

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:)
)
RECLOSABLE PLASTIC BAGS)
)

Investigation No. 347-TA-22

COMMISSION MEMORANDUM OPINION IN
SUPPORT OF THE COMMISSION ACTION



USITC Publication 801
Washington, D.C.
January 1977

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.
January 17, 1977

In the Matter of:)
)
RECLOSABLE PLASTIC BAGS) Investigation No. 337-TA-22
)

COMMISSION MEMORANDUM OPINION 1/

Procedural history

On October 20, 1975, Minigrip, Inc., of Orangeburg, N.Y., filed a complaint with the Commission under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), alleging that certain respondents violated section 337 by the unlicensed importation and sale in the United States of reclosable plastic bags covered by claims 1 and/or 2 of U.S. Patent No. 3,198,228, and/or covered by U.S. Trademark Reg. No. 946,120, the effect or tendency of which is to destroy or substantially injure a domestic industry which is efficiently and economically operated in the United States. Named as respondents in the complaint were 4 foreign manufacturers of said bags, 7 foreign exporters, and 10 distributors of the imported bags in the United States. Two other domestic manufacturers of reclosable plastic bags subsequently joined Minigrip, Inc., as cocomplainants. These were KCL Corp., Shelbyville, Ind., and Millhiser, Inc., of Richmond, Va.

1/ The views of Commissioner Ablondi are set forth in attached opinion.

The complaint was the subject of a preliminary inquiry by the Commission investigative staff. On January 12, 1976, a public notice of the institution of an investigation of the complaint was issued by the Commission. Ten firms were named as respondents in addition to those named in the complaint. Another respondent, Sungem Co., was formally added as a respondent by order of the Commission on May 5, 1976.

Formal responses to the complaint were filed by Alberto Ades, Gordon Co., Imperial Gems, and Sungem Co. Letters concerning the investigation were also received by the Commission Secretary from House of Onyx, Jadco Supply, Polishook and Son Corp., and VSI Corp. (formerly Furst Bolt & Screw Co.), but these letters were not served on any of the parties to the investigation.

On July 27, 1976, a hearing commenced before the presiding officer in the investigation to determine whether there is a violation under section 337 as alleged in the complaint. The only parties which appeared at the hearing were Minigrip, Inc., KCL Corp., Millhiser, Inc. (represented by Minigrip's counsel), respondent Alberto Ades, and the Commission investigative staff. The hearing continued until August 4, 1976, when it was adjourned. Provision was made by the presiding officer for the submission of certain limited evidence by August 24, 1976, and for the subsequent submissions of briefs and reply briefs by all parties. Thereafter, complainant Minigrip, respondent Ades, and the Commission investigative staff filed additional exhibits and briefs.

On October 4, 1976, the presiding officer issued a recommended determination in the investigation under section 210.53 of the Rules of Practice and Procedure of the Commission that the Commission find a violation of

section 337 with respect to the patent count but not with respect to the trademark count. Exceptions to the recommended determination were filed by respondent Ades (an extensive brief accompanied these exceptions), 1/ and complainant Minigrip.

On October 18, 1976, the Commission issued a notice and order announcing a schedule for briefs with respect to the recommended determination and ordering a hearing for December 16, 1976, before the Commission to hear argument with respect to the recommended determination and to hear argument and receive information concerning appropriate relief, bonding, and the public interest factors set forth in subsections (d) to (f) of section 337. The notice and order also provided for the filing by complainants of a proposed order granting relief, and advice and information was requested from the Department of Justice, the Department of Health, Education, and Welfare, and the Federal Trade Commission, pursuant to subsection (b)(2) of section 337.

Briefs in support of the recommended determination were received from complainant Minigrip and the Commission investigative staff. The Commission held its scheduled hearing on December 16, 1976, with complainant Minigrip and the investigative staff appearing. No substantive advice or information was received from the two departments and one agency contacted.

Consideration of the issues presented

Pursuant to section 337 the following issues are considered by the Commission: (1) Whether there is a violation of section 337, and, if so, (2) what remedy should be afforded for such violation, and (a) whether that remedy should be withheld in light of the public interest factors set

1/ On Oct. 18, 1976, counsel for respondent Ades withdrew.

forth in amended section 337 1/ and (b) if a remedy order issues, what amount of bond should be set.

Having reviewed the recommended determination of the presiding officer, the record developed at the hearing before the presiding officer, and the record of the December 16, 1976, hearing before the Commission, and having considered all the arguments, relevant submissions, and other appropriate information, the Commission finds itself basically in agreement with the findings of fact and conclusions of law of the presiding officer.

Determination and order of the Commission

We have found, therefore, that there are violations of section 337 in the unlicensed importation into the United States of reclosable plastic bags by reason of their having been made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,198,228 and in their unlicensed sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated in the United States. After considering the public interest as required by statute, we have also directed the exclusion of the articles concerned from entry into the United States for the term of the patent, and have determined the amount of the bond required by subsection (g)(3) of section 337 to be 100 percent of the value of the articles concerned. The precise determination and order of the Commission is set out at the beginning of this opinion.

1/ If the Commission determines that there is a violation of sec. 337, it may order the appropriate statutory relief to remedy the violation unless, after considering the effect of such remedy upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, it finds that relief should not be ordered.

In addition, we have found that there is no violation of section 337 in the importation of reclosable plastic bags into the United States which allegedly infringe U.S. Trademark Reg. No. 946,120, since the effect or tendency of such alleged infringement is not to substantially injure or destroy an industry, efficiently and economically operated, in the United States, to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.

Jurisdiction.--Under section 337, the Commission's subject matter and personal jurisdictions are very broad. The Commission adopts the findings of fact and conclusions of law in the presiding officer's recommended determination which support the Commission jurisdiction in this investigation and to which no persuasive exceptions have been taken.

Violation of section 337.--The first matter to be considered by the Commission is whether there is a violation of section 337 on the facts in this investigation. In the recommended determination, the presiding officer made 220 "findings of fact." On October 14, 1976, respondent Ades' attorney filed an extensive list of exceptions to a substantial number of these findings. 1/ Those findings to which respondent's attorney did not take exception are not at issue; only the excepted findings will be discussed herein. Respondent's attorney also took exception to each of the proposed conclusions of law of the presiding officer.

1/ Respondent took specific exceptions to the following findings in the recommended decision of the Administrative Law Judge: 1, 2-8, 44, 45, 46, 47, 51, 57-59, 76-95, 99-100, 101-116, 117-126, 127-153, 154-157, 158-171, 172-175, 176-213, and 214-220.

The presiding officer's recommended findings with respect to certain imported plastic bags reading on the claims of the patent at issue have not been objected to. Further, with respect to the plastic bags imported by persons other than named respondents, the evidence of the shadowgraph tracings and testimony in the record indicate that these bags do read on the patent claims in issue. It is clear that should the '228 patent be held valid, the imported reclosable plastic bags of this investigation would infringe the said patent, and, therefore, would constitute an unfair act or unfair method of competition, as has been repeatedly held by the Commission. No exceptions were made to this conclusion.

Moreover, there have been no exceptions taken to the recommended findings of fact (60-75) and no substantial exceptions to the recommended conclusions of law 6c(1-18), regarding invalidity of the '228 patent because of alleged fraud on the Patent and Trademark Office (PTO) and the introduction of new matter by amendment. These findings, holding the patent not invalid on these grounds, need not be discussed.

Therefore, the remaining issues to be discussed regarding the question of violation can be broadly classified into seven major areas of consideration:

- 1) Patent validity;
- 2) Laches and unclean hands;
- 3) Patent exhaustion;
- 4) Violations of the antitrust laws;
- 5) The efficiently and economically operated domestic industry;
- 6) Injury to the domestic industry; and
- 7) The trademark.

1. Patent validity

Under section 337(c), "all legal and equitable defenses may be presented" in section 337 investigations with respect to the question of violations. Respondent Ades raised the defense of patent invalidity in this investigation, and excepted to the presiding officer's finding that the patent is valid.

The only patent claims involved in this case are claims 1 and/or 2 of U.S. Letters Patent No. 3,198,228, which since the hearing before the presiding officer has been reissued by the PTO as Re. 28,969. The date of reissue was September 21, 1976. Therefore, Re. 28,969 now stands in the place of the earlier '228 patent, and it has the same effect and operation in law as if it had been the patent at the original cause for action. ^{1/} By law, its termination date is also the same as the original '228 patent.

The validity of the '228 patent was attacked on three basic grounds. The first was on the prior art, the second was on fraud, and the third was on the addition of new matter to the application. We will discuss only the prior art defense, as no exceptions were taken to the presiding officer's findings and conclusions regarding the other grounds, as noted above.

The attack on validity on the basis of prior art is based upon one U.S. patent, the Freedman patent (No. 2,133,755), and two Japanese patents (No. 32,10736 and No. 35,22217). The Freedman patent was considered by the PTO both in the original application for the '228 patent and in the reissue application that was granted just subsequent to the hearing before the

^{1/} See 35 U.S.C. 251 and 252.

presiding officer. This means that in two separate instances the PTO considered the Freedman patent and found that the claims of the '228 patent were patentable over the Freedman patent. Since we have no new evidence before us that was not before the PTO, and are in agreement with the PTO and with the presiding officer and his findings that such patents are not invalidated by prior art, we do not find the '228 patent invalid on the basis of prior art for the purposes of this adjudication.

2. Laches and unclean hands

Laches is an equitable doctrine which asserts that long-neglected rights cannot be enforced. It was presented by respondent Ades in this investigation as a defense to a finding of violation, the assertion being that complainant did not, in a timely manner, seek to protect his rights under the patent in issue. Laches signifies not only undue lapse of time in enforcing a right of action and failure to act promptly, but also that the adverse party has been led by the neglect of the enforcing party to change his position as to the property or right in question. As an equitable defense, laches is used when good conscience requires it.

Section 337 mandates that once the Commission finds an unfair method of competition or an unfair act in the importation of articles into the United States, it must rectify the situation. There is no requirement that the unfair act be discovered by a certain time. Even if the unfair act is discovered at a late date or reported at a late date by the complainant, the Commission is still free to rectify the situation.

Mr. Ausnit, president of Minigrip, testified in the hearing before the presiding officer that respondent Ades agreed orally to cease importation

of infringing bags in 1973 pursuant to a sales agreement with Minigrip. The record further demonstrates that Ades did not import any reclosable bags covered by the patent in issue following his sales agreement with Minigrip and thereby supports the existence of such an oral agreement to cease importation of infringing bags. 1/ On the basis of these facts and findings (76-95) of the presiding officer, we hold that the doctrine of laches and unclean hands is inapplicable in this case.

3. Patent exhaustion

The law of domestic patent exhaustion holds that the first sale of a patented product "exhausts" the patent control by the patentee (Adams v. Burke, 17 Wall 453 (1883)). Therefore, the patent confers no right upon the patentee to attempt to control the destiny of a product after it has been sold (Keeler v. Standard Folding Bed Co., 157 U.S. 659 (1895)).

In Boesch v. Graff (133 U.S. 697 (1889)), the Supreme Court held that the rights of a licensee under a foreign patent have no bearing on the rights accorded under U.S. patent laws. Since the reclosable plastic bags at issue are protected by a U.S. patent (reissue patent No. 28,969), no foreign license on the same product can interfere with the rights granted the U.S. patentee by U.S. patent laws. Therefore, Minigrip's patent rights in the United States cannot be diminished by the importation of reclosable plastic bags made by a licensee under a corresponding patent in another country.

1/ See p. 24 (finding 85) of the recommended determination of the presiding officer, dated Oct. 4, 1976.

Moreover, the doctrine of patent exhaustion is inapplicable to the case before us since there is no evidence on the record that Hong Ter Products Co., Ltd., or any other foreign respondent had a license to sell the reclosable plastic bags in question after 1973. ^{1/} Therefore, we adopt the findings of the presiding officer (99 and 100) that hold the inapplicability of the doctrine of patent exhaustion.

4. Violations of the antitrust laws

The antitrust charges by respondent Ades are raised as a defense to a finding of violation under section 337, and fall basically into four different categories. The first is the charge of division of markets, the second is the charge of accumulation of patents, the third is the charge of a grant-back provision, and the fourth is the charge of exclusive dealership.

Regarding the charge of division of markets, it is well-settled law that the division of markets through the "field of use" limitation is perfectly acceptable. An invention may have applications in more than one field or industry. A patent owner may limit an assignment or license on lines drawn according to field of use (General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 37 U.S.P.Q. 357, reargued 305 U.S. 124, 39 U.S.P.Q. 329 (1938)). In the instant case, the licensor was merely limiting

^{1/} See p. 28 (finding 100) of the recommended determination of the presiding officer, dated Oct. 4, 1976.

the use of the patented product to the industrial area on the one hand, and the retail area on the other.

The next antitrust charge was the accumulation of patents. It is well-settled law that the mere accumulation of patents, no matter how many, is not in and of itself illegal (Automatic Radio Manufacturing Co. v. Hazeline Research, Inc., 339 U.S. 837, 834 (1950)). We find nothing wrong with the fact that Minigrip has about 50 patents in this and other fields. Improvement and collateral patents are necessary in many instances to spur the growth of a small business and to justify investment for expansion. However, it must be kept in mind that only one patent is relevant to the instant case, and that is patent Re. 28,969.

The third antitrust charge is that of a grant-back provision. In Transparent-Wrap Machine Corp. v. Stokes & Smith Co. (329 U.S. 637, 648 (1947)), the Supreme Court stated that a grant-back, i.e., a covenant in a patent license that requires the licensee to assign improvement patents to the licensor, is not "illegal per se and unenforceable." This rule has been applied where there is no evidence that the grant-back provision constitutes an undue restraint or exerts an adverse effect on trade or commerce. Therefore, grant-back provisions are legal even when they cause the licensee to give up complete rights to his improvement invention to his licensor.

In the instant case the grant-back provision is legal, since it does not even call for the licensee to give up its control of any improvement invention, i.e., it does not call for the licensee to assign the improvement patent back to the licensor. It merely requires the licensee to allow the licensor to use the improvement invention of the patent by granting a nonexclusive license to use the improvement to the licensor. The licensee still has complete control and dominion over it.

The licensee may assign it to another, or license it to others at the same time.

The fourth charge is that Minigrip maintains a network of exclusive distributorships in violation of the antitrust laws. We find that the evidence does not support the existence of such a network, and agree with the presiding officer in this matter. Under our reading of U.S. v. Arnold Schwinn & Co. (388 U.S. 365 (1967)), and U.S. v. Arnold Schwinn & Co. (1968 CCH Trade Cases para. 72, 480 (N.D. Ill, 1968)), the distributorship arrangements disclosed by the facts in this investigation are not in violation of the antitrust laws.

5. The efficiently and economically operated domestic industry

We agree with the conclusion (8 and 9) of the presiding officer that the domestic industry in this investigation is composed of Minigrip, KCL, Millhiser, and Dow Chemical Co.--those firms in the United States which produce reclosable plastic bags covered by the claims of patent '228 and the reissue patent. 1/

The Commission notes that the findings of the presiding officer that describe the numerous facets contributing to the efficient and economical operation of the domestic industry are not challenged by Ades. 2/ Moreover, counsel for Ades stipulated that the reclosable-plastic-bag operation of Millhiser is efficiently and economically operated. Thus, respondent Ades' objection is not to the fact that the domestic industry

1/ See p. 58 (conclusion 8 and 9 of the recommended decision of presiding officer, dated Oct. 4, 1976).

2/ See findings of the recommended decision of the presiding officer, dated Oct. 4, 1976.

is operated efficiently and economically, but that it received its technology from the original Japanese patent holder. 1/ Since this in no way prevents the efficient and economic operation of the domestic industry, but aids it, we adopt the presiding officer's findings that the domestic industry involved is efficiently and economically operated.

6. Injury to the domestic industry

Respondent takes numerous exceptions to the presiding officer's findings regarding the issue of whether the unfair acts of infringement have the effect of substantially injuring or tendency to substantially injure the relevant domestic industry. We adopt the recommended findings of the presiding officer as respondent's exceptions and arguments are unpersuasive.

Respondent objects to certain findings based on hearsay evidence. While the Commission prefers primary evidence whenever possible, the traditional common law rules of evidence were developed for formal adversary adjudication before judge and jury and are not strictly applicable to the modern administrative proceeding. Evidence inadmissible by common law standards may be admissible in administrative adjudications so long as it is of the kind that usually affects fairminded men in the conduct of their daily and more important affairs. 2/ Sections 210.42 and 210.36(b)(4) of the Commission's rules allow for use of hearsay evidence. Hearsay may be admitted if it appears reliable, and it should be admitted if the nature of the information and the state of the particular record make it useful. In the instant case, admission of hearsay evidence is necessary because of the refusal of all but one of the foreign respondents to answer the complaint or the Commission

1/ See pp. 22 and 23 of respondent's "Exceptions to Recommended Determination," filed Oct. 14, 1976.

2/ NLRB v. Remington Rand, 94 F.2d 862, 873 (2d Cir. 1938) cert. denied, sec. 1401, 1410-1412 (1958).

investigative staff's questionnaire. The hearsay evidence was often corroborated by exhibits and documentary evidence. In these circumstances, we find that the evidence does appear reliable, and we agree with its admission by the presiding officer.

The presiding officer's findings of fact (154-213) on injury were an extensive compilation of testimony which provided direct and indirect evidence that the unfair acts found to exist do tend to substantially injure the domestic industry. These findings of fact show underselling of the domestic industry's product by the infringing bags, a small but increasing level of market penetration by the infringing bags, lost sales (which are likely to increase) by the domestic industry to infringing bags, and substantial capacity by the exporters of the infringing bags to increase exports of such bags to the United States, with numerous willing importers in the United States. Because of the weight and breadth of this evidence, we are convinced that there is a tendency toward substantial injury to the domestic industry involved. We adopt the findings (154-213) of the presiding officer with respect to injury to the domestic industry.

7. The trademark

The Commission agrees with the recommended determination of the presiding officer, excepted to by complainant Minigrip, that the effect or tendency of any infringement of complainant's trademark is not to substantially injure or destroy the relevant domestic industry. In the absence of the patent infringement which we have found to exist, imports of bags which may infringe complainant's trademark have not been shown by the evidence to have the injurious effect required by the statute, and we

are not prepared to infer such effect. The primary, if not the sole, success of the imports under consideration would seem to derive from the inclusion of the patented invention (the reclosable device) in them, and not from the inclusion of the trademark.

Remedy.--Turning to the issue of appropriate remedy, we have directed, as a result of the determination of violation, that the unlicensed articles concerned--reclosable plastic bags made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,198, 228 (Re. 28,969)--be excluded from entry into the United States for the term of this patent. Our reasoning for arriving at this conclusion is the same as for our decision in Chain Door Locks: Investigation No. 337-TA-5 (USITC Publication 770, 1976, pp. 41-42). Further, it is to be remembered that the essential patent right of a patentee is the right to exclude others from making, using, or selling its patented product in the United States for a fixed period of years. Also, in the situation revealed by the facts of this investigation, i.e., numerous importers and exporters of the infringing bags, with easy entry into either category, the exclusion order directed by the Commission prevents avoidance of an in personam remedy of cease and desist by switching importers and exporters from those active at the time of the remedy finding.

Public interest.--We find that after considering, pursuant to section 337(d), the effect of exclusion of the articles under consideration upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive products, and U.S. consumers, the infringing articles should be excluded from entry. No evidence was submitted to the Commission by the parties to the investigation or by the

Government agency and departments contacted by the Commission which would show an adverse effect on the relevant public interests by the exclusion of infringing bags from entry into the United States. It appears that the domestic industry has been and will be able to provide adequate quantities of dependable products of reasonable quality at fair prices.

Bonding.--We have determined that the bond provided for in subsection 337(g)(3) is to be prescribed by the Secretary of the Treasury in the amount of 100 percent of the value of the articles concerned, f.o.b. foreign port. The infringing imported bags undersell the domestic product by varying amounts, some quite substantial. In our opinion, this full-value bond will largely offset any competitive advantage resulting from the unfair acts of importation or sale of the infringing articles in this case. 1/

1/ Chairman Minchew determined that the amount of the bond should be 300 percent of the value of the articles concerned, f.o.b. foreign port. The Chairman believes that the 300-percent bond would be more equitable because of the great disparity in prices between the costs of production of foreign bags and those of domestic bags, since domestic bags cost at least four times more than foreign bags.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

January 17, 1977

In the Matter of:)
)
RECLOSABLE PLASTIC BAGS) Investigation No. 337-TA-22
)

SEPARATE OPINION OF COMMISSIONER ITALO H. ABLONDI

Upon review of the entire record in this investigation and the oral argument before the full Commission, I determine that there are no violations of section 337 in the unlicensed importation into the United States of reclosable plastic bags by reason of their having been made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,198,228 (which reissued as U.S. Patent Re. 28,969 on September 21, 1976) and in their unlicensed sale by the owner, importer, consignee, or agent of either, since there is no effect or tendency to substantially injure an industry which is efficiently and economically operated in the United States.

In making this determination, I have considered the relevant industry to consist of all domestic facilities engaged in the production of reclosable plastic bags in accordance with the above-mentioned patent. There are currently four domestic firms which manufacture reclosable plastic bags: Minigrip, Inc., KCL Corp., Millhiser, Inc., and the Dow Chemical Company. KCL and Millhiser manufacture the reclosable plastic bags pursuant to franchise agreements with Minigrip, and, like Minigrip, sell only to the industrial market. Under its exclusive license, Minigrip has also granted a sublicense to Dow which, by the terms of the agreement, requires Dow to sell exclusively through the retail

market. The firms manufacture products which are intrinsically the same and each firm is properly considered a part of the same industry.

Information received during this investigation regarding the financial condition of the industry producing plastic bags completely belies complainant's allegations of injury. Indeed, throughout the period of importation the industry has flourished.

Since 1970, sales of the domestic product have increased annually, rising from 145.8 million units in 1970 to 1.1 billion units in 1975. Production of reclosable plastic bags followed the same pattern, increasing from 173.4 million units in 1970 to 1.1 billion units in 1975. This growth is reflected in the number of production and related workers engaged in the manufacture of plastic bags, which more than doubled during the period 1970-75--increasing from 52 workers in 1970 to 130 workers in 1975. Furthermore, U.S. production per man-hour (output) by these workers more than doubled during the period 1970-75, increasing from 1,717 units in 1970 to more than 4,000 units in 1975.

Financial returns from both Minigrip and KCL reflect the same pattern of growth and prosperity. 1/ Net sales and operating profits of those two firms increased annually throughout accounting years 1971-75. In fact, the aggregate operating profits for both firms were substantial and exceeded the average operating profit of many other industries. It should also be noted that Minigrip's financial position is further bolstered by revenue which it derives under its license

1/ Profit-and-loss data from Millhiser, Inc., are not available.

agreement with Dow. Minigrip receives a fixed percentage of the net sales value of all bags sold by Dow.

Significantly, the largest producer of the domestic product, Dow Chemical Co., refused to participate in these proceedings. Dow, which controls 70 percent of the U.S. market, has reported, however, that it has not lost sales to foreign imports.

If substantial injury was imminent for the industry as a whole, Dow, from among all industry members, would stand to suffer the most, since it is the dominant member of the industry. Its nonappearance can only be interpreted as an indifference to imports.

The competitive position of the domestic industry is also enhanced by certain built-in protective hedges against competition from imports. For instance, foreign importers do not compete with U.S. industries for contracts with the General Services Administration (GSA). GSA purchases bags under provisions of the law which preserves the market solely for "small" U.S. producers. For Minigrip alone, GSA sales account for 10 to 12 percent of total sales per year.

Although data compiled by the Commission covers only the period through 1975, testimony received at the hearing confirms that during the period since the end of 1975, the condition of the domestic industry remains prosperous. As late as April 1976, Mr. Ausnit, the president of Minigrip, admitted that Minigrip had suffered no injury whatsoever and was running its production as follows:

Extruders were running, at that time, 7 days a week, 24 hours a day. Perhaps two of the extruders or three were not running on Sunday. All the rest were. The bag machines were running two shifts, 6 days a week. 1/

Moreover, testimony at the hearing before the presiding officer indicated that Minigrip had its extruders working so hard that there was some fear that they might break down.

When an unfair act under section 337 exists, a low level of import penetration is not by itself a controlling consideration, although it may be relevant to the question of injury. In this regard it should be noted that imported reclosable plastic bags have never represented more than 1.5 percent of total U.S. production. It does not appear that such a small quantity of imports could have the effect of substantially injuring or tendency to substantially injure the domestic industry.

The overall significance of the level of imports is put in perspective by the fact that U.S. exports of the subject product have consistently been at least 150 percent greater than imports of the foreign product. This is an indication of the domestic industry's ability to divert sales of its reclosable plastic bags for export purposes notwithstanding alleged underpricing.

Conclusion

I, therefore, find that the record does not sufficiently reveal an effect of substantially injuring or tendency to substantially injure an industry which is efficiently and economically operated in the United States,

1/ See p. 418 of the transcript of the hearing before the presiding officer, July 27 to Aug. 4, 1976.

and thus find no violation of section 337 in the unlicensed importation into the United States of reclosable plastic bags by reason of their having been made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,198,228 (which reissued as U.S. Patent Re. 28,969 on September 21, 1976) and in their unlicensed sale by the owner, importer, consignee, or agent of either. Since I determine that there is no violation under section 337, questions of remedy and bonding are not before me and will not be addressed.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

[337-TA-22]

RECLOSABLE PLASTIC BAGS

Commission Determination and Order

On the basis of the record in investigation No. 337-TA-22, Reclosable Plastic Bags, the United States International Trade Commission, 1/ under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and the Administrative Procedure Act (5 U.S.C. 551 et seq.)--

1. Determines that there are violations of section 337 in the unlicensed importation into the United States of reclosable plastic bags by reason of their having been made in accordance with claims 1 and/or 2 of the U.S. Patent No. 3,198,228 (which reissued as U.S. Patent Re. 28,969 on September 21, 1976) and in their unlicensed sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States;

2. Determines that there is no violation of section 337 in the importation of reclosable plastic bags into the United States which allegedly infringe U.S. Trademark Reg. No. 946,120, since the effect or tendency of such alleged infringement is not to substantially injure or destroy an industry, efficiently and economically operated,

1/ Commissioner Ablondi dissents from this determination and order except as to par. 2 of the determination.

in the United States, to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States;

3. Finds as a result of the determination of violation, and after considering the effect of an exclusion upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers, that the articles concerned, reclosable plastic bags made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,298,228 (Re. 28,969) should be excluded from entry into the United States for the term of this patent;

4. Determines that the bond provided for in subsection 337(g)(3) is to be as prescribed by the Secretary of the Treasury in the amount of 100 percent of the value of the articles concerned, f.o.b. foreign port.


ACCORDINGLY, IT IS ORDERED--

1. Articles made in accordance with claims 1 and/or 2 of U.S. Patent No. 3,198,228 (Re. 28,969) shall upon the publication of this notice in the Federal Register and until the expiration of such patent be excluded from entry into the United States except (1) as provided in paragraph 2 below of this order or (2) as such importation is under sublicense of the exclusive U.S. licensee of said patent.

2. Notwithstanding the foregoing, from the day after the day this order is received by the President pursuant to section 337(g) of the Tariff Act of 1930, as amended, until such time as the President approves or disapproves this Commission action (but in any event, no later than sixty (60) days after such day of receipt), the articles concerned shall be entitled to entry under bond in the amount of one hundred per centum (100%) of the value, f.o.b. foreign port, of the articles concerned.

3. This order will be published in the Federal Register and 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, the Federal Trade Commission, and the Secretary of the Treasury.

By order of the Commission.



KENNETH R. MASON
Secretary

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UNITED STATES
INTERNATIONAL TRADE COMMISSION
WASHINGTON, D. C. 20540

OFFICIAL BUSINESS

ADDRESS CORRECTION REQUESTED



PERMIT NO. 1788
USE TO ABOVE ADDRESS
POSTAGE WILL BE PAID BY ADDRESSEE

ADDRESS CHANGE
Remove from List
Change as Shown
Please detach address
label and mail to address
shown above