industry, efficiently and economically operated in the United States. The complainant requested that the Commission institute an investigation, and, after a full investigation, issue a permanent exclusion order.

Upon consideration of the complaint, the Commission ordered, on October 12, 1983, that an investigation be instituted pursuant to subsection (b) of Section 337 to determine whether there is a violation of subsection (a) of

^{1/} While this respondent's name has been spelled "Yi Fong" in many of the submissions in this investigation, it appears from the complaint and notice of investigation, and a letter to the Commission from complainant's counsel, dated October 6, 1983, that the correct spelling is "Yi Fon". (SPX 14 at 2).

Section 337, as alleged in the complaint. The notice of institution of the investigation was published in the Federal Register on October 24, 1983. (48 Fed. Reg. 49106-07). The following parties were named as respondents in the Notice of Investigation:

Globe-Union Industrial Corporation
4th Floor, Room 3, No. 32 An Ho Road
Taipei, Taiwan

Yi Fon Hygienic Fixture Co., Ltd.
P.O. Box 23-24 Taichung
Taichung 409, Taiwan

Strong Hardware Co., Ltd.
P.O. Box 1121
Kaohsiung, Taiwan

Noble General Trading Co., Ltd.
P.O. Box 1121
Kaohsiung, Taiwan

Charles Laurel Co., Inc.
5226 N. Tamiami Trail
Fort Meyers, Florida 33903

Laurel International
7887 Colonial Boulevard
Fort Meyers, Florida 33907

On November 4, 1983, complainant moved to amend the complaint and notice of investigation by joining Everpromotion Industrial Company, Ltd., P.O. Box 36-360, Taipei, Taiwan, Republic of China, as a party respondent to the investigation. By Order No. 4, issued December 15, 1983, the Presiding Officer granted the motion, and on January 6, 1984 the Commission determined not to review the Presiding Officer's initial determination. (49 Fed. Reg. 1433-34, January 11, 1984).

Everpromotion was alleged to be committing the unfair acts of false representation, common law trademark infringement and infringement of complainant's registered trademark.

Deborah S. Strauss, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, was named as Commission investigative attorney, a party to this investigation. On December 21, 1983, a notice of change of the Commission investigative attorney was issued, redesignating Victoria Partner, Esq. as a party to the investigation. (48 Fed. Reg. 57384).

By Order issued October 25, 1983, Judge John J. Mathias was designated as the Presiding Officer in this investigation.

On November 21, 1983, respondents Globe-Union Industrial Corporation and Yi-Fon Hygienic Fixture Co. filed a response to the complaint and notice of investigation. None of the other respondents formally entered an appearance in this investigation, though respondents Strong Hardware Co., Ltd. and Noble General Trading Co., Ltd. filed letters in response to the complaint on November 28, 1983 and respondent Everpromotion Industrial Corporation Ltd. filed a letter in response to the complaint on February 1, 1984.

A preliminary conference was held in this matter before Administrative Law Judge John J. Mathias on December 14, 1983. Appearances were made on behalf of complainant, the Commission investigative staff, and respondents Globe-Union Industrial Corp. and Yi Fon Hygienic Fixture Co., Ltd. No appearances were made on behalf of the other respondents.

Order No. 9, issued February 6, 1984, granted complainants motion to compel discovery from respondents Globe-Union Industrial Corporation and Yi Fon Hygienic Fixture Co., Ltd. Order No. 10, issued February 14, 1984, granted the Commission investigative attorney's motion to compel discovery

from respondents Globe-Union Industrial Corporation, Yi Fon Hygienic Fixture Co., Ltd., Strong Hardware co., Ltd., Noble General Trading Co., Ltd., Charles Laurel Co., Inc., and Laurel International. Order No. 13, issued March 22, 1984, granted complainant's motion to compel discovery from respondents Strong Hardware Co., Ltd., Noble General Trading Co., Ltd., and Everpromotion Industrial Co., Ltd.

On April 19, 1984, complainant filed the instant motion for summary determination (Motion Docket No. 167-10) that a violation of Section 337 be found and that a general exclusion order be issued. The Commission investigative attorney filed a brief in support of complainant's motion. No responses were received from any of the respondents in this investigation.

Order No. 18, issued May 2, 1984, was an initial determination granting complainant's motion to terminate the investigation as to respondents Charles Laurel Co., Inc., Laurel International, Globe Union Industrial Corporation and Yi Fon Hygienic Fixture Co., Ltd. on the basis of consent order agreements and a settlement agreement entered into by said respondents and complainant. On June 7, 1984, the Commission issued a Notice of Commission Decision Not To Review Initial Determination. (49 Fed. Reg. 24459, June 13, 1984).

On May 17, 1984, an order to show cause was issued as to why the investigation should not be terminated with respect to the remaining respondents, Strong Hardware Co., Ltd., Noble General Trading Co., Ltd. and Everpromotion Industrial Co., Ltd. Responses in opposition to termination were received from complainant and the Commission investigative attorney; no responses were filed on behalf of any of the remaining respondents. A hearing on the show cause order was held on June 1, 1984. Appearances were made on behalf of complainant and the Commission investigative staff. No respondents appeared at this hearing.

This initial determination regarding the motion for summary determination (Motion Docket No. 167-10) is based upon the entire record of this investigation, including the supporting submissions filed with the motion and the brief and accompanying exhibits filed by the Commission investigative attorney, as well as the evidentiary record compiled at the hearing of June 1, 1984 and all exhibits submitted into record at that hearing.

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

I. Jurisdiction

1. Service of the complaint and Notice of Investigation was perfected on respondents Strong Hardware Co., Ltd., Noble General Trading Co., Ltd., and Everpromotion Industrial Co., Ltd. (Response to comp. by Strong Hardware Co., Ltd., filed November 28, 1983; response to comp. by Noble General Trading Co., Ltd., filed November 28, 1983; response to comp. by Everpromotion Industrial Co., Ltd., filed February 1, 1984.

II. Parties

2. Complainant, Masco Corporation of Indiana (Masco), is a wholly-owned subsidiary of Masco Corporation of Taylor, Michigan. Delta Faucet Company (Delta), a division of Masco Corporation of Indiana, has its headquarters located at 55 East 111th Street, Indianapolis, Indiana 46280. Delta is engaged in the manufacture and sale of plumbing products, including single handle kitchen and lavatory faucets, for residential, commercial, and institutional installations. (Comp., ¶¶ 3, 6; Kilmer affid. at 1).
3. Respondent Strong Hardware Co., Ltd. (Strong), P.O. Box 1121, Kaohsiung, Taiwan, is a manufacturer and exporter alleged to have offered for sale in the United States certain of the accused single handle faucets. (Strong response to complaint, filed November 28, 1983; Comp. Exhs. 10 - 11; SX 14 at 2).
4. Respondent Noble General Trading Co., Ltd. (Noble General), P.O. Box 220, Kaohsiung, Taiwan is a trading company alleged to have offered

for sale in the United States certain of the accused single handle faucets. (Noble General response to comp., filed November 28, 1983; Comp. Exhs. 10 - 11; SX 14 at 2).

5. Respondent Everpromotion Industrial Co., Ltd. (Everpromotion), P.O. Box 36-360, Taipei, Taiwan, is a trading company alleged to have offered for sale in the United States certain of the accused single handle faucets. (Everpromoton response to comp. filed February 1, 1984; Comp. Exh. 22).

III. Products In Issue

6. The products of complainant involved in this investigation are single handle kitchen and lavatory faucets incorporating a ball handle design, sold under the name DELTA to plumbing wholesalers and hardware or cooperative distributors, and are intended for residential, commercial and institutional installations. (Kilmer affid. at 2; Kilmer affid. Exh. 1; SX 1 at 6; Kilmer affid. at 1, 3).
7. The accused imported single handle faucets are those single handle faucets having the same configuration as the Delta single handle faucets, either unmarked or marked as ATLED, the reverse spelling of DELTA. (Comp. Exh. 6-7, 9; SPX 4-5; CPX A; CPX C; Motion at 53).

IV. Unfair Acts and Methods of Competition

A. Infringement of Complainant's Common Law Trademark

1. Masco's Right To Use The Alleged Trademark

8. The configuration of the DELTA single handle faucet includes a single handle with a ball at the end. (SX 1 at 6; Kilmer affid., Exh. 1).

9. A ball handle design was developed by Delta for a single handle faucet. The patent rights to the said faucet had been acquired in 1954 by Alex Manoogian, Chairman of the Board of Masco. (Kilmer affid. at 1-2).
10. Delta has marketed ball handle faucets exclusively, throughout the United States, for the last 30 years. (Kilmer affid. at 2).

2. Functionality

11. The entire configuration of the single handle faucet was developed to assist in the control of the flow of water. The handle couples to the internal valve of the faucet which controls the flow and temperature of the water. (SX 1 at 6).
12. The ball handle design was selected to distinguish the Delta single handle faucet from that of the earlier-marketed Moen faucet which featured a flat handle. (Kilmer affid. at 2; SX 1 at 6).
13. There are many other competitive single handle faucets on the market today that do not employ the same handle design features as in the Delta faucet. (Everhardt affid. at 5; Everhardt affid. Exhs. 10-32).
14. Delta's promotional literature touts both the utilitarian and the cosmetic features of its single handle design. (Eberhardt affid. Exhs. 2-4).
15. The design of the Delta faucet handle does not affect its cost of manufacture. (SX 1 at 7).
16. Delta's expired utility patent U.S. Letters Patent No. 3,056,418 does not disclose any utilitarian advantage in its ball handle design. (SX 3).

3. Distinctiveness

17. The ball handle design was selected to distinguish the configuration of Delta's faucet from the competitive Moen faucet which featured a flat handle. (Kilmer affid. at 2).
18. Before settling on the ball handle design, Delta considered a number of alternative designs, including a flat handle design. (Kilmer affid. at 2).
19. There are many competitive faucets on the market that incorporate a single handle. (Eberhardt affid. Exhs. 10-32). Until the advent of the accused products, none had the same handle configuration. (FF 12, 13 and 35).

4. Secondary Meaning

20. Approximately 85 percent of Delta's plumbing products are sold through manufacturer's representatives to plumbing wholesalers who, in turn, sell Delta's products to plumbers and sometimes to consumers. (Kilmer affid. at 3).
21. Approximately 15 percent of Delta's plumbing products are sold to hardware or cooperative distributors who, in turn supply the retail trade, including hardware and department stores. (Kilmer affid. at 3).
22. Approximately 75 percent of all Delta faucets are sold to plumbers. (SX 6 at 3).
23. A survey was conducted by Survey Center, Inc. under the direction of Dr. Hans Zeisel to determine whether the shape of the Delta

- single handle faucet had acquired secondary meaning among the plumbing profession and to test the extent to which plumbers confuse the shape of the imported, imitation faucet with that of the Delta faucet. (SX 6 at 1-2).
24. The sample of interviewees for the survey consisted of 201 plumbers interviewed in plumbing supply shops located in New York, Chicago, Dallas, and Los Angeles - the four largest metropolitan areas in each of the four major census regions - the East, Midwest, South, and West. (SX 6 at 6-7).
 25. A representative sample was drawn by a random intercept interviewing process at geographically diverse sites. The specific sites were selected through probability sampling techniques. (SX 6 at 7-8).
 26. Half of the plumbers interviewed were shown photographs of the Delta single handle faucet, a Moen brand single handle faucet and an Eljer brand single handle faucet. The other half of the plumbers were shown photographs of the ATLED single handle faucet as well as the Moen and Eljer faucets. (SX 6 at 1).
 27. Upon viewing the photographs, each of the interviewees was asked whether they could identify the manufacturer of each of the faucets and, if so, who that manufacturer was. (SX 6 at 2).
 28. The interviewers did not know the purpose nor the sponsor of the survey. (SX 6 at 2).
 29. The Zeisel survey indicates that 63 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the Delta faucet correctly identified the faucet as complainant's. (SX 6 at 6).

30. Another survey, authorized and partially developed by Alexander Kalbouss, Vice President of Marketing for complainant's Masco Plumbing Products Group, was conducted by Walker Research Company to determine whether consumers recognized complainants Model 100 ball handle faucet. (Kalbouss affid. at 1, 5). Approximately 25 percent of all Delta faucets are sold to non-plumbers. (SX 6 at 10).
31. The sample of interviewees for the survey consisted of approximately 200 people 21 years of age and over who owned their own home. (Kalbouss affid. at 5-6).
32. The survey was conducted in a shopping center mall near Carmel, Indiana, a suburb of Indianapolis. (Kalbouss affid. at 5; Motion at 48).
33. Each of the interviewees viewed a Delta faucet and a faucet of three other faucet manufacturers; each of the four faucets being viewed had their brand names covered. (Kalbouss affid. at 5).
34. Thirty four percent of the interviewees were able to identify the Delta faucet by name. (Kalbouss affid. at 6).
35. Prior to the events giving rise to this investigation, Delta was the exclusive marketer of ball handle faucets for nearly 30 years. (Kilmer affid. at 2).
36. Since 1971, Delta has sold more than 15 million ball handle faucets, 6.5 million of which were sales of Delta's Model 100, the largest selling kitchen faucet in the U.S. (Kilmer affid. at 2).
37. Revenues from sales of ball handle faucets since 1971 is in excess of \$250 million. (Kilmer affid. at 2-3).

38. In the last 11 years Delta has spent more than \$50 million in advertising and promotion of its entire faucet line. (Kilmer affid. at 4).
- C 39. Delta's advertising, promotional and literature expenses for its entire faucet line were in excess of \$4.8 million in 1982 and in 1983. (Kilmer affid. at 4; SX 1 at 10).
40. Delta's advertising, promotion, and literature expenses in 1982 were in excess of the combined amount spent by all of its competitors. (Kilmer affid. at 4).
- C 41. Approximately sixty percent of complainant's capital budget is attributable to the Delta single handle faucet. (Comp. Exh. 16).
42. At least until January 1984, Delta and its sister company, the Peerless Faucet Company, were the only manufacturers of plumbing products that advertised on network television. (Kilmer affid. at 4).
43. The Model 100 ball handle faucet has figured prominently in Delta's television advertising. (Kilmer affid. at 5).
44. At both the retail and wholesale level the single handle faucet is displayed mounted on a sink or a board or is packaged in a container bearing a configuration of the faucet and the notation "TM". (Kilmer affid. at 3; SPX 2-3; Kilmer affid. Exh. 2).
45. A random survey of 500 plumbers located nationwide was conducted by the Market Research Department of Rosenfield, Sirowitz & Lawson in 1980 indicating that 72% of those surveyed were aware of Delta's advertising. (Kilmer affid. at 6).

46. Delta uses the design of its single handle faucet in its promotional and advertising efforts in connection with products other than plumbing products. (Kilmer affid. at 6; Kilmer affid. Exh. 6; Eberhardt affid. Exhs. 6-8; SPX 7).
47. Delta has incorporated the design of its ball handle faucet in all of its packaging for its plumbing products, numbering in the millions of packages, since 1978. (Kilmer affid. at 5).
48. There has been intentional copying of the Delta single handle faucet design. (SX 10, Laurel Dep., at 13, 16-18, 23; Alvis affid. at 1-4; FF 80, 81, below).
49. Complainant is the owner of U.S. Registration No. 1,204,403 for the mark DELTA and design consisting of the configuration of the single handle faucet at issue for plumbing products. (SX 8).
50. The design element of U.S. Registration No. 1,204,403 is disclaimed apart from the mark as a whole. (SX 8).

5. Likelihood of Confusion

51. As indicated in finding 48, above, the design of the Delta single handle faucet has been deliberately copied by Laurel, Yi Fon and other foreign producers. (FF 80, 81).
52. The appearance of the Delta single handle faucets and the imported single handle faucets is virtually identical. (SPX 2-5; CPX A; CPX C; Comp. Exhs. 6-9).

53. Approximately 85 percent of Delta's sales are made to plumbing wholesalers, whose practice is to sometimes display plumbing fixtures, including faucets, mounted on a sink or board, or otherwise shown on a wall, counter, or floor space. (SX 11 at 2).
54. Approximately 50 percent of the customers of Charles Laurel Co., Inc. and Laurel International, to whom the ATLED faucets were advertised, are customers of Delta. (Tr. at 13-14; CX 1).
55. Both the Delta single handle faucets and the imported faucets are packaged such that the faucets themselves are nearly entirely visible from the outside of the package. (SPX 2-5; CPX A).
56. Some of the imported faucets are packaged in boxes bearing the notations "America's most dependable faucet" or "America's most dependable washerless faucet" and "Made in Taiwan". (SPX 4-5; CPX A). The first two of these notations necessarily imply that these products are Delta faucets, since the imported copies thereof had not been marketed in the United States previously. Such statements are an obvious attempt to trade on complainant's good will. (FF 35).
57. In the Zeisel survey, approximately 64 percent (the figure when the results are corrected for "good guessers") of the plumbers shown a photograph of the ATLED single handle faucet with the name removed, identified the faucet as a Delta.
58. Another survey was conducted by Survey Center Inc. under the direction of Philip Johnson, to determine whether plumbers confuse the ATLED single handle faucet with the Delta single handle faucet. (Johnson affid. at 1).
59. The sample of interviewees for the survey consisted of 30 plumbers interviewed in two plumbing supply stores in Chicago. (Johnson affid. at 1).

60. Each of the interviewees was shown a photograph of an ATLED single handle faucet, a Moen brand single handle faucet and an Eljer brand single handle faucet, each with the brand name visible, and asked whether they could identify the manufacturer of the faucets, and if so, who the manufacturer was. (Johnson affid. at 2).
61. The interviewers did not know the purpose nor the sponsor of the survey. (Johnson affid. at 2).
62. The Johnson survey indicates that 86 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the ATLED faucet identified it as a faucet made by Delta. (Johnson affid. at 5).
63. Charles Laurel has testified that at a distance of approximately eight feet he was unable to distinguish a difference in appearance between the DELTA and ATLED Faucets. (Laurel dep. at 57-59).
64. Some American manufacturing companies other than complainant have their plumbing products manufactured for them by Taiwanese companies. (SX 12).
65. Private labeling is a common practice in the plumbing industry. (SX 10 at 82, 101-102).

B. Infringement of Registered Trademark

66. Delta's ball handle faucets have been sold under the name DELTA since 1964. (Kilmer affid. at 2).

67. DELTA was registered to Stephen A. Young Corporation on October 28, 1958 on the Principal Register for use in connection with plumbing fixtures, as Registration No. 668880. (Kilmer affid. at 2; Comp. Exh. 3).
68. Registration No. 668880 was assigned to Masco in 1964 and renewed in 1978. (Kilmer affid. at 2-3; Comp. Exh. 3).
69. The trademark DELTA has been used by respondents Strong and Noble General in the offering for sale of the single handle faucets at issue in this investigation. (Comp. Exhs. 10-11; SX 14 at 2).
70. The term ATLED has been used by Yi Fon, Charles Laurel, and Laurel International in the assembly and marketing of the single handle faucets at issue in this investigation. (Comp. Exhs. 6-7; SPX 4-5; SX 10 at 38).
71. The Zeisel survey indicates that approximately 64 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the ATLED single handle faucet with the name removed, identified the faucet as a Delta. (SX 6 at 4).
72. The Johnson survey indicates that approximately 86 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the ATLED single handle faucet with the ATLED name in view, identified the faucet as a Delta. (Johnson affid. at 5).
73. The term ATLED has no meaning or significance beyond the fact that it is the reverse spelling of the trademark DELTA. (Motion at 53).

C. False Representation & Palming Off

74. The Delta single handle faucets and the imported single handle faucets are virtually identical in appearance. (SPX 2-5; Comp. Exhs. 6-9).
75. The term ATLED has been used by Yi Fon, Charles Laurel, and Laurel International in the assembly and marketing of the imported single handle faucets. (Comp. Exhs. 6-7; SPX 4-5; SX 10 at 38; Alvis affid. at 3; Conf. SX 16 at 2).
76. The trademark DELTA and the Delta faucet Model Nos. 100, 400 and 500 have been used by respondents Strong and Noble General in the offering for sale of the single handle faucets at issue in this investigation. (Comp. Exhs. 10-11; SX 14 at 2).
77. Packaging containing the ATLED faucets do not contain the name of any manufacturer and include the notation "America's most dependable washerless faucet". The use of such statement is misleading and further enhances the probability of confusion. (FF 56). The faucets themselves carry the name ATLED on the base of the kitchen faucet and on the underside of the lavatory faucet, the same locations for the placement of DELTA on the Delta kitchen and lavatory faucets. (SPX 2-5).
78. In its advertising of its Gobo Top Mount Single Handle Faucet, Globe Union Industrial Corporation claims that they have "... proven dependable in millions of installation." [sic] This enhances the probability of confusion because Delta, not Globe Union has installed millions of single handle faucets. (Comp. Exh. 9).

79. An agreement was entered into between Laurel International and Yi Fon, whereby Yi Fon would assemble 6,000 copies of the Delta single handle faucet. (SX 10 at 16).
80. When placing an order with Yi Fon for the single handle faucets, Laurel International supplied Yi Fon with actual Delta lavatory and kitchen ball handle faucets and told Yi Fon to copy them. (Alvis affid. at 1-3; SX 10 at 17).
81. In order to make copies of the Delta single handle faucet, Yi Fon disassembled the Delta faucets and made drawings of all the parts and then submitted the drawings to subcontractors with instructions to make the tooling for the parts and the parts themselves. The faucets were then assembled by Yi Fon bearing the name ATLED and packaged in blister packages also bearing the name ATLED. (Alvis affid. at 3).

V. Importation and Sale

82. Between August and September, 1983 Laurel purchased from Yi Fon in Taiwan, and imported into the United States at least 1000 of the accused single handle faucets. (SX 10 at 23; Conf. SX 16 at 1; Motion at 11).
83. Globe Union has offered the accused single handle faucets for sale, but there is no evidence of either actual importation or sale. (Comp. Exhs. 8-9).
84. Everpromotion offered the accused single handle faucets for sale to certain American importers in mid-October of 1983, but there is no evidence of either actual importation or sale. (Everpromotion response to complaint, filed February 1, 1984).

85. Stapled to the inside cover of a Strong catalog sent to the U.S. Brass Company in Plano, Texas in July of 1983, is an offer to sell DELTA Model Nos. 100, 400, and 500, the Delta single handle kitchen and lavatory faucets. (SX 14 at 2; Comp. Exhs. 10-11).
86. A business card stapled to the cover of the Strong catalog identified James Carter Ho as the managing director of both Strong and Noble General. International Dun and Bradstreet reports on both Strong and Noble General indicate that the companies are affiliated with one another and have basically the same ownership. (SX 14 at 2).
87. A plumber in Saginaw, Michigan recently purchased a Delta Model 100 single handle faucet packaged in a pink box and selling for \$15, from Barnett Brass Company, a Florida plumbing fixture wholesaler. Delta does not sell any of its faucets in a pink box and its list price for the Delta Model 100 faucet is approximately \$53. Moreover, Delta has not sold its faucets to Barnett Brass Co. (Herrbach affid. at 1).
88. A single handle faucet packaged in a box containing depictions of the accused single handle faucet and bearing the words "Made in Taiwan" was recently purchased from the Budget Power Company of Minneapolis, Minnesota. Budget Power was supplied by an unknown trading company. (Burgess affid. at 1-2; CPX A).
89. Delta has recently received a ball handle of the same configuration as the handle of its single handle kitchen and lavatory faucets from the Norca Corporation of Great Neck, New York and received offers of the same from the Simmons Group of Hong Kong, Taiwan, the Peoples Republic of China, Tokyo, the Philippines, California, Ohio, and New York. (CPX C; Kilmer affid. of May 29, 1984, at 1).

VI. DOMESTIC INDUSTRY

90. Complainant, Masco Corporation of Indiana, is a wholly-owned subsidiary of Masco Corporation of Taylor Michigan. Delta Faucet Company (Delta), a division of Masco Corporation of Indiana, has its headquarters located at 55 East 111th Street, Indianapolis, Indiana 46280. Delta is engaged in the manufacture and sale of plumbing products, including single handle kitchen and lavatory faucets, for residential, commercial, and institutional installations. (Comp., ¶¶ 3, 6; Kilmer affid. at 1).
91. Complainant's two production facilities devoted to its line of single handle faucets are located at Greensburg, Indiana and Chickasha, Oklahoma. They have an aggregate floorspace of 700,000 sq. ft. (Kilmer affid. at 9).
92. Approximately sixty percent of the production areas of the Greensburg, Indiana, and Chickasha, Oklahoma plants are devoted to the manufacture of the Delta single handle faucet. (Comp. Exh. 13).
93. The products of complainant involved in this investigation are single handle kitchen and lavatory faucets incorporating a ball handle design, sold to plumbing wholesalers and hardware or cooperative distributors, and are intended for residential, commercial and institutional installations. (Kilmer affid. at 2; Kilmer affid. Exh. 1; SX 1 at 6; Kilmer affid. at 1, 3).
94. Delta has been the exclusive marketer of ball handle faucets throughout the United States for the last 30 years. (Kilmer affid. at 2).
95. Delta employs 36 sales representatives who sell to approximately 4000 plumbing wholesalers. (Eberhardt affid. at 3).

96. Approximately 85 percent of Delta's plumbing products are sold through manufacturer's representatives to plumbing wholesalers who, in turn, sell Delta's products to plumbers and sometimes to consumers. (Kilmer affid. at 3).
97. Approximately 15 percent of Delta's plumbing products are sold to hardware or cooperative distributors who, in turn supply the retail trade, including hardware and department stores. (Kilmer affid. at 3).
98. Approximately 75 percent of all Delta faucets are sold to plumbers. (SX 6 at 3).
99. Approximately 25 percent of all Delta faucets are sold to non-plumbers. (SX 6 at 10).

VII. EFFICIENT & ECONOMIC OPERATION

100. In the last 11 years Delta has spent more than \$50 million in advertising and promotion of its entire faucet line. (Kilmer affid. at 4).
101. Delta's advertising, promotional and literature expenses for its entire faucet line were in excess of \$4.8 million in 1982 and in 1983. (Kilmer affid. at 4; SX 1 at 10).
102. Delta's advertising, promotional, and literature expenses in 1982 were in excess of the combined amount spent by all of its competitors. (Kilmer affid. at 4).
103. Delta and its sister company, the Peerless Faucet Company, are the only manufacturers of plumbing products, that at least until January 1984, advertised on network television. (Kilmer affid. at 4).

104. Delta representatives attend trade shows as well as conduct meetings with architects, engineers, builders and plumbers. These practices were initiated during the early 1970's as a means of creating a demand for Delta products. (Eberhardt affid. at 3).
105. Delta's promotional activities over the last 16 years have included offers of premiums to plumbing contractors based on the number of faucets purchased by them and providing favorable financing terms. (Kilmer affid. at 4).
106. In addition, Delta has offered gifts of free clothing and electronic equipment during the Christmas season. (Eberhardt affid. at 4).
107. Delta's success partnership program provides a 2% discount to customers who pay for a purchase within 90 days. (Eberhardt affid. at 4).
108. Delta's advertising efforts have included the distribution of hundreds of thousands of its catalogues to wholesalers, plumbers, builders, architects and engineers and the publication of advertisements in magazines designed for general and trade-oriented distribution. (Kilmer affid. at 4).
109. In the period 1972 to 1982, Delta grew from a company with \$36 million in sales to a company with \$134 million in sales. (Kilmer affid. at 7).
110. Since 1971, Delta has sold more than 15 million ball handle faucets and received revenue from those sales which is in excess of \$250 million. (Kilmer affid. at 3).

111. The Model 100 is the largest selling kitchen faucet in the United States. Of the more than 15 million single handle faucets sold by Delta since 1971, more than 6.5 million were of the Model 100 Series. (Kilmer affid. at 3).
112. In the period 1977 through 1983, Delta and Peerless made capital outlays in excess of \$20,000,000 for its Greensburg plant, its Chickasha plant and its headquarters in Indianapolis, Indiana. (Kilmer affid. at 18).
113. For 1983, Delta and Peerless spent more than \$4.5 million for machinery and equipment. This amount is in addition to \$1,500,000 which was previously committed to the purchase of new machinery and equipment. (Kilmer affid. at 18).
114. Price increases have been minimized by cost savings introduced by Delta in the manufacture of its faucets, through significant expenditures in modern, cost-efficient capital equipment. (Kilmer affid. at 8).
115. In 1973, Delta and its sister division, Peerless, spent about \$145,000 for engineering, research and development. In 1982, engineering, research and development expenses were more than \$1.2 million. (Kilmer affid. at 18).
- C 116. In 1983 research and development expenses were . (SPX 8).
117. In 1976, Delta and Peerless employed an average number of 1,048 persons, 909 of whom were hourly employees and 139 of whom were salaried employees. As of June 1982, this figure increased to 1,338: 1,117 hourly employees and 221 salaried employees. Approximately 700 of these employees are engaged in the manufacture of the DELTA single handle faucets. (Kilmer affid. at 19).

- C 118. In 1983 Delta and Peerless budgeted _____ for quality control.
C In 1982 _____ was spent for quality control. Approximately sixty percent of the foregoing monies is attributable to the Delta single handle faucet. (Comp. Exh. 16).
119. Delta's efforts at quality control include inspection of all materials used in the production of faucets for any variance of standards. (Kilmer affid. at 15).
120. Delta quality control inspectors perform on-site tests at various stages of production. (Kilmer affid. at 15).
121. In addition, lab inspectors run endurance and pressure tests under inflated conditions to assure satisfactory performance at all times. (Kilmer affid. at 16).
122. As of June 1983 Delta maintained an inventory of single handle faucets
C valued at _____. (Comp. Exh. 19).
123. Delta's production capacity for single handle faucets is presently 2,250,000 units per year. (Kilmer affid. Exh. 5 C).
124. As a result of recent capital expenditures Delta estimates that its
C production capacity for single handle faucets will increase to _____ units per year. (Comp. Exh. 18).
- C 125. As of June 1983 Delta sold _____ single handle faucets in 1983 which
C generated revenues in excess of _____. (Comp. Exh. 20).
- C 126. Delta has maintained a pretax profit margin in excess of _____
_____ for each of the years 1980-1982 and for the first six months of 1983). (Comp. Exh. 20).

VIII. INJURY

127. An agreement entered into in February 1983 between Charles Laurel and Yi Fon called for the manufacture and importation of 6,000 imitation single handle kitchen and lavatory faucets having the configuration of the Delta faucets. (SX 10 at 17).
128. Between August and September, 1983 Laurel purchased from Yi Fon in Taiwan, and imported into the United States at least 1000 of the accused single handle faucets. (SX 10 at 23; SX 16 at 1; Motion at 11).
129. The counterfeit faucets were available in the United States from Laurel and other importers for \$23.61 and \$20.96. Delta's Models 400 and 520 are priced at \$30.63 and \$26.50, respectively. Thus, the Delta 400 single handle faucet was priced 30% more than the U.S. landed counterfeit kitchen faucet. The Delta Model 520 had a price which was 26% greater than the counterfeit faucet. (Kilmer affid. at 20).
130. The counterfeit single handle kitchen faucet was selling to importers in the United States for \$14.95 and the single handle lavatory faucets sold for \$13.64. (Kilmer affid. at 20). It appears that
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C
its genuine ball handle faucets. (Comp. Ex. A; Kilmer Ex. 4; SX 1 at 9; SPX 8).
131. Globe Union has offered the accused single handle faucets for sale, but there is no evidence of either actual importation or sale. (Comp. Exhs. 8-9).
132. Everpromotion offered the accused single handle faucets for sale to certain American importers in mid-October of 1983, but there is no

evidence of either actual importation or sale. (Everpromotion response to complaint, filed February 1, 1984).

- 133 Stapled to the inside cover of a Strong catalog sent to the U.S. Brass Company in Plano Texas in July of 1983, is an offer to sell DELTA Model Nos. 100, 400, and 500, the Delta single handle kitchen and lavatory faucets. (SX 14 at 2; Comp. Exhs. 10-11). A business card stapled to the cover of the Strong catalog identified one individual as being the managing director of both Strong and Noble General. International Dun and Bradstreet reports on both Strong and Noble General indicate that they are affiliated companies and have basically the same ownership. (FF 86). Thus, the offer of DELTA model faucets appears to apply to either concern.
134. The 1000 faucets imported by Laurel have been disassembled and the ball handle portions have been turned over to Delta pursuant to the terms of the settlement agreement between Laurel and Delta. (Kilmer affid. at 23).
135. A plumber in Saginaw, Michigan recently purchased a Delta Model 100 single handle faucet packaged in a pink box and selling for \$15, from Barnett Brass Company, a Florida plumbing fixture wholesaler. Delta does not sell any of its faucets in a pink box and its list price for the Delta Model 100 faucet is approximately \$53. Moreover, Delta has not sold its faucets to Barnett Brass Co. (Herrbach affid. at 1).
136. A single handle faucet packaged in a box containing depictions of the accused single handle faucet and bearing the words "Made in Taiwan" was recently purchased from the Budget Power Company of Minneapolis, Minnesota. Budget Power was supplied by an unknown trading company. (Burgess affid. at 1-2; CPX A).

137. Delta has recently received ball handles of the same configuration as the handle of its single handle kitchen and lavatory faucets from the Norca Corporation of Great Neck, New York and the Simmons Group of Hong Kong, Taiwan, the Peoples Republic of China, Tokyo, the Philippines, California, Ohio, and New York. (CPX C; Kilmer affid. of May 29, 1984, at 1).
138. Delta has received information from the Simmons Group of Hong Kong revealing its capacity to produce 71,000 handles per month at a cost of \$932/thousand. This cost includes the cost of delivery to the United States. (Kilmer affid. of May 29, 1984 at 1; CPX C).
139. Delta currently obtain's handles from domestic manufacturers for
C . . . (Kilmer affid. of May 29, 1984, at 1).
140. Charles Laurel has represented to Delta that the cost of tooling for the production of ball handle faucets by Taiwanese manufacturers should not exceed \$800. (Murnane affid. at 1; Kilmer affid. of May 2, 1984, at 3). Further, it required only 5 months for Yi Fon to be ready to ship production quantities of such products to the United States. (Alvis affid. at 3).
141. By September 1, 1983, Delta learned that other Taiwanese manufacturers had the capability and the intention to make and export to the United States counterfeit copies of the ball handle faucet. (Kilmer affid. of May 2, 1984, at 3).
142. The combined capacity of known Taiwanese manufacturers is 106,000 faucets per month or 1,272,000 faucets per year. (Kilmer affid. of May 2, 1984, at 3).

143. Delta's capacity to manufacture single handle kitchen and lavatory faucets is 2,250,000 per year. (Kilmer Exh. 5).
144. Delta has reviewed a list of customers to whom Laurel promoted the counterfeit Altled faucet and found that a substantial number of those customers are Delta customers. (Kilmer affid. of May 23, 1984, at 3).
145. Delta has learned that a number of United States individuals and concerns are planning to travel to Taiwan and arrange for the importation of Delta-copy faucets. (Herrbach affid. at 2).
146. The Jones Manufacturing company of Alabama, a well established maker of repair parts for plumbing fixtures, has arranged to import imitation Delta faucets from Taiwan. These imports are to be tested in Alabama and advertised as American-tested Taiwanese faucets. (Herrbach affid. at 2).
147. In June of 1983 Delta's Laboratory supervisor, Patrick Fonte, evaluated imported imitation Delta kitchen and lavatory faucets bearing the name Atled. It was determined that the materials and construction of the Atled faucets were of a very poor quality. (Jonte affid. at 3). The mounting base was of such construction that it was subject to deformation and early failure. The ball valve was poorly made and was likely to cause the seats to suffer cuts and premature wear. The cam packing was such that it would need to be adjusted or replaced frequently. The stem that mounts the handle was defectively made, so that the ball would slip and come out under normal use. The ball sockets had burrs, which cause leaks. The seat springs were poorly wound and were not

square, making the seats prone to wear and cutting. The pin holding the ball from rotating was made of brass and would soon wear off. Finally, supply tubes were so constructed as to be prone to leaking. (Jonte affid. at 3-4). The deposition testimony of one of the importers, Mr. Laurel, confirms the poor construction of the imported look-alikes . (Laurel Dep. at 35).

148. In 1969, there were two manufacturers of single handle faucets in the United States. Today, Delta has 15 to 20 major competitors that market single handle faucets, but such faucets have designs which are dissimilar to the design of Delta's ball handle faucet. (Kilmer affid. at 7).

149. As a result of the quality of its products, product acceptance and the efficient and economical manner in which Delta manufactures and markets its faucets, Delta has been able to realize a
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on its sales while maintaining its position as a leader in the field. (Comp. Exh. A).

150. The low cost and poor quality of the imported imitation ball handle faucets, coupled with the likelihood of their confusion with the genuine Delta faucets as discussed in findings 51 through 65, above, threatens complainant with a loss of both sales and goodwill. (FF 129, 130, 147, 149).

OPINION

I. INTRODUCTION

This investigation concerns the importation into the United States of certain single handle faucets which are alleged to infringe both complainant's common law trademark in the configuration of its single handle kitchen and lavatory faucets incorporating a ball handle design as well as complainant's registered trademark DELTA. Complainant further contends that respondents have engaged in false representation and palming off. These unfair acts and methods of competition are alleged to have the effect or tendency to destroy or substantially injure an efficiently and economically operated domestic industry.

The products in issue are single handle kitchen and lavatory faucets incorporating a ball handle design, intended for residential, commercial and institutional installations. The accused single handle faucets are alleged to have the identical external appearance as complainant's single handle faucets, the overall external configuration and appearance of which Masco Corporation of Indiana claims as a common law trademark.

There were originally seven respondents named in the present investigation. The investigation has been terminated as to four of these respondents. (See Procedural History, supra). None of the remaining three respondents entered a formal appearance or participated in the investigation. Despite their failure to appear or participate herein, none of these respondents has been found formally in default.

The present motion for summary determination requires consideration of whether there has been a violation of Section 337. Pursuant to Rule 210.50(b) (19 C.F.R. §210.50(b)), complainant is entitled to a summary determination if it can be shown that no genuine issue as to any material fact remains regarding each element required for a finding of a violation under Section 337, and that complainant is entitled to a summary determination as a matter of law.

II. JURISDICTION

On June 1, 1984, a hearing was held on an order to show cause why the investigation should not be terminated as to the remaining respondents, Strong, Noble General, and Everpromotion, based upon the Commission's lack of subject matter jurisdiction. (Order No. 20, issued May 17, 1984).

In discussing the general issue of jurisdiction, subject matter jurisdiction must be distinguished from jurisdiction over the parties or the property - in personam and in rem jurisdiction, respectively.

Subject matter jurisdiction is the competence of a court or agency to hear and decide a particular type of action. Jurisdiction over parties or property, on the other hand, is the competence of a court or agency to hear and decide a case involving specific parties or property. "When a court or agency has both subject matter jurisdiction and jurisdiction over the parties or property, it has the power to decide a particular case." Certain Steel Rod Treating Apparatus and Components Thereof, Inv. No. 337-TA-97, Comm. Memo. Op., at 5 (1982).

Pursuant to Section 337, the Commission has subject matter jurisdiction over unfair methods of competition and unfair acts in the importation into or sale in the United States of articles, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. This subject matter jurisdiction was delegated by Congress pursuant to the foreign commerce clause of the Constitution, Art. I, §8, cl. 3. Frischer & Co., Inc. v. Elting, 60 F.2d 711, 713 (2d Cir. 1932), cert. denied, 287 U.S. 649 (1933); S.J. Charia & Co. v. United States, 135 F. Supp. 727, 728 (Cust. Ct. 1954), aff'd. 248 F.2d 124 (C.C.P.A. 1956).

While the original parties to this investigation who have been shown to have imported allegedly infringing single handle faucets have been terminated from the investigation on the basis of a settlement agreement and consent order agreements, the Commission was vested with subject matter jurisdiction at the time the investigation was instituted by virtue of that showing of importation.

In Bally/Midway Mfg. Co. v. U.S. International Trade Commission, 714 F.2d 1117 (C.A.F.C. 1983), the court held that under the appropriate circumstances the proper date for determining the nature of the "domestic industry" was the date on which the complaint was filed. Likewise, the pertinent date for a determination of whether there exists the requisite "importation or sale" to vest the Commission with subject matter jurisdiction under Section 337, should, under the present circumstances, be the filing date of the complaint. In Bally, the court, in reversing the

Commission's decision, stated that whether the Commission's ruling (that there was no domestic industry) was sound "... must be determined in the light of the actual business operations that the Commission was endeavoring to protect from unfair competition ..." Id at 1121.

Under the present circumstances where there has been an admitted importation of 1000 of the accused single handle faucets by the terminated parties (FF 82), along with a showing of recent importations by parties unknown, as well as solicitations for sale by the remaining respondents (FF 84-89)^{2/}, and a showing of foreign capacity to produce additional accused single handle faucets (FF 141-42), it would be manifestly unfair to find a divestiture of jurisdiction in this forum in light of the alleged currently existing threat to complainant's business interest. (Tr. at 15-16). It is the policy of the Commission to favor the settlement of Section 337 actions. Certain Trolley Wheel Assemblies, Inv. No. 337-TA-161, ID at 62 (1984), Certain Food Slicers and Components Thereof, Inv. No. 337-TA-76 at 19 (1981). A complainant seeking redress under the statute should not be dissuaded from resolving its dispute with individual parties when it is still faced with allegedly unfair acts in the importation or sale by others, of articles into the United States.

In personam jurisdiction is not a prerequisite to party respondent status, as Section 337 exclusion orders are in rem and therefore act against particular property and not individuals. Steel Rod, supra, at 5-6; Sealed Air Corp. v. U.S. International Trade Commission, 209 U.S.P.Q. 469 (C.C.P.A.

^{2/} The recent importations and sales may or may not have been made by one or more of the remaining respondents, as a result of such prior solicitations.

1981); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, RD at 26 (1982). It is only necessary that the named foreign party respondents be served the complaint and notice of investigation for purposes of satisfying the due process requirements of reasonable notice. Steel Rod, supra, at 5. Each of the remaining respondents in the investigation were so served. (FF 1).

Furthermore, the Commission has in rem jurisdiction over any of the accused single handle faucets that have been imported or sold in the United States whether or not the foreign manufacturer has been explicitly identified and named as a respondent, or received actual notice of the investigation. Trolley Wheel, supra at 29, citing Sealed Air, supra.

Therefore, it is determined that the Commission has subject matter jurisdiction over the investigation and in rem jurisdiction over the single handle faucets that have been imported into or sold in the United States.

III. UNFAIR ACTS AND METHODS OF COMPETITION

A. Infringement of Complainant's Common Law Trademark

A trademark is defined at common law as it is under the Lanham Act, as any word, name, symbol, or device, or any combination thereof, adopted and used by a manufacturer or a merchant to identify his goods and to distinguish them from those manufactured or sold by others. 15 U.S.C. §1127; 1 McCarthy, Trademarks and Unfair Competition, §3:1. A trademark generally serves to signify that all goods with which it is associated come from a single albeit anonymous source, that all goods bearing the trademark are of an equal level of quality, and finally it serves as a prime tool for

the advertising and selling of goods. 1 McCarthy, supra, §3:1. Infringement of a common law trademark is an unfair act within the meaning of Section 337. Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137 (1984); Certain Novelty Glasses, Inv. No. 337-TA-55, 208 U.S.P.Q. 830 (1979).

A trademark is deemed established and protectible upon proof that the complainant has a right to use the mark, that the mark is inherently distinctive or has acquired secondary meaning, that the mark is not primarily functional, and that the mark has not acquired generic meaning. Staple Gun Tackers, supra; Certain Cube Puzzles, Inv. No. 337-TA-112 (1982); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108 (1982); Novelty Glasses, supra.

Delta seeks protection of its alleged trademark in the overall configuration of its single ball handle design kitchen and lavatory faucets, particularly with respect to its ball handle design. Delta claims that the accused single handle faucets are virtually identical in appearance and therefore, infringe Delta's common law trademark.

1. Delta's Right To Use The Alleged Trademark

Delta was established in 1954 and acquired patent rights to an invention for a single handle faucet. Some months later the ball handle was designed for the faucet. Delta has been the exclusive marketer of single handle faucets with the ball design throughout the United States for 30 years. (FF 10). There is no evidence in the record to indicate that Delta was not the original user of the single handle faucet design nor that it has not continued to exclusively use it.

Thus, complainant has the right to use the configuration of its single handle faucets which it claims constitutes a trademark.

2. Functionality

While complainant claims a common law trademark in the overall configuration of its single handle faucets, Delta's argument regarding the non-functionality of the design of its single handle faucets is directed specifically to the configuration of its ball handle, common to both the kitchen and lavatory faucets at issue. (Motion at 43). It should be noted that the spouts and bases of the kitchen and lavatory faucets are of different configurations (Comp. Exh. 12). Indeed, Delta has proffered no evidence to support a finding of non-functionality as to any of the other design features that make up the faucets at issue. Therefore, the issue of functionality will be considered only as it relates to the ball handle design.

In determining functionality, the Commission has adopted the Morton-Norwich test of whether competition will be hindered by preventing others from copying the design or configuration. In re Morton-Norwich Products, Inc., 213 U.S.P.Q. 9 (C.C.P.A. 1982); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108 (1982); Certain Cube Puzzles, Inv. No. 337-TA-112 (1982). The Morton-Norwich court determined that the public must be free to copy those "[n]ecessary elements of mechanical construction, essential to the practical operation of a device, and which cannot be changed without either lessening the efficacy or materially increasing expense." Morton-Norwich, supra, at 14. Thus, a design element that serves a utilitarian purpose may be appropriated as a trademark as long as it can be shown that alternative, commercially feasible means exist for performing the same function, that is, as long as it is not a design of a superior nature.

The C.A.F.C. and the Commission have identified four factors that aid in the determination of functionality: (1) whether the utilitarian advantages of the design are touted in advertising; (2) whether the particular design results from a comparatively simple or cheap method of manufacture; (3) whether there exists a utility patent which discloses the utilitarian advantage of the design for which protection is sought; and (4) whether commercial alternatives are available. Morton-Norwich, supra, at 15, 16; Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137, ID at 21 (1983).

The record supports complainant's position that the features which make up the design of its ball handle used on its single handle faucets are nonfunctional.

The advertising submitted indicates that while some mention is made of the single handle's utility - "[w]e redesigned the handle so its easier to operate." (Eberhardt affid. Exh. 4) - the bulk of its advertising touts the handle's cosmetic attributes. (Eberhardt affid. Exhs. 2, 3). It is the "washerless system" incorporated in Delta's faucets, inter alia, that is touted for its utility. (See, e.g. Eberhardt affid. Exh. 2 at 3).

The record indicates that the ball handle was first designed to distinguish it from the earlier marketed "Moen" faucet which featured a flat-topped single handle. The entire configuration of the single handle faucet was developed to assist in the control of water flow with the handle coupled to the internal valve of the faucet which controls the flow and temperature of the water. (FF 11). The record also indicates, however, that there are at least 18 commercial alternatives available to the single ball handle design of Delta. (Eberhardt affid.

Exhs. 10-11, 13-20, 23-24, 26-27, 29-32). There is no evidence that these alternative designs necessitate an inferior or more costly product. Complainant has testified that the cost of manufacture of its single handle faucets is not affected by the design. (FF 15).

Finally, the expired utility patent, U.S. Letters Patent 3,056,418, which covered Delta's single handle faucet, did not cover the ball handle design, itself.

Accordingly, it is determined that the configuration of Delta's ball handle is a nonfunctional design feature of its single handle faucet.

3. Distinctiveness

For the purposes of determining distinctiveness, only the configuration of the single ball handle will be considered, for those reasons discussed under the issue of functionality, supra.

Only those marks considered arbitrary or fanciful, i.e., inherently distinctive marks, or marks considered suggestive, are given legal protection against infringement upon adoption and use. Those marks considered descriptive on the other hand are not afforded such protection without a showing that they have acquired distinctiveness or have assumed a secondary meaning. 1 McCarthy, supra, §§11:2, and 11:5.

The test of the inherent distinctiveness of a product configuration is whether the design is so unique in its field that the reaction of the average purchaser may be presumed. Cube Puzzles, supra, at 10, citing In re Days-Ease Home Products Corp., 197 U.S.P.Q. 566 (T.T.A.B. 1977); In re International Playtex Corp., 153 U.S.P.Q. 377 (T.T.A.B. 1967); Staple Gun Tackers, supra, at

25. In other words, to be considered an inherently distinctive configuration, it must be shown that it is unique in relation to that of the configuration of competitor's goods such that prospective purchasers could become conditioned to its appearance and perceive it as an indicator of product source. See In re Days-Ease, supra, at 568.

While the ball handle design was chosen from many alternative designs, including a flat-topped handle design, it does not necessarily follow that Delta created an inherently distinctive design, thereby. (FF 12). The essence of Delta's ball handle design consists of a single handle generally positioned in the middle of the base, upon its escutcheon, immediately posterior to the spout, and angled in a forward direction. (Comp. Exh. 12 at 4, 6).

The Commission has compared the configuration of a domestically produced product with that of its non-accused competitors and made a determination of nondistinctiveness based in part upon such a comparison. See, e.g., Staple Gun Tackers, supra, 26-28; and Vacuum Bottles, supra, at 33-36. The record shows no fewer than 15 competitive single handle faucets that meet the above-description of the Delta single handle faucet. (Eberhardt affid. Exhs. 10, 11, 13, 16, 18-20, 23, 24, 26, 27, 29, 31). Though none of these competitive faucets incorporate the ball design at the end of the handle, this difference is considered insufficient for a finding of inherent distinctiveness.

Therefore, Delta must show that the design of its single handle faucets has acquired distinctiveness, i.e., that it has acquired secondary meaning.

4. Secondary Meaning

As the configuration of Delta's single handle faucet has not been found inherently distinctive, complainant must prove that the configuration has acquired secondary meaning in order to obtain protection from alleged infringement. 1 McCarthy, supra, §15.1. Secondary meaning depends upon a showing that "in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 215 U.S.P.Q. 1, 4 n.11 (S.Ct. 1982). That product feature need only be associated with a single source - not necessarily a known source. 1 McCarthy supra, §15.2.

Secondary meaning is established when it can be shown that a substantial number of the relevant consumer group for the product at issue associates a mark with a single, though perhaps anonymous source. Staple Gun Tackers, supra, at 29; Cube Puzzles, supra, at 10; Vacuum Bottles, supra, CD at 8; 1 McCarthy, supra, §15.11. The party seeking protection for its proposed mark must show that there is substantial evidence of secondary meaning, not merely a remote possibility. 1 McCarthy, supra, §15.11, citing Restatement of Torts §727, Comment C (1938). Proof of secondary meaning may be shown by direct and/or circumstantial evidence.

At the outset it should be noted that approximately 85 percent of Delta's plumbing products are sold to plumbing wholesalers who, in turn, sell Delta's products primarily to plumbers and less often, to consumers. Approximately 15 percent of Delta's plumbing products are sold to hardware or cooperative distributors who, in turn, supply the retail trade. Roughly 75 percent of all Delta faucets are sold to plumbers. (FF 20-21).

(a) Direct Evidence

Direct evidence refers to actual testimony of buyers as to their state of mind and may include professionally conducted consumer surveys. Staple Gun Tackers, supra, at 29, 1 McCarthy, supra, §15.10. Complainant has offered the results of two surveys as direct evidence of secondary meaning.

The guidelines prescribed by the Judicial Conference of the United States, for a survey to be admissible in evidence, are:

1. examination of the proper universe;
2. a representative sample drawn from that universe;
3. a correct mode of questioning interviewees;
4. recognized experts conducting the survey;
5. accurate reporting of data gathered;
6. sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys;
7. sample design and interviews conducted independently of the attorneys;
8. the interviewers, trained in this field, have no knowledge of the litigation or the purposes for which the survey is to be used.

Handbook of Recommended Procedures for the Trial of Protracted Cases 73-74 (West ed. 1960); 25 FRD 351, 429 (1960); see also Staple Gun Tackers, supra, at 30-31.

The first survey offered by Delta as direct evidence of secondary meaning is the survey conducted by Survey Center, Inc. under the direction of Dr. Hans

Zeisel, Professor Emeritus of law and sociology at the University of Chicago and Director of the American Association of Public Research (AAPOR). (FF 23; Zeisel affid. at 1).

A representative sample of 201 plumbers was drawn by a random intercept interviewing process and interviewed at plumbing supply shops chosen by means of probability sampling techniques. The shops were located in the geographically diverse sites of New York, Chicago, Dallas and Los Angeles. The interviewers did not know the purpose or the sponsor of the survey. The questioning and conduct of the interviews was proper and the data compiled was verified and accurately reported. (See Zeisel affid. at 7-8; Zeisel affid, Exhs. 5-6; FF 24-25, 28).

Half of the plumbers interviewed were shown photographs of the Delta single handle kitchen faucet, a Moen brand single handle faucet and an Eljer brand single handle faucet. The other half of the plumbers were shown photographs of the ATLED single handle kitchen faucet as well as the Moen and Eljer faucets. Upon viewing the photographs, each of the interviewees was asked whether they could identify the manufacturer of each of the faucets and, if so, who that manufacturer was. (FF 26-27).

The results of the survey indicate that 63 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the Delta faucet correctly identified the faucet as complainant's. (FF 29).

Although the survey only tested the perceptions of plumbers and not those of non-plumber consumers, the results are probative of secondary meaning amongst the relevant consumer group, that is the primary purchaser of the faucets at issue.

That 63 percent of the plumbers surveyed correctly indentified the faucet as complainant's convincingly demonstrates a high association of the product configuration with its source.

Furthermore, there is no evidence of record to indicate that this survey was not properly conducted or that its results are in any way unreliable.

A second survey, authorized and partially developed by Alexander Kalbouss, Vice President of Marketing for complainant's Masco Plumbing Products Group, was conducted by Walker Research Company to determine whether consumers recognized complainants Model 100 ball handle faucet, the single handle kitchen faucet. The sample of interviewees for this survey consisted of approximately 200 people 21 years of age and over who owned their own home. The survey was conducted in a shopping center mall near Carmel, Indiana, a suburb of Indianapolis. Each of the interviewees viewed the Delta kitchen faucet and a faucet of three other faucet manufacturers; each of the four faucets being viewed had their brand names covered. (FF 30-33).

While this survey indicates that 34% of the interviewees identified the Delta faucet correctly (FF 34), these results are of less probative value than the results of the Zeisel survey. The selection of only one site located near complainant's headquarters would likely lead to biased results. It is reasonable to assume that consumers in that area are more aware of the Delta faucet than would be the average consumer nationwide, and would be more likely to have developed an association between the faucet configuration and its source. Also, the 34 percent figure includes those who identified other faucets as the Delta as well, and may indicate a certain amount of guessing. As a result, the number of correct identifications is not considered conclusive.

As a survey designed to test the perceptions of general consumers who make up approximately 25 percent of Delta's customers, this survey has value as an adjunct to the Zeisel survey which was designed as a study of the perceptions of plumbers. Though its indicia of reliability are not as high as in the Zeisel survey, its results do have a tendency to corroborate that survey. Accordingly, the mall survey is entitled to some weight in the eventual determination of secondary meaning.

(b) Circumstantial Evidence

Evidence such as the amount and nature of advertising of the mark, the length of time the mark has been in use, and the amount of goods sold under the mark or in association with it, is considered circumstantial as to the mental associations of buyers and is considered in determining whether a proposed mark has acquired secondary meaning. 1 McCarthy, supra, 15:16; See Vacuum Bottles, supra, at 51-52.

Delta has been the exclusive marketer of ball handle faucets for 30 years and in that time has sold more than 15 million, 6.5 million of which were sales of Delta's Model 100, the largest selling kitchen faucet in the U.S. (FF 35-36). While there is no fixed rule as to length of time a symbol must be in use before it can achieve secondary meaning, it would be logical to infer that the proposed mark's presence in the marketplace on an exclusive basis for some 30 years with sales of some 15 million units, would have the tendency to associate it with the exclusive seller.

Complainant submits that in the last 11 years it has spent more than \$50 million in advertising and promotion of its entire faucet line; that its

advertising, promotional and literature expenses for its entire faucet line were in excess of \$4.8 million in 1982 and \$6.7 million in 1983 and that this 1982 figure represents an amount in excess of the corresponding combined amount spent by all of its competitors; and that it and its sister company, Peerless Faucet Company were, at least until January 1984, the only manufacturers of plumbing products to advertise on network television. (FF 38-40, 42). This data relates to Delta's entire line of faucets which clearly includes many faucets that do not incorporate the configuration at issue. (Kilmer affid. exh. 4). As a result, it is difficult to extrapolate the percentage of the foregoing figures which relate to the single handle faucets. Though complainant C indicates that approximately 60 percent of its capital budget is attributable to the single handle faucet (FF 41), it is not clear that the 60 percent figure reflects past expenditures as well, nor whether it is the percentage applied to its advertising expenditures.

While this data makes it difficult to draw any inferences regarding consumer associations with much precision, there is evidence of record which, when considered with the foregoing, supports the likelihood that the single handle faucet configuration has acquired secondary meaning.

The record indicates that the configuration of the single handle faucet has figured prominently in the marketing of Delta's products. Specifically, complainant claims the following: that its Model 100 faucet has been prominently featured in Delta's television advertising; that at both the retail and wholesale level the single handle faucet is displayed mounted on a sink or a board or is packaged in a container bearing a configuration of the faucet and the notation "TM"; that Delta uses the design of its single handle faucet

in its promotional and advertising efforts in connection with products other than plumbing products; and most significantly, that Delta has incorporated the design of its ball handle faucet in all of its packaging for its plumbing products, numbering in the millions, since 1978. (FF 43-44, 46-47).

In evaluating the significance of advertising efforts

"it is necessary to consider not only the extent of advertising but also whether the use of the designation therein has been of such nature as to create in the minds of the purchasing public an association of the designation with the user and/or his goods or services." In re Semel, 189 U.S.P.Q. 285, 287 (T.T.A.B. 1975).

From the foregoing it is concluded that the evidence adduced regarding length of time on the market, units sold, and extent and nature of promotional efforts expended, combine to support an inference that the configuration of the ball handle of Delta's single handle faucet has acquired secondary meaning.

The Commission has recognized that intentional copying may also be probative of secondary meaning, and in those instances where there is a showing of deliberate and close imitation of the senior user's mark, may even give rise to a presumption of secondary meaning. Certain Novelty Glasses, Inv. No. 337-TA-55 at 11, 208 U.S.P.Q. 830 (1979), Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108 at 17-19, USITC Pub. 1305 (1982). The appearance of the accused faucets alone evidences intentional copying. The testimony of Charles Laurel confirms that complainant's faucets were deliberately copied. (FF 48). This provides further evidence of secondary meaning.

In conclusion, all of the foregoing evidence, considered cumulatively, provides a basis for a finding that the configuration of Delta's ball handle has acquired secondary meaning and is entitled to protection as a common law trademark.

5. Generic Meaning

There is no evidence of record to indicate that the configuration of the Delta single handle faucet is generic.

6. Likelihood of Confusion

The basic test of infringement of a common law trademark is likelihood of confusion in the minds of a substantial number of reasonable buyers. Certain Sneakers With Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118, Views of the Commission at 16 (1983). Although secondary meaning and likelihood of confusion are two separate legal issues they are related in that confusion can occur only after initial association or recognition of the mark. Sneakers, Id. at 16; 1 McCarthy, supra, §15.3.

For purposes of this discussion a consideration of likelihood of confusion will be made only with respect to the configuration of the single ball handle. This is in accordance with the discussion, supra, in which the determination of the existence of a common law trademark was only made with reference to the handle configuration and not the entire design of both the Delta kitchen and lavatory faucets. As no secondary meaning has been established as to the entire faucet configurations, it follows that no likelihood of confusion could properly be found as to the faucet configurations as a whole. See Nationwide Advertising Services, Inc. v. Nation-Wide Employment Agencies, Inc., 471 F.2d 638 (C.C.P.A. 1973).

337-TA-87, 214 U.S.P.Q. 217 (1981), the Commission considered the following factors in determining the likelihood of confusion:

- (1) the degree of similarity between the designation and the trademark in
 - (a) appearance;
 - (b) pronunciation of the words used;
 - (c) verbal translation of the designs or pictures involved;
 - (d) suggestion
- (2) the intent of the actor in adopting the design;
- (3) the relation in use and manner of marketing between the goods marketed by the actor and those marketed by the other user; and
- (4) the degree of care likely to be exercised by purchasers.

First, it is apparent that the Delta single handle faucets and the accused single handle faucets are virtually identical in appearance. (FF 52). In fact, Charles Laurel has testified that at a distance of approximately eight feet he was unable to distinguish a difference in appearance between the DELTA and ATLED faucets. (FF 63). Secondly, the survey results of record, as well as certain circumstantial evidence of record, support a likelihood of confusion among consumers between the Delta single handle faucets and the accused faucets.

In the Zeisel survey, approximately 64 percent (the figure when the results are corrected for "good guessers") of the plumbers shown a photograph of the ATLED single handle faucet with the name removed, identified the faucet as a Delta. (FF 57). Additionally, a survey was conducted by Survey Center Inc. under the direction of Philip Johnson to determine whether plumbers confuse

the ATLED single handle faucet with the Delta single handle faucets. The sample of interviewees for the survey consisted of 30 plumbers interviewed in two plumbing supply stores in Chicago. Each of the interviewees was shown a photograph of an ATLED single handle faucet, a Moen brand single handle faucet and an Eljer brand single handle faucet, each with the brand name visible, and asked whether they could identify the manufacturer of the faucets, and if so, who the manufacturer was. The interviewers did not know the purpose nor the sponsor of the survey. The Johnson survey indicates that 86 percent (the figure when the results are corrected for "good guessers") of the plumbers presented with a photograph of the ATLED faucet identified it as a faucet made by Delta. (FF 58-62).

While the methodology of the Johnson survey appears to be patterned after that of the Zeisel survey and thus shares much of that survey's indicia of reliability, its sample of only 30 plumbers in two shops in Chicago indicates that its results are not as reliable or conclusive as those from the Zeisel survey. Nonetheless, that 86 percent of the plumbers identified the ATLED faucet (marked ATLED) as a Delta faucet is a strong indication that applying the name ATLED to the accused faucets does not prevent confusion. Further, a review of cases where survey evidence has been presented to prove likelihood of confusion indicates that the courts have accepted a wide range of percentages, often considerably lower than in the present case, as proof of likelihood of confusion. See generally 2 McCarthy, supra, §32.54.

Considered together, the two surveys provide strong evidence that potential consumers are likely to confuse the faucets at issue.

The evidence of record demonstrates that the marketing of the faucets at issue would enhance any likelihood of confusion. Both the Delta single handle faucets and the imported faucets are packaged such that the faucets themselves are

nearly entirely visible from the outside of the box. Approximately 85 percent of Delta's sales are made to plumbing wholesalers, whose practice is to display plumbing fixtures, including faucets, mounted on a sink or board, or otherwise shown on a wall, counter, or floor space. (FF 53,55). It is reasonable to assume that the accused faucets would be displayed in the same manner as other plumbing fixtures.

The likelihood that a potential consumer coming upon one of the imported faucets would be confused is enhanced by the fact that some of the imported faucets are packaged in boxes bearing the notations "America's Most Dependable Faucet" or "America's most dependable washerless faucet", apparently an intended reference to Delta's products. (FF 56). Moreover, it is reasonable to assume that plumbers would be a large percentage of the potential consumers of the imported faucets, as they are of the Delta faucets. That approximately 50 percent of the customers of Charles Laurel Co., Inc. and Laurel International, to whom the ATLED faucets were advertised, are customers of Delta, provides some support to this assumption. (FF 54).

The prevalence of private labeling in the plumbing industry - the practice of manufacturing for and under the name of another - and the existence of Taiwanese manufacture of plumbing products for American companies (FF 64,65) makes it more likely that a consumer would believe an association exists between the Delta faucets and the imported faucets, even if the latter faucets were marketed under a name other than Delta and even if the consumer was aware they were manufactured in Taiwan.

Finally, "[p]roof that [one] chose a mark with the intent of copying [another's] mark, standing alone, may justify an inference of confusing similarity".

Sun-Fun Products, Inc. v. Suntan Research and Development, Inc., 213 U.S.P.Q. 91 (5th Cir. Fla., 1981). See also, Parrot Jungle, Inc., Corp. of Florida v. Parrot Jungle, Inc., Corp. of New York, 213 U.S.P.Q. 49 (S.D.N.Y., 1981) and John Wright, Inc. v. Casper Corp., 419 F. Supp. 292 (D.Pa., 1976), aff'd, and mod. 587 F2d. 602 (3rd Cir. 1978). The deposition testimony of Charles Laurel demonstrates that complainant faucets have been deliberately copied. (FF 48).

Based upon the cumulative evidence of likelihood of confusion presented, it is determined that the configuration of the accused faucet handles is confusingly similar to the configuration of the Delta ball handle and that Delta's common law trademark therein is therefore, infringed.

B. Infringement of Registered Trademark

Complainant is the assignee of the registered trademark DELTA, Registration No. 668880. (FF 66-68). Section 32(a) of the Lanham Act, 15 U.S.C. §1114(a) provides that:

- (a) Any person who shall, without the consent of the registrant --
 - (1) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
 - (2) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Respondents Strong and Noble General have used the registered trademark DELTA in advertising and offering for sale counterfeit copies of Delta's ball handle faucets. (FF 69).

The Laurel respondents and respondent Yi Fon have used the term "ATLED" in the assembly and marketing for sale of the single handle faucets at issue in this proceeding. (FF 70). The term ATLED is DELTA spelled backwards. (FF 7). Furthermore, there is survey evidence of record showing that the mark ATLED is confusingly similar to the mark "DELTA" and enhances the confusion among plumber consumers as to who produces and markets the ATLED faucets. (FF 71-72). The Zeisel survey indicates that even with the names removed, approximately 64 percent of the plumbers presented with a photograph identified the ATLED faucet as a DELTA faucet. (FF 57). The Johnson survey shows, however, that when presented with a photograph of the ATLED faucet with the name in view, 86% of the plumbers interviewed identified it as a DELTA faucet. (FF 72). Clearly then the ATLED mark is confusingly similar to the DELTA mark.

Since the Laurel respondents and Yi Fon have entered into settlement agreements herein, I do not find that they have infringed the registered "DELTA" trademark. However, I do find that faucets bearing the mark "ATLED" would and do infringe that registered mark.

C. False Representation^{3/}

False representation of origin is proscribed by section 43(a) of the Lanham Act which reads in pertinent part, as follows:

- (a) Any person who shall affix, apply, annex or use in connection with any good or services or any container or containers

^{3/} False advertising by respondents Globe Union, Yi Fon, and Laurel was originally within the scope of this investigation. As complainant has not pursued this count in the present motion and the charged respondents have been terminated from the investigation, this count has not been considered.

for goods, a false designation of origin, or any false description or representation, including any words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce ... shall be liable to a civil action ..

15 U.S.C. §1125(a).

The same facts that support an action for trademark infringement will support an action for false representation under §43(a). Estate of Presley v. Russen, 211 U.S.P.Q. 415 (D.N.J. 1981); Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 208 U.S.P.Q. 631 (8th Cir. S.D. 1980); Rare Earth Inc. v. Hoorelbeke, 401 F. Supp. 26 (D.N.Y. 1975). In fact, the Commission has found that the elements of proof of common law trademark infringement constitute prima facie evidence of false designation of origin or false representation of manufacturing source. Certain Sneakers With Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118 at 21 (1983); Certain Coin-Operated Audio-Visual Games and Components Thereof, Inv. No. 337-TA-87 at 9 (1980).

Having determined that Delta's common law and registered trademarks have been infringed, I conclude that the importation and sale of those single ball handles which infringe complainant's common law trademark, and the use of the names DELTA or ATLED in association therewith, constitute false representation of origin.

D. Palming Off

In addition to the elements required for a showing of trademark infringement, palming or passing off requires proof that respondents subjectively and knowingly intended to confuse buyers. Certain Braiding Machines, Inv. No. 337-TA-130 at 79-80 (1983); Certain Miniature Plug-In Blade Fuzes, Inv. No. 337-TA-114 at 28 (1983); Certain Cube Puzzles, Inv. No. 337-TA-112 at 25-26 (1982); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 at 3 (1981).

The record shows that Laurel and Yi Fon intentionally copied the design of the Delta single handle faucets; that the name ATLED (the reverse of DELTA) was placed on the faucets in the same location in which complainants' faucets are marked; and that ATLED faucets were packaged in boxes bearing the notation "America's Most Dependable Washerless Faucets". (FF 75, 77, 80-81).

Nonetheless, as Laurel and Yi Fon have entered into settlement agreements, I do not find that they have engaged in passing off.

In Globe Union's advertising of its infringing single handle faucets, it claims that their faucets have "... proven dependable in millions of installation." [sic] (FF 78). While this statement is misleading, it is insufficient evidence of intent to deceive, and like Laurel and Yi Fon, Globe Union has been terminated from this investigation and therefore, is not found to have engaged in passing off.

With respect to the remaining respondents, Strong, Noble General, and Everpromotion, while there is evidence of offers to sell infringing products (FF 84-86) and, with respect to Strong and Noble General, use of the name DELTA and certain of its model numbers (FF 76), there is no evidence of direct involvement by these parties in any intentional copying or even in actual importation or sale.

Therefore, I do not find that any parties have engaged in passing off.

IV. IMPORTATION AND SALE

The record establishes that the remaining respondents, Strong, Noble General, and Everpromotion have offered the accused faucets for sale in the United States. (FF 84-86). However, there is no direct evidence that these parties have sold or imported any of the accused faucets.

There is evidence of record that companies in Florida and Minnesota have recently sold infringing single handle faucets. (FF 87-88). There is further evidence that Delta has recently received an infringing ball handle from a New York company as well as additional evidence that there exists substantial capacity to produce such handles and a willingness to export them to the United States. (FF 89).

V. DOMESTIC INDUSTRY

Definition

In cases wherein trademark infringement constitutes an alleged unfair act or method of competition, the Commission has defined the relevant domestic industry for section 337 purposes 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. Certain Plastic Food Storage Containers, Inv. No. 337-TA-152, I.D. at 76 (1984); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, R.D. at 68 (1982); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 (1981); Certain Coin-Operated Audio-Visual Games, Inv. No. 337-TA-87 (1981).

The trademarks at issue in the present investigation are complainant's registered trademark DELTA, U.S. Reg. No. 668,880 and its alleged common law trademark consisting of the overall configuration of its single handle faucets.

Though complainant applies the DELTA mark to its entire product line, the domestic industry should, nonetheless, be limited to those products which are the target of unfair acts. See, Food Storage Containers, supra at 76. (registered trademark at issue was used in association with complainant's entire product line). Specifically, these products consist of complainant's kitchen and lavatory faucets which embody the single ball handle design and are identified as Model Nos. 100-570 P. (SX 1, at 3-4). Pursuant to the Notice of Investigation (48 Fed. Reg. 49106-07, October 24, 1983) and the definition of the domestic industry in complainant's brief supporting the instant motion, the domestic industry is defined only with reference to the single handle kitchen and lavatory faucets.

Complainant Masco manufactures its DELTA line of products at two manufacturing plants in the United States. (FF 91). The product is distributed mainly by independent salesmen. (FF 96). Approximately 36 sales representatives sell to about 4000 plumbing wholesalers throughout the United States. (FF 95).

Thus, the domestic industry in this investigation consists of complainant's domestic operations devoted to the design, manufacture, distribution and sale of complainant's single handle kitchen and lavatory faucets sold under the DELTA trademark and incorporating the alleged common law trademark design.

VI. EFFICIENT AND ECONOMIC OPERATION

In order to prevail under Section 337, complainant must establish that the relevant domestic industry is efficiently and economically operated. The traditional guidelines set forth by the Commission to assess efficient and economic operation include the use of modern equipment, effective quality control programs, profitability of the relevant product line, and substantial expenditures in advertising, promotion and development of consumer goodwill. Certain Trolley Wheel Assemblies, Inv. No. 337-TA-161, I.D. at 58 (1984); Certain Heavy Duty Staple Gun Tackers, Inv. No. 337-TA-137 (1983); Certain Vacuum Bottles and Components Thereof, Inv. No. 337-TA-108, R.D. at 69 (1982); Certain Coin Operated Audio Visual Games and Components Thereof, Inv. No. 337-TA-105, 216 U.S.P.Q. 1106 (1982); Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, 215 U.S.P.Q. 963 (1981).

Complainant's success in the plumbing industry is due in part to its aggressive marketing and promotional campaigns. Delta is the most promotion/marketing-oriented faucet manufacturer in the industry. Over the past 11 years Delta has spent in excess of \$50 million to advertise and promote its entire product line. (FF 100). Delta and its sister company, Peerless, are the only plumbing manufacturers which advertise on Network television. Expenditures for television advertising comprise the largest portion of Delta's advertising budget. In 1982 Delta recorded expenditures in excess of \$4.8 million for advertising and sales promotion of its faucet products - an amount which exceeded the aggregate amount spent by its competitors. Advertising and promotional expenses for 1983 were in excess of (FF 101).

Delta employs approximately 40 sales representatives who sell to more than 4,000 plumbing wholesalers. Delta representatives frequently participate in trade shows and meet directly with architects, engineers, builders, and other representatives of the trade. (FF 104). Other promotional efforts include offers of premiums, holiday gifts, and a success partnership program which provides for a 2% discount on orders paid for within 90 days of delivery. (FF 105-07).

Effective advertising and promotional efforts have enabled Delta to experience substantial sales increases over the past decade. From 1972 to 1982 annual sales increased from \$36 million to \$134 million. During this period more than 15 million single handle faucets were sold, generating revenues in excess of \$250 million. (FF 109-10). Delta's model 100 kitchen faucet is the largest selling faucet of its type in the United States. Of the 15 million single handle faucets sold by complainant since 1971, 6.5 million were of the model 100 series. (FF 111).

Delta utilizes the most modern equipment available in the manufacture of its single handle faucets. (FF 114). Delta's two manufacturing facilities in the United States have an aggregate floor space of 700,000 square feet. (FF 91). Approximately sixty percent of the production areas of the Greensburg, Indiana and Chickasha, Oklahoma, plants are devoted to the manufacture of the single handle faucets. (FF 92). As of June 1983, Delta and Peerless employed an average number of 1338 employees, of which approximately 700 are engaged in the manufacture of the Delta single handle faucet. (FF 117).

Delta has maintained a large inventory of its single handle faucets and is capable of manufacturing 2.25 million kitchen and lavatory faucets

annually. (FF 122-23). This number will increase as a result of recent capital expenditures. (FF 124). In 1983, Delta's production of single handle kitchen faucets (Model Nos. 100-450) approached 80% of total capacity. With respect to Delta's line of lavatory faucets (Model Nos. 500-575) production exceeded stated capacity. (FF 123).

The quality of Delta's single handle faucets can be attributed to the skilled workforce which Delta employs for research, development, and production with respect to its faucets, as well as to the large capital equipment expenditures that Delta has incurred. Through substantial expenditures in modern, cost efficient capital equipment Delta has been able to minimize price increases. (FF 114). In 1983 Delta spent in excess of \$4.5 million for machinery and equipment. An additional _____ was spent for engineering, research, and development. (FF 113,116).

In addition, Delta performs stringent quality control testing of its single handle faucets. Testing includes spot checks at various stages of production as well as laboratory testing of the finished product to ensure satisfactory performance at all times. (FF 119-21). In 1983, Delta spent in excess of _____ to ensure the quality of its single handle faucets. (FF 118).

Since 1980, Delta has been able to realize a _____ profit on its sales. (FF 126). This accomplishment in the face of rather stiff competition is a further indication of the efficient and economic manner in which Delta operates. In 1969, there were two manufacturers of single handle faucets in the United States. Today, Delta has approximately 20 major competitors. (FF 148). Delta's reputation and its position as a leader in the

field of plumbing fixtures is a result of the quality of its products, product acceptance and the efficient and economical manner in which Delta Manufactures its faucets. (FF 149).

For the foregoing reasons, I find that the domestic industry as defined herein, is efficiently and economically operated.

VII. INJURY

In order to prevail in a Section 337 action, complainant must show that the importation and sale of single handle faucets has "... the effect or tendency ... to destroy or substantially injure the domestic industry ..." 19 U.S.C. §1337(a). This element requires proof separate and independent from proof of an unfair act. Further, complainant must establish a causal relationship between respondent's alleged unfair acts and the injury suffered as a result of such acts. Certain Spring Assemblies and Components Thereof and Methods of Their Manufacture, Inv. No. 337-TA-88, at 43-44, 216 U.S.P.Q. 225, 243 (1981). (Spring Assemblies).

A. Substantial Injury

Several factors are relevant to a determination of injury to the domestic industry, including: (1) lost customers; (2) declining sales; (3) volume of imports; (4) decreased production and profitability; (5) level of market penetration by imports; and (6) substantial foreign capacity to increase exports. Certain Drill Point Screws for Drywall Construction, Inv. No. 337-TA-116, at 18 (1982); Spring Assemblies, supra, at 42-49, 216 U.S.P.Q. 242-245; Certain Flexible Foam Sandals, Inv. No. 337-TA-47, RD at 4 (1979); Certain Roller Units, Inv. No. 337-TA-44, at 10, 208 U.S.P.Q. 141 (1979); Certain Reclosable Plastic Bags; Inv. No. 337-TA-22, at 14, 192 U.S.P.Q. 674 (1977).

Complainant has demonstrated instances of importation by Laurel and Yi Fon. The record establishes that at least 1000 faucets manufactured by Yi Fon were imported into the United States by Laurel between August and September of 1983. (FF 128). In the intervening months both Laurel and Yi Fon have been terminated from this investigation on the basis of settlement agreements pursuant to 19 C.F.R. §210.51(c).

Under certain circumstances evidence of importation by respondents no longer a party to an investigation may be considered in an assessment of injury. Certain Heavy Duty Staple Gun Tackers, Inv. No. 337-TA-137, at 75 (1984). The Commission has concluded that "... injury from imports by parties terminated from an investigation will as a general rule be relevant ... when there is some indication that an unfair act has occurred." Certain Food Slicers and Components Thereof, Inv. No. 337-TA-76, at 19 (1981).

Pursuant to the settlement agreement entered into between, inter alia, Laurel and Complainant, the 1000 imported faucets have been disassembled and the ball handle portions have been turned over to Delta. (FF 134). Thus, the record lacks any evidence of subsequent sale of any of the 1000 faucets or, indeed, any evidence whatever of any effect upon the domestic industry caused by the importation by Laurel and Yi Fon of the accused faucets.

Therefore, while a determination of substantial injury cannot be made on the basis of the importation by Laurel, such acts are relevant to the issue of tendency to injure, discussed infra. This view is in keeping with the Commission's policy favoring the amicable settlement of Section 337 actions and is consistent with the terms of the settlement agreements entered into by the parties, in which there is to be no finding as to the settling parties that Section 337 has been violated. Food Slicers, supra, at 19 (1981).

Complainant has demonstrated recent instances of importation of look-alike single handle faucets in addition to those imported earlier by Laurel. The record reveals that a Delta look-alike faucet was recently sold to a plumber in Michigan for \$15. (FF 135)^{4/}. In addition, a single handle faucet packaged in a box depicting drawings of the Delta single handle faucet and bearing the words "Made in Taiwan" was recently sold by a company in Minneapolis, Minnesota. (FF 136). The record, however, lacks evidence of a specific quantity of such imitation single handle faucets available in the United States.

The record also indicates that manufacturers not a party to this investigation have provided copies of single ball handles to Delta. One Taiwanese manufacturer, Simmons, has represented that it can manufacture 71,000 handles each month and deliver them to the United States at a cost of \$932/thousand. (FF 137,138).

Finally, Complainant has also demonstrated instances of solicitation of sale by terminated respondent Globe Union Industrial Corporation and the remaining parties to the investigation. (FF 131-33). However, such activity in and of itself is insufficient for purposes of demonstrating substantial injury.

Therefore, the record lacks sufficient evidence of importation and sale of the accused single handle faucets to support a finding of substantial injury. Accordingly, I find that complainant has not suffered substantial injury.^{5/}

^{4/} Delta's list price for its Model 100 faucet is \$53. (FF 135).

^{5/} The lack of evidence of substantial injury is due in great part to the swiftness with which complainant instituted this suit and companion litigation in the Courts, upon learning of the importation of the look-alike faucets.

B. Tendency to Substantially Injure

When an assessment of the market in the presence of the accused imported product demonstrates relevant conditions or circumstances from which probable future injury can be inferred, a tendency to substantially injure the domestic industry has been shown. Certain Combination Locks, Inv. No. 337-TA-45, RD at 24 (1979). Relevant conditions or circumstances may include foreign cost advantage and production capacity, ability of the imported product to undersell complainant's product, or substantial manufacturing capacity combined with the intention to penetrate the United States market. Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, U.S.P.Q. 348 (1982); Reclosable Plastic Bags, *supra*; Panty Hose, Tariff Commission Pub. No. 471 (1972). The legislative history of section 337 indicates that "[w]here unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established." Trade Reform Act of 1973, Report of the House Comm. on Ways and Means, H. Rep. No. 93-571, 93 Cong., 1st Sess. at 78 (1973), *citing*, In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955). *See also* Bally/Midway Mfg. Co. v. U.S. International Trade Commission, 219 U.S.P.Q. 97, 102 (C.A.F.C. 1983).

The record herein reveals an intent to penetrate the United States market by the remaining respondents and possibly other non-party concerns and individuals. The remaining respondents, Noble General, Strong Hardware, and Everpromotion have not participated in discovery, despite Order No. 13, compelling discovery. It has been shown, however, that each has offered the accused single handle faucets for sale into the United States. (FF 131-33). Moreover, despite the settlements with Laurel and Yi Fon, and the subsequent obtaining of all 1000 accused faucets previously imported by Laurel, single

handle faucets imitating complainant's configuration are still being imported and sold in the United States. Recent purchases of Delta look-alike faucets in Michigan and Minnesota (FF 135, 136) give explicit proof that someone is still importing the accused imitation products. This, coupled with the fact that Delta has recently received a ball handle of the same configuration as its product from the Norca Corporation of Great Neck, N.Y. and evidence of substantial production capacity from the Simmons Group of Hong Kong, the Peoples Republic of China, Tokyo, and the Philippines, as well as Taiwan, indicates that the settlements with Laurel and Yi Fon did not eliminate the threat to complainant's business. (FF 137).

There is already a substantial capacity in Taiwan alone to produce the accused products. It has been shown that known manufacturers there can produce approximately 1,272,000 faucets per year (over half of complainant's present capacity). (FF 141-43). The record further shows that it takes very little time and capital to tool up for the production of such faucets. (FF 140). These facts, coupled with the known intent of a number of domestic concerns and individuals to arrange for the importation of the look-alike faucets (FF 145-46), reveal a substantial threat to the economic well-being of the domestic industry.

In so finding, I am mindful of the fact that complainant currently realizes about a on the sale of its kitchen and lavatory single handle faucets. (FF 149). While this is a very healthy profit, it must be noted that the evidence indicates that it is not a monopoly profit. Complainant has substantial competition in the single handle faucet business. There are approximately 15 to 20 firms which legitimately compete with complainant

for the supply of single handle faucets to the domestic market. (FF 148). The record indicates that Delta's superior quality, high product acceptance, and the efficient and economical manner with which it manufactures and markets its products, are the principal reasons for its success in this area. (FF 100-26, 148).

The tendency to injure the domestic industry is adequately demonstrated in this record through the intent and substantial capacity of the imitators, as noted above, along with the low costs and selling prices of the infringers and the poor quality of the accused products.

Although the record reveals little evidence concerning foreign costs of production, it does establish that the cost of tooling for such manufacture is only about \$800.00. (FF 140). The record also reveals that the Simmons Group of Hong Kong has offered the imitation Delta ball handles for delivery in the United States at a price of \$932.00 per thousand (FF 138), whereas Delta must pay between \$1122.00 and \$1230.00 per thousand to domestic manufacturers for the same handles. (FF 139). This evidence coupled with the substantially lower selling prices of the imported imitation faucets (30% or more below that of the real Delta faucets) supports the inference that foreign costs of production are significantly lower than complainant's. (FF 129-30). Furthermore, the record evidence indicates that Delta's
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of the imported imitation products. (FF 130).

The final factor indicating a tendency to substantially injure the domestic industry is the inferior quality of the imitation faucets imported from abroad. The look-alike faucets have been shown to be of very poor construction which will require frequent repair and replacement of parts. (FF 147). Complainant's tests also revealed a tendency for such faucets to leak. (FF 147). The poor quality of the imported imitations is confirmed

by the deposition testimony of one of the importers, Mr. Laurel. (Laurel Dep. at 22-23, 35).

The poor quality of the accused products, when combined with the likelihood of confusion caused by the close similarity between the Delta ball handle faucets and their imitators, as discussed above, poses a very serious threat to the continued good will associated with complainant's products. If such poorly made copies continue to come into the domestic market, not only will complainant lose substantial sales to these cheap imitations, but the market acceptance of its products will be severely damaged by the perception among its customers and potential customers that the Delta faucet is no longer a premium product. In this regard it must be noted that Delta has reviewed a list of customers to whom Laurel had promoted the counterfeit ATLED faucets and found that a substantial number of those listed were Delta customers. (FF 54, 144).

On the basis of these facts, I find that the importation into and sale in the United States of the accused single ball handle faucets has the tendency to substantially injure the domestic industry. Although there is no explicit evidence that the remaining respondents, Noble General Trading Co., Ltd., Strong Hardware Co., Ltd. and Everpromotion Industrial Company, Ltd., have imported into or sold the accused products in the United States, there is proof that they have offered such products for sale to the United States market. Further, there is proof that they or some other non-party persons or concerns are still importing into or selling in the United States the infringing products. This coupled with the fact that these said respondents have refused to participate in discovery herein, as ordered, raises at least the inference that they may be responsible, in whole or in part, for the continued importation into this country of the accused products. Lastly, there is proof that Laurel imported 1000 of the accused faucets into this country prior to the institution of this investigation and its entrance into the settlement agreement herein.

The Commission has consistently supported the view that imports by parties who have been terminated from an investigation as a result of settlement agreement must be considered in connection with the issue of injury and tendency to injure. See Food Slicers and Components Thereof, Inv. No. 337-TA-76 (1981); Certain Heavy-Duty Staple Gun Tackers, Inv. No. 337-TA-137 (1984). One of the reasons for this position is that not to do so would discourage settlements between the parties. In Food Slicers the Commission concluded that:

[I]njury from imports by parties terminated from an investigation will as a general rule be relevant to the "effect" of imported devices, when there is some indication that an "unfair act" has occurred. In addition import competition may be an indication that a domestic industry is vulnerable to injury. A slight increase in unfair import competition could have a disproportionate future impact, and this circumstance could sustain a finding of tendency to injure. Id. at 19.

If sales by the terminated respondents are not included in determining the issue of tendency to substantially injure, the effect will be what the Commission sought to avoid in Food Slicers and Staple Gun Tackers; that is, it will discourage settlements by and among the parties. A complainant would certainly avoid settling if, as in the present case, to settle would damage his own case and chance for broad relief.

Although the 1000 units imported by Laurel were ultimately disassembled and obtained by complainant as a result of the settlement agreement, they were to be the initial shipment of a large and steady supply for sale in the United States. (FF 127; SX 10 at 22). Further, they were offered for sale to a large percentage of complainant's customers at a substantial reduction in price from complainant's prices. (FF 54, 129). These facts, along with the other facts discussed above, clearly reveal a tendency to substantially injure the domestic industry.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this investigation. 19 U.S.C. §1337.
2. Trademark infringement is an unfair act or method of competition under 19 U.S.C. §1337.
3. Complainant has a common law trademark in the configuration of the ball handle of its single handle faucets.
4. A likelihood of confusion exists between complainant's single handle faucets and the accused single handle faucets.
5. Complainant's registered trademark DELTA has been infringed.
6. The importation or sale of the accused single handle faucets and the use of the names DELTA or ATLED in association therewith, constitute false representation in violation of Section 43(a) of the Lanham act. 15 U.S.C. §1125(a).
7. Respondents have not engaged in palming off in violation of Section 43(a) of the Lanham Act. 15 U.S.C. §1125(a).
8. There is no evidence that respondents Strong, Noble General, or Everpromotion have exported to, imported into, or sold in the United States, any of the accused single handle faucets.
9. The domestic industry consists of complainant's domestic operations devoted to the design, manufacture, distribution and sale of the single handle kitchen and lavatory faucets sold under the DELTA trademark and incorporating the common law trademark configuration.

10. The relevant domestic industry is efficiently and economically operated.
11. Importation of the accused single handle faucets has not substantially injured the relevant domestic industry.
12. Importation of the accused single handle faucets by respondents or by foreign manufacturers not party to this investigation would have the tendency to substantially injure the relevant domestic industry.
13. There is a violation of Section 337 in the importation into the United States, or in the sale of the accused single handle faucets.

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 of the submissions and the pleadings and arguments presented orally and in briefs, it is the Presiding Officer's DETERMINATION that there is a violation of Section 337 in the unauthorized importation into the United States of the accused single handle faucets.

There being no genuine issue as to any material fact, it is further determined that complainant is entitled to a summary determination as a matter of law, and therefore complainant's motion for summary determination (Motion No. 167-10), is hereby granted.

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

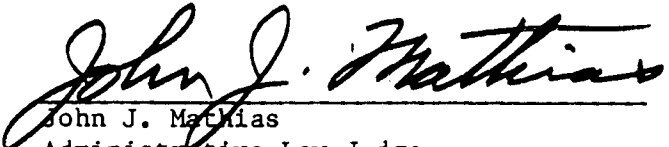
1. The transcript of the hearing; and
2. The Exhibits accepted into evidence in the course of the hearing, as listed in the Appendix attached hereto.

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

Further, it is ORDERED that:

1. The Secretary shall serve a 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, and upon the Commission investigative attorney.

2. This Initial Determination shall become the determination of the Commission thirty (30) days after the service thereof, unless the Commission, within thirty (30) days after the date of filing of the Initial Determination shall have ordered review of the Initial Determination or certain issues therein, pursuant to 19 C.F.R. 210.54(b) or 210.55, or by order shall have changed the effective date of the Initial Determination.


John J. Mathias
Administrative Law Judge

Issued: July 24, 1984



