

In the Matter of

# CERTAIN CANAPE MAKERS

Investigation No. 337-TA-146

Unreviewed Initial  
Determination



USITC PUBLICATION 1436

OCTOBER 1983

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**COMMISSIONERS**

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**Kenneth R. Mason, Secretary to the Commission**

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

This is an initial determination issued by a Commission administrative law judge (presiding officer) that was not reviewed by the Commission. The initial determination has, therefore, become the Commission determination in this investigation on the issue of violation of section 337. See section 210.53(h) of the Commission's Rules of Practice and Procedure, 47 Fed. Reg. 25134, June 10, 1982 and 48 Fed. Reg. 20225, May 5, 1983; to be codified at 19 C.F.R. § 210.53(h).



UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

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In the Matter of )

CERTAIN CANAPE MAKERS )

) Investigation No. 337-TA-146  
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INITIAL DETERMINATION ON PERMANENT  
EXCLUSION ORDER

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## PROCEDURAL HISTORY

On March 24, 1983, complainant LK Manufacturing Corp. filed a complaint with the United States International Trade Commission alleging that certain respondents had violated §337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). Complainant sought an exclusion order but did not seek orders to cease and desist against individual respondents.

The Commission issued a notice of investigation which was published in the Federal Register on April 27, 1983. The investigation was to determine whether there is a violation of §337 in the unlawful importation of certain canape makers into the United States or in their sale, by reason of infringement of the claim of U.S. Letters Patent Des. 268,318, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

Six companies were named as respondents in the notice of investigation. One of these respondents, S. Rossi Co., was dismissed. The remaining respondents are:

Wecolite Company, Inc.  
699 Front Street  
Teaneck, New Jersey 07660

Hoan Products Ltd.  
615 East Crescent Avenue  
Ramsey, New Jersey 07446

Rowoco  
Warehouse Lane  
Elmsford, New York 10523

Mid-West Housewares, Inc.  
3320 North Kedzie Avenue  
Chicago, Illinois 60618

Cook Tools Ltd.  
621 Route 46 West  
Hasbrouck Heights, New Jersey 07604

All of the respondents are domestic companies over whom personal jurisdiction was obtained by service of the complaint and notice of investigation.

The Commission has jurisdiction over the subject matter of the case since complainant LK Manufacturing Corp. alleged facts which would establish an unfair act under §337 in the importation of articles into the United States or in their subsequent sale.

Under the Commission's Rules (§210.21(d) and 210.36) and Rule 55 of the Federal Rules of Civil Procedure, testimony is not required before a default judgment is entered, but a court may conduct a hearing to determine whether to enter a judgment by default. Such a hearing is not considered to be a trial but is in the nature of an inquiry before the judge. 10 Wright & Miller, Federal Practice and Procedure: Civil 2d §2688.

All respondents are in default because jurisdiction was obtained over these respondents and they failed to comply with Order No. 2.

Complainant's first motion for sanctions against respondents Cooks Tools, Ltd., Hoan Products Ltd., Mid-West Housewares Inc., Rowoco and Wecolite (Motion 146-5), was based on the failure of these respondents to comply with Order No. 2. Most of the sanctions sought are not necessary because of the evidence offered at the hearing.

Since complainant was unable to learn through discovery the exact number of imported canape makers sold in the United States by each respondent, it is found that for the purposes of this investigation the number of canape makers in issue imported or sold by Cooks Tools, Ltd., Hoan Product Ltd., Rowoco and Wecolite, Inc., was substantial. Complainant offered evidence that the imported canape makers in issue had caused substantial injury to the domestic industry, but it could not obtain evidence through discovery that sales by particular respondents had caused the injury.

Evidence was offered at the hearing that Hoan, Rowoco and Cooks Tools purchased the canape makers in issue from Wecolite Company, and that Wecolite imported the canape makers from Taiwan. Staff Ex. 10. See also Wecolite response to complaint. No sanctions are necessary to establish these facts.

Sanctions will be used in this case only where necessary to fill in the gaps in evidence offered by the parties at the hearing. They will not be used to find that a respondent has violated §337 when there is no indication in the record that the company ever bought or sold the product in issue, and the company states that it has not done so.

Neither complainant nor the Commission investigative attorney offered any evidence that Mid-West Housewares, Inc. imported canape makers or sold imported canape makers. A letter dated May 9, 1983 from Mid-West Housewares, Inc., which was considered to be a response, and in the absence of any evidence of importation of canape makers or sale of imported canape makers by Mid-West, and in the absence of any physical exhibits of canape makers sold by Mid-West which could be compared to the '318 design patent, no sanctions will be issued against this company.

Since complainant seeks only an exclusion order, there was no need to prove that Mid-West violated §337. The evidence that four other companies violated §337 is adequate to support an exclusion order if the Commission determines that one should be issued.

LK's second motion for sanctions against respondents Cook Tools, Ltd.; Hoan Products Ltd., Mid-West Housewares Inc., Rowoco, Wecolite Co., and S. Rossi Company (Motion 146-6) is in fact a motion to compel which was filed five days before trial. The hearing is over and complainant has shown no further need for the evidence sought. Complainant's motion is granted to the extent that it is found that LK was entitled to get the information sought, but no order will be issued compelling production of the information at this time.

On June 21, 1983 a default hearing was held. No respondent participated in the hearing. Complainant offered uncontroverted evidence on the issues relating to patent infringement and injury. The Commission investigative attorney cross-examined the inventor on the issue of patent validity.

Although the Commission investigative attorney cross-examined some of complainant's witnesses, no issues were "litigated." Evidence was offered because the Commission requires that a prima facie case be made against each respondent even when respondents are in default. See Certain Food Slicers and Components Thereof, 337-TA-76 and Pump Top Insulated Containers, 337-TA-59.

Complainant offered prima facie evidence that four respondents violated §337 in connection with the importation of canape makers or their subsequent sale. No evidence was offered by any respondent or the Commission investigative attorney to the contrary. The Commission investigative attorney supports complainant's position in all respects.

The hearing was completed on June 21, 1983, and briefs have been filed by the Complainant and the Commission investigative attorney.

### ISSUES

Complainant sought both a temporary exclusion order and a permanent exclusion order. The Commission granted complainant's request for a hearing on temporary relief. At the request of the parties who participated in the hearing, the hearings on a temporary exclusion order and a permanent exclusion order were combined. Since different issues are raised in connection with temporary relief, the initial determination on a temporary exclusion order was issued on July 5, 1983. This is the initial determination on a permanent exclusion order.

The following substantive issues are raised:

1. Is the '318 patent valid?
2. Did the imported canape makers infringe the '318 patent?
3. Is the domestic industry efficiently and economically operated?
4. Did the sale of imported canape makers which infringed the '318 patent have the effect or tendency to destroy or to injure substantially the domestic industry?

## FINDINGS

### 1. Validity of the '318 patent

The '318 patent is a design patent for a canape maker. LK Ex. 5. The patent was issued on March 22, 1983 to the inventor, Robert S. Lutzker, and was assigned to complainant LK. LK Ex. 7. The patent illustrates the design of a plastic tool for making canapes.

§171 of the Patent Act reads as follows:

Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.

The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

A patentable design may consist of surface ornamentation, or configuration, or a combination of both. A design must have a pleasing appearance and the design cannot be dictated solely by functional considerations. The design also must be novel and nonobvious. 1 D.S. Chisum, Patents, §1.04.

The '318 design patent is presumed to be valid under §232 of the Patent Act. 35 U.S.C.A. 232. No evidence that the patent was invalid was offered.

The patented design for a canape maker shown in the '318 patent consists of a design in which a container in the desired canape shape is pressed down on layers of food, cutting the food into the desired shape. Then a plunger is pressed down, pushing the canape outside the container after a toothpick has been inserted to hold the layers of food together. The cross-sectional shapes shown in the '318 patent are square, circular, oval and hexagonal. Since four cross-sectional shapes are shown in the patent, and a design patent can be for only a single design, it is clear that the cross-sectional shape determining the shape of the canape can change and the design can still fall within the single design concept of the patent. See LK Phys. Exs. J-U, and In re Rubinfeld, 123 USPQ 211, (CCPA 1959).

Although the canape maker design has functional aspects, this does not mean that the design is not patentable under a design patent. 1 D.S. Chisum, Patents, §1.04 [2](d). The design in this case is functional but it is not dictated solely by considerations of function.

In the absence of evidence to the contrary, complainant is entitled to the presumption that the '318 design patent is valid. The patent is found to be valid.

## 2. Infringement of the '318 Patent

The following test for infringement of a design patent was set forth in Gorham Company v. White, 81 U.S. 511, 528 (1872):

... if, in the eye of the ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive an observer, inducing him to purchase one supposing it to be the other the first one patented is infringed by the other.

In Ashley v. Weeks-Numan Co., 220 F.899 (2d Cir. 1915), the court held that "the patentee of a design patent is entitled, not only to the exact design shown in his drawing of the patent, but also to the protection of the court against the making and marketing of inkstands which contain the dominant features of the design described in the specification." 220 F. at 903.

Four of the respondents sell plastic canape makers which have almost precisely the same measurements as complainant's. TR 85. The principal difference in the designs (other than the color of the plastic) is that respondents' designs have cross-sections of hearts, diamonds, clubs or spades, instead of cross-sections which are oval, square, round or hexagon, as shown in the patent. Under Patent Office practice, a design patent can cover only a single design. In re Rubinfield, supra, at 213. It is clear that the Patent Office accepted in the '318 design patent four cross-sectional shapes as illustrations of the single design. The change in the cross-sectional shapes to hearts, diamonds, clubs or spades is not a significant change in the patented design.

Eric Takseras, a design expert, testified that he was certain that complainant's canape maker had been measured and copied in every feature except for the cross-sectional shape. TR 90-91. Even details that had no functional purpose were copied. TR 89.

Based on the evidence presented and a comparison of respondents' and complainant's products, it is found that the canape makers are so similar in overall appearance, size, shape, and packaging that it is likely that the ordinary purchaser would be deceived, and that he might purchase one of respondents' canape makers supposing it to be one of complainant's canape makers.



It is found that the canape makers sold by each respondent infringed the '318 design patent.

3. The domestic industry

The domestic industry, consisting of that part of the business of LK devoted to the manufacture and sale of the canape makers in issue, is efficiently and economically operated. LK has no licensees.

Complainant has an excellent reputation in the housewares industry for designing and selling quality products. TR 116, 117. The inventor, Robert S. Lutzker, spent a considerable amount of time developing a satisfactory design for a canape maker. TR 178-182. LK invested money in promoting and advertising the canape maker. TR 28-30. There are no comparable canape makers on the market except those alleged to infringe complainant's design patent. TR 71-75.

Complainant selects other companies to produce the parts for the canape makers. The parts are made by injection molds manufactured pursuant to complainant's designs. TR 17. The parts are assembled and packaged in the United States for complainant, and sold through a specially selected group of manufacturer's representatives. TR 17-20.

As soon as complainant put its canape maker on the market, it received unsolicited advertising, endorsements, and achieved immediate success. TR 27-32, 62, 72, 74, 99-100, 202, LK Exs. 11, 12, 13 and 15. Complainant's sales of and profits from canape makers increased until the infringing canape makers appeared on the market. TR 20, 21, 25, 45, LK Ex. 10, 11 and 12.

Complainant now has the capacity to produce 2.25 million canape makers and was planning to increase its capacity. TR 32, 33.

It is found that the domestic industry is efficiently and economically operated.

#### 4. Injury

There was evidence that four respondents had sold imported canape makers in the United States and that these canape makers had been imported by respondent Wecolite. TR 201, Staff Ex. 4, Staff Ex. 10.

Before the infringing canape makers appeared on the market in 1982, complainant had projected sales for 1983 at between \$375,000 and \$400,000. TR 32, 40.

Instead, as respondents' canape makers appeared on the market, complainant lost customers and its sales of the canape makers dropped drastically. TR 27, 28, 40, 41, LK Exs. 11, 12. Since the sales of respondents' canape makers started in 1982, LK's sales of canape makers have decreased to a negligible level. TR 27, 28, 40, 41, LK Exs. 11 and 12. Current sales are about \$1,000 per month, down from a high of \$33,000 per month. TR 41. Respondents' prices are lower than complainant's prices. TR 37, 44, 45. Because buyers want to buy the lower priced canape makers sold by respondents, complainant's entire product line has suffered. TR 41, 48. Manufacturer's representatives are now unsuccessful in selling complainant's canape makers to customers. TR 48. Complainant has been asked by customers to meet the lower prices at which respondents offer their canape makers. TR 44, 107, 108, 115, 116. To meet these prices, however, complainant would have to sell below its cost. TR 47, 48.

There was evidence of LK losing sales of canape makers to respondents. TR 53-56, 66-71, 102, 105-106, 110, 113-115.

Because of the drop in complainant's sales of canape makers, resulting in a current operating loss for complainant's entire line, complainant may be forced to terminate all of its operations within a short time.

TR 42, 51 52, 73, 74, LK Ex. 10. Respondents' imported canape makers have caused substantial injury to complainant's business in canape makers, and they threaten complainant's continued existence.

Since sales of complainant's canape makers are practically non-existent at this time, and respondents have unlimited production capability, (TR 35, Staff Ex. 4) there is also a tendency to injure the domestic industry substantially.

## CONCLUSIONS

It is found that:

1. The '318 design patent is valid and infringed by respondents' imported products.
2. The domestic industry is efficiently and economically operated.
3. The unfair acts of respondents Cooks Tools, Ltd., Hoan Products Ltd., Rowoco and Wecolite Co., Inc. in connection with the unlawful importation of canape makers have caused substantial injury to the domestic industry, and have a tendency to cause substantial injury to that industry.
4. There has been a violation of Section 337 of the Tariff Act, as amended.
5. No violation of Section 337 by Mid-West Housewares, Inc. was shown.

Complainant has made a prima facie case showing that Section 337 was violated in connection with the importation and subsequent sale of imported canape makers.

The record in this case, consisting of the transcript of the testimony received in evidence at the hearing, complainant's exhibits identified as LK Exhibits 1 - 17 and LK Physical Exhibits A-U, Staff Exhibits 2-4, and 6-12,

and all other papers and requests filed in this proceeding, is certified to the Commission. 1/

*Janet D. Saxon*  

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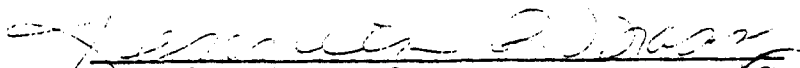
Janet D. Saxon  
Administrative Law Judge

Issued: July 21, 1983

1/ Pursuant to Section 210.53(h) of the Commission's Rules the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to Section 210.54, or the Commission pursuant to Section 210.55 orders on its own motion a review of the initial determination or certain issues therein. For computation of time, see Section 201.14. For computation of additional time after service by mail, see Section 201.16(d).

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Initial Determination was served upon Samuel Bailey, Jr., and upon the following parties via first class mail, and air mail where necessary, on July 22, 1983.

  
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