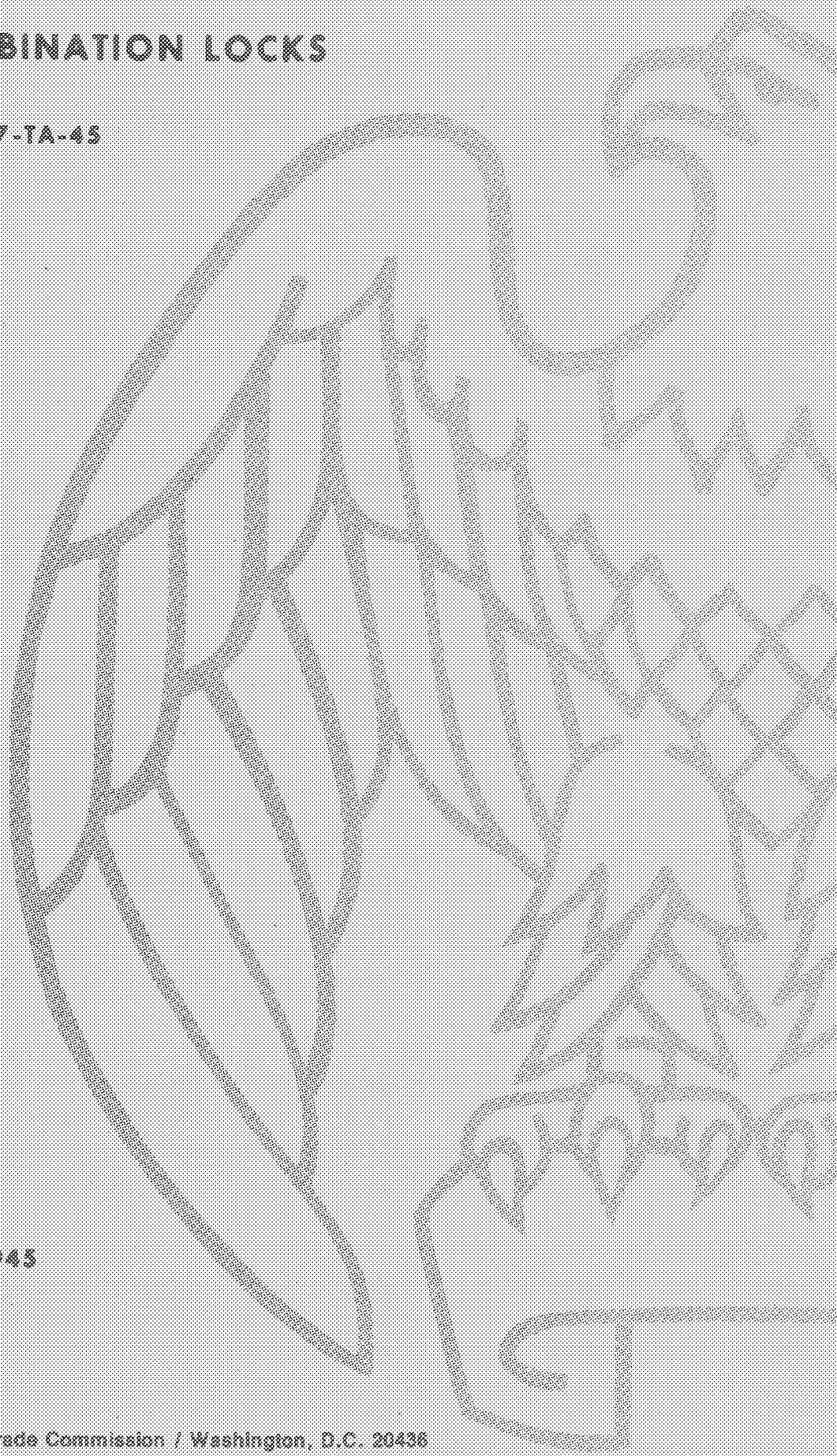


In the Matter of

CERTAIN COMBINATION LOCKS

Investigation No. 337-TA-45



USITC PUBLICATION 945

FEBRUARY 1979

UNITED STATES INTERNATIONAL TRADE COMMISSION

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of
CERTAIN COMBINATION LOCKS

Investigation No. 337-TA-45

COMMISSION DETERMINATION, ORDER, AND MEMORANDUM OPINION

Introduction

The United States International Trade Commission, pursuant to the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), conducted an investigation with respect to certain combination locks and vinyl attache cases bearing such locks allegedly covered by the claims of U.S. Letters Patent 3,416,338, owned by the complainant, Presto Lock Co., a division of Walter Kidde & Co., Inc. The Commission investigated alleged unfair methods of competition and unfair acts in the importation of these combination locks and attache cases bearing such locks 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.

This Commission determination, order, and memorandum opinion provides for the final disposition of investigation No. 337-TA-45 by the full Commission. It is based upon the Commission's unanimous determination, made

in public session at the Commission meeting of January 16, 1979, that there is no violation of section 337.

The text of the Commission's determination and order appear immediately below and are followed by the Commission's memorandum opinion.

Determination

Having reviewed the record in this investigation, including the evidentiary record developed before the presiding officer on July 25, 1978, the recommended determination of the presiding officer, the oral arguments and oral presentations before the Commission, and the pleadings of the parties, the Commission, on January 16, 1979, unanimously determined that, with respect to investigation No. 337-TA-45, there is no violation of section 337 of the Tariff Act of 1930.

More specifically, the Commission determined--

(1) With respect to respondent H.I.T. Industries, Ltd., that there is no violation of section 337 of the Tariff Act of 1930, as amended, in the importation into the United States of articles that meet the claim of the complainant's U.S. Letters Patent 3,416,338, and in their sale by the owner, importer, consignee, or their agents, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States; and

(2) That in view of the determination of no violation, there is no need for a remedy.

Commission Order

Accordingly, it is hereby ordered that--

1. Investigation No. 337-TA-45 is terminated by the issuance and publication of a notice of Commission determination and action in the Federal Register and by the issuance of this Commission determination, order, and memorandum opinion;

2. This order shall be served upon each party of record in this investigation and upon the U.S. Department of Health, Education, and Welfare, the U.S. Department of Justice, and the Federal Trade Commission; and

3. This order may be amended at any time.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: February 16, 1979.

Commission Memorandum Opinion

Procedural history

The complaint in this matter was filed with the Commission on January 12, 1978, by the Presto Lock Co., a division of Walter Kidde & Co., Inc., of Elmwood Park, N. J. The complaint alleged unfair methods and acts in the importation into the United States and sale of certain combination locks and vinyl attache cases bearing such locks, by reason of the alleged coverage of such locks by the claims of U.S. Letters Patent 3,416,338, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. An investigation was instituted and notice thereof was published in the Federal Register of February 16, 1978.

The complainant named H.I.T. Industries, Ltd., as importing or selling infringing articles. H.I.T. Industries was named as respondent in the notice of investigation and was duly served with a copy of the complaint and notice of the investigation.

Complainant initially requested both temporary and permanent relief, but withdrew the request for the former when it was determined that the proceeding before the presiding officer could be expedited. The hearing before the presiding officer was held on July 25, 1978. Only complainant and

the Commission investigative attorney participated in the hearing; respondent did not appear or offer evidence. 1/

The presiding officer forwarded his recommended determination of no violation of section 337 to the Commission on September 25, 1978.

Specifically, the presiding officer granted a motion offered by the Commission investigative attorney at the close of the hearing that the investigation be terminated on the principal ground that complainant had failed to sustain its burden of proving that the effect or tendency of the alleged unfair acts is to destroy or substantially injure the domestic industry in question. The granting of such a motion by a presiding officer when the Commission does not serve as presiding officer constitutes a recommended determination under section 210.51 of the Commission's rules. The presiding officer also found the subject patent to be valid, enforceable, and infringed and the relevant domestic industry to be efficiently and economically operated.

No exceptions to the recommended determination were filed by any of the parties within the 10-day period after service of the recommended determination provided therefor by section 210.54 of the Commission's rules, nor were any filed prior to the Commission hearing on December 1.

On December 1, 1978, the Commission held a hearing for the purpose of (1) hearing oral argument with respect to the recommended determination, and (2) receiving oral presentations with respect to the issues of relief,

1/ However, respondent participated in certain of the prehearing proceedings. Respondent also signed an affidavit agreeing not to import more luggage bearing the allegedly infringing locks. This affidavit was introduced into the hearing record by the Commission investigative attorney as exhibit No. 10.

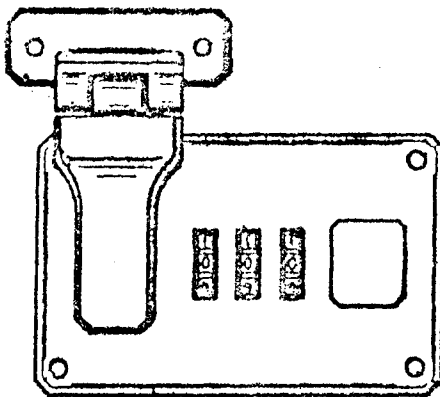
bonding, and the public interest. Notice to such effect was served upon the parties and appropriate Government agencies and departments and published in the Federal Register of November 1, 1978 (43 F.R. 50973). Only complainant and the Commission investigative attorney appeared at the hearing. Persons wishing to file posthearing briefs were given until December 11, 1978, to do so, and only complainant and the Commission investigative attorney filed such briefs. At the hearing and in posthearing briefs, complainant took exception to the presiding officer's recommended determination; the Commission investigative attorney supported the recommended determination.

No violation of section 337

Upon consideration of the presiding officer's recommended determination and the record in this proceeding, we have determined that there is no violation of section 337 of the Tariff Act of 1930, as amended, in the importation into the United States and in the sale of certain combination locks, including attache cases bearing such locks, that meet claim 1 of complainant's U.S. Letters Patent 3,416,338, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. We adopt the findings of fact and conclusions of law of the presiding officer.

Patented article.--The patented products are combination locks manufactured in accord with the claims of U.S. Letters Patent 3,416,338. The patented device is suitable for mounting on attache cases by manufacturers of such cases. The patented locks have assembly parts which interfit and

combinations which may be set without the use of tools. A drawing of the device is reproduced below.



Patent validity.--In the present case, the ownership and validity of complainant's suit patent were established by the stipulation of complainant and the Commission investigative attorney and by the production of a properly authenticated copy of the patent showing issuance by the Patent Office to complainant on December 17, 1968. Further, no party or other interested person asserted or sought to prove that the patent was invalid or unenforceable. A regularly issued patent is presumed valid as a matter of law and the burden of proving a patent invalid rests upon the party asserting invalidity. 1/ We therefore adopt the presiding officer's findings and conclusion on this issue of patent ownership and validity. 2/

1/ 35 U.S.C. 282; Solder Removal Co. v. U.S. International Trade Comm., et al., 582 F.2d 628, 632-33 (C.C.P.A. 1978).

2/ Recommended findings of fact 7 and 8 and conclusion of law 3.

Patent infringement. -- Patent infringement occurs whenever anyone "without authority makes, uses or sells any patented invention, within the United States, during the term of the patent therefor" 1/ Infringement is made out where accused matter falls clearly within the claim of a patent. 2/

In the present case, the presiding officer found the combination locks on the attache cases imported by respondent to infringe claim 1 of the suit patent. 3/ No one asserted, either at the July 25, 1978, hearing before the presiding officer or at the December 1, 1978, hearing before the Commission, or in any of the briefs or other relevant documents, that the articles found by the presiding officer to infringe did not in fact infringe.

During the course of the December 1 hearing before the Commission, we examined the physical exhibits and compared complainant's patented device and the allegedly infringing imported devices. As a result of that examination, we agree with the presiding officer that the imported articles are in fact infringing.

Injury.--We have determined that the effect or tendency of the unfair acts described above is not to substantially injure an industry, efficiently and economically operated, in the United States. We affirm the presiding officer's findings and conclusion that the appropriate domestic industry consists of that portion of complainant's business involved in the

1/ 35 U.S.C. 271(a).

2/ See Graver Tank & Mfg. Co., Inc., et al. v. Linde Air Products Co., 339 U.S. 605, 607 (1950).

3/ See recommended finding of fact 11 and conclusion of law 5.

production of the patented article, 1/ and that the industry is efficiently and economically operated. 2/

In determining whether the effect or tendency of unfair methods or acts is to destroy or substantially injure a domestic industry, the Commission in past cases has considered a number of factors, including the ratio of infringing imports to domestic production, the volume of imports, import trends, import prices (vis-a-vis domestic prices), foreign capacity, and sales and profit in the domestic industry. 3/ In making our determination in the present case, we have examined evidence relevant to these and similar factors.

At the December 1 hearing, complainant conceded that the record shows imports of approximately 30,000 infringing locks, for the most part in 1977, which constituted about 2 percent of complainant's production, 4/ that total sales are increasing despite a decline in domestic sales, 5/ that its profits are "excellent" and there is no real evidence of injury to its lock operations in terms of profit, 6/ that there is no specific evidence in the record of the loss of a customer to respondent, 7/ that it is operating at 80

1/ Recommended finding of fact 9 and conclusion of law 6.

2/ Recommended finding of fact 10 and conclusion of law 6.

3/ See, for example, Commission opinions in Certain Luggage Products, investigation No. 337-TA-39, USITC Publication 932, November 1978, at p. 11; Reclosable Plastic Bags, investigation No. 337-TA-22, USITC Publication 801, January 1977, at p. 14; and Chain Door Locks, investigation No. 337-TA-5, USITC Publication 770, April 1976, at pp. 40-41.

4/ Transcript, at pp. 13, 15.

5/ Transcript, at p. 24.

6/ Transcript, at p. 25.

7/ Transcript, at p. 26.

percent of capacity, 1/ and that it has not cut back its employment. 2/ Such evidence is not indicative, in our view, of substantial injury.

At the hearing and in its posthearing brief, complainant took issue with the presiding officer's recommended determination of no violation and asserted that the record supports a finding that the effect or tendency of the unfair acts or methods is to substantially injure the domestic industry. 3/ In support of its injury argument, complainant asserted, among other things, that the record shows that complainant's domestic sales declined last year, that there are nine producers of infringing locks in Taiwan, that these nine producers have substantial capacity to produce infringing locks, and that imported infringing locks undersell domestic locks. 4/

We agree with the presiding officer and the Commission investigative attorney that the record does not support a finding of effect of substantially injuring or tendency to substantially injure. While complainant is correct in noting that the record shows a decline in its domestic sales in 1977, the record also shows that complainant's total sales, including exports, have increased substantially in recent years. 5/ It appears that this decline in domestic sales and increase in exports reflects a continuing shift to foreign sources for attache cases. Complainant's assertion, based on nine

1/ Id.

2/ Transcript, at p. 38.

3/ Transcript, at p. 12; complainant's brief, at p. 4.

4/ Transcript, at pp. 10-11, 24; complainant's brief, at pp. 5-9.

5/ Recommended finding of fact 38.

controversial affidavits 1/ submitted at the hearing before the presiding officer, that there are nine producers of infringing locks in Taiwan and that these nine producers have substantial capacity 2/ does not prove, absent something further, an effect of substantially injuring or tendency to substantially injure. The affidavits do not show that any of the nine manufacturers ever exported or planned to export infringing locks to the United States. Further, we agree with the Commission investigative attorney that, assuming the affidavits to be accurate, evidence of foreign capacity even if coupled with a large U.S. market does not show a tendency to injure absent a strong showing that foreign manufacturers intend to direct their capacity toward penetrating the U.S. market. 3/ Such evidence of intent to penetrate the U.S. market could consist of outstanding orders or offers to sell in the United States or the existence of past importers in the United States which have demonstrated an intent to continue importing, but there is no such evidence. Finally, complainant is correct in asserting that the

1/ "Controversial" because all were almost identically worded, were untimely filed (at the hearing and after discovery had been concluded, allowing other parties almost no opportunity to cross-examine affiants), and one of them was substantially impeached by an affidavit submitted by the Commission investigative attorney. (The nine affidavits appear in the record as complainant's exhibits 32-40; complainant's affidavit exhibit 38 was substantially impeached by the Commission investigative attorney's affidavit exhibit 11.) The presiding officer concluded that serious doubts as to the credibility of the affidavits precluded their being accorded any substantial probative weight. See the presiding officer's recommended determination, at p. 28.

2/ Complainant did not state where such evidence of foreign capacity could be found in the record. From our review of the record, it appears that the nine affidavits are the source.

3/ Brief of the Commission investigative attorney, at p. 6.

infringing locks undersell domestic locks. 1/ However, underselling in the absence of evidence of significant import penetration, lost sales, decline in profit, and so forth is not indicative, in our view, of the requisite effect of substantially injuring or tendency to substantially injure. Thus in summary, complainant's exceptions presented at the hearing and in its posthearing brief do not suggest to us that the Commission should come to a conclusion other than that recommended by the presiding officer on this question.

At the December 1 hearing complainant questioned the enforceability of the affidavits of respondent and three nonparty importers not to import. 2/ Complainant asserted that the four firms remain "willing importers" and that there is no assurance that they will abide by their affidavits. 3/ The Commission has relied in numerous previous patent cases on such assurances. If the affiants abrogate their agreements and resume importing attache cases bearing infringing locks, complainant may subsequently bring this fact to the Commission's attention, and the Commission will take such action as it deems necessary at that time. However, the question is moot

1/ See recommended finding of fact 47.

2/ The affidavits were submitted by respondent (recommended finding of fact 35 and Commission investigative attorney's exhibit 10) and by nonrespondents Creative House (recommended finding of fact 29 and Commission investigative attorney's exhibits 5, 6 and 13), U.S. Luggage & Leather Products Co., Inc. (recommended finding of fact 32 and Commission investigative attorney's exhibit 1), and Barker International Industries (recommended finding of fact 34 and Commission investigative attorney's exhibit 9).

3/ Transcript, at p. 9; complainant's brief, at pp. 4-6.

in this case because the effect or tendency of the unfair acts is not to substantially injure even in the absence of the affidavits.

Conclusion

For the foregoing reasons, we have determined that there is no violation of section 337 in this case.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D. C.

In the Matter of)
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CERTAIN COMBINATION LOCKS)

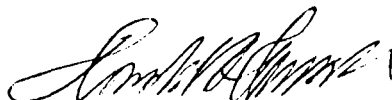
Investigation No. 337-TA-45

NOTICE OF CONTINUANCE OF PRELIMINARY CONFERENCE

Notice is hereby given that the Preliminary Conference in this matter previously scheduled for March 14, 1978 is continued until March 30, 1978 at 10 a.m., in the ALJ Hearing Room, Room 610, Bicentennial Building, 600 E Street, N.W., Washington, D.C. Notice of this Preliminary Conference was first made in the Notice of Consolidated Preliminary Conference issued March 3, 1978 and published in the Federal Register at 43 FR 9541. The purpose of this preliminary conference is to establish a discovery schedule, to discuss the procedures to be followed in pursuing such discovery, to set the dates for the Prehearing Conference and Temporary Relief Hearing, and to resolve any other matters necessary to the conduct of this investigation.

If any questions should arise not covered by these instructions, the parties or their counsel shall call the chambers of the undersigned Presiding Officer.

The Secretary shall serve a copy of this Notice upon parties of record and shall publish this Notice in the Federal Register.



Judge Donald K. Duvall
Presiding Officer

Issued March 17, 1978

(1) That, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. 1337), an investigation be instituted to determine, under subsection (c) whether, on the basis of the allegations set forth in the complaint and the evidence adduced, there are violations or there is reason to believe there are violations of subsection (a) of this section in the unauthorized importation of certain combination locks and vinyl attache cases bearing such locks into the United States, or in the sale thereof, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The alleged violations of subsection (a) of this section consist of allegations that such imported articles infringe claims 1-5 of U.S. Letters Patent No. 3,416,338, which patent is wholly owned by Presto Lock Company.

(2) That, for the purpose of the investigation so instituted, the following person, alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, is hereby named as the respondent upon which the complaint and this notice are to be served:

Importer

H.I.T. Industries, Ltd.
22-C Cragwood Road
Avenel, New Jersey 07001

(3) That, for the purpose of the investigation so instituted, Judge Myron R. Renick, Chief Administrative Law Judge, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed as presiding officer, and

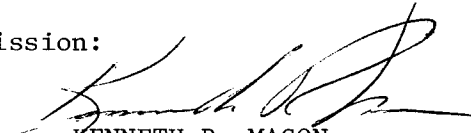
(4) That, for the purpose of the investigation so instituted, JoAnn Miles, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby named Commission investigative attorney.

Responses must be submitted by the named respondent in accordance with section 210.21 of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of the respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute waiver of the right to appear and contest the allegations of the Complaint and of this notice, and will authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The complaint, with the exception of confidential information referred to therein, is available for inspection by interested persons at the Office of the Secretary, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City Office of the Commission, 6 World Trade Center.

By order of the Commission:


KENNETH R. MASON
Secretary

Issued: February 13, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C. 20436

In the Matter of:
CERTAIN COMBINATION LOCKS

Investigation No. 337-TA-45

NOTICE AND ORDER

CONCERNING PROCEDURE FOR COMMISSION

DETERMINATION AND ACTION

Notice is hereby given that --

1. The Commission will hold a hearing beginning at 10:00 a.m., e.s.t., Friday, December 1, 1978, in the Commission's Hearing Room, 701 E Street, N.W., Washington, D.C., for the purposes of (1) hearing oral argument on the recommended determination of the presiding officer concerning whether there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337); and (2) receiving oral presentations with respect to the subject matter of section 210.14(a) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.14(a)) concerning relief, bonding, and the public interest factors set forth in subsections (d) and (f) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), which factors the Commission is to consider in the event it determines that relief should be granted. The

latter proceeding is legislative in character, and therefore the hearing on remedy, bonding, and public interest will not be subject to the requirements of 5 U.S.C. 556, 557. Instead, this phase of the hearing will be conducted in accordance with section 201.11 of the Commission's Rules of Practice and Procedure (19 C.F.R. 201.11). These matters are all being heard on the same day in order that this investigation may be completed within the time limits prescribed by the statute and to minimize the burden of this hearing upon the parties.

Parties and agencies wishing to make oral argument with respect to the recommended determination shall be limited in each oral argument to not more than 30 minutes, 10 minutes of which may be reserved for rebuttal by the staff and complainant.

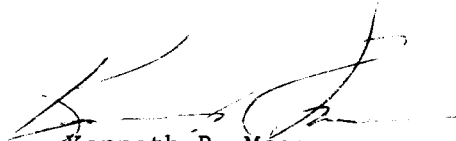
For that part of the hearing devoted to relief, bonding, and the public interest, parties, interested persons, and Government agencies will be limited in their presentations to no more than 15 minutes. Participants will be permitted an additional 5 minutes for closing arguments after all presentations have been concluded. The Commission's investigative staff will be allotted the full time available to a party.

Requests for appearances at the hearing should be filed, in writing, with the Secretary of the Commission at his office in Washington no later than close of business, Friday, November 24, 1978. Requests should indicate the part of the hearing (i.e., with respect to the recommended determination, relief, bonding, the public interest factors, or any combination thereof) in which the requesting person desires to participate.

2. Written submission from the parties, other interested persons, Government agencies and departments, governments, or the public with respect to the recommended determination and the subject matter of subsections (a)(1), (a)(2), and (a)(3) of section 210.14 of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.14(a)(1), (2), and (3)) concerning remedy, bonding, and the public interest will be considered if received by the Commission by Monday, December 11, 1978.

Notice of the Commission's institution of the investigation was published in the Federal Register of February 16, 1978 (43 F.R. 6945).

By order of the Commission:



Kenneth R. Mason
Secretary

Issued: October 27, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
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CERTAIN COMBINATION LOCKS)
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Investigation No. 337-TA-45

NOTICE OF
COMMISSION DETERMINATION AND ACTION

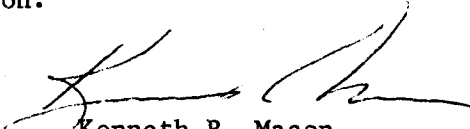
Upon consideration of the presiding officer's recommended determination and the record in this proceeding, the Commission orders the termination of investigation No. 337-TA-45, Certain Combination Locks, on the basis of a unanimous Commission determination that no violation of section 337 of the Tariff Act of 1930, as amended, exists.

This Commission order is effective on the date of its publication in the Federal Register. Any party wishing to petition for reconsideration must do so within fourteen (14) days of service of the Commission determination. Such petitions must be in accord with section 210.56 of the Commission rules (19 CFR 210.56). Any person adversely affected by a final Commission determination may appeal such determination to the United States Court of Customs and Patent Appeals.

Copies of the Commission's determination, order, and memorandum opinion (USITC Publication 945, February 1979) are available to the public during official working hours at the Office of the Secretary, United States

International Trade Commission, 701 E Street NW., Washington, D.C. 20436,
telephone (202) 523-0161. Notice of the institution of the Commission's
investigation was published in the Federal Register of February 16, 1978 (43
F.R. 6845).

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: February 16, 1979

Library Cataloging Data

U.S. International Trade Commission.

In the matter of: certain combination
locks. Investigation no. 337-TA-45. Wash-
ington, 1979.

14 p. 28 cm. (USITC Publication 945)

1. Locks and keys. I. Title. II. Title:
Certain combination locks.

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

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