

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

CERTAIN COIN-OPERATED
AUDIO-VISUAL GAMES AND
COMPONENTS THEREOF

Investigation No. 337-TA-87

COMMISSION ACTION AND ORDER

Introduction

On May 22, 1980, Midway Mfg. Co., 10750 West Grand Avenue, Franklin Park, Illinois, filed a complaint with the U.S. International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). An amendment to the complaint was filed on July 9, 1980. The amended complaint alleged unfair methods of competition and unfair acts in the unauthorized importation of certain coin-operated audio-visual games into the United States, or in the unauthorized sale of such articles in the United States based upon common-law trademark infringement, passing off, imitation of trade dress, and false designation of origin. The complaint alleged that the effect or tendency of these unfair acts and methods of competition was to substantially injure an industry, efficiently and economically operated, in the United States.

On June 19, 1980, the Commission voted to institute an investigation regarding Midway's complaint. On June 20, 1980, a notice of investigation was issued and thereafter published in the Federal Register (45 F.R. 42891, June 25, 1980). On October 8, 1980, the notice of investigation was amended to add a count of copyright infringement.

Eight foreign and twelve domestic respondents were named in the original notice of investigation. Since institution of the investigation, several motions to add and/or terminate respondents have been granted by the Commission. The following respondents still remained in the investigation at the time the record was certified to the Commission:

1. Active Amusement Co.
2. Artic Electronics Co., Ltd.
3. Arjay Export Co.
4. Bonanza Enterprises, Ltd.
5. Chens International, Inc.
6. Circle International, Inc.
7. En'sco Co., Ltd.
8. Fuso Corp.
9. General Vending Sales Corp.
10. Hoei Sangyo
11. Hobby Industries, Ltd.
12. I.J.S., Inc.
13. International Trademarks
14. KEK Industries
15. Kyugo Co., Ltd.
16. Miyabi Inc., d/b/a Compu Game, Inc.
17. Nihon Bussan Co., Ltd., a/k/a Nichibutsu
18. Stan Rousso, Inc.
19. Taito of Japan
20. T.T. Sales & Service, a/k/a M. Enterprise, Inc.
21. Wesco

The names of the **games at issue** are the following: Moon Alien, Cosmic Alien, Fuso Karateco, Hoei Galaxy, Kyugo Galaxy, Fuso Galaxian, and Artic Galaxian.

The complainant in this investigation, Midway Mfg. Co. (Midway), is an Illinois corporation engaged in the business of manufacturing coin-operated audio-visual games and components thereof. Galaxian is Midway's trademark for its coin-operated audio-visual game.

In her recommended determination, filed on January 12, 1981, the Commission administrative

law judge (ALJ) recommended that the Commission determine that there is a violation of section 337 by reason of unfair acts in the importation of certain games into the United States or in their subsequent sale, the effect or tendency of which is to injure substantially an industry efficiently and economically operated in the United States. The ALJ recommended that the following respondents be found in violation of section 337: Hoei Sangyo; Nihon Bussan Co., Ltd. (Nichibucu); Artic Electronics Co., Ltd.; Fuso Corp.; Kyugo Co., Ltd.; Chens International, Inc.; Arjay Export Co.; I.J.S., Inc.; General Vending Sales Corp.; Taito Corp.; Stan Rousso, Inc.; Compu-Game, Inc. (Myabi); M. Enterprise, Inc., (T.T. Sales & Service), and Circle International. The ALJ also recommended that the Commission find no violation of section 337 as to 10 other respondents.¹ The ALJ found that respondents Hoei Sangyo et al., listed above, committed some or all of the following unfair acts: (1) common-law trademark infringement, (2) false designation of origin, (3) simulation of trade dress, and (4) copyright infringement.²

The Commission held a public hearing regarding exceptions to the ALJ's recommended determination, and on relief, bonding, and the public interest on March 16, 1981. Posthearing briefs were filed by complainant and by the Commission investigative attorney (CIA). A request to suspend the investigation was filed by Richard Kinney, Esq., to which complainant and CIA filed responses in opposition. The request was denied.

¹ Hobby Industries, Ltd.; En'sco Co., Ltd.; Universal Co., Ltd.; Universal U.S.A., Inc.; Wesco Co.; Active Amusement Co.; International Trademarks; Bonanza Enterprises, Inc.; KEK Industries, Inc.; and Sunrise New Sound, Inc.

² The issues listed in the notice of investigation (as later amended) were (1) common-law trademark infringement, (2) false designation of origin, (3) passing off, (4) misappropriation of trade dress, and (5) copyright infringement.

Because of the complexity of the copyright issue, the Commission published a Notice of Request for Further Briefing on May 4, 1981. As a result of the notice, the Commission received 15 amicus briefs on the copyright question.³

On June 9, 1981, at a public meeting, the Commission unanimously determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation and sale of certain coin-operated audio-visual games, kits and components thereof which infringe complainant's copyrights or common-law trademark or bear false designation of origin as to manufacturer. The Commission unanimously determined that an exclusion is the appropriate remedy. The Commission also unanimously determined that public interest considerations not preclude the granting of an exclusion order in this investigation and that a bond of 54 percent of the c.i.f. value of the imported articles is appropriate during the Presidential review period.⁴

Ac t i o n

Having reviewed the record compiled in investigation No. 337-TA-87 and the recommended determination of the ALJ, the Commission, on June 9, 1981, determined--

1. To deny the joint motion to terminate respondent Nichibutsu as a party respondent;

³ Briefs were submitted by the following: Richard Kinney, Esq., Richard H. Stern, Esq., and Jeffrey L. Squires, Esq.; Harold L. Novick', Esq.; Sega Enterprises, Inc., and Gremlin Industries Inc., (Sega/Gremlin); Omni Video Games, Inc., and Ferncrest Distributors, Inc.; Intel Corp.; Arthur L. Levine, Esq.; Finnegan, Henderson, Farabow, Garrett & Dunner; IBM; Kaye, Scholer Fierman, Hays & Handler; Williams Electronics, Inc.; and Atari, Inc.

⁴ The Commission also voted to deny the joint motion of complainant and respondent Nichibutsu to terminate Nichibutsu as a party respondent based upon a consent order agreement.

2. That there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation and sale of certain coin-operated audio-visual games, kits and components thereof which infringe complainant's copyright, common-law trademark, or bear false designation-as to manufacturer, the tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States;
3. That the appropriate remedy for such violation of section 337 is an exclusion order, pursuant to subsection (d) of section 337 of the Tariff Act of 1930 (19 U.S.C. 5 1337(d)), preventing the importation of certain coin-operated audio-visual games, kits and components thereof as follows:
 - A. Exclusion of the following coin-operated audio-visual games and kits and components therefor which infringe the complainant's copyrights in the attract mode of the Galaxian game and the first few moments of the play mode of that game: (1) Moon Alien, (2) Kyugo Galaxy, (3) Hoei Galaxy, (4) Taito Galaxian, (5) Karateco and Fuso Galaxian, and (6) Artic Galaxian.
 - B. Exclusion of coin-operated audio-visual games, kits or components thereof which infringe Midway's common law trademark through the use of the names Galaxian, Galaxy or Galaxip or which bear a false designation of origin.
4. That the public interest factors enumerated in subsection (d) of section 337 of the Tariff Act of 1930 (19 U.S.C. 5 1337(d)) do not preclude the issuance of an exclusion order in this investigation; and
5. That, as provided in subsection (g)(3), of section 337 of the Tariff Act of 1930 (19 U.S.C. §

1337(g)(3)) the appropriate bond during the period this matter is pending before the President is in the amount of 54 percent of the c.i.f. value of the imported articles.

Order

Accordingly, it is hereby ORDERED THAT-

1. The joint motion (Motion 87-16) of complainant and respondent Nihon Bussan Co., Inc., d/b/a/ Nichibutsu to terminate Nichibutsu as a party respondent on the basis of a consent order agreement is denied;
2. Certain coin-operated audio-visual games, kits and components thereof which infringe complainant's attract mode and the first few moments of the play mode before the player takes control of the game are excluded from entry into the United States--specifically, Moon Alien, Kyugo Galaxy, Hoei Galaxy, Taito Galaxian, Karateco and Fuso Galaxian, and Artic Galaxian.
3. All games, kits and components which infringe complainant's trademark or bear false designation of origin are excluded from entry into the United States.
4. The articles to be excluded from entry into the United States shall be entitled to entry under bond in the amount of 54 percent of the c.i.f. value of the imported articles from the day after this order is received by the President pursuant to subsection (g) of section 337 of the Tariff Act of 1930 (19 U.S.C. 5 1337(g)) until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after the date of receipt;

5. Notice of this Action and Order be published in the **Federal Register**;
6. A copy of this Action and Order, and of the Commission opinion in support thereof be served 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
7. The Commission may amend this Order in accordance with the procedure described in rule 211-57 of the Commission's Rules of Practice and Procedure (46 F.R 17533, Mar. 18, 1981).

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: June 25, 1981