

In the Matter of

**COIN-OPERATED
AUDIO-VISUAL GAMES
AND COMPONENTS THEREOF**

Investigation No. 337-TA-87



USITC PUBLICATION 1160

JUNE 1981

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

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

_____)
In the Matter of)
)
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 alleges 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 alleges that the effect or tendency of these unfair acts and methods of competition is 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 Co.

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. (Nichibutsu); 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 the 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 do 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/

Action

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--

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.

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

OPINION OF THE COMMISSION

I. PROCEDURAL HISTORY 1/

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 alleges unfair methods of competition and unfair acts in the unauthorized importation of certain coin-operated audiovisual 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, 2/ imitation of trade dress, 3/ and false designation of origin. The complaint alleges that the effect or tendency of these unfair methods of competition and unfair acts is to substantially injure an industry, efficiently and economically operated, in the United States.

Complainant seeks cease and desist orders against the domestic respondents and an exclusion order against the allegedly offending imported games and kits (i.e., circuit boards).

On June 19, 1980, the Commission instituted an investigation based on Midway's amended complaint. On June 20, 1980, a notice of investigation was

1/ In this opinion, the following abbreviations will be used: ALJ means the Administrative Law Judge. RD means Recommended Determination of the ALJ. CX means exhibit filed with the complaint. CPX means complainant's physical exhibit. IA means Commission Investigative Attorney. tr. means transcript of hearing before the Commission on March 16, 1981. TR. 1 means transcript of temporary exclusion order hearing.

2/ This count was subsequently waived by complainant and therefore the Commission need not address this issue. (Complainant's Pre-hearing Brief, p. 5, Aug. 11, 1980.)

3/ This count was also waived by complainant and thus will not be considered by the Commission. (Complainant's Brief, p. 2, Dec. 30, 1980.)

issued and thereafter published in the Federal Register (45 F.R. 42891, June 25, 1980). On October 8, 1980 on complainant's motion, the notice of investigation was amended to add a count of copyright infringement.

Eight foreign and 12 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. 4/

Seven respondents filed responses or answers to the complaint and three parties appeared at the prehearing conference on July 25, 1980.

The following respondents remained in this 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., a/k/a Compu Game, Inc.
17. Nichibutsu, a/k/a Nihon Bussan Co., Ltd.
18. Stan Rousso, Inc.
19. Taito of Japan
20. T.T. Sales & Service, a/k/a M. Enterprise, Inc.
21. Wesco Company

4/ On March 3, 1981, the Commission granted a motion to terminate the investigation as to respondents Universal U.S.A., Universal Co., Ltd., and Sunrise New Sound, Inc.

The games at issue are Moon Alien, Cosmic Alien, Hoi Galaxy, Kyugo Galaxy, Fuso and Karateco Galaxian, Artic Galaxian. The kits are Wesco Galaxian Kit, KEK Galaxian Kit, Hobby Galaxian Kit, and En'sco Galaxian Kit.

The ALJ has recommended that the Commission determine that there is a violation of section 337 by the following respondents: Hoi Sangyo, Nihon Bussan Co., Ltd., a/k/a Nichibutsu, Artic Electronics Co., Ltd., Fuso Corporation, Kyugo Company, Ltd., Chens International, Inc., Arjay Export Co., I.J.S., Inc., General Vending Sales Corp., Taito Corporation, Stan Rousso, Inc., Compu-Game, Inc. (Miyabi), M. Enterprise, Inc. a/k/a T.T. Sales & Service, and Circle International. The ALJ also recommended that 10 other respondents be dismissed. 5/ The ALJ found that each of the respondents listed above committed one or more of the following unfair acts: (1) common law trademark infringement, (2) false designation of origin, (3) simulation of trade dress, and, (4) copyright infringement.

Only the IA filed exceptions to the R.D. 6/

Because of the complexity of the copyright issue, the Commission

5/ 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. As noted in footnote 4, supra, Universal U.S.A., Universal Co., Ltd., and Sunrise New Sound have already been dismissed.

6/ IA Pre-hearing Brief (p. 8). The Commission investigative attorney disagrees with and takes exception to that part of the R.D. which finds that:

1. Respondents Nichibutsu, General Vending, and I.J.S. violated section 337 by infringing both of complainant's copyrights, by the manufacture and sale of The Moon Alien Game.

2. Respondent Circle misrepresented the origin of the Kyugo Galaxy game, and that respondents Circle and Kyugo infringed a Midway copyright.

3. Respondents Hoi Sangyo, Stan Rousso, Inc., and Compu-Game have infringed Midway's common law trademark, simulated the trade dress of Midway's Galaxian game, falsely designated the origin of the games, and infringed Midway's two copyrights by the manufacture and sale of the Hoi Galaxy Game.

published a notice of request for further briefing on May 4, 1981. As a result of that Notice, the Commission received fifteen amicus briefs on the copyright question 7/

II. PRELIMINARY ISSUE

On November 19, 1980, complainant and respondent Nichibutsu, Ltd., filed a motion to terminate as to Nichibutsu based upon a proposed consent order and a proposed consent order agreement. The IA opposed that motion because he was not a party to the negotiations. Both section 211.20(b) of the Commission's Rules of Practice and Procedure and public policy considerations suggest participation of the IA in consent settlements. We see no compelling reason in this investigation to disregard that rule. Accordingly, the motion to terminate respondent Nichibutsu is denied. 8/

III. FACTUAL BACKGROUND

The products involved in the investigation are certain coin-operated audiovisual games and kits. The "Galaxian" game was introduced by Namco, Ltd., the Japanese company that created the game, at a trade fair of the Japan

7/ 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 J. Levine, Esq.; Finnegan, Henderson, Farabow, Garrett & Dunner; IBM; Kay, Scholer Fierman, Hays & Handler; Williams Electronics, Inc.; and Atari, Inc.

8/ Chairman Alberger and Commissioner Stern would have provisionally granted the joint motion to terminate pending publication of a notice of the settlement terms and an opportunity for public comment. The general rule set forth by the Administrative Procedure Act in 5 U.S.C. 556(c)(1) that an "agency shall give all interested parties opportunity for the submission and consideration of . . . offers of settlement" should be governing under the facts of this case. They find that the proposed consent order agreement on its face is not contrary to the public interest.

Amusement Trade Association in Tokyo in October 1979. (TR 367.) The game became popular almost immediately in Japan. (TR 37.)

Shortly after the introduction of the Galaxian game in Japan, on November 13, 1979, Midway purchased from Namco the exclusive right to manufacture and sell the Galaxian game in the United States. (CX 25.) The license agreement includes the "attract mode" for the game, and the game itself (the "play mode"). As part of the license agreement with Namco, Midway agreed to make no changes in the game itself, and only a few minor changes, expressly agreed to by Namco, could be made in the trade dress of the game.

The Galaxian game has both a "play mode" and an "attract mode." The attract mode is a short sequence of images designed to attract potential players to the game and to encourage them to play it. The attract mode is silent and begins with the display on the screen

We are the Galaxians
Mission: Destroy Aliens

Thereafter a "score advance table" appears on the screen showing the point value to the player of each alien destroyed. The remainder (approximately 25 seconds) consists of a simulated game, which ends with the destruction of the player's rocket base defense ship.

Once a coin is inserted the game enters the "play mode" in which the player controls the lateral movement of the defense ship and fires missiles at the attacking aliens.

Galaxian is Midway's trademark for a coin-operated audio-visual game which incorporates numerous distinctive design features in both its video screen and cabinetry. The video screen of the Galaxian game displays a visual work incorporating five rows of "alien" figures swinging in a slow sideways

movement back and forth across the top of the screen. For scoring purposes, there are four denominations or ranks of these aliens, which are reflected in different colors for the different rows, with the highest ranking near the top of the screen and the lowest ranking near the bottom. The top-most row of aliens consists of two rocketship-shaped figures with stationary wings, and the lower rows of aliens have flapping wings. At the bottom of the Galaxian screen is a two-color rocket figure or defense ship (Galaxip) that shoots yellow missiles in a vertical trajectory toward the aliens. When the missiles collide with an alien, the alien is destroyed, accompanied by a multicolored "explosion" appears on the screen. Surviving aliens invert and swoop down to bomb the defense ship. This "peeling off" from the alien convoy occurs either by single aliens or by aliens in formation. The defense ship is shifted horizontally along the base of the screen under control of the player to avoid a destructive collision with the aliens and the shower of bombs dropping from the aliens as they descend. Behind the aliens appears a twinkling star background of multicolored lights which rolls from the top of the screen to the bottom. In the lower right corner of the screen, the number of alien convoys destroyed is recorded by means of images shaped as pennants, and at the lower left corner of the screen the number of defense ships is recorded by means of images of defense ships remaining to be played.

The visual features of the Galaxian game are accompanied by distinctive sound effects, including musical phrases and sounds of firing rockets and explosions.

Midway's Galaxian game is manufactured in two models, an upright console, approximately 6 feet by 2 feet by 2 feet, and a cocktail table configuration,

approximately 3 feet by 3 feet by 2 feet. Both types of cabinet contain a logo characterized by the word "Galaxian" in distinctive lettering with a distinctive style in the form of a large arc over the letters and a star as the dot of the "I". This logo appears in the upper part of the front of the upright cabinet and on the top horizontal surface of the cocktail table. The logo without the star appears on the sides of the upright cabinet. The sides of the upright cabinet also depict a large robotic insect in flight over an extraterrestrial landscape. (CPX-12)

IV. COMMON LAW TRADEMARK INFRINGEMENT.

The elements necessary to prove common law trademark infringement are as follows:

1. The mark must be distinctive;
2. The mark must be arbitrary or created for the express purpose of serving as a trademark;
3. The mark, if a design, must be nonfunctional;
4. The mark must have achieved secondary meaning, unless the mark is either "suggestive" 9/ or non-descriptive, i.e., arbitrary and fanciful;
5. There must be likelihood of confusion. 10/

There is a conflict between the IA and complainant as to whether secondary meaning 11/ is a necessary element of Midway's common law trademark

9/ A suggestive mark is one which merely suggests some quality or ingredients of goods as opposed to a descriptive mark (1 J.T. McCarthy, Trademarks an Unfair Competition, § 11:20).

10/ Certain Novelty Glasses, 337-TA-55, USITC Pub. 991 (1979).

11/ Secondary meaning occurs when the name of a product is associated with a particular manufacturer in the minds of consumers. Carter-Wallace v. Proctor & Gamble Co., 434 F.2d 794 (9th Cir. 1970).

infringement claim. 12/ The IA concedes, and the ALJ found, however, that secondary meaning as to "Galaxian" has been established, and that the name "Galaxian" has acquired a common law trademark status. The Commission also agrees that the use of the word "Galaxian" by any other manufacturer would misappropriate complainant's proprietary interest in the name "Galaxian."

The term "Galaxian"

The ALJ found that the word "Galaxian" is arbitrary and distinctive in its stylization, lettering, and coloring, which makes it a common law trademark not requiring proof of secondary meaning. 13/ All parties agreed that the term "Galaxian" is nonfunctional. The ALJ noted that complainant does not claim that there is confusion of the playing public by the use of the name Galaxian since the ordinary player neither knows nor cares who manufactured the game. Rather, Midway is concerned about the confusion of the operator who buys the games from the distributor. 14/ An operator is the owner of an arcade or a person who buys a game, finds a restaurant or bar location for it, and splits the income from it with the owner of the restaurant or bar. We agree with the ALJ and we believe that the word Galaxian is entitled to protection.

The Restatement of Torts § 729 sets forth four criteria to be considered in determining likelihood of confusion:

12/ IA Reply Brief p. 3; complainant's supplemental brief Section II.

13/ R.D., p. 10; See also Miller Brewing Co. v. G. Heilman Brewing Co., Inc., 561 F.2d (7th Cir. 1977), J.T. McCarthy, Trademarks and Unfair Competition, § 3:1 at 86 (1973).

14/ R.D., p. 12.

- (a) the degree of similarity between the designation and the trademark or trade name in
 - (i) appearance;
 - (ii) pronunciation of the words used;
 - (iii) verbal translation of the pictures or designs involved;
 - (iv) suggestion;
- (b) the intent of the actor in adopting the designation;
- (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other;
- (d) the degree of care likely to be exercised by purchasers.

These Restatement criteria are often used as guidelines by the courts. ^{15/}

The three-part test of Restatement § 729(a) has been characterized as the "sound, sight and meaning" trilogy. 1 J. T. McCarthy, § 23:4. That is, the conflicting marks are to be compared with respect to similarity of pronunciation, appearance, and verbal translation. Id.

As to the other elements of likelihood of confusion, there is testimony of actual confusion in the record. (CX 61 p. 5-6) Operators viewing respondent's games are misled into thinking that they are buying complainant's game. The fact that the respondents have solicited complainant's customers using the Galaxian trademark establishes intent to mislead and also establishes the relation and use and manner of marketing between the goods and services of the complainant and the respondents. (CX-87).

The terms "Galaxy" and "Galaxip"

The remaining question is whether using the words "Galaxy" and "Galaxip" infringe Midway's trademark because of the similarity of sound, meaning, and appearance of these words with the word Galaxian. The ALJ found that those

^{15/} See, for example, Sears, Roebuck & Co. v. Johnson, 219 F.2d 590 (3d Cir. 1953), Sarah Coventry, Inc., v. T. Sardell & Sons, Inc., 526 F.2d. 22 (1st Cir. 1975).

respondents who used the words "Galaxy" and "Galaxip" had also infringed complainant's trademark rights. The IA argued that "Galaxy" and "Galaxip" are not similar enough to "Galaxian" to infringe the common law trademark accorded to the word Galaxian.

A discussion of the test for likelihood of confusion based upon similarity in sound, meaning and appearance as to each game follows: 16/

The ARTIC GAME is manufactured by Artic Electronics, Inc., and sold in the United States by Chens International. A comparison of the Artic game and Midway's game shows that they are extremely similar. Both use the name "Galaxian" on the game cabinet, and in both names there is an arc between the "G" and the "N", and a star above the "I". Although the colors are different, in both games the colors are split horizontally. The words "Galaxip" and "Galaxians" appear in the attract mode.

Since there is a likelihood of confusion between the Artic game and the Midway game, both Chens and Artic have infringed Midway's common law trademark "Galaxian."

As to the KARATECO GAME, manufactured by Fuso Corp. and imported by Arjay, there is a likelihood of confusion between the two games because the name "Galaxian" is used by both games, and because the Karateco game and the Midway Galaxian game are almost identical. The Karateco game uses the name "Galaxians" and the word "Galaxip" in the attract mode, but not on the cabinet. (CPX-I). We agree with the ALJ that Fuso has infringed Midway's common law trademark.

16/ The Moon Alien Game does not use the name Galaxian or any similar sounding name. No allegation of common law trademark infringement was made against Nichibutsu, General Vending, or I.J.S., Inc.

The TAITO GALAXIAN GAME (CPX-Q) is manufactured by respondents Taito of Japan and is imported and distributed in the United States by a wholly owned subsidiary, Taito of Hawaii, Corp. The game uses the word "Galaxians," Midway's common law trademark, in the attract mode. We therefore determine that TAITO has infringed the common law trademark of Midway.

The HOEI GAME, manufactured by Hiei Sangyo and distributed by Stan Rousso and Miyabi, Inc., d/b/a Compu-Game, uses the name "Galaxy" on the cabinet. (CPX-F). Because the Hiei Galaxy game and the Midway Galaxian game are so similar and the name "Galaxy" is so close to the name "Galaxian" the use of the name "Galaxy" creates a likelihood of confusion. In addition, the attract mode of the Hiei game uses the word "Galaxians". We therefore determine that Hiei Sangyo, Stan Rousso, and Compu-Game, Inc., have infringed Midway's common law trademark.

The FUSO GALAXIAN GAME manufactured by Fuso Corp. and distributed by M. Enterprise, Inc., uses the word "Galaxian". We determine that Fuso and M. Enterprise, Inc., have infringed Midway's common law trademark.

The Commission finds that the complainant's common law trademark has been infringed by the following respondents by use of the terms "Galaxian", "Galaxy" or "Galaxip": 17/ Chens International, Inc.; Taito of Japan, Ltd.;

17/ It is interesting to note that, when complainant filed its application for federal registration of the Galaxian trademark, the application was objected to on the ground that there was another mark registered as "Galaxy Ranger." tr., p. 17. However, upon a showing by the complainant that it also owned that mark, the objection was withdrawn and complainant is currently awaiting publication of the trademark "Galaxian." The initial objection to the use of the name "Galaxian" was based upon the finding by the examiner in the Patent and Trademark Office that there might be the likelihood of confusion between "Galaxian" and "Galaxy Ranger."

Artic Electronics Co., Ltd.; Fuso Corporation; T.T. Sales and Service; Hoei Sangyo; Stan Rousso, Inc.; and Miyabi, Inc., d/b/a Compu-Game, Kyugo Co. Ltd. and Circle International, Inc.

FALSE DESIGNATION OF ORIGIN

The complainant has alleged the count of false designation of origin. The same elements which establish common-law trademark infringement also establish a prima facie case of false designation of origin, i.e. of the manufacturer. We, therefore, find that Taito of Japan, Ltd., Hoei Sangyo, Stan Rousso, Inc., Miyabi, Inc., Fuso Corporation, Circle International, Inc., and T.T. Sales & Service have violated section 337 by reason of false designation of origin. 18/ Respondents Chens International and Artic Electronics, because of the conspicuous use of the name of the manufacturer (Artic) in the attract mode, on the sides of the cabinet, and on the instruction panel as well as such instructions being in Japanese, are not found to have falsely designated the manufacturer of origin. Additionally, there is no finding made against Kyugo Company Ltd. as there was no evidence presented that Kyugo had misrepresented the origin of its Galaxy game.

VI. UNFAIR ACTS REGARDING COPYRIGHT

In order to sustain a claim of copyright infringement, a plaintiff in federal court 19/ is required to demonstrate two elements: (1) ownership of

18/ Chairman Alberger, Vice Chairman Calhoun, and Commissioner Bedell note that there is no respondent found to have engaged in false designation of origin which is not also covered under the common-law trademark findings. Furthermore, there is no additional or more appropriate relief available under section 337 for this particular violation beyond that which the Commission is already granting for common-law trademark infringement.

19/ At least one of the briefs received by the Commission as a result of our request for further briefing of copyright issues suggested that the Commission has the power to remedy an unfair act or unfair method of competition pursuant
(footnote continued)

the copyright in question; and (2) copying by the defendant. Samet & Wells, Inc. v. Shalom Toy Co., Inc., 429 F. Supp. 895 (E.D.N.Y. 1977), aff'd 578 F.2d 1369 (2d Cir. 1978); Russ Berrie & Co., Inc. v. Jerry Elsner Co., Inc., 482 F. Supp. 980 (S.D.N.Y. 1980); Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977); M. Nimmer, Nimmer on Copyright § 13.01 (hereinafter Nimmer). We deal with each of these elements separately.

A. COPYRIGHT OWNERSHIP

According to Professor Nimmer, the copyright law of the United States sets forth a series of elements which must be present if a prima facie case of copyright ownership is to be made. 3 Nimmer § 13.01[A] and cases cited therein. These elements are as follows:

1. Originality in the author;
2. Copyrightability of the subject matter;
3. Citizenship status of the author such as to permit a claim of copyright;
4. Compliance with applicable statutory formalities; and
5. If the plaintiff is not the author, a transfer of rights or other relationship between the author and the plaintiff so as to constitute the plaintiff the valid copyright claimant.

Complainant alleges that it has made a prima facie showing of each of these elements and, therefore, that the Commission should conclude that it is the copyright owner.

(footnote continued)

to section 337 of the Tariff Act of 1930 without regard to whether that act might also be deemed a violation of another statute. Nevertheless, on the basis of the record before us, we find that a copyright infringement has occurred. Therefore, we need not consider whether the acts complained of might be remediable under the broad provisions of section 337 without regard to other provisions of law.

A review of the record in this investigation reveals that the complainant has alleged facts tending to prove each of these elements. It appears to us that, in the absence of any rebuttal, the evidence brought forth by the complainant in support of those allegations is sufficient to meet threshold levels of reliability and probative value.

In finding that ownership of the copyright has been established in this case, we note that the respondents in this investigation are in default--that is, none of the named respondents participated in the fact-finding phase before the Commission's ALJ. The record certified to the Commission consists exclusively of evidence presented by the complainant and by the Commission investigative attorney. Since no evidence was presented by any of the respondents, we are constrained to rely upon that evidence presented by the complainant and the IA. Therefore, while our factual conclusions are based upon the record before us, we will not speculate whether we would reach the same conclusions after examining the record of a fully litigated proceeding.

We turn now to each of the requisite elements.

Originality. As cited above, there is evidence on the record that the game known as Galaxian was created by Namco of Japan, and there is also evidence that Namco transferred all its rights, title, and interest in the game, at least for the U.S. market, to the complainant. The document of transfer, in fact, has been filed with the Copyright Office. No evidence has been brought forward to rebut this evidence of originality and transference of rights. Therefore, we find that Midway is the proprietor of all legal rights in the Galaxian game.

Validity. The record of this investigation reveals that the Register of Copyright has issued certificates of registration on the Galaxian play mode and the Galaxian attract mode. The certificates of registration have been made a part of the record of this investigation. The certificates of registration recite complainant's claim that copyright extends to all audiovisual or cinematographic work.

The Copyright Act of 1976 treats the existence of certificates of registration as evidence relevant to the proof of the validity of copyright:

§ 410. Registration of claim and issuance of certificate.

* * *

(c) In any judicial proceedings, the certificate of a registration made before or within 5 years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court. (Emphasis supplied.)

17 U.S.C. 410(c). Since registration appears to have been made within five years of the date of first publication, the certificates of registration constitute prima facie evidence of the validity of the claimed copyright. ^{20/} This follows the principles of case law enunciated under the Copyright Act of 1909.

The legislative history makes it clear that § 410(c) is a codification of the principles developed in judicial decisions under the Copyright Act of 1909. H.R. Rep. 94-1476, 94th Cong., 2d Sess, p. 157 (1976). It is well settled in that case law that once a copyright certificate is issued, it

^{20/} Although the record is not specific, the first publication of Galaxian appears to have occurred in 1979 and registration was made in 1980.

constitutes prima facie evidence of the facts stated therein. 21/ The issuance of a certificate of registration by the Copyright Office gives rise to a presumption of ownership and validity of the claimed copyright. 22/ The presumption so created is rebuttable, 23/ and the burden of going forward shifts to the defendant. 24/ These principles dictate our conclusion.

Complainant's certificates of registration create, at law, the presumption of validity of the claimed copyright. Since no evidence to rebut that presumption has been brought forward by any of the respondent parties or by the Commission investigative attorney, we must conclude that complainant has a valid copyright. 25/

21/ Monogram Models v. Industro Motive Corp., 448 F.2d 284 (6th Cir. 1971); Herbert Rosenthal Jewelry Corp. v. Grossbardt, 428 F.2d 551 (2d Cir. 1970).

22/ Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977); Kieselstein-Cord v. Accessories by Pearl, Inc., 489 F. Supp. 732 (S.D.N.Y. 1980).

23/ Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284 (6th Cir. 1971); Rohauer v. Friedman, 306 F.2d 933 (9th Cir. 1962); Jerry Vogel Music Co. v. Forster Music Publishers, 147 F.2d 614 (2d Cir. 1945).

24/ Monogram Models, Inc. v. Industro Motive Corp., 448 F.2d 284 (6th Cir. 1971); Rohauer v. Friedman, 306 F.2d 933 (9th Cir. 1962); Samet & Wells, Inc. v. Shalom Toy Co., Inc., 429 F. Supp. 895 (E.D.N.Y. 1977), aff'd 578 F.2d 1369 (2d Cir. 1978); Stratchborneo v. Arc Music Corp., 357 F. Supp. 1393 (S.D.N.Y. 1973); See also Epoch Producing Corp. v. Killiam Shows, Inc. 522 F.2d 737 (2d Cir. 1975), cert. den. 424 U.S. 955 (1976); Plymouth Music Co. v. Magnus Organ Co., 456 F. Supp. 676 (S.D.N.Y. 1978).

25/ We note that the Commission has recently instituted an investigation, based upon another complaint by Midway, which appears to involve similar allegations of copyright infringement. Since our conclusions today are based upon an unrebutted presumption, we expressly reserve judgment on the copyrightability of the games covered by the new investigation, particularly the audiovisual displays of those games.

Chairman Alberger and Commissioner Stern note further that the conclusions reached today leave unresolved some significant issues, since the facts before us do not permit us to reach them. These issues may arise under the new complaint. For example, it would be helpful to know the following:

1. Whether an audiovisual work is an "original work of authorship" or whether it is derived from another original work?
2. Whether the videotapes are a fixation of the original work of authorship or whether they are a "photograph" of a fixed copy of the original work?
3. For purposes of determining the proper form of deposit and registration, whether the work was first published in Japan or the United States.

Citizenship, Statutory Formalities, and Transference. The same reasoning also dictates our conclusions with regard to the citizenship status of the author, compliance with applicable statutory formalities, and a transference of rights so as to constitute the complainant as the valid copyright claimant. On the basis of the lack of any evidence to rebut the presumptions created by the certificates of registration and the facts brought forward by the complainant, we find that the complainant has established a prima facie case for each of these elements.

B. COPYING

The second substantive element necessary to sustain a copyright infringement action is copying by the defendant. Since it is rare for the plaintiff to be able to prove copying by direct evidence, the courts have developed the principle that evidence of access and substantial similarity create an inference of copying. The plaintiff has the burden of showing both. Jewel Music Publishing Co. v. Leo Feist, Inc., 62 F. Supp. 596 (S.D.N.Y. 1945); Sarkadi v. Wiman, 135 F.2d 1002 (2d Cir. 1943).

As Professor Nimmer has stated:

It has been held that where the plaintiff has made a strong prima facie case of copying by proving both access and a convincing number of similarities there is a high probability that copying, whether intentional or unintentional has in fact occurred so that at that point the burden of going forward with evidence shifts to the defendant who must either negative the probability of copying by evidence of independent creation, or justify the copying by evidence of authority from or through the plaintiff. Once a prima facie case of copying has been made by evidence of access and substantial similarity, it has been said that in the absence of countervailing evidence of independent creation by defendant (or, presumably of authority from or through plaintiff), a finding that there has been no copying would be clearly erroneous. (Citations omitted)

3 Nimmer § 12.11[D], pp. 12-83-85.

In this investigation, there is no direct evidence of copying. Therefore, we must look to see whether the respondents had access to plaintiff's work and whether there is substantial similarity. There is evidence in the record that the respondents had access to the Galaxian games. There were at least two trade shows at which the games were displayed. In addition, the games have been available in the market place for some time, and respondents' alleged infringing games did not appear until well after they had such access. Therefore, there is a sufficient demonstration on the record to support the proposition that the respondents had access to the complainant's Galaxian game, and we so find.

Since respondents had access to complainant's work, we turn now to an analysis of the alleged similarity between complainant's work and the allegedly infringing works.

Similarity itself is insufficient; there must be "substantial similarity" between the two works. 3 Nimmer § 13.03. However, the determination of substantial similarity is difficult, and it is almost impossible to lay down a general definition. 3 Nimmer § 13.03[A]; See Caddy-Imler Creations, Inc., v. Caddy, 299 F.2d 79 (9th Cir. 1962); L & L White Metal Casting Corp. v. Joseph, 387 F. Supp. 1349 (E.D. N.Y. 1975). In general, the courts have applied what may be called the "ordinary observer" test. 3 Nimmer § 13.03[E][1]; for example, Novelty Textile Mills, supra.

The ordinary observer test in discussing fabric designs, for example, has been stated to be "whether an ordinary observer, who is not attempting to

discover disparities 'would be disposed to overlook them and regard their aesthetic appeal as the same.'" Novelty Textile Mills, supra, 1093. The ordinary observer test appears to have been modified in the leading case of Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), where the Court divided the issue of substantial similarity into two elements: Whether the defendant copied the plaintiff's work and whether the copying constitutes appropriation. See for example, Mattel, Inc. v. S. Rosenberg Co., 296 F. Supp. 1024 (S.D.N.Y. 1968); Stratchborneo, supra. The Ninth Circuit also appears to have established a two-step analysis. Sid & Marty Krofft Television Productions, supra. First the court would examine whether there is a substantial similarity between the "general ideas" of the two works. If such substantial similarity exists, the second stage would determine whether such similarity constitutes infringement by analyzing the "response of the ordinary reasonable person."

With regard to all games available to the Commission, and for which physical exhibits have been submitted, the ALJ, the Commission, and the Commission's staff have conducted exhaustive observations. It is abundantly clear that the attract modes of each of the alleged infringing games except Moon Alien are almost identical to the attract mode of complainant's Galaxian game. Therefore, whether we apply the ordinary observer test directly, or the two-pronged test of Arnstein or Sid & Marty Krofft, there can be no doubt that the respondents' games are "substantially similar" to Galaxian with regard to the attract mode. We therefore concur with the ALJ's conclusion with regard to the attract mode.

It is also apparent to us that the play mode of each of the alleged infringing games, at least up until that moment in which the player is given control over the defenseship, is substantially similar to the play mode of the complainant's game. To this extent, we concur with the opinion of the ALJ.

Moon Alien is different from the other infringing games in that there are original works of authorship which are apparently unique to Moon Alien. These are the energy bar, which appears at the bottom of the screen during the actual performance of the game itself and during the performance of the simulated game in the attract mode, and the trajectory of the missiles fired by the player have some lateral movement subject to control by the player. In all other respects, the Moon Alien game appears to be derived from the Galaxian game.

With regard to the attract mode of Moon Alien, our observation demonstrates that Moon Alien is similar to Galaxian in several significant aspects :

1. The rolling star background;
2. The shape and color of the aliens in the simulated game;
3. The formation of the aliens in the simulated game and its placement on the display screen;
4. The movement of the aliens both while in formation and while swooping down in attack; and
5. The scoring table, including the manner in which it is brought into display on the screen, the wording contained, and the flashing score values.

Applying the ordinary observer test to the scoring table portion of the attract mode, we conclude that it is substantially similar to the scoring

table portion of the attract mode of Galaxian. Likewise, applying the substantial similarity test to the simulated game in the Moon Alien attract mode, we find that the elements of expression contained therein are substantially similar to those in the simulated game in the Galaxian attract mode. We therefore find that the Moon Alien attract mode in the enumerated respects is substantially similar to the Galaxian attract mode and is likely to cause confusion in the mind of the ordinary observer. We do not find substantial similarity with regard to any of the other elements of the Moon Alien attract mode.

With regard to the first few moments of the play mode of Moon Alien we likewise find substantial similarity. Even though there is the difference that in Moon Alien the energy bar appears in these moments of the play mode, it is clear to us that the remainder of the display on the screen is substantially similar to that of the first few moments of the play mode of Galaxian.

As noted above, no evidence was presented by any respondent. Therefore, the Commission has before it no evidence of independent creation of these works. Likewise, there is no evidence that either respondents had no access to complainant's games or that they did not, in fact, copy the games. In absence of any such evidence, we find that complainant has established a prima facie case of copying.

C. SCOPE OF THE COPYRIGHT

A major premise of U.S. copyright law is that ideas are not subject to copyright; copyright protection extends only to the form of expression used by

the author. As the Supreme Court has said, "[u]nlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea--not the idea itself." Mazer v. Stein, 347 U.S. 201, 217 (1954). See also Franklin Mint Corp. v. National Wildlife Art Exchange, Inc., 575 F.2d 62 (3d Cir. 1978) cert. den.

The basic issue in a copyright action is whether there has been a wrongful appropriation of expression. Copyright protection extends only to the expression of the idea; it does not protect the idea itself. 'It must be remembered that copyright protection does not extend to ideas, plots, dramatic situations and events. Rather, it is limited to the arrangement of words the author uses to express his ideas.'

O'Neill v. Dell Publishing Co., Inc., 630 F.2d 685, 686 (1st Cir. 1980), citing Scott v. WKJG, Inc., 376 F.2d 467, 469 (7th Cir. 1967), cert. den., 389 U.S. 832, 88 S. Ct. 101, 19 L. Ed. 2d 91 (1967).

It follows that games as such are not entitled to copyright protection. Chamberlin v. Uris Sales Corp., 56 F. Supp. 987 (S.D.N.Y. 1944) aff'd 150 F.2d 512 (2d Cir. 1945); See also Morrissey v. Proctor & Gamble Co., 262 F. Supp. 737 (D. Mass. 1967) aff'd on other grounds 379 F.2d 675 (1st Cir. 1967); Affiliated Hospital Products, Inc. v. Merdel Game Manufacturing Co., 513 F.2d 1183 (2d Cir. 1975). It is well settled that no copyright may be obtained in the system or manner of playing a game or engaging in any other sporting or similar activity. 1 Nimmer § 2.18[H][3]; Affiliated Enterprises, Inc. v. Gruber, 86 F.2d 958 (1st Cir. 1936); Russell v. Northeastern Publishing Co., 7 F. Supp. 571 (D. Mass. 1934). While a game itself is not subject to copyright, labels for games, game boards, and game rules may usually be copyrightable. There are limitations to this rule, however, especially where

any attempt to copyright the rules would so limit the possible number of forms of expression as to permit, by monopolizing the forms of expression of the rules, establishment of a monopoly in the system to which the rules pertain.

Morrissey, supra; Affiliated Hospital Products, supra.

For these reasons, we specifically note that our findings do not extend to the copyrightability of the Galaxian game itself, but only to the modes of expression used in the attract mode and the first few moments of the play mode. We do not decide whether any performance of one of the infringing games could conceivably infringe a valid copyright, if one exists, in the play mode of the game itself. We do so for three reasons.

First, for statistical reasons, it is virtually impossible for a performance of Galaxian ever to duplicate that performance fixed in the video tape. If we were to hold that such performances could infringe a copyright in the play mode, we might be protecting the game itself or its mode of play, items which are specifically not subject to copyright protection. Second, each performance of the Galaxian play mode depends, in part, on the player. It is therefore possible that the player may be considered a "coauthor" of each performance of the play mode. Our research has indicated no legislative history or case law on whether coauthored works of this sort are subject of copyright, and we decline to rule on this issue. Third, in view of the remedy we are granting in this investigation, a ruling on either copyrightability or infringement of the play mode is unnecessary. We are ordering the exclusion of those games and cabinetry which infringe complainant's trademark rights and copyright in the attract mode and in the first few moments of the play mode.

VI. INJURYScope of domestic industry

In this case, the complainant is the only domestic manufacturer of the game and has an agreement with the creator of the game giving it exclusive rights in the game in the United States. Under the agreement, complainant is the owner of all domestic rights in the game and in the manufacture, distribution, and sale of the game in the United States. (FF 38). The ALJ found that complainant's facilities for the production, distribution, and sale of the game constitute the relevant domestic industry in this case. We agree. 26/

Efficient and economic operation

Section 337 (a) requires that the industry alleged to be injured by the unfair acts be "efficiently and economically operated." The ALJ found that the relevant domestic industry is efficiently and economically operated. No one disputes this. There is sufficient evidence on the record to establish, prima facie, that the industry is efficiently and economically operated. (TRI 7-8 CX10).

At its facilities for the manufacture of the Galaxian game, Midway employs 1,200 people. The modern facilities consist of the Grand Avenue plant and the Belmont Avenue building in Franklin Park, Illinois.

Midway's plant on Grand Avenue in Franklin Park, Illinois consists of 90,000 square feet and contains a Printed Circuit Department with 15 computerized drills, the latest equipment for dry film processing and in-house

26/ See Certain Window Shades, Inv. No. 337-TA-83.

facilities for plating. That plant contains the Printed Circuit Assembly Department which is comprised of 250 people, with three assembly lines, an automatic assembly conveyer line, automatic soldering machines and automatic washing and cleansing equipment. Complainant's Belmont Avenue building contains approximately 144,000 square feet and houses Midway's Engineering Department. TR.1 7,8.

Midway maintains a large network of distributors which covers the entire United States. Midway has made a substantial investment in the Galaxian game and has devoted substantial manhours to its production.

Effect or Tendency to Substantially Injure

The complainant did not take exception to the ALJ's finding that there is no showing of effect to substantially injure. Complainant states that it took no exception to the ALJ's finding in this regard because of the belief that the finding of tendency to injure meets the statutory test for injury and is sufficient to support a finding of violation. It nevertheless argues in its post hearing brief that the record does support a finding that Midway has suffered substantial injury. Complainant's position regarding the claim of present injury has thus been inconsistent. It's failure to take exception to the ALJ's recommended findings under these circumstances compels us to conclude it has waived it's right to further argue this claim. See 19 CFR 210.54.

There was evidence before the ALJ which establishes lost sales, and, as is explained below, a tendency to substantially injure the domestic industry.

Complainant experienced a decline in monthly production of Galaxian games from 5,000 in February 1980, to 2200 in July 1980 (CX 67). This is more than

a 50% decline in a period of six months. Although the complainant acknowledges a short lifespan for these games, there was testimony at the temporary exclusion order hearing that there is still a market for the games in the United States, and that Midway would have sold more games but for the infringing imports. (TR.I pp. 315-318.)

Complainant also claims that importations by respondents would have been even greater (making the loss greater) but for this investigation, which has caused importers to be more cautious. While such an assertion has not been proven, it does seem likely that the Commission's investigation may have deterred importers somewhat.

There is evidence of actual lost sales. (CX 17, 55). The ALJ notes "the record contains evidence of a number of imported games sold to purchasers who had requested Midway's game and this shows actual sales lost by Midway." (RD p. 35, CX 17, CX 55). The record shows 295 lost sales of games (CX 96) and 71 lost sales of kits (CX 96 p.2). These sales would have gone to Midway but for the presence of the infringing games. Complainant further claims that there is competition for the limited space in which to install individual games, 27/ making each imported game tantamount to a lost sale for Midway.

The record indicates that imported games undersell Midway's games by margins of up to 37% (CX 74). The imported kits undersell complainant's product by approximately 30% of the price of the completed Galaxian games.

In this case, the complainant has presented evidence which demonstrates that foreign respondents have placed advertisements in the United States

27/ Meprobamate, TC Pub. 389 (1971); Luggage Products, Pub. 932 (1978), 337-TA-44 ITC; Convertible Game Tables, 337-TA-02 (1974) TC Pub. 705 (Doc. A-74).

offering "Galaxian" games for sale. 28/ Further, complainant presented evidence that there are a large number of games waiting in Japan to enter the U.S. market. 29/ These games use the Midway Galaxian name and logo. The record also shows it is the intention of the owners of these games to ship them to the United states. 30/ Testimony by Japanese distributors and manufacturers reveals that there are at least 100,000 similar or identical games, or kits capable of producing such games, in Japan and the Far East. (TR. I pp. 141-142; p. 243). At least half of these games have been shown to specifically bear the Galaxian name and logo (TR. I, pp. 246, 249, and 304). There is testimony that these games are wired and suitable for immediate use in the United States without the need for modification (TR. I p. 320).

The ability and intention of the respondents to ship these games to the United States has been corroborated by the respondents. Respondent KEK testified as to the capacity to make a limitless supply of infringing games in Japan and as to the ability of the Japanese to ship these games rapidly to the United States (CX 57, p. 11). There is testimony in the record that the United States is the only available market for the Galaxian game today. (TR-1, p. 266).

We believe that the complainant has made a prima facie showing of tendency to injure. Absent any evidence to the contrary, we concur with the ALJ that there is a tendency to substantially injure an industry in the United States.

28/ tr. at 25.

29/ CX 5, 19, 22, 23, 24, 27, 62.

30/ Id.

VIII. REMEDY

An exclusion order against the infringing games is the more effective remedy since they are numerous and easily recognizable. Because an exclusion order operates in rem and will exclude all games which fall within its protective scope, we have attempted to design a remedy which does not affect non-infringing exporters. Therefore, the exclusion order is directed against those games and kits which are clearly marked or use the words "Galaxian", "Galaxy," or "Galaxip" so that there is no chance that it will exclude only infringing articles. 31/ Finally, since many of the respondents apparently have no offices or assets in the U.S., the only effective remedy which the Commission could issue as to these respondents is an exclusion order.

In Sealed Air Corp. v. USITC and Unipak (H.K.) Ltd. v. USITC, Nos. 79-35, 80-4 (C.C.P.A. March 12, 1981), the Court pointed out that an exclusion order operates against goods, not parties. The Court stated that--

the purpose of the exclusion remedy was to get away from in personam procedures which United States business found unsatisfactory. Being unable in most cases to sue a foreign supplier, a U.S. business faced with infringing products from abroad was forced to pursue a multiplicity of individual importers, and if a court enjoined one, another could be found to take his place. Thus, the exclusion remedy was conceived.

Id. (Opinion of Nies & Baldwin, J.J. concurring with respect to 79-35, and dissenting with respect to 80-4). The Court in affirming the Commission's jurisdiction to issue exclusion orders said, "an exclusion order operated against goods, not parties." Therefore, we have issued an exclusion order against any games of foreign origin which infringe complainant's common law trademark by engaging in false designation of origin.

31/ tr. p. 31.

With regard to the copyright violations, however, the more prudent course is to issue an exclusion order against only those games and kits which we have specifically found to infringe complainant's copyright. 32/ We do so for several reasons. First, and foremost, there is ease of application of such an order by the U.S. Customs Service. By giving the Customs Service the specific names of each infringing game, we give them a means to distinguish between infringing and other games and kits. Secondly, any attempt to enumerate the specific elements found to infringe complainant's copyright would be extremely difficult and fraught with ambiguities. Not only would such a document be difficult for the Commission to draft, but we fear that it would be exceedingly difficult for Customs to enforce, especially if Customs is called upon to judge which elements infringe the copyright. Finally, we note that no other allegedly infringing games have been brought before the Commission. The Commission cannot make any finding as to whether any such games infringe complainant's copyright, since this requires a factual determination on case-by-case basis. 33/

The Commission has the power to remedy unfair methods of competition in the importation of goods or in the sale of those imported goods. Complainant

32/ A list of those games specifically found to infringe complainant's copyright is given in the Conclusions section of this opinion.

33/ Commissioners Alberger and Stern note that an exclusion order which may be viewed as directed to more than the games specifically before us today may be a prior restraint on valid modes of expression. While the exact scope of the parameters of the doctrine of prior restraint under the First Amendment are not fully defined, it is clear that substantive restraints on modes of expression are not favored. Near v. Minnesota, 283 U.S. 697 (1931); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); New York Times Co. v. United States, 403 U.S. 713 (1971). Therefore, the Commission properly does not extend its remedy beyond those games specifically before us in this investigation.

and the IA argued that cease and desist orders would be an appropriate remedy with regard to the domestic respondents. Such a remedy, they argued, would be effective as to those companies that are known to be engaged in importing or selling infringing games in the United States. The cease and desist orders could be issued against those respondents engaged in false designation of origin and common law trademark infringement. This would have the effect of reaching those which have managed to stockpile games during the pendency of this investigation. There are many respondents in the United States (distributors) which can only be reached by a cease and desist order. However, because the record did not contain sufficient evidence regarding instances of stockpiling by domestic respondents, we decline to issue cease and desist orders.

IX. PUBLIC INTEREST FACTORS.

Subsection (d) of section 337 provides that exclusion is to be ordered unless the Commission finds that such relief would not be in the public interest.

Because of the nature of the articles involved (audio-visual games), it is unlikely that such relief would have a detrimental impact on the public health and welfare. The record establishes that Midway is capable of supplying the U.S. market with Galaxian games as long as the demand for them continues. TRI, CX 10. Because the unfair competition laws of the United States have as their goal both the protection of the consumer from deceptive practices and the protection of property rights inherent in valid trademarks, the public interest is best served by the issuance of an exclusion order.

No Government agencies or departments, either orally or in writing, expressed an opinion on the public interest question. There was one public interest witness at the Commission hearing of March 16, 1981, but his concerns were directed, as noted previously, more toward violation than toward public interest factors.

X. BONDING

The Commission must set a bond for such infringing articles entered during the period the Commission's determination is pending before the President. 19 U.S.C. 1337(g)(3). The Commission's rules provide that the Commission is to determine a bond "taking into consideration . . . the amount which would offset any competitive advantage resulting from the violation." (19 C.F.R. 210.14(a)(3).) The Commission has generally set a bond equal to the difference between the selling prices of the domestic and imported articles. ^{34/}

The IA has indicated that a bond in this case should not exceed 54% of the ad valorem price of the imported articles. His recommendation is based upon the wholesale price of the domestically manufactured games compared with the wholesale price of the imported games. We agree with his recommendation and therefore determine that a bond of 54 percent should offset any competitive advantage accruing to respondents.

^{34/} See, for example, Certain Roller Units, *supra*, at 12. But compare Doxycycline: Inv. No. 337-TA-3, USITC Pub. 964, April 1979, at 21 (concurring opinion of Commissioner Alberger), and Certain Thermometer Sheath Packages: Inv. No. 337-TA-56, USITC Pub. 992, July 1979, at 30, where a bond of 10 percent representing a reasonable royalty was found appropriate. (In the latter case, the price of the imported article was found to be higher than the price of the domestic article.)

XI. CONCLUSIONS.

After reviewing the record of this investigation, including the recommended determination, the briefs of the parties and the public interest witness, and the transcript of the hearing of March 16, 1981, we determine:

1. That the following respondents have violated section 337 of the Tariff Act of 1930 by reason of common law trademark infringement:

Chens International, Inc.
 Taito of Japan, Ltd.
 Artic Electronics Co., Ltd.
 Fuso Corp.
 M. Enterprise, Inc., a/k/a T.T. Sales & Service
 Hoei Sangyo
 Stan Rousso, Inc.
 Miyabi, Inc.
 Kyugo, Co., Ltd.
 Circle International, Inc.

2. That the following respondents have violated section 337 of the Tariff Act of 1930 by reason of false designation of origin:

Taito of Japan, Ltd.
 Hoei Sangyo
 Stan Rousso, Inc.
 Miyabi, Inc.
 Fuso Corp.
 Circle International, Inc.
 M. Enterprise, Inc., a/k/a T.T. Sales & Service

3. That the following games and kits have violated section 337 of the Tariff Act of 1930 by reason of copyright infringement:

Moon Alien
 Kyugo Galaxy
 Hoei Galaxy
 Taito Galaxian
 Karateco and Fuso Galaxian
 Artic Galaxian

4. That the unfair methods of competition and unfair acts of those respondents in violation of section 337 have the tendency to substantially injure an efficiently and economically operated industry in the United States.

5. That the issuance of an exclusion order against the specified games or kits which infringe complainant's copyright is appropriate.
6. That the issuance of an exclusion order against any games or kits which infringe complainant's common law trademark or bear a false designation of origin is appropriate.
7. That public interest considerations do not preclude relief.
8. That bond be set at 54 percent of the c.i.f. value of the imported products.
9. That the motion to terminate respondent Nichibutsu be denied.

