In the Matter of

CERTAIN PRODUCTS WITH GREMLINS CHARACTER DEPICTIONS

Investigation No. 337-TA-201

USITC PUBLICATION 1815

MARCH 1986

United States International Trade Commission / Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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

In the Matter of CERTAIN PRODUCTS WITH GREMLINS CHARACTER DEPICTIONS	Investigation No. 337-TA-201

NOTICE OF COMMISSION DECISION TO REVERSE A PORTION OF INITIAL DETERMINATION; TERMINATION OF INVESTIGATION ON THE BASIS OF NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has determined to reverse that part of the presiding administrative law judge's initial determination (ID) finding that complainant's licensing program can be a domestic industry under section 337, and to terminate the investigation on the basis that there is of no violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).

SUMMARY: The Commission has determined to reverse that part of an ID that found complainant's licensing program to be a domestic industry under section 337. The investigation is therefore terminated on the basis that there is no violation of section 337.

FOR FURTHER INFORMATION CONTACT: N. Tim Yaworski, Esq., Office of the General Counsel, telephone 202-523-0311. Hearing impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-724-0002.

SUPPLEMENTARY INFORMATION: On September 12, the presiding administrative law judge issued an ID in the above-captioned investigation. The ID found that (1) certain imported products infringe complainant's Warner Bros., Inc.'s copyrights; (2) there are domestic industries, including one consisting of complainant's licensing program for the Gremlins copyrights; (3) the domestic licensing industry is efficiently and economically operated; and (4) respondents' unfair practices have the tendency to substantially injure the domestic licensing industry, but no other domestic industry.

On October 30, 1985, the Commission determined to review those portions of the ID relating to industry and injury.

Notice of this investigation was published in the Federal Register of August 30, 1984 (49 F.R. 34422-23.

Copies of the public version of the Action and Order, Commission opinion, and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, telephone 202-523-0161.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: January 16, 1986

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

In the Matter of CERTAIN PRODUCTS WITH "GREMLINS" CHARACTER DEPICTIONS	Investigation No. 337-TA-201

COMMISSION ACTION AND ORDER

Background

A complaint was filed with the Commission on July 25, 1984, by Warner Brothers, Inc. (Warner), alleging unfair acts and methods of competition in the unauthorized importation and sale of certain products with "Gremlins" character depictions. The Commission on August 22, 1984, instituted the above-captioned investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation of certain products with "Gremlins" character depictions into the United States, or in their sale, by reason of alleged: (1) infringement of U.S. Copyright Reg. No. VAu 54-951; (2) infringement of U.S. Copyright Reg. No. VAu 54-952; and (3) infringement of U.S. Copyright Reg. No. PAu 214-201, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On September 12, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) in the above-captioned investigation. The ID found that: (1) Warner's copyrights are infringed; (2) there are domestic industries, including one consisting of complainant's licensing program for the Gremlins copyrights; (3) the domestic licensing industry is efficiently and economically operated; and (4) respondents' unfair practices have the tendency to substantially injure the domestic licensing industry, but no other domestic industry.

On October 30, 1985, the Commission determined to review the portions of the ID relating to industry and injury.

Action

Having reviewed the record in this investigation, including the briefs of complainant Warner and the Commission investigative attorney, the Commission on January 16, 1986, determined to reverse the portion of the ID finding complainant's licensing program to be a domestic industry under section 337, and to terminate the investigation on the basis that there is no violation of section 337. 1/

Order

Accordingly, it is hereby ORDERED THAT—

1. The part of the ALJ's initial determination finding complainant's licensing program to be a domestic industry is reversed;

2. The investigation is terminated on the basis that there is no violation of section 337;

3. A copy of this Action and Order shall be served upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of Treasury; and

4. Notice of this Action and Order shall be published in the Federal Register.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: January 16, 1986

1/ Vice Chairman Liebeler dissenting.

Certificate of Service

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF COMMISSION DECISION TO REVERSE A PORTION OF INITIAL DETERMINATION; TERMINATION OF INVESTIGATION ON THE BASIS OF NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930, was served upon Gary Rinkerman, Esq., and upon the following parties via first class mail, and air mail where necessary, on January 17, 1986.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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	)	
CERTAIN PRODUCTS WITH GREMLINS CHARACTER DEPICTIONS	)	Investigation No. 337-TA-201
	)	

VIEWS OF CHAIRWOMAN STERN, COMMISSIONER ECKES, COMMISSIONER LODWICK, AND COMMISSIONER ROHR

On July 25, 1984, Warner Brothers, Inc. (Warner), 1/ filed a complaint with the Commission alleging unfair acts and methods of competition in the unauthorized importation and sale of certain products with "Gremlins" character depictions. On August 22, 1984, the Commission instituted an investigation to determine whether there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation of certain products with "Gremlins" character depictions into the United States, or in their sale, by reason of alleged: (1) infringement of U.S. Copyright Reg. No. VAu 54-951; (2) infringement of U.S. Copyright Reg. No. VAu 54-952; and (3) infringement of U.S. Copyright Reg. No. PAu 214-201, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. 2/ 3/ In its complaint, Warner requested that the Commission issue a permanent exclusion order; Warner also requested a temporary exclusion order.

1/ Warner Bros., Inc. is a wholly-owned subsidiary of Warner Communications, Inc.

2/ 49 Fed. Reg. 34422-23.

3/ The following abbreviations will be used in this opinion: presiding administrative law judge (ALJ); deposition (Dep.); findings of fact (FF); Commission investigative attorney (IA); initial determination (ID); and temporary exclusion order (TEO).

Thirty-two respondents were named in the notice of investigation. None of the respondents participated in the investigation.

On December 10, 1984, the ALJ issued an ID denying Warner's motion for temporary relief. On January 10, 1985, the Commission affirmed the determination, denying Warner's motion for temporary relief on the basis that there was no immediate and substantial harm to complainant. 4/

On August 1, 1985, the Commission designated the investigation "more complicated" and extended the administrative deadline for completion of the investigation by one month to December 16, 1985. 5/ On September 12, 1985, the ALJ issued an ID that there is a violation of section 337. He found that: (1) certain imported products infringe three copyrights owned by complainant Warner; (2) there are domestic industries, including one consisting of complainant's licensing program for the Gremlins copyrights; (3) the domestic licensing industry is efficiently and economically operated; and (4) respondents' unfair practices have the tendency to substantially injure the domestic licensing industry, but did not injure any product industry.

On October 30, 1985, the Commission on its own motion determined to review the industry and injury determinations of the ALJ in this investigation. In particular, the Commission stated in its review notice that it would review:

1. Whether in light of the Court of Appeals for the Federal Circuit's decision in Schaper Manufacturing Co. v. U.S. International Trade Commission, 717 F.2d 1368 (CAFC 1983), a licensing industry can be a domestic industry within the meaning of section 337.
2. Whether, if a domestic licensing industry exists in this investigation, it is efficiently and economically operated.

4/ 50 Fed. Reg. 3037-38.

5/ The investigation was suspended for 77 days by order of the Court of Appeals for the Federal Circuit (CAFC). 50 Fed. Reg. 35169-70.

3. Whether respondents' unfair acts have the tendency to substantially injure the domestic licensing industry in light of the expected decline in the popularity of the Gremlins characters and the Gremlins motion picture.
4. Whether the Commission should redefine the domestic industry to include the production activities of the licensees and complainant's licensing activities, and if so, whether respondents' unfair acts have the effect or tendency to substantially injure the domestic industry as so defined. 6/

Warner and the IA filed briefs on the issues under review and on remedy, public interest, and bonding. No other briefs or comments were received. On December 16, 1985, the Commission determined to extend the administrative deadline an additional month to further consider the industry and injury issues in this case.

DISCUSSION

The Commission determined to review the ID in this investigation because it raises several questions with respect to the interpretation and application of the domestic industry and injury requirements of section 337. Upon review, the Commission determines that, in light of the purpose and legislative history of section 337, Commission precedent, and the CAFC's decision in Schaper Manufacturing Co., supra, there is no violation of section 337 because it has not been shown that the unfair acts in this investigation have the effect or tendency to substantially injure or destroy an industry, efficiently and economically operated, in the United States. Specifically, the Commission holds that the licensing activities of Warner with respect to the "Gremlins

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6/ The Commission also requested further briefing on the issue of whether the ALJ underestimated the type and degree of injury to the domestic licensing industry caused by the unfair acts of respondents. The specific issues were: whether sales were lost because of piratical goods that competed directly with licensed merchandise; whether sales were lost because the infringing imports satisfied consumers' demand for the Gremlins products; and whether sales were lost because the unauthorized products diminished the strength of the Gremlins licensing program. 50 Fed. Reg. 46367.

copyrights" do not constitute a domestic industry under section 337; that there is a domestic industry in the United States that includes the domestic production-related activities of Warner's licensees involving the Gremlins copyrights; and that Warner has failed to establish that imports have substantially injured or destroyed that industry, or have a tendency to do so.

1. Licensing industry

In the ID, the ALJ found that complainant's licensing activities with respect to the management of the Gremlins copyrights were a domestic industry under section 337. This domestic licensing industry consists of the marketing, financial, and legal activities related to the lease and legal protection of the Gremlins copyrights.

Section 337(a) provides:

> Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, . . . are declared unlawful . . . .

In explaining the term domestic industry under section 337, the House report on the Trade Act of 1974 states:

> In cases involving the claims of U.S. patents, the patent must be exploited by production in the United States, and the industry in the United States generally consists of the domestic operations of the patent owner, his assignees and licensees devoted to such exploitation of the patent. 7/

7/ H.R. Rep. No. 571, 93rd Cong., 1st Sess. 78 (1973) (emphasis added). In its past decisions interpreting this provision, the Commission has consistently utilized the term "exploitation" of the patent to mean exploitation of the patent by production in the United States. See, e.g., Certain Composite Diamond Coated Textile Machinery Components, Inv. No. 337-TA-160, USITC Pub. 1603 (1984); Certain Plastic Food Storage Containers, Inv. No. 337-TA-152, USITC Pub. 1563 (1984); and Certain Coin-Operated Audiovisual Games and Components Thereof, Inv. No. 337-TA-87, USITC Pub. 1160 (1981).

In accordance with this legislative history, the Commission has consistently defined the industry in section 337 cases to be the domestic production of the products covered by the intellectual property rights in question. In copyright cases, the Commission has defined the domestic industry to consist of the domestic production of the copyrighted products. 8/

Beginning with Certain Miniature, Battery-Operated, All-Terrain, Wheeled Vehicles (Toy Trucks), 9/ the test utilized by the Commission to determine the existence of a domestic industry has been to evaluate "the nature and significance of complainant's business activities in the United States" which relate to the production of the patented, copyrighted, or trademarked products. 10/ In Toy Trucks, the Commission rejected complainants' arguments that licensing activities were a part of the domestic industry. Instead, the Commission considered as part of the domestic industry only those activities which related to complainants' production of the patented items, 11/ not to the mere servicing of the intellectual property right in question.

The CAFC affirmed the Commission's determination in Toy Trucks and held that complainant Goldfarb's licensing activity could not be part of the domestic industry:

> Third, we also agree with the Commission that appellant Goldfarb's activities cannot be considered part of any domestic 'industry' relevant to this case. His activity concerning the Stomper toy vehicles is the design and licensing of the toy vehicles and accessories, and the collection of royalties; Goldfarb is not involved in the manufacture or selling of the vehicles . . . . There is nothing in the statute or its legislative history to indicate that such activities, which do not involve either

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8/ See Certain Coin-Operated Audiovisual Games and Components Thereof (Viz. Rally-X and Pac Man), Inv. No. 337-TA-105, USITC Pub. 1267 at 21-22 (1982).
9/ Inv. No. 337-TA-122, USITC Pub. 1300 (1982).
10/ Id. at 6.
11/ Id. at 8; 717 F.2d 1371.

> manufacture or production or servicing of the patented item, are meant to be protected by section 337. 12/

In Schaper, the CAFC emphasized that the activities which are significant in determining the existence of a domestic industry are the production-related activities:

> As quoted above, the House report accompanying the Trade Act of 1974 states that 'the patent must be exploited by production in the United States, and the industry in the United States generally consists of the domestic operations of the patent owner, his assignees and licensees devoted to such exploitation of the patent.' H. Rep. No. 571, 93rd Cong., 1st Sess. 78 (1973). The Commission in Certain Ultra-Microtome Freezing Attachments, . . . likewise said that '[p]ast Commission decisions, from Bakelite [Frischer & Co. v. Bakelite Corp., 39 F.2d 247 (CCPA 1930)] through Electronic Pianos [USITC Pub. 721 (March 1975)], have defined 'industry' in section 337 investigations as the domestic manufacture or production of the patented product by the patentee or his licensee. 13/

The CAFC further stated: "Also, Schaper's very large expenditures for advertising and promotion cannot be considered part of the production process. Were we to hold otherwise, few importers would fail the test of constituting a domestic industry." 14/

Production-related activities distinguish a domestic industry from an importer or inventor. It is clear from section 337, its legislative history, past Commission decisions, and Schaper that section 337 protects domestic industries, not importers or inventors. 15/ Although some Gremlins products are produced domestically, the ALJ did not define the domestic licensing industry to include the licensees' production-related activities. The ALJ defined the domestic licensing industry to include solely Warner's licensing activities.

12/ 717 F.2d 1371 (footnote omitted).
13/ 717 F.2d 1373.
14/ Id.
15/ 717 F.2d 1371.

In the ID, the ALJ attempted to distinguish the licensing activity in Schaper from the licensing activity in the present case:

> The activity which complainant engages in under the name licensing certainly includes services as the activity was defined in Cast Iron Stoves, and the licensing activity in this investigation is unlike that found in [Toy Trucks]. It involves far more than the usual activity of any inventor or copyright holder and is part of an established industry . . . . Every film or television series involving fanciful characters created to appeal to children, such as "E.T.," "Star Wars," and "Star Trek," has utilized a character licensing program as an integral part of their original profit-making domestic activity . . . . Large sums of money are invested in the planning of the licensing program and significant personnel are utilized in developing and executing it 16/

The ALJ distinguished Toy Trucks on the basis of the extent of Warner's licensing activities, in effect finding that Warner's domestic licensing activities were significant. The Commission's test, however, analyzes not only the significance of complainant's activities in the United States, but also the nature of those activities. The Commission has never determined that the servicing of intellectual property rights, as contrasted with the servicing of products, qualifies as the type of "servicing" activity that may be considered to be part of the domestic industry. 17/ An importer or an inventor could service the intellectual property rights in the United States as readily as a "domestic industry."

In the ID, the ALJ relied on a description of domestic industry in Certain Airtight Cast-Iron Stoves (Cast Iron Stoves) 18/--i.e., land, labor,

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16/ ID at 30.

17/ This position has also been upheld by the CAFC. Warner has argued that the only significance of the Schaper decision is that it recognizes that a service industry can be a domestic industry under section 337. In Schaper, however, the CAFC was referring to "servicing of the patented [or copyrighted] item," not to the servicing of the intellectual property rights. 717 F.2d 1371.

18/ Chairwoman Stern dissenting.

and capital devoted to the creation of value in the United States--as did Warner and the IA in their briefs--to support his conclusion. However, as the CAFC noted in Schaper:

> [t]he Commission has not adopted [complainants'] proposed general definition that a 'significant employment of American land, labor, and capital for the creation of value' constitutes such an 'industry' and the words, purposes, and history of section 337 do not compel that reading if it is meant to downplay the role of production and servicing [of the patented or copyrighted products] in this country. 19/

Since the Toy Trucks decision, the Commission has made it clear that the quoted language in Cast-Iron Stoves is not the test for a domestic industry. Instead, the Commission has consistently focused on the nature and significance of complainant's activities relating to the production of the patented, trademarked or copyrighted items in the United States. In Certain Cube Puzzles, 20/ for example, the Commission focused on the packaging, repair, and quality control of the trademarked cube puzzles themselves, not on the marketing or licensing of the trademark.

Moreover, in Cast-Iron Stoves, the Commission based its determination on the assembly and installation of the trademarked products, i.e., the stoves, not on the servicing or licensing of the intellectual property rights. Assembly and installation of the imported stoves, therefore, were integrally

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19/ 717 F.2d 1373. In Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126 at 10 (1981), the Commission only stated in its opinion:

> The Commission investigative attorney has urged the Commission to adopt as the test for domestic industry 'any systematic activity which significantly employs use of American land, labor, and capital for the creation of value.' We agree that in this case there is clearly a significant employment of land, labor, and capital for the creation of value.

Id.

20/ Inv. No. 337-TA-112, USITC Pub. 1334 (1983).

related to the product. 21/ The Gremlins licensing industry, as found by the ALJ, is not, therefore, a "service industry" as that term has been used by the Commission or the CAFC.

In his opinion, the ALJ did not specifically define the scope of the licensing industry. In his findings of fact, however, he indicated that the domestic industry includes the Licensing Company of America (LCA), a division of Warner Communications, Inc. LCA acts as Warner Brothers, Inc.'s agent in licensing rights to the Gremlins copyrights. 22/ The six departments of LCA are: (1) market research; (2) sales; (3) sales promotion; (4) graphics services; (5) financial control; and (6) business affairs. 23/

LCA's market research department assists the sales department and promotional licensing department in developing a marketing plan. 24/ The various experts in the sales department assist in development of an overall marketing strategy, help to establish a licensing network, and play a secondary role in designing licensed products. 25/ The sales promotion department creates and develops concepts and negotiates licenses that utilize

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21/ In Toy Trucks, Commissioner Eckes made that point in distinguishing the Cast-Iron Stoves case:

> In Stoves, however, the nature and significance of the business activities in the United States were found to constitute a service industry based on the installation and repair of the imported product. The nature of the activities in the United States were thus integrally related to that product.

Toy Trucks at 6 n.9.

22/ FF 3. Arguably, Amblin Entertainment, Inc. (Amblin), which was engaged in production of the motion picture Gremlins, is also part of the domestic licensing industry. Amblin worked closely with Warner Bros. and LCA throughout the design and implementation of the Gremlins character licensing program. FF 4. Warner, however, stated in its petition for review at p. 3 that LCA almost exclusively performed the service of developing and managing the Gremlins licensing program. See also Warner brief at 5 n.4.

23/ FF 135E.

24/ FF 135F.

25/ FF 135G.

the licensed property in promotion offers. 26/ LCA's graphic services department creates marketing kits, provides creative or artistic aid to manufacturers, and serves as a quality control department. 27/

The ALJ also described LCA's financial control department and business affairs department:

> LCA's financial control department maintains accounting procedures to monitor royalty reports and the receipt of timely payments, and oversees disbursement to the property owner. The financial control department also possesses the expertise to know when the accuracy of a royalty report should be questioned, because while a licensor has the legal right to audit each of the licensee's books, it is impracticable for them to do so on a regular basis . . . .
>
> LCA's business affairs department works closely with Warner in supervising the marketplace to police against counterfeit products and assists in both formal and informal legal actions to protect all participants in a licensing program. The business affairs department is also primarily involved in the negotiation and actual preparation of the licensing agreements. 28/

The Gremlins licensing program used all of these services. 29/

The activities performed by LCA, although extensive, could be performed by an importer. If Warner's and the ALJ's proposed definition of this domestic licensing industry were adopted by the Commission, a foreign producer could obtain a U.S. copyright, produce all of the products abroad without adding any production-related value to the products or engaging in any production-related activities in the United States, and still be a domestic industry based on extensive marketing and legal activities (to protect the copyright) in the United States. Congress did not intend to protect the activities of importers when it enacted section 337. As the CAFC stated in

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26/ FF 135H.
27/ FF 135I.
28/ FF 135K-135L.
29/ FF 135P.

Schaper: "If, as appellants suggest, present-day 'economic realities' call for a broader definition to protect American interests (apparently including many of today's importers), it is for Congress, not the courts or the Commission, to legislate that policy." 30/

The ALJ has defined Warner's activities that relate to the marketing, sale, and legal protection of the copyrights to be a domestic industry under section 337 without including any production-related activities. Because these activities relate solely to the servicing of the intellectual property rights in question and are not the type of activities that Congress intended to protect by section 337, we reverse the ALJ on this issue.

The Commission also has determined not to redefine the domestic industry so as to include both the licensing activities and the domestic production activities of Warner's licensees. Warner never developed this argument before the ALJ or the Commission. In its brief to the Commission, Warner dismissed the new definition as unnecessary. 31/ The Commission is not obligated to pursue this question in absence of an adequate development of the issue by the parties. Further treatment of the issue of combining licensing activities and production activities must await another investigation in which the parties have adequately raised the issue and developed the factual record before the Commission.

2. Domestic product industry

The Commission determines that there is a domestic industry in this investigation consisting of the domestic production-related activities of Warner's licensees under the Gremlins copyrights. The record in this case is

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30/ 717 F.2d 1368, 1373.
31/ Warner brief at 41.

unclear as to the exact number and type of Gremlins items produced in the United States. 32/ From the questionnaire responses, the Commission has determined that certain Gremlins products are domestically produced. 33/ These Gremlins products include such items as painters caps, Gremlins books and records, nightshirts, higher-priced Gremlins toys, flashlights, ball point pens, and Gremlins cereal. 34/ The domestic production of such items qualifies as a domestic industry. 35/

32/ The IA sent questionnaires to 48 Warner licensees requesting production and employment data, but only 36 responded and several of those responses are incomplete. Thus, the ALJ found it impossible to determine the number of employees producing Gremlins products in the United States and the aggregate number of domestic sales. FF 196-97. These are the same findings the ALJ made in denying Warner's motion for temporary relief on Dec. 10, 1984. TEO FF 196-97. For over seven months, Warner had the opportunity to add additional evidence to the record from the 12 licensees that did not respond to the questionnaires and to correct the data in the record. Warner chose not to do so.

33/ For certain products, it is impossible to determine from the questionnaires whether or to what extent the products are produced in the United States. For example, latex Gremlins masks are produced in both Mexico and the United States, but from the questionnaire, it cannot be determined which masks are produced in the United States and which produced in Mexico.

34/ The following Gremlins clothing/footwear items are included in the domestic industry: painters caps, baseball caps, Halloween costumes and masks, nightshirts, pajamas, bathrobes, underwear, T-shirts, jerseys, sweatshirts, belts, blanket sleepers, children's socks, knee-high socks, children's house slippers, knit hats, and scarves. The following Gremlins toys are included in the domestic industry: Gremlins books, records, toy Gizzmobiles, Gremlins card games, stickers, posters, puzzles, paint sets, games, Viewmaster picture reels, Lite Brite picture kits, Colorforms, transfers, and picture cards. The following Gremlins miscellaneous products are included in the domestic industry: Gremlins clipboards, binders, flashlights, penlights, lanterns, nightlights, ballpoint pens, breakfast cereal, theme books, memos, portfolios, pads, school lunch kits, insulated bottles, and paper patterns for costumes.

35/ Commissioner Rohr notes that further specification of the domestic industry would require the Commission to examine the nature and significance of the domestic production-related activities of the Warner licensees. As noted above, the record in this investigation does not permit the Commission to make this determination for many of the licensees who conduct their activities both in the United States and abroad. In the circumstances of this investigation, and in light of the Commission's affirmance of the ALJ's determinations with respect to injury, he agrees that it is unnecessary to provide further specification of the domestic industry.

In addition to his finding that Warner's licensing program constituted a domestic industry, the ALJ also analyzed three possible domestic product industries based on the activities of Warner's licensees. These are: (1) an industry producing higher priced utilitarian products; 36/ (2) an industry producing souvenir items; 37/ and (3) an industry producing Gizmo dolls. The ALJ concluded that the producers of higher priced utilitarian products did not constitute a domestic industry because there were no imports of such products and because such products were not competitive with the goods being imported. 38/ He also distinguished between domestic producers of the souvenir items and domestic producers of the Gizmo dolls on the basis of a lack of competition between such goods. 39/

The Commission determines that the use of competition between domestic production and imports to define the domestic industry is not the proper analysis of the domestic industry requirement of section 337. 40/ Similarly, the Commission determines that competition between various domestically

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36/ Such as lunchboxes, notebooks, and clothing.

37/ Such as painter's caps, puffy stickers, and other items that usually sell for less than a dollar.

38/ ID at 28.

39/ Id. at 27-28.

40/ The ALJ's determination to limit the domestic industry to production of items that are competitive with the infringing imports was based on his interpretation of the Commission's determination in Certain Coin-Operated Audiovisual Games and Components Thereof (Viz. Rally-X and Pac Man) (Games II), Inv. No. 337-TA-105, USITC Pub. 1262 (1982). In that case, the infringing imports were Pac Man audiovisual games and the Commission did not include in the domestic industry production of "collateral" products such as shirts and board games. Games II at 20. However, the copyright in that case concerned the audiovisual work of the game rather than the individual characters. Production of the "collateral" products was not relevant to that investigation. In this investigation, the Gremlins' copyrights specifically apply to the Gremlins characters. The domestic industry must be defined accordingly.

produced products should not be used to define separate domestic product industries. 41/

3. Injury

We agree with the ALJ that the imported products do not have the effect or tendency to substantially injure the domestic product industry. 42/ In an analysis of injury, we first examine whether the imported products compete with the domestically produced products and therefore can injure the domestic industry. As the ALJ found, all the imported products are in the souvenir, low-priced category, whereas almost all of the domestic products are higher-priced toys and utilitarian products, such as clothes or flashlights. Thus, the ALJ stated:

> Most of the imports at issue are products within the souvenir market (e.g., circular PVC [polyvinyl chloride] key chains, PVC medallions, PVC badges, color stickers, photoframes, and other low-priced trinket items) . . . that have virtually no counterpart in the domestic products industry because the licensor chose not to exploit this market segment . . . . Evidence concerning the levels of market penetration for these imports is not apparent on the record so it is difficult to determine the significance of the imports . . . . Also, only a small fraction of the unlicensed GREMLINS products imported were ever sold because of complainant's success in having this merchandise seized . . . . Finally, the quality of the imported products are [sic] so low, and the quality of the licensed products so high, it is doubtful that the low quality

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41/ The ALJ's conclusion was based on his finding that because the souvenir items and the dolls do not compete they should be analyzed as separate industries. While the lack of competition between these products is a proper and relevant consideration for the analysis of the injurious impact of imports on the industry, it should not be used to define the domestic industry.

42/ As stated above, we determine that complainant's licensing activities cannot be a domestic industry under section 337. We, therefore, do not reach the issues of injury or efficient and economic operation of the "domestic licensing industry."

imports will cause a diminution in sales of the licensed products. 43/

All of the imported products usually sell for less than three dollars per unit and most sell for less than a dollar. 44/ The imported Gremlins products are: low-cost jewelry, such as earrings, necklaces and rings, label pins, puffy stickers, plastic dolls, stuffed Gizmo dolls, 45/ Gremlins savings banks, address books, telephone note pads, photoframes, painters caps, and small purses. 46/

As the ALJ determined in the ID, there is no domestic production of these items, except for puffy stickers and painters caps. The licensed Gizmo dolls that are competitive with the imported Gizmo dolls are all produced abroad. Warner acknowledged this fact in its petition for review: "The actual manufacture of these dolls is not claimed to be a domestic industry because the dolls were produced overseas." 47/

The only doll being produced in the United States is the Stripe doll by the L.J.N. Company. 48/ The imported dolls, however, are Gizmo dolls. The two characters are completely different. Gizmo is a soft, huggable character. The Gizmo doll looks like a teddy bear. The Stripe character is an ugly, snarling, creature. The L.J.N. Stripe doll is a large, hard plastic figure that looks more like a statue for sale to teenage boys or adults as a

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43/ ID at 35. This is the same finding the ALJ made in his temporary relief ID on Dec. 10, 1984. TEO at 29. For over seven months, Warner had the opportunity to introduce additional evidence to contradict this finding, but chose not to do so.

44/ ID (FF 200-23).

45/ From the record, it is not clear whether any of the infringing stuffed Gizmo dolls were actually imported. However, there is evidence of offers for sale to importers in the United States. See FF 87, 91, and 95-96.

46/ ID (FF 200-23).

47/ Warner's petition for review at 5 n.5.

48/ ID at 27-28. L.J.N. was one of the companies that did not complete the questionnaire.

novelty item. The evidence on the record is that the two dolls do not compete with one another. 49/

As the ALJ determined, the only two domestic products that clearly compete with the imported products are painters caps and puffy stickers. We concur with the ALJ that the evidence does not support findings that the infringing imports had the effect or tendency of substantially injuring the domestic production of the two products. As the ALJ determined with regard to stickers:

> Finally, the only evidence of Hallmark's sales for paper stickers demonstrates that approximately one month after the film 'Gremlins' was released, Hallmark reported it had already sold more than 50 percent of its projected sales for this item. FF 248. At the same time, there is no evidence that imported stickers have actually been sold to United States' consumers, or that there has been any underselling. Some stickers were shipped into the United States but seized as a result of a district court suit filed by complainant. FF 225. 50/

We also concur with the ALJ that the imports of infringing Gremlins painters caps were so few and their quality so low that they are not competitive with the domestically produced painters caps. 51/

An argument has been made that the imported products, although they are low-priced souvenir items, have a competitive impact on the higher-priced utilitarian products and toys. 52/ We concur with the ALJ, however, that the

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49/ ID at 27-28. See testimony of Mr. Owen, Vice President-Marketing Services, Hasbro, Owen Dep. at 56-57. This is the same finding the ALJ made in his temporary relief ID on Dec. 10, 1984. TEO at 24.

50/ ID at 36. This is the same finding the ALJ made in the TEO on Dec. 10, 1984. TEO at 30.

51/ ID at 37. This is the same finding the ALJ made in the TEO on Dec. 10, 1984. TEO at 30.

52/ Although Warner made this cross-elasticity argument, Warner did not argue that the infringing imports injured the domestic product industry, but the domestic licensing industry. See Warner's Brief to the Commission at 30-31.

evidence does not support this argument, which has been referred to as "the cross-elasticity argument."

In the ID, the ALJ stated:

> The administrative law judge evaluated the testimony of several business executives who gave their depositions on the question whether souvenir items will displace or decrease sales of higher priced, largely functional products and finds that the testimony generally supports the view that only closely similar products are in competition. FF 128. The statements relied on by the parties to support the assertion that all GREMLINS licensed products are in competition are the result of leading questions and reflect an ambiguous and unclear notion of the type of competition under discussion. The spontaneous testimony of the businessmen clearly reflects a view that low-priced, inferior quality souvenir items are not in competition with the licensed, high-quality GREMLINS functional products. FF 128, 132. 53/

Much of the testimony in the depositions demonstrates that the witnesses were unsure of whether there was competition between different Gremlins products. In fact, some of the testimony supports just the opposite conclusion, i.e., the conclusion that the disparate Gremlins products are not competitive with one another. When the depositions on the record are examined, the ALJ is correct that the statements relied on by the parties to support the assertion that all Gremlin licensed products are competitive are "the result of leading questions and reflect an ambiguous and unclear notion of the type of competition under discussion."

Mr. Globe, who oversees the licensing and merchandising interests of Amblin, the company that helped produce the Gremlins movie, when asked whether products within a toy category compete with each other, stated:

> I would assume there is a certain level of competition. . . . But assuming the demand is great enough, ultimately different consumers are going to want different types of products, which is oftentimes the case.

53/ ID at 38.

> So, I don't really know if I have the answer to that question. 54/

When asked whether products in different product categories, such as food products and toys, compete, Mr. Globe again responded:

> I don't have the answer to that question. I would assume there would probably be even less competition there than there would be between, you know products in the same category. 55/

Mr. Romanelli, the Vice President of Merchandising for LCA, which licensed the Gremlins copyrights, stated that there was no competition between food products and toys, 56/ between articulated figures and plush toys, 57/ or between expensive and low-priced Gremlins masks. 58/ Mr. Owen, the Vice President of Manufacturing for Hasbro, which produces the plush Gizmo dolls, testified that he did not believe there was competition between different Gremlins product categories, such as toys and clothing. 59/

Although Mr. Globe and Mr. Romanelli testified that the infringing Gremlins imports injured the licensed Gremlins products, Mr. Owen was equivocal about whether infringing products in one category could injure products in other categories:

> If it's a directly competing product that is infringing, obviously that is one-for-one impact. If somebody is going to buy a plush doll that is a counterfeit of what we are doing, we have lost a sale.
>
> I think it goes beyond that though. I think a lot of times, if they buy a three inch figurine that is counterfeit, we have--may have lost a plush sale. That may

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54/ Globe Dep. at 25.
55/ Id. at 26.
56/ Romanelli Dep. at 12.
57/ Id. at 52-53.
58/ Id. at 17.
59/ Owen Dep. at 47-48. Mr. Owen also testified that the Gizmo and Stripe characters do not compete with one another. Id. at 56-57.

> have satisfied the demand. I have no way of measuring that. 60/

As Mr. Owen stated, there is no way of measuring the impact of infringing products in one product category on other product categories, such as the impact of an infringing Gremlins key chain on sales of licensed Gremlins pajamas or flashlights.

Although all the witnesses speculated in their depositions that the infringing imports have injured the domestic licensed products, there is no evidence of a single transaction in which a domestic producer has lost a sale because of an infringing import. 61/

In her deposition, Ms. Young, the Vice President of Merchandising for Lucasfilm, in addition to other witnesses, argued that the infringing imports took sales away from the licensed products because the imports could satisfy a consumer's demand for Gremlins merchandise. Ms. Young stated:

> Q. If I understand you correctly, within a licensing program, there is competition amongst licensed items.
>
> A. Yes. The competition being the licensees are competing for a certain number of dollars. Whether the consumer chooses to spend it on toys or apparel or housewares is a decision that's made by the consumer. So the competition is not within the range of products but for the dollars to be spent on this product. 62/

The argument here appears to be that a consumer has a limited amount of disposable income for Gremlins products and when he buys an infringing Gremlins key chain, he is less likely to buy a licensed Gremlins lunchbox. However, various consumer products are always competing for a consumers

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60/ Id. at 26 (emphasis added).

61/ The closest evidence is complaints by domestic licensees for Gizmo dolls about infringing imported dolls. However, as stated above, all the licensed Gizmo dolls are produced entirely abroad.

62/ Young Dep. at 30.

disposable income. A consumer is always faced with the choice of buying a new refrigerator, a new television set, or a new suit. It is questionable whether a consumer who buys a Gremlins key chain for less than a dollar will not buy a higher-priced Gremlins lunchbox or flashlight which would be used for a specific purpose. As Ms. Young further stated:

> I think the consumer, in some instances, goes out to buy something for a purpose. For instance, take an example of a lunch kit. Kids are going to need lunch kits when they start school in the fall and the consumer walks into a mass-merchandising outlet and sees a range of products that are available. He can buy what I'll call a non-branded product or he can buy something with any selection of character licenses on it. They're usually pretty competitively priced and--well, they'll make a selection to buy one of them. There are other instances where it's strictly an impulse purchase. 63/

From this testimony, it is unclear whether there is substitution between an impulse item, such as a Gremlins keychain, and a utilitarian item, such as a Gremlins lunchbox.

As the ALJ stated:

> The realities of the marketplace are that one product will substitute for another only when there is direct or close competition between the two. Broad definitions of competition for the disposable income of a consumer are not meaningful measures for the substitutability of one product for another because they do not focus on the actual point at which the infringing imports have an adverse impact. Thus, a determination must be made as to what segment or segments of the domestic licensed products are in live competition with the imports in order to determine whether they are substantially injured by the infringing imports. 64/

63/ Id. at 18.

64/ ID at 24-25. This comment was made by the ALJ in connection with his finding on the domestic industry, which we believe is inappropriate. It is clearly relevant to injury.

The Commission determines that Warner has not produced sufficient evidence to support its cross-elasticity argument. 65/ As stated, there is no hard evidence that a domestic producer of higher-priced Gremlins toys or utilitarian products has ever lost a sale because of the infringing imports. There is merely hypothetical speculation by the various witnesses, which in some cases is contradicted by their own testimony.

Warner also had ample opportunity to produce additional evidence to support its cross-elasticity argument. In the ID dismissing Warner's motion for temporary relief, the ALJ on December 10, 1984, rejected Warner's cross-elasticity argument for the same reasons and based on the same evidence as in the final ID. 66/ Warner chose not to do so.

Finally, even if the infringing imports were competitive with the licensed Gremlins domestic products, the Commission would not necessarily find that the imports have the tendency to substantially injure the domestic industry. As the ALJ determined, the U.S. Customs Service is already seizing the infringing Gremlins imports under the copyright laws, and Warner has been successful in a number of suits in district court in stopping the infringing imports. 67/ Thus, the ALJ determined "only a small fraction of the unlicensed Gremlins products imported were ever sold because of complainant's success in having the merchandise seized." 68/

65/ The Commission does not hold that a cross-elasticity argument can never be established. We merely find that Warner did not meet its burden of establishing cross-elasticity between the imports and the domestic products in this case.

66/ TEO at 32.

67/ FF 225-26.

68/ ID at 35.

For the above reasons, the Commission determines that the infringing imports do not have the tendency to substantially injure the domestic industry for Gremlins products.

CONCLUSION

For the above reasons, the Commission determines that there is no violation of section 337.

ADDITIONAL VIEWS OF CHAIRWOMAN STERN

I am in agreement with the majority of my colleagues on the important substantive issues brought to light throughout both the temporary and permanent relief phases of this investigation. However, I believe the facts of this case also highlight significant procedural issues which concern the proper implementation of section 337, and thus warrant special comment. Specifically, this case squarely presents questions regarding the extent of Commission discretion in accelerating our procedure for

temporary relief and in the implementation of our default standard. Although these issues were not outcome determinative in this particular investigation, the effectiveness of the statute in providing relief in future cases could be compromised, should they remain unresolved.

When Warner Brothers, Inc. filed its complaint with the Commission in July, 1984, it requested expedited action in the form of a temporary exclusion order, (TEO), based on the grounds that unauthorized imports threatened the existence of a short-lived copyright licensing program. Although 32 respondents were named in the notice of investigation, none participated and the investigation proceeded on a default basis. Five months later, after a full evidentiary hearing and discovery, the ALJ issued his initial determination denying Warner Brothers' request for temporary relief on the basis that there was no immediate and substantial harm to complainant. One month later, six months after the request for expedited relief, the Commission upheld the finding on the same grounds.

The Commission's decision has been criticized as an example of the "lumbering equanimity" with which the ITC approaches requests for temporary relief.[1/] It has been argued that ITC

1/ See Robert D. Bannerman, "Temporary Relief in Section 337 Cases - A Call for Reform," Temporary Relief Before the U.S. International Trade Commission, ITC Trial Lawyers Association, October 28, 1985.

procedural requirements for expedited relief are cumbersome, time consuming, expensive, and can even be an obstacle to an effective remedy under section 337. Warner's counsel during the temporary relief phase of the investigation has argued that the issue of temporary relief was in fact moot by the time discovery was completed, a full evidentiary hearing was held, the ALJ had made a determination and the Commission had upheld that determination.[2/]

I am aware that there has been growing criticism of ITC procedures relating to two issues: (1) temporary relief, and (2) default under section 337. And I believe that there is enough discretion under the statute and ITC rules to resolve procedural delays while maintaining appropriate legal standards for Commission actions.[3/]

2/ It should be noted that both the Administrative Law Judge and the Commission found that Warner Brothers suffered no injury in the absence of temporary relief because the U.S. Customs Service excluded the infringing imports under the copyright laws during the entire period of investigation.

3/ The United States Court of Appeals for the Federal Circuit recently upheld the Commission decision regarding temporary relief in this investigation, finding that the ITC applied the correct legal standard regarding immediate and substantial harm. Warner Brothers, Inc. v. U.S. International Trade Commission, Appeal No. 85-2107, January 10, 1986.

A Full Evidentiary Hearing is Not Required for Temporary Relief[4/]

An example of where improved procedures are called for is in the conduct of hearings on temporary relief. A due process hearing may be required, but neither the APA nor the U.S. Constitution grants the right to present all possible evidence. The TEO hearing must be a due process hearing within the meaning of the Administrative Procedure Act ("APA"). The statute expressly states that a determination of whether or not to enter a TEO "shall be made on the record after notice and opportunity for a hearing in conformity with [the APA]." 19 USC 1337(c)

The APA sets out these requirements:

> to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

5 USC Section 556(d) (emphasis supplied)

The legislative history of the APA reiterates this requirement:

4/ See "Memorandum Regarding Appropriate Procedures for TEO Hearing," Certain Hand-Operated, Gas-Operated Welding, Cutting and Heating Equipment and Component Parts Thereof," Unfair Imports Investigations Division, Inv. No. 337-TA-132, December, 1982, and "Review of Initial Determination Denying Temporary Relief in Certain Hand-Operated, Gas-Operated, Welding, Cutting and Heating Equipment and Component Parts Thereof," Inv. No. 337-TA-132, GC-G-97, April 1, 1983.

> [t]he full hearing required would be a full 'due process' hearing, with the Commission of course being able to impose reasonable restraints on the time to be devoted to such hearings.

S.Rep. No. 93-1298, 93d Cong., 2d Sess. 195 (1974) (emphasis supplied).

A full "due process" hearing gives each party the opportunity to present all the essentials of its case. But, it does not grant by constitutional right or by statute the opportunity to present all possible evidence. To the contrary, the APA statute expressly limits evidence to that "required for a full and true disclosure of the facts." And as Congress recognized, the Commission could "impose reasonable restraints" on the length of the hearing. In short, the right to administrative due process guarantees to each party the opportunity to present evidence and controvert evidence against it, as necessary. This opportunity only includes the right to cross-examine when the absence of such cross-examination can be shown to cause prejudice to the party.

Simply put, due process requires that the administrative law judge (ALJ) exercise his/her power to conduct the hearing in order to insure fairness to all the parties. The essence of fairness is the allowance of each party to introduce all the evidence needed to present its case. It should not be forgotten that fairness to one party often requires that another party be limited as to the evidence introduced.

For this reason, the ALJ is accorded discretion as to the conduct of the hearing. A fair trial requires that "[the ALJ] have wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed." Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962). Keeping in mind the requirement of fairness, the ALJ must be prepared to adapt to the demands of the circumstances. See, e.g., In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)

Two related principles are found in an examination of the case law implementing APA due process requirements for hearings. First, it is always permissible to limit cross-examination as long as the limitation does not substantially prejudice any party. Secondly, the party which seeks the cross-examination must establish need, i.e., that the absence of such examination will prejudice it.[5/]

5/ Cross-examination is at the discretion of the ALJ. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 880 (1st Cir. 1978), cert. den. 439 U.S. 824 (1979). Cross-examination can always be limited to "reasonable bounds." Loesch v. FTC, 257 F.2d 882, 883 (4th Cir. 1958). Of course, a party which cannot establish its case without cross-examimation must be allowed reasonable cross-examination. Beaumont Broadcasting Corp. v. FCC, 2302 F.2d 306 (D.C. Cir. 1952). But, the burden of establishing the need is

(Footnote continued to page 7)

Similarly, discovery is not required in every case. Discovery is not mandated by the Due Process Clause of the U.S. Constitution. Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977). And the APA does not provide for discovery. However, I recognize that the denial of proper discovery in a particular situation may work a substantial hardship on the party denied access and arguably constitute a denial of due process.

These principles regarding cross examination and discovery should certainly be followed in Section 337 temporary relief investigations. Probably the most difficult part of the ALJ's responsibility when conducting a hearing is the hard decision limiting the hearing itself within reasonable and necessary bounds. The ALJ can certainly order an attorney to move on to another line of cross-examination or to sit down. The ALJ also can tell a litigator that he/she cannot call more than two or three witnesses or cannot have more than two or three days of trial time. And the ALJ can substitute written for oral testimony for purposes of a hearing on temporary relief. Such limitations, when

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(Footnote continued from page 6)
always on the party seeking the cross-examination. American Public Gas Assn. v. FPC, 498 F.2d 718 (D.C. Cir. 1974).

exercised reasonably, do not offend due process; are within the Commission's discretion under APA provisions; and would ensure that the purposes of section 337 are not frustrated by delay. Moreover, it is incumbent on the ALJs to improve Commission procedure where discretion allows. In the case of proceedings for temporary relief, the absence of alacrity cries out for attention.

The Default Rule

In many section 337 cases where there have been defaulting respondents, the ALJs have required a full evidentiary hearing in order to provide "substantial, reliable, and probative evidence" which could support an affirmative finding. However, the Commission's rule regarding default can be applied rigorously without necessarily requiring a full evidentiary hearing in every situation.

The Commission's default rule states that where a respondent fails to "show cause" in a proceeding before the ALJ why it should not be found in default, the ALJ may assume that such respondent has waived its right to appear. The ALJ may also make adverse inferences where appropriate, if complainant shows that it has made a good faith effort, but has been unsuccessful in

obtaining information necessary to establish a prima facie case.[6/]

When the Commission's default rule was officially promulgated November 23, 1984, it essentially codified existing practice which required a showing of "substantial, reliable, and probative evidence" to establish a prima facie case. The ALJs and the Commission had, for the most part, already required the creation of some evidentiary record which would support relief. To some extent adverse inferences were also used, if complainant could demonstrate that it attemped in good faith to secure the needed information but was unsuccessful in its efforts to do so.

However it appears that since the default rule went into effect in 1984, the implied discretion to hasten Commission proceedings when there are defaulting respondents has not been

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6/ Section 210.25 (19 C.F.R. Section 210.25) specifically states: (a) a failure to respond (or to defend) by a respondent "may be deemed to constitute a waiver of the respondent's right to appear, to be served with documents, and to contest the allegations at issue in the investigation." (Emphasis supplied.) The rule goes on in subsection (b) to provide the procedure for determining a default: a "show cause" proceeding is held before the ALJ where, once a respondent fails to show cause why it should not be found in default, the ALJ "may make any orders appropriate to paragraph (a) of this section" (Emphasis supplied.) Subsection (c) provides that as to those issues for which complainant "made a good faith but unsuccessful effort to obtain evidence," the Commission "may draw appropriate adverse inferences" in considering whether a prima facie case has been presented.

used. Rather, the default rule has been interpreted to mean that the evidentiary showing required in a default situation necessarily entails a full evidentiary hearing under all circumstances. Although many cases involving default have been based on a record which includes an evidentiary hearing, there is an earlier line of cases which demonstrates that a showing of "substantial, reliable and probative evidence" to establish complainant's prima facie case does not necessarily require it.

The first case in this earlier line of cases is Certain Attache Cases, Inv. No 337-TA-49, USITC Pub. No. 955 (1979). In Attache Cases, complainant filed a motion for default under (then) section 210.21(d) of the Commissions' Rules following respondents' failure to appear or contest the allegations of the complaint. Complainant itself maintained that this would obviate the need for a hearing. The ALJ cancelled the hearing, but found no violation of Section 337 in the recommended determination because of his view that there was no injury. The complainant challenged this conclusion, arguing that the Commission should: (1) affirm the granting of default in its entirety by finding all of the facts alleged in the complaint as being true, or (2) remand the case to the ALJ for a full evidentiary trial on injury. The Commission, however, affirmed the ALJ on the grounds that there was no injury. The Commission stated:

> . . . the effect of a finding of default is to authorize [the ALJ] to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial, reliable, and probative evidence which would support a recommended determination.
>
> However, the presiding officer's recommended determination in a default situation is not required to be affirmative, nor is any complainant required by the rules to rely soley upon the allegations of its complaint to support an affirmative determination. ... Notwithstanding the failure of a respondent to participate, an affirmative order of this agency will not issue except when the Commission determines that there is a violation of the statute, which is supported by reliable, probative, and substantial evidence..
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> Id. at 10

Thus, the ALJ decided Certain Attache cases on the basis of pleadings alone, without a hearing. Even though no hearing was held, the ALJ determined there was no violation of section 337 on the grounds of no injury. The Commission upheld the ALJ, noting that the APA requires only the opportunity for a hearing, not an actual hearing. In any event, the Commission found that complainant had waived its right to a hearing.[7/]

At about the same time Attache Cases was decided, the

7/ Certain Attache Cases, Inv. No. 337-TA-49, USITC Pub. No. 955 (1979) at 11-12.

Commission made its determination in Certain Electric Slow Cookers, Inv. No 337-TA-42, USITC Pub. No. 994 (1979), Here, the ALJ found in his recommended determination that certain respondents, none of whom had filed answers to the complaint or participated in the proceeding, were in default, and recommended that the Commission determine that there was a violation of Section 337. No hearing was held before the ALJ, and no evidence was introduced, although the ALJ did make certain findings as to violation.

The Commission declined to find a violation of Section 337, stating that "we....do not find that a sufficient record has been developed to support a determination on the issue of violation ..." Id. at 3. The Commission provided by way of explanation the same reasons articulated in Attache Cases. Specifically, "substantial, reliable, and probative evidence, was lacking which would support a recommended determination." Id. at 6. The Commission remanded the case to the ALJ for further proceedings. Once before the ALJ again, the complainant filed a motion for summary determination and supported this motion by introducing physical exhibits, affidavits, customs invoices, and requests for admissions that had not been responded to into the record. This time the Commission affirmed the ALJ in determining that there was a violation of Section 337 and issued an exclusion order.

Slow Cookers thus reflects the limits to Commission discretion in a default situation, and the Commission requirement

that there be documentation to support relief on default. This documentation extends beyond the contents of the complaint and may require proof of factors extrinsic to the complaint.

The same concerns were reflected in another case decided solely on the pleadings, Certain Novelty Glasses, Inv. No. 337-TA-55, USITC Pub. No. 991 (1979). The Commission found the existence of affidavits, customs invoices, shipping documents, findings as to secondary meaning, and evidence on sales and profitability (all of which supplemented the motion for default) to be adequate for purposes of finding a violation of Section 337.

Two other default cases were decided by the ALJs and affirmed by the Commission where no hearing was held.[8/] Laced throughout these previous investigations determined without an

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8/ In one, Food Slicers and Components Thereof, Inv. No. 337-TA-76, USITC Pub. No. 1159 (1981), complainant filed a motion for summary determination but did not include a physical sample as an exhibit. The ALJ denied the motion (although the ALJ had made affirmative findings as to other elements of the statute) and the Commission affirmed the denial. On remand, a physical exhibit was submitted and the ALJ found that there was infringement of the patent in issue. The Commission, on review of the Recommended Determination, disagreed, determining that these findings were not supported by "substantial, reliable and probative evidence." Id. at 7. In Certain Window Shades, Inv. No. 337-TA-83, USITC Pub. No. 1152 (1981), decided about the same time, the Commission affirmed the ALJ's finding of a violation of Section 337 based upon the granting of a summary determination motion supported by physical exhibits, affidavits, and purchase orders.

evidentiary hearing, however, were several default cases decided on the basis of a record which included a full evidentiary hearing.[9/] As time progressed, the requirement for a full evidentiary hearing in the context of defaulting respondents became the rule, rather than the exception. Moreover, any application or mention of the Commission's default rule or to the standards set forth in earlier default cases was consistently absent.[10/]

In the instant case, Certain Products with Gremlin Character Depictions, none of the 32 respondents named in the

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9/ See Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29, USITC Pub. No. 863, (1978); Certain Combination Locks, Inv. No. 337-TA-45, USITC Pub. No. 945 (1979); Certain Cigarette Holders, Inv. No. 337-TA-52, USITC Pub. No. 959 (1979).

10/ See Certain Airtight Cast Iron Stoves, Inv. No. 337-TA-69, USITC Pub. No. 1126 (1981), (Commissioner Stern dissenting). In this case none of the non-settling respondents which remained active participants in the investigation appeared or presented evidence at the hearing. The complainant and the Commission investigative attorney presented evidence. The ALJ and the Commission found a violation of Section 337, but there was no reference made to the Commission's default rule or to earlier default cases where no hearing was required. In Certain Methods of Extruding Plastic Tubing, Inv. No. 337-TA-110, USITC Pub. No. 1287 (1982), all ten of the foreign respondents were found to be in default by the ALJ. A hearing was required, although the ALJ imposed sanctions which precluded respondents from contesting the evidence offered and precluded respondents from submitting any evidence. The ALJ thus found a violation of Section 337 based on secondary evidence, and the Commission affirmed without any reference to the standard used in default cases. In Certain Miniature Plug-in Blade Fuses, Inv.

(Footnote continued to page 15)

notice of investigation participated to any degree in discovery. Although the Commission investigative attorney filed a motion for default at both the temporary and permanent relief phases of the investigation, the ALJ did not respond to either motion and held a full evidentiary hearing for temporary and for permanent relief.

Thus, while recent Commission precedent would seem to imply that a full evidentiary hearing is always required when respondents default, it should be noted that this has not consistently been the Commission practice. It is both appropriate and incumbent on those who implement Commission procedure to interpret the Commission's rule regarding default in light of the full ambit of precedent which led to its development.

(Footnote continued from page 14)
No. 337-TA-114, USITC Pub. No. 1337 (1983), the ALJ held an evidentiary hearing following the request and granting of a motion for default. The ALJ found a violation of Section 337 as to one respondent. The Commission, however, found a violation of Section 337 as to four respondents. Here the Commission cited Novelty Glasses, Attache Cases, and Slow Cookers regarding the need for "substantial, reliable and probative evidence." Hearings were also held in a default situation in Trolley Wheel Assemblies, Inv. No. 337-TA-161, USITC Pub. NO. 1605 (1984), Bag Closure Clips, Inv. No. 337-TA-170, USITC Pub. No. 1663 (1984), and Certain Softballs and Polyurethane Cores Therefor, Inv. No. 337-TA-190, USITC Pub. No. 1751 (1985). Violations of Section 337 were found by the ALJ in the first two cases and no violation of Section 337 was found in the last case. The Commission agreed with the ALJ in Trolley Wheels and Softballs. Closure Clips was not reviewed by the Commission.

Conclusion

An examination of APA provisions as well as Commission rules and precedent implementing those provisions reveals considerable uncertainty regarding due process requirements. It would appear that both the Commission and the Administrative Law Judges have substantial discretion regarding temporary relief proceedings and application of the default rule. If this discretion is used appropriately, truly expedited and effective relief with due process can be accomplished within the parameters of the statute and our standards as they currently stand.

Dissenting Views Of Vice Chairman Liebeler[1]

On September 12, 1985, the Administrative Law Judge (ALJ) issued an initial determination (ID) that there is a violation of section 337[2] in the importation and sale of certain products with Gremlins character depictions in Investigation No. 337-TA-201. I would affirm this determination.

The ALJ found that Complainant, Warner Brothers, Inc., owns three copyrights that are being infringed by respondents' imports.[3] The ALJ found that these imports have a tendency to cause substantial injury to the licensing program for products with Gremlins character depictions.[4] The majority does not dispute that the copyrights are infringed and that imports of unlicensed products have occurred. Rather, the majority has found that the complainant's

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[1] All references in this opinion to the reasoning of the majority are based on conjecture. Some members of the Commission will not exchange draft opinions and I have not seen the majority opinion.

[2] 19 U.S.C. 1337 (1980).

[3] ID at 19.

[4] ID at 42.

licensing activities are insufficient to constitute a domestic industry. The majority's decision to reverse the determination by the ALJ on this point is contrary to the mandate of the statute, the legislative history, Commission precedent, and good economic policy. Their decision could have severe ramifications for many of the industries in the service sector of the American economy.

This opinion will address four issues: (1) whether a licensing industry can constitute a domestic industry within the meaning of section 337; (2) whether the domestic industry should include the production activities of the licensees and complainant's licensing activities, and if so, whether respondents' unfair acts have the effect or tendency to cause substantial injury to the domestic industry as so defined; (3) whether, if a domestic licensing industry exists in this investigation, it is efficiently and economically operated; and (4) whether respondents' unfair acts have the tendency to cause substantial injury to the domestic licensing industry in light of the expected decline in the popularity of the Gremlins characters and the Gremlins motion picture.

I. Whether a licensing industry can be a domestic industry within the meaning of section 337.[5]

Section 337 of the Tariff Act of 1930 is best characterized as a remedial statute designed to protect domestic property rights from unfair acts occurring in connection with imports. The domestic industry test implicit within section 337 should reflect its remedial purpose. I can find no meaningful way to differentiate domestic activities for the purpose of determining whether they come within the purview of section 337.

In attempting to distinguish among various domestic activities the Commission partakes in a 200 year-old debate. In 18th Century France there was a school of economists, or more accurately pre-economists, known as the Physiocrats. They believed that it was possible to gain insights into economic reality by categorizing economic activities on a hierarchical scale. Physiocrats thought some forms of endeavor were "inherently" more valuable

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[5] It is interesting to note that the very phrasing of the question for review uses the term "licensing industry." Arguably, the only question left is whether the licensing industry is domestic.

than others. They thought that agriculture was the most productive, and that manufacturing was more important than performing services.

The myth that some economic activities are "inherently" more productive than others was not exclusively held by 18th century Frenchmen. Embedded deep in human consciousness is the idea that human beings have the power to create. The physiocratic philosophy rests on a false distinction between economic activity that "creates" something and that which does not.

A more meaningful question one can ask about an activity is, "does it add to the value of the product?" Value can be added by inventing, agricultural nurturing,[6] manufacturing, advertising, installing, repairing, servicing, retailing and a variety of other similar commercially productive activities.

Moreover, our perceptions of "value" must not be too rigid. As technology improves, contemporary notions about which activities are most valuable change. The agricultural industry employed over half

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[6] By agricultural nurturing, I mean the actual growing or raising of foodstuff; feeding cattle and watering seed both add value.

the labor force through the 19th century, with most inputs devoted to the nurturing or growing process. At the time, no doubt agricultural nurturing was viewed as the most important activity. The manufacturing industry then took over as the major factor in the growth of per capita income. Today, the service sector accounts for over two-thirds of domestic GNP and its share continues to grow. In 1983, the service industry labor force comprised nearly 74 percent of total nonagricultural employment.[7] All these activities add to the value of the final product and each of them is entitled to protection under section 337. Failure to recognize the importance of the service sector in the modern American economy is reminiscent of Luddism.[8]

The controversy over the appropriate domestic industry standard is intimately related to the question of whether there is a hierarchy of productive activities. It is important to note that the statutory language does not refer to such a

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[7] FF 110.

[8] The Luddites were a band of early 19th century workmen who destroyed labor-saving machinery. They were named after Ned Lud, who broke up stocking frames in the late 18th Century.

hierarchy.[9] It does not require a minimum relative or absolute size of productive activities, and says nothing about the character of the productive activity that takes place in this country.

Nonetheless, Commission practice clearly reflects a physiocratic prejudice. A complainant who demonstrates that it is engaged or irrevocably bound

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[9] There is nothing in the statute to indicate that only manufacturing industries are entitled to protection under section 337. In fact, Congress deliberately used the term manufacturing when that was its intent. See 19 U.S.C. 1332(d) (1980)(". . . it shall be the duty of the commission to ascertain conversion costs and costs of production in the principal growing, producing, or manufacturing centers of the United States . . ."). Because the statute unambiguously does not restrict the availability of relief only to manufacturing industries, rules of statutory construction would dictate that the inquiry end there and the finding that LCA is a domestic industry be affirmed.

Assuming arguendo that section 337 is ambiguous with respect to what may constitute a domestic industry, the next step is to examine the legislative history to the act. Although there is a reference to a requirement of manufacturing, H. Rep. No. 93-571, 93d Cong., 1st Sess. at 78 (1973), there are several other references that indicate that section 337 applies to the nonmanufacturing sector. Commission precedent recognizes that both the statute and the legislative history require a definition of domestic industry that would include service industries. Certain Airtight Cast Iron Stoves, Inv. No. 337-TA-69, USITC Pub. No. 1126, 215 USPQ 963, 967 (Jan. 1980) ("In the floor debate on the 1922 law, Mr. Fordney, one of the principal sponsors of the act, referred to industries as including farming and mining as well as manufacturing. During the Senate debates on the 1930 act, Senator Simmons stated that section 337 applies to all industries alike.")

to engage in[10] some sort of domestic manufacturing operation is much more likely to clear the domestic industry hurdle.[11]

Some Commission decisions do not expressly compare various productive activities and focus instead on "value added" as but one of a number of relevant factors to be examined in assessing the "nature and significance" of complainant's domestic activities.[12]

While value added is superior to a standard based on physiocratic theory, it too poses significant

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10 Petitioners must show readiness to commence production in order to prevail in a prevention of establishment case. E.g., Certain Ultra-Microtome Freezing Attachments, 337-TA-10, USITC Pub. 771 (1976) (investigation discontinued because of no commitment or decision to engage in domestic production); Certain Caulking Guns, Inv. No. 337-TA-139, USITC Pub. 1507 (1984) (Relief only appropriate when complainant entered into binding contract with domestic licensee. ITC required future periodic reporting and monitoring to ensure that complainant commenced domestic production).

11 But see Cube Puzzles, Inv. No. 337-TA-112, USITC Pub.1334 (1983); Certain Airtight Cast Iron-Stoves, Inv. No. 337-TA-69, USITC Pub. No. 1126 (1981); Spray Pumps, Inv. No. 337-TA-90, USITC Pub. No. 1199 (1981).

12 See Certain Fluidized Supporting Apparatus and Components Thereof, Inv. No. 337-TA-182/188, USITC Publ. 1667 (1984)("Fluidized Apparatus"). In Fluidized Apparatus, the Commission equivocated, however: "We note that a value-added analysis is simply one factor in considering the nature and significance of a party's relevant activities in the United States." Id. at 15.

problems. When the overseas production and domestic sales are undertaken by the same firm, there may be an incentive for creative accounting. Moreover, measuring value added can be quite difficult and many attempts to measure value added have a physiocratic bias, which ignores or understates the value of research and development, advertising and services.

Both justice and economic efficiency are promoted by a system of law that secures property rights. Rather than placing additional burdens on patent, copyright, and trademark holders, the Commission's role should be to provide a more efficient forum for relief from the special problems posed when these rights are infringed by imports. By failing adequately to protect intellectual property rights, the Commission reduces the value of these rights. More importantly, however, failure to prevent importation of infringing products reduces the incentive of others to innovate, develop and produce new products. The economic rationale for protecting intellectual property rights is not dependent on the nature and extent of complainant's domestic activities.

The ALJ held that the Licensing Corporation of America (LCA)[13] clearly satisfied the domestic

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[13] LCA is a division of Warner Communications, Inc. and acts as Warner Bros., Inc.'s licensing agents.

industry requirement.[14] I agree.

LCA is a full-service licensing management company that provides various business services to its clients.[15] These services are provided by six departments: (1) market research; (2) sales; (3) promotional licensing; (4) graphic services; (5) financial control; and (6) business affairs. LCA has managed intellectual property rights for 20 years.[16] At the time the complaint was filed, LCA had approximately 48 full-time employees.[17] In 1984, LCA realized a gross profit of $[ ] million on gross royalty revenues of $[ ] million.[18]

Approximately one year prior to the release of the movie Gremlins, LCA started planning its marketing strategy. Careful planning was required to select the optimal number of products and the best

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[14] ID at 30.

[15] FF 135A.

[16] FF 135A.

[17] In addition, LCA uses independent contractors to produce collateral and promotional materials. FF 135B.

[18] FF 135C.

licensees.[19] Because the Gremlins characters were new, LCA had to educate the potential licensees about the characters. The graphic services division created marketing kits and brochures for use in attracting prospective licensees. This division also served as the quality control center for designs submitted for the products. Finally, all packaging materials had to be approved by the graphic services division. Samples were rejected if they did not accurately depict the movie characters.[20] In addition, LCA performed safety inspections on the product designs, an extremely important function for products targeted toward young children.[21] In total, LCA invested between $500,000 and $700,000 in "servicing" the Gremlins characters.[22]

LCA must be part of any common-sense definition of "domestic industry." The opinion of the Federal Circuit in Bally/Midway v. USITC,[23] supports this view. In Bally/Midway the Federal Circuit overturned

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19 FF 230.

20 FF 170-71.

21 ID at 32, FF 160-61, 250.

22 FF 135N.

23 714 F.2d 1117 (Fed. Cir. 1983).

a decision in which the Commission had found no injury to the domestic video game industry. Although the primary holding of the case dealt with the injury determination, the court's treatment of this question is informative on the purpose of section 337. The court found that "pirating of these games . . . [has] an adverse effect on competition in the development and manufacture of video games [under copyrights]. There will be little incentive for video game manufacturers to devote the months or years necessary to develop a new video game if the result of their ingenuity and workmanship can be stolen so easily and the resultant product can be instantaneously undersold by pirated copies."[24] Thus, the Bally/Midway court declined to elevate manufacturing over development and correctly perceived that there will be no manufacturing if the incentive to develop a product is destroyed through unlawful copying. The Bally/Midway court essentially stated that it was the Commission's mandate to protect economic incentives from dissipation due to pirated goods. Providing protection for LCA would be consistent with this mandate.

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[24] 714 F.2d at 1124 (emphasis added) (quoting ALJ).

The majority apparently concludes that Schaper Manufacturing Co. v. USITC[25] requires the Commission to hold otherwise. In Schaper, the complainants were the inventor of a toy truck and his domestic licensee. The court did not disturb the Commission's determination that an inventor's activities were not protected by section 337. In addition, the court upheld the Commission's finding that the design and quality control activities of the domestic licensee were insufficient to constitute a domestic industry. The licensee in Schaper purchased pre-packaged trucks from a foreign manufacturer and used a sampling technique to inspect them when they arrived in the United States. The court stated "the Commission did not err in deciding that Schaper's activities in the United States are too minimal to be considered an 'industry' under section 337. There is simply not enough significant value added domestically to the toy vehicles by Schaper's activities in this country . . . "[26]

Moreover, although it was not required to do so, the Schaper court cited with approval several

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[25] 717 F.2d 1368 (Fed. Cir. 1983).

[26] Id. at 1373.

previous Commission decisions in which the Commission found a domestic industry where there was little or no domestic manufacturing. For example, the Schaper court discussed Certain Cube Puzzles where the Commission held that the quality control, repair and packaging activities for imported Cube puzzles was a domestic industry[27] and Certain Airtight Cast Iron Stoves, where the Commission found that the domestic repair and installation activities for stoves imported from Norway were a domestic industry. Thus, a careful reading of Schaper lends support to the view that the CAFC will defer where possible to Commission expertise in this area.[28]

The Schaper court did note that "servicing of the patented item" was meant to be protected by section 337,[29] but that it was unnecessary "to decide the full nature and extent of servicing activities which may be sufficient to meet section 337's requirement."[30]

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[27] 717 F.2d at 1372.

[28] This is not meant as a criticism. The role of a reviewing court is a limited one.

[29] Id. at 1371.

[30] Id. at 1373 n.11.

The Commission in this case has attempted to define the "full nature and extent of servicing" required of a domestic industry. The majority attempts to distinguish the servicing of the product from the servicing of the intellectual property right. This is a meaningless distinction. The ALJ correctly recognized that "the intellectual property rights are themselves products for sale by the licensor for exclusive use by a limited number of licensees."[31]

It is undisputed that LCA is one of the leaders in the licensing management industry. LCA engaged in the selection of marketing strategy, licensees and designs, as well as quality control and safety inspection. Further, as evidenced by the current investigation, LCA has invested substantial sums in the protection of Gremlins copyrights through litigation.[32]

Although I concur that repair and installation activities are protected under section 337, it is readily apparent that these development activities

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31 ID at 41.

32 FF 135.

must be protected also.[33] U.S. sales of products containing Gremlins depictions in the United States totalled over $11,000,000 in wholesale value.[34] Given the tremendous pre-release marketing planning for the Gremlins products, Warner Brothers must have anticipated these sales in determining whether or not to make the film. As a result of the Commission's decision today, the next time Warner Brothers or another movie producer is considering a multimillion dollar movie, they may forego making the marginal expenditure in character development, or they may forego making the film altogether. More certainly,

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[33] It is also noteworthy that in refusing to consider the inventor's activities as part of the domestic industry, the Schaper court noted that the inventor was "not involved in the manufacture or selling of the vehicles." 717 F.2d at 1371 [emphasis added]. Unless one regards the use of "selling" as a mere superfluity, it is clear that the court believed something more than physical manufacture could constitute the productive process necessary to meet the statutory definition of domestic industry. This reading of Schaper is buttressed by the court's comment that "we agree that in proper cases 'industry' may encompass more than the manufacturing of the patented item . . .". Id. at 1373. Further, the Schaper court noted that "[as] the statute now stands, Congress did not mean to protect American importers (like Schaper) who cause the imported item to be produced for them abroad and engage in relatively small nonpromotional and non-financing activities in this country . . .". The only reasonable reading of this sentence is that Congress did intend to protect significant promotional activities in this country.

[34] FF 197.

LCA will think twice before spending a half million dollars to service a copyright that will become increasingly expensive to protect and thus harder to sell. Potential domestic licensees, who might otherwise invest in plant to manufacture licensed Gremlins products, will either leave the industry or move offshore and pirate themselves.

Finally, although I might have decided Toy Trucks differently, the Gremlins case presents very different facts. The amount of activity undertaken by LCA's six departments far surpasses that of a licensee.[35] In Schaper, the court stated that "Schaper has not shown its United States inspection activities to be substantially different from the random sampling and testing that a normal importer would perform upon receipt (and Schaper does no repairs)."[36] No one should confuse LCA with a normal importer. LCA screened the licensees and the products, prepared sales pitches and brochures for the products, approved the packaging, and performed safety inspections, among other activities.

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[35] The choice of the term "licensing industry" might be unfortunate. One wonders whether the complainant might have succeeded had it only been named Gremlins Producers of America instead of Licensing Corporation of America.

[36] 717 F.2d at 1372-73.

Furthermore, Schaper never stated that the licensing industry was not a domestic industry. Rather, the court stated that the inventor's activities were of a kind that could properly be excluded when deciding whether a domestic industry exists. LCA is a far cry from a single inventor licensing to a single licensee. As the ALJ in Gremlins concluded:

> The activity which complainant engages in under the name licensing certainly includes services as the activity was defined in Cast Iron Stoves, and the licensing activity in this investigation is unlike that found in [Toy Trucks]. It involves far more than the usual activity of any inventor or copyright holder and is part of an established industry.

As noted earlier, "the intellectual property rights are themselves products for sale by the licensor for exclusive use by a limited number of licensees."[37] These rights were developed and marketed by LCA, which also inspected the final products bearing the Gremlins depictions. Moreover, unlike Schaper, the market for these products is evolving. LCA thus can continue to entertain ways to exploit the Gremlins copyrights. Failure to protect

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[37] ID at 41.

these rights will diminish the incentive for LCA and others to undertake similar product development.

I conclude that the ALJ was correct in finding the existence of a domestic licensing industry.

II. Whether the domestic industry should include the production activities of the licensees and complainant's licensing activities, and if so, whether respondents' unfair acts have the effect or tendency to cause substantial injury to the domestic industry as so defined.

There is ample Commission precedent for including the activities of licensees within the domestic industry. For example, in Certain Apparatus for the Continuous Production of Copper Rod,[38] the domestic industry included not only the divisions of complainant corporation exploiting the patent through development, sale, servicing and licensing, but also the subcontractors who manufactured the components. This interpretation of the statute is consistent with the legislative history which states: "... the

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[38] Inv. 337-TA-52, USITC Pub. No. 1017 (1979) at 50.

industry in the United States generally consists of the domestic operations of the patent owner, his assignees and licensees devoted to . . . exploitation of the patent."[39] Thus, the Commission has traditionally looked to all domestic exploitation of the intellectual property right in question.[40]

LCA licensed 54 domestic companies to sell Gremlins items. There was an aggregate wholesale value of at least $11,209,400 for the goods manufactured in the United States. LCA realized approximately $2.5 million in royalties from the sales of these domestically manufactured products. A very substantial amount of the licensing activity of LCA resulted in domestic manufacturing.

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39 H.Rep. No. 93-571, 93d Cong. 1st Sess. 78 (1973). See also Certain Ultra-Microtome Freezing Attachments, Inv. 337-TA-10 (1976).

40 I do not know if the Commission majority included the activities of LCA's licensees that are engaged in the domestic manufacture of articles bearing Gremlins depictions within their definition of the domestic industry. They should have done so. I believe the majority would have included the manufacture of these articles if LCA did the manufacturing itself. It is not justifiable to exclude this manufacturing activity on the basis of LCA's decision to license other domestic manufacturers instead of manufacturing the items itself. LCA's decision to license rather than manufacture itself was probably made for legitimate economic reasons. Thus, one of the harmful effects of the majority's decision is to encourage vertical integration where it is not efficient.

The remaining question is whether the unfair acts have had a tendency to substantially injure this industry.[41] Prior to answering this question, it should be noted that no respondents participated in this investigation. Thus, the Commission only requires that a prima facie case be presented because of the impossibility of obtaining information through discovery.[42]

Complainant has submitted undisputed deposition testimony that this combined industry has been injured in several ways. First, there has been head to head competition between several products.[43] Second, complainant argued persuasively that unlicensed imports of products depicting Gremlins

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41 The discussion that follows applies equally to a domestic industry defined as only those domestic firms exploiting the copyright through manufacturing, whether broadly defined to include all firms, or narrowly defined so that there is a doll industry, a hat industry, etc. I would employ the broadest definition, including all firms engaged in exploitation of the intellectual property right within the definition of the domestic industry.

42 The Commission Rules of Practice and Procedure provide in pertinent part: "The Commission shall issue relief against a respondent found to be in default if (1) The record developed by the administrative law judge establishes a prima facie case of violation of section 337 or reason to believe there is a violation of section 337." 19 C.F.R. Chap. II. 210.25 (1984).

43 ID at 35-38.

supplant sales of more expensive domestically produced items. This is the so-called cross-elasticity argument. Gremlins products compete for a limited market: children (and parents) will buy a finite amount of Gremlins depictions. If an unlicensed Gremlin keychain is purchased, it is less likely that a licensed tee-shirt with a Gremlins will be purchased.[44] This argument is extremely

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[44] This a straightforward application of the law of demand. There is demand for tee-shirts and key chains, and also a demand for Gremlins depictions. The ALJ rejected this theory in part because he found "the spontaneous testimony of the businessmen clearly reflects a view that low-priced, inferior quality souvenir items are not in competition with the licensed, high-quality Gremlins functional products. ID at 38. The Vice President of Marketing Services for Hasbro noted:

> If it's a directly competing product that is infringing, obviously that is a one-for-one impact. If somebody is going to buy a plush doll that is a counterfeit of what we are doing, we have lost a sale.
>
> I think it goes beyond that though. I think a lot of times, if they buy a three inch figurine that is counterfeit, we have -- may have lost a plush sale. That may have satisfied the demand. I have no way of measuring that.
>
> Q. Do you think it's significant though?
> A. I think it's significant, yes.

Owen deposition, at 26. See also Young deposition, at 38 (Margaret Young, Vice President Merchandise Licensing, Lucas Film):

> Q. Now, if an item is in one price category, would it also be in competition with an item in another price category?

(Footnote continued to page 22)

plausible and given the absence of respondents' participation, one would not expect a complainant to engage in more extensive analysis. Third, domestic licensees can lose sales due to market saturation. Undisputed testimony indicated that flooding a market with products can reduce total demand over time.[45]

(Footnote continued from page 21)

A. It's very possible that a consumer may decide to buy one of those or three of these.
Q. Does that mean yes, there is competition between the two levels, between the two categories?
A. Yes. It depends on the amount of money that's being spent.

See also Office of Unfair Import Investigations, Staff Brief on Industry and Injury, at 15-16 (Nov. 8, 1985).

[45] Thorstein Veblen, an American economist, once wrote of what he termed "conspicuous consumption." This refers to the theory that people buy some products simply to impress others. The presence of a large quantity of merchandise on the market could dissuade these people from making purchases. See H. Kohler, Intermediate Microeconomics 90-91 (1982).

The ALJ rejected the market saturation argument as overly speculative: "A mere hypothesis that infringing imports may raise the threat that a product market will be flooded with inferior quality goods to the point of market saturation is insufficient evidence they have the effect or tendency to substantially injure the domestic industry." ID at 40.

LCA invested a great deal of time in selecting the proper number of products and licensees to market Gremlins products. FF 143-82. There should be a strong presumption that the investment in this selective licensing was undertaken to avoid the market saturation phenomenon. In the absence of evidence to the contrary, I believe that the business judgment of LCA is highly probative that selective licensing was worthwhile. See,

(Footnote continued to page 23)

Both domestic manufacturers and LCA could be injured by the mere presence of the unlicensed Gremlins, even in the absence of a single sale. Thus, LCA licensed only a limited number of products to avoid consumer antipathy at seeing Gremlins everywhere. Finally, purchasers may associate all Gremlins products with the same manufacturer. Thus, a prior purchase of a shoddy unlicensed import could dissuade a consumer from purchasing another Gremlins product.[46] This factor applies to both head-to-head and indirect competition. Thus, purchase of an inferior quality unlicensed painter's cap can be injurious in several ways. First, the consumer satisfies his demand for a Gremlins painter's cap. Second, the consumer satisfies his demand for a Gremlins character and therefore does not buy a doll. Third, the consumer associates the shoddy workmanship on the cap with all Gremlins products and therefore does not make other Gremlins purchases the consumer otherwise would have made.

(Footnote continued from page 22)
e.g., Fraser affidavit at 2; Young deposition at 16; Chojnack deposition at 24; Owen deposition at 39; Grant deposition at 2-22.

46 This problem is widely recognized in trademark law. See McCarthy, Trademarks and Unfair Competition 24:13 (1982); Young deposition, at 16, 19; Fraser affidavit at 2.

These three forms of injury must be added to those already found by the ALJ when considering injury. When this is done it becomes clear that the redefined domestic injury is substantially injured by imports of unlicensed Gremlins depictions.[47]

III. Whether, if a domestic licensing industry exists in this investigation, it is efficiently and economically operated.

I adopt that part of the ALJ's ID which finds that the domestic licensing industry is efficiently and economically operated.[48]

IV. Whether respondents' unfair acts have the tendency to cause substantial injury to the domestic

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[47] Injury to the licensing industry was based on lost royalties, lost licensee confidence, and the loss of potential licensees. ID at 41-42.

[48] The ALJ concluded that "the domestic industry consisting of the licensing program for Gremlins characters in this investigation is, to the extent it was exploited, efficiently and economically operated. I interpret the ALJ's use of the term "licensing program" to include the domestic manufacturers.

licensing industry in light of the expected decline in the popularity of the Gremlins characters and the Gremlins motion picture.

The Commission last was faced with a short product life in Coin-Operated Audiovisual Games and Components ("Games II").[49] In Games II the Commission found no tendency to substantially injure the Rally-X video game industry because "the popularity of the Rally-X game is in a state of permanent decline which is characteristic of such games." The Court of Appeals for the Federal Circuit reversed the Commission on this point.[50] The court's discussion of the domestic industry question is particularly relevant:

> Since most individual games in the video game business have only a short life it is immaterial that Rally-X was in this category. If the fact that Rally-X was short-lived was dispositive or even significant in determining the existence of an industry under section 337(a), it would be a rare video game that would be entitled to the protection of that section. There is nothing in the statute that indicates or even suggests that Congress did not intend relatively short-lived

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[49] Inv. No. 337-TA-105 (1982).

[50] Bally/Midway Mfg. Co. v. USITC, 219 USPQ 97 (Fed. Cir.1983).

> American video games to receive the same protection against copyright and trademark infringement by imported competing products that other domestic businesses enjoy.[51]

Industries with short product cycles are clearly entitled to protection under section 337. Moreover, LCA argues that sales, though decreasing, still exist and are expected to be boosted significantly when Gremlins is rereleased and the expected sequel is released.[52] Furthermore, sales lost during even a relatively short life cycle still constitute substantial injury. I therefore find the fact that the industry may be in a permanent state of decline irrelevant.

V. Conclusion

The primary purpose of section 337 is to maintain and protect the incentive to innovate. A concurring opinion in Bally/Midway is particularly relevant:

> A public and obvious demonstration that the protective laws are ineffectual induces capital

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[51] Id. at 101.

[52] FF 188-89.

> to be withdrawn from the industry to some safer use, and prevents new video games from being conceived, manufactured, and marketed in a lawful way. Is this not the injury the congress enacted [section] 1337 to prevent? If not, what was it?[53]

The decision by the majority today is "a public and obvious demonstration that the protective laws are ineffectual." I would affirm the determination of the Administrative Law Judge that there is a violation of section 337 in the importation and sale of certain products with Gremlins character depictions.

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[53] 219 USPQ at 104 (Nichols, J., concurring).

Public Version

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

12-10-84
12-19-84
12-20-84
12-31-84
2-3-85
1-9-85

In the Matter of	)	
	)	
CERTAIN PRODUCTS WITH GREMLIN CHARACTER DEPICTIONS	)	Investigation No. 337-TA-201
	)	

INITIAL DETERMINATION

Sidney Harris, Administrative Law Judge

Pursuant to the Notice of Investigation in this matter (48 Fed. Reg. 34,442-43), this is the administrative law judge's Initial Determination under 19 C.F.R. § 210.53(b).

The administrative law judge hereby determines that there is reason to believe that there is a violation of section 337 of the Tariff Act of 1930, as amended, in the importation of certain products with GREMLINS character depictions into the United States, or in their sale, by reason of infringement of Copyright Registration Nos. VAu 54-951, VAu 54-952, and PAu 214-201, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The administrative law judge, however, finds that pursuant to the factors set forth in 19 C.F.R. § 210.24(e) complainant's motion for temporary relief under subsections 337(e) and (f) should be denied.

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PROCEDURAL HISTORY

On July 25, 1984, Warner Bros., Inc., 75 Rockfeller Plaza, New York, New York 10019, filed a complaint and a notice for expedited temporary relief pursuant to Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337). An amendment to the complaint and to the memorandum in support of the motion for expedited temporary relief was filed on August 10, 1984.

The amended complaint alleges unfair methods of competition and unfair acts in the importation of certain products with GREMLINS character depictions into the United States, or in their sale, by reason of alleged (1) infringement of U.S. Copyright Reg. No. VAu 54-951, (2) infringement of U.S. Copyright Reg. No. VAu 54-952, and (3) infringement of U.S. Copyright Reg. No. PAu 214-201. The complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

On August 22, 1984, the Commission ordered pursuant to 19 U.S.C. § 1337(b) that an investigation be instituted to determine whether there is a violation of 19 U.S.C. § 1337(a) as alleged in the amended complaint. The Commission also forwarded pursuant to 19 C.F.R. § 210.24(e) to the Office of the Administrative Law Judges complainant's motion for expedited temporary relief under 19 U.S.C. §§ 1337(e) and (f) for an initial determination pursuant to 19 C.F.R. § 210.53(b). The Notice of Investigation and Complaint were served on parties and interested government agencies either by first-class mail or air mail on August 28, 1984. The Notice of Investigation was also published in the Federal Register on August 30, 1984. (49 Fed. Reg. 34422-23).

The following persons were named as respondents in this investigation:

Hope Industries Inc.
1170 Broadway
New York, New York 10001

Dai-Dai Industrial Corp.
(also d/b/a JC Imports and FADA Trading)
1204 Broadway
New York, New York 10001

Maxson Imports, Inc.
1214 Broadway
New York, New York 10001

Founders Enterprises Ltd.
4th Floor
34 Lane 81
Fu Hsing North Road
Sung Shan District
Taipei City
Northern Taiwan

Jar Jung Co., Ltd.
P.O. Box 30-465
Taipei, Northern Taiwan

Kai Chen Industries Co., Ltd.
P.O. Box 48594
Taipei, Taiwan

Keyne Enterprise Co., Ltd.
1st Floor
13 Lane 116
Chien Min Road
Shih Pai District
Taipei City
Northern Taiwan

Ladies and Gentlemen Ornaments Co., Ltd.
2nd Floor
117 San Yang Road
San Chung City
Taipei County
Northern Taiwan

Lay Grand Co., Ltd.
Fifth Floor
Hung Fu Nan Fu Bldg.
96 Roosevelt Road
Section 1
Ky Ting District
Taipei City
Northern Taiwan

Lien Ho Plastic Co., Ltd.
2nd Floor
4 Alley 2 Lane 325
Shui Yuan Road
Hsi Chih Toun
Taipei County
Northern Taiwan

Lion City Industries
(also d/b/a/ Lion City Industrial Co., Ltd.)
1st Floor 3 Alley 20 Lane 158
Pa Te Road
Section 3
Taipei City
Northern Taiwan

Shine Land Inc.
F. 8, No. 97
Section 2
Nan King E. Road
Taipei, Taiwan

Shiuh Cha Trading Ltd.
8th Floor
139 Keelung Road
Section 1
Taipei City
Northern Taiwan

Ta Hsin Co., Ltd.
2nd Floor
171 Chung Hsiao Road
Section 1
San Chung City
Taipei County
Northern Taiwan

Te Feng Industrial Store
2nd Floor
18 Alley 58 Lane 7
Li Ming Road
Nan Tun District
Taichung City
Central Taiwan

The Superior Taiwan Corp.
P.O. Box 55-1266
Taipei, Northern Taiwan

Crichton Trading Co.
58 Changon W. Road
7th Floor
Taipei, Taiwan

Tiger Lion Enterprise Co., Ltd.
5th Floor
7 Lane 342
Lung Chiang Road
Chung Shan District
Taipei City
Northern Taiwan

Y.C. Low Enterprise Co., Ltd.
6th Floor
470-472 PA TE Road
Section 4
Sung Shan District
Taipei City
Northern Taiwan

Ying Zan Enterprise Corp.
5th Floor-1
212 An Ho Road
Ta An District
Taipei City
Northern Taiwan

Chin Mei Co., Ltd.
150 Fu Te South Road
San Chung City
Taipei County
Northern Taiwan

Bethel Enterprises Co.
58 West 28th Street
New York, New York 10001

C.H. Trade
20 West 27th Street
New York, New York 10001

Dae Rim Trading, Inc.
43 West 30th Street
New York, New York 10001

Jim Trading Corp.
1181 Broadway
New York, New York 10001

Komax General Corp.
(also d/b/a The Komas General Corp.)
1232 Broadway
New York, New York 10001

Motivic, Inc.
53 West 36th Street
New York, New York 10001

Multinational Products Corp.
(also d/b/a Multinational Products)
1181 Broadway
New York, New York 10001

Samba Trading Corp.
(also d/b/a Samba Jewelry Corp.)
842 Avenue of the Americas
New York, New York 10001

Top Line
1220 Broadway
New York, New York 10001

Young Man General Merchandise Co.
41 West 30th Street
New York, New York 10001

Yu Il International Trading Corp.)
(also d/b/a Yuil International Trading Corp.)
868 Avenue of the Americas
New York, New York 10001

Gary Rinkerman, Esq., Unfair Import Investigations Division, U.S. International Trade Commission, was designated the Commission investigative attorney. Pursuant to Rule 210.4(b), the Commission investigative attorney is a separate and independent party to this proceeding.

The Acting Chief Administrative Law Judge Janet D. Saxon designated Administrative Law Judge Sidney Harris to preside over this investigation.

On September 4, 1984, Judge Harris issued a Notice of Preliminary Conference and Order for Discovery Statements. The purpose of the conference was to determine the issues to be litigated, to review and discuss the hearing

ground rules, to review the discovery statements of the parties, to establish a schedule for the exchange of information and evidence relevant to the investigation, and to set a procedural schedule for the hearing. The notice also informed the parties that the conference would determine whether or not it would be necessary to have a hearing on complainant's motion for expedited temporary relief, or whether it could be decided on the basis of the papers accompanying the motion and responses to them.

The Preliminary Conference in the Matter of Certain Products with Gremlins Character Depictions was held on October 1, 1984. Appearances were noted for the record by complainant, the Commission investigative attorney, and one respondent, Maxson Imports, Inc. According to the representations made at the preliminary conference, complainant and the Commission investigative attorney were then engaged in discovery in an effort to supplement the record with additional affidavits and factual material. (Prelim. Conf., Tr. 11-15, 21, 36-40). The administrative law judge reviewed complainant's motion for expedited temporary relief and pointed out potential deficiencies in the evidence which could be the subject of discovery. (Prelim. Conf., Tr. 14-34). Given these circumstances, the Commission investigative attorney's motion for extension of time to respond to complainant's motion for temporary relief was granted. (Order No. 3 (Oct. 10, 1984); see Prelim. Conf., Tr. 36-41). It was also ordered that the parties participating in this proceeding would inform the administrative law judge by no later than October 22, 1984, whether or not complainant's motion for expedited temporary relief should be decided with or without a hearing. (Order No. 3, at 2 (Oct. 10, 1984)).

On October 24, 1984, the administrative law judge requested a telephone conference with all parties participating in this proceeding in order to discuss the procedural schedule for consideration of complainant's motion for expedited temporary relief. The administrative law judge informed the parties that a hearing in this matter would take place in order to give respondents the opportunity to appear and cross-examine witnesses or otherwise present evidence. (Tele. Conf. Tr. 5, 8-9, 13-14). Pursuant to Order No. 4, issued October 25, 1984, notice was given that Proposed Findings of Fact, Conclusions of Law, and Hearing Briefs were to be submitted by all parties on or before November 5, 1984. A Prehearing Conference in this matter was then scheduled for November 12, but was subsequently rescheduled for November 9, 1984. (Order No. 5 (Oct. 31, 1984). The administrative law judge also ordered that any respondent wishing to participate in the hearing on temporary relief was to inform him in writing on or before November 5, 1984. No respondent contacted the administrative law judge.

A Prehearing Conference was held on November 9, 1984. The Commission investigative attorney and complainant waived objections to admissibility of depositions. The administrative law judge inquired whether complainant wished to make an alternative motion for summary determination utilizing the same factual material which was collected to support the motion for expedited temporary relief. Complainant requested time to consider this suggestion.

The Hearing concerning expedited temporary relief commenced immediately after the Prehearing Conference before Administrative Law Judge Sidney Harris. The only appearances made at the Hearing were those of complainant Warner and the Commission investigative attorney. In the interest of expedition, and in view of the fact that none of the respondents were partici-

pating in the Hearing, there were no live witnesses. After the Hearing concluded, complainant informed the administrative law judge in writing that it did not wish to have its motion alternatively considered as a motion for summary determination.

Staff counsel, after the hearing, has moved to amend the Notice of Investigation to include an allegation that section 43(a) of the Lanham Act has been violated. This motion is denied without prejudice to renewal of it during the phase of this investigation relating to permanent relief. The motion for temporary relief has been denied because it has not been established that immediate and substantial harm would result to complainant in the absence of such relief. The addition of the Lanham Act allegation would not alter the denial of temporary relief.

This Initial Determination is based on the entire record of this proceeding. Proposed findings not herein adopted, either in form or in substance, are either specifically dealt with in this initial determination, or are rejected as not supported by the evidence or as involving immaterial matters.

The findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the depositions and exhibits supporting the findings of fact; they do not necessarily represent complete summaries of the evidence supporting each finding. Some findings of fact are contained within the body of this opinion.

The following abbreviations are used in this Initial Determination:

CX - Complainant's Exhibit (followed by its number and the referenced age(s))

CPX - Complainant's Physical Exhibit

SX - Staff Counsel's Exhibit

SPX - Staff Counsel's Physical Exhibit

FF - Finding of Fact

-I. Standards for Granting Temporary Relief

The issuance of temporary relief is governed by sections 337(e) and (f) of the Tariff Act of 1930, as amended. Section 337(e) provides:

> If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

The standards for review of a complainant's motion for temporary relief as adopted by the Commission pursuant to section 337(e) are set forth in 19 C.F.R. § 210.24(e) and include: (1) complainant's probability of success on the merits; (2) immediate and substantial harm to the domestic industry in the absence of the requested temporary relief; (3) harm, if any, to the proposed respondents if the requested temporary relief is granted; and (4) the effect, if any, that the issuance of the requested temporary relief would have on the public interest. (See In re Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-89, 214 U.S.P.Q 892, 893-94 (Oct. 29, 1980), citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977)). Each of the factors are to be first analyzed individually, then balanced against each other. (In re Certain Coin-Operated Audiovisual Games, Inv. No. 337-TA-105, 216 U.S.P.Q. 1106, 1109 (Jan. 4, 1982)).

Before a finding is made as to whether a balancing of these factors indicate that temporary relief should or should not issue, the Commission must initially find whether there is a reason to believe that a violation of

section 337 exists. (Certain Fluidized Supporting Apparatus and Components Thereof, Inv. No. 337-TA-182/188, Comm'n Memorandum Op. 4-5 (Sept. 17, 1984)). The evidence to support a finding that there is reason to believe a violation exists need not rise to the level of a preponderence of the evidence. (Copper Rod, 214 U.S.P.Q. at 893-94). Evaluation of the first factor, probability of success on the merits, is closely related to the "reason to believe" determination. "The distinction is that the substantive determination [reason to believe] is a determination that a threshold has been met, while evaluation of the first factor is a measure of the extent to which that threshold has been exceeded." (Fluidized Apparatus, Comm'n Memorandum Op. 5). Immediate and substantial harm in the absence of temporary relief and harm to other parties are required to be considered by the rules of the Commission in order to recognize the issue of equity as regards complainant's entitlement to temporary relief. (Copper Rod, 214 U.S.P.Q. at 893-94).

In order to determine whether there is "reason to believe" a violation exists, we will consider each of the substantive elements of the amended complaint.

II. Copyright Infringement

Two elements must be present if complainant is to demonstrate that respondents have engaged in unfair methods of competition by virtue of copyright infringement: (1) ownership of the copyright by complainant Warner; and (2) copying by the respondents. (Certain Coin-Operated Audio-Visual Games, Inv. No. 337-TA-105 (1982), Inv. No. 337-TA-87 (1981); 3 NIMMER ON COPYRIGHT § 13.01 (1981)).

1. Copyright Ownership

Ownership of a copyright is determined by: (1) originality in the author; (2) copyrightability of the subject matter; (3) citizenship status of the author; and (4) compliance with statutory formalities. (Games II, Inv. No. 337-TA-105, at 4-5; 3 NIMMER ON COPYRIGHT § 13.01[A] (1981)). If complainant is not the author, there must exist a transfer of rights or other relationship between the author and the complainant such that complainant constitutes the valid claimant to the copyright. (Id.)

"The certificate of a registration made before or within five 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." 17 U.S.C. § 410(2). The effective date of registration for Copyright Registration Nos. VAu 54-951 and 54-952, which cover the pictorial works depicting the "Gremlins" movie characters "Stripe" and "Gizmo," respectively, is December 30, 1983. (FF 40). The effective date of registration for Copyright Registration No. PAu 214-201, which covers the motion picture "Gremlins," is June 29, 1984. (FF 41). Warner first released the film "Gremlins" to the viewing public on June 8, 1984. (Complaint, para. 25). Therefore, copyright registration of the GREMLINS character depictions at issue in this investigation were made before or within five years after first publication of the works and constitutes prima facie evidence that Copyright Registration Nos. VAu 54-951, VAu 54-952, and PAu 214-201, and the facts stated within those certificates, are valid. As such, there is a rebuttable presumption that the first four elements that determine copyright ownership have been established. The fifth element, transfer of rights to the copyright from the author to the

claimant, is also established by this same rebuttable presumption. That is, though the original screenplay for the motion picture "Gremlins" was authored by Chris J. Columbus (FF 43) and the characters depicted in the film were designed by Chris Walas (FF 47-51), Warner is the author by its contribution to the works pursuant to the "work made for hire" provisions of 17 U.S.C. § 201(b). (FF 52-55).

Notwithstanding the rebuttable presumption as to Warner's ownership of the copyrights at issue, the Commission in Certain Food Slicers and Components Thereof stated that in those investigations in which respondents do not actively participate, complainant and the Commission investigative attorney are required to make a reasonable effort to produce "'substantial, reliable and probative evidence sufficient to establish a prima facie case of violation by respondents.' The complainant cannot rest on the allegations in the complaint except where critical information cannot be obtained after a reasonable effort." (Inv. No. 337-TA-76, Comm'n Decision at 5 (1981), quoting from Certain Window Shades and Components Thereof, Inv. No. 337-TA-83, at 5 (1981)). Therefore, given the fact that section 337 is an international trade statute, and not a statute that deals solely with intellectual property rights, the administrative law judge is required to review those elements in which a statutory presumption stands as a substitute for evidence adduced by complainant.

The issue of validity in copyrights cases, as contrasted with patent-based cases, does not require the production of evidence other than the copyright registration. Because copyrighted works need not be novel or rise to a level of invention, it is not necessary to review, as it is with a patent, the rele-

vant history of the intellectual property right. A copyright need only be an original work created without copying. (See, e.g., Leeds Music Ltd. v. Robin, 358 F. Supp. 650 (D.C. Oh. 1973)). So long as the copyrighted work does not plagerize another individual's effort, there is no requirement that the work differ from prior works or contribute anything of value. (Russell v. Trimfit, Inc., 428 F. Supp. 91 (D.C. Pa. 1977)). Also, while the public is prevented from making, using, or selling the subject matter of a patent for a statutory period of time, a copyright does not confer an exclusive right to the idea disclosed. (Id.)

For the foregoing reasons, I find that there is substantial, reliable, and probative evidence in the record to have a "reason to believe" that complainant Warner is the owner of Copyright Registration Nos. VAu 54-951, VAu 54-952, and PAu 214-201. (See Prehearing Brief of the Commission Investigative Staff, 3-8 (Nov. 5, 1984)).

2. Copying

Copying is defined by two elements: (1) access to the work of the copyright owner by the alleged infringer; and (2) substantial similarity between the works of complainant and respondents. (3 NIMMER ON COPYRIGHT § 13.01[B] (1981)). Before determining whether respondents' products copy and thereby infringe complainant's copyrights, however, we must first define the scope of the copyrights.

First, the photocopies attached to Copyright Registration Nos. VAu 54-951 and VAu 54-952 are representations of the artwork entitled "Stripe" and "Gizmo," respectively, deposited with the Copyright Office. (CX 1-2). Pur-

suant to 17 U.S.C. § 113, "the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies . . . includes the right to reproduce the work in or on any kind of article, whether useful or otherwise." Therefore, the protection afforded Warner under the copyrights for Stripe and Gizmo extends to all other mediums in which the work may be copied.

Second, Copyright Registration No. PAu 214-201 is for the motion picture "Gremlins." Complainant has never asserted that any respondent has actually copied the motion picture. Instead, complainant asserts that respondents' products copy two characters portrayed in "Gremlins," Stripe and Gizmo. The issue here then is whether a fanciful and graphically represented character found in a work of fiction can be protected separate from the story in which that character appears.

a. Access

Access is defined as the actual viewing and knowledge of complainant's work by the person who composed respondents' work. (3 NIMMER ON COPYRIGHT § 13.02[A] (1981)). Complainant therefore must show that the persons who composed the various works of respondents viewed the copyrighted works or had a reasonable opportunity to do so. (Id. § 13.02[C]).

There is evidence of record that despite Warner's attempt to keep the depiction of the GREMLINS characters and the story line of the motion picture confidential, information as to the nature of the GREMLINS characters was released to the public. (FF 174-82; CX 45). There is no evidence, however, that the persons who composed respondents' work had the opportunity to view the copyrighted works, especially since it is apparent that the manufacture of the alleged infringing articles takes place outside the United States.

"Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing plaintiff's work -- not a bare possibility." (3 NIMMER ON COPYRIGHT § 13.02[A] (1981)). The strict secrecy maintained by complainant, and the fact that at times this secrecy was breached, is not evidence in and of itself to demonstrate that the respondents had a reasonable opportunity to view complainant's work. Complainant also failed to demonstrate that its works were sufficiently disseminated such that respondents' had access to them. Still, the striking similarity between respondents' Gizmo character and the copyrighted character, in light of the fact that Gizmo was a fanciful, created character (FF 38, 47, 49; see FF 137), the unusual speed in which respondents created their work, and the precise timing at which respondents offered their products so as to coincide with Warner's release of the motion picture "Gremlins" to the viewing public (FF 84-96), is sufficient circumstantial evidence to demonstrate that respondents had access to and used complainant's work rather than resorting to independent creation. The references by respondents that their articles are depictions of the GREMLINS characters portrayed in the motion picture "Gremlins" is virtually conclusive evidence that such is the case. (See FF 56-83).

b. Substantial Similarity

The second element of copying, substantial similarity, is not given to a simple definition as to what similarity between the articles in question is substantial. (See 3 NIMMER ON COPYRIGHT § 13.03 (1981)). The Commission, however, has defined substantial similarity relative to the ordinary observer,

a person who is otherwise not attempting to discover disparities but would be disposed to overlook them and regard the aesthetic appeal of the two articles in question as the same. (Games I, Inv. No. 337-TA-87 (1981)).

There is no question that the similarity between respondents' articles and complainant's copyrighted works "Gizmo" and "Stripe" are not only substantial but striking. Simple observation of respondents' products demonstrate that there has been a comprehensive attempt by respondents to copy complainant's copyrighted works. (FF 56-83). Secondary evidence as to the promotion of respondents' articles demonstrates that it is the express purpose of respondents' to offer their articles to the public as products with GREMLINS character depictions identical or substantially similar to the GREMLINS characters depicted in Copyright Registration Nos. VAu 54-951 and VAu 54-952. (FF 56-83).

While it is readily apparent that respondents' products copy and thereby infringe Copyright Registration Nos. VAu 54-951 and VAu 54-952 for "Stripe" and "Gizmo," respectively, it is less obvious that these same products actually infringe complainant's Copyright Registration No. PAu 214-201 for the motion picture "Gremlins" given the two different mediums in which these works are represented. The issue is whether the characters Stripe and Gizmo are protected separate from the motion picture "Gremlins" notwithstanding the separate copyrights on the characters themselves.

Characters may be protected independently of the story in which they are represented. However, the less developed the characters, the less they can be copyrighted. (Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930)). In this case, the characters which complainant is attempting to protect are graphic representations of newly created fictional animals, much like

cartoon characters, and are more readily protectible than word portraits. (Walt Disney Productions v. Air Pirates, 581 F.2d 751, 754-55 (9th Cir. 1978); 1 NIMMER ON COPYRIGHT § 2.12 (1981)). The dissimilarity of the media in which respondents' products and the film characters are embodied makes the task of determining whether the allegedly infringing articles are copied from the original characters difficult. Respondents' products have none of the qualities that the characters in the motion picture "Gremlins" have as elements in a drama, except for whatever comparison can be made on the basis of physical appearance. This sole attribute of respondents' products will have to be compared to only one attribute of complainant's movie char- acters. (See Ideal Toy Corp. v. Kenner Products Div., 443 F. Supp. 291, 302 (S.D.N.Y. 1977)).

Because of the different dimensions in which the characters are found, it is inherently difficult to place respondents' products next to the characters portrayed in the motion picture "Gremlins" for comparison. However, after viewing the film on November 26, 1984, it is obvious that the copies challenged by Warner have closely similar characteristics as the original copyrighted characters. (FF 56-83). (Accord Warner Bros. Inc. v. American Broadcasting Co., Inc., 720 F.2d 231 (2d Cir. 1983)).

For the foregoing reasons, I find there is "reason to believe" that respondents' products copy and thereby infringe Copyright Registration Nos. VAu 54-951, VAu 54-592, and PAu 214-201.

III. Importation and Sale

To invoke the subject matter jurisdiction of the Commission and to support a finding that a violation of section 337 exists, complainant must establish that there is a reason to believe that the accused product has been imported and/or sold in the United States. 19 U.S.C. § 1337.

The evidence of record establishes that there is a reason to believe that the following respondents have imported into or sold in the United States certain products bearing representations that infringe the copyrighted GREMLINS character depictions: Bethel Enterprises; Chin Mei Industrial; C.H. Trade; Dae Rim Trading; Dai Dai Industrial; Founders Enterprises; Hope Industries; Jim Trading; Keyne Enterprise; Komax General; Lien Ho Plastic; Maxson Imports; Motivic; Multinational Products; Samba Trading; Ta Hsin; Te Feng Industrial Store; Tiger Lion Enterprises; Top Line; Y.C. Low Enterprise; Ying Tan Enterprises; Young Man General Merchandise; and Yu Il International Trading. (FF 84, 86, 88-94, 97-100).

There is insufficient evidence on the record to establish that there is a reason to believe that the following respondents have imported into or sold in the United States certain products bearing representations that infringe the copyrighted GREMLINS character depictions: Kai Chen Industries; Jar Jung; Ladies & Gentlemen Ornaments; Lay Grand; Shiuh Cha Trading; and The Superior Taiwan Corporation. (FF 85, 87, 95, 96). While there is evidence that the above companies have infringed complainant's copyrights and have attempted to market their infringing products for the purpose of export to countries other than Taiwan, there is nothing to suggest in the record that there is a reason to believe that these respondents have actually exported such products to the

United States. There is also no significant evidence of record as to respondents Lion City Industries, Shine Land, and Crichton Trading with regard to their activities concerning products bearing representations of GREMLINS character depictions.

IV. Domestic Industry

The licensing of the GREMLINS characters, Gizmo and Stripe, in connection with the showing of the "Gremlins" movie has created a domestic industry, or industries, which are not susceptible to simple definition under section 337 in light of prior precedents. The outer boundaries of the possible domestic industry in this investigation incorporates the domestic manufacture, distribution, and sale of products licensed to include depictions of the GREMLINS characters on or in association with those products. Such a definition of the domestic industry would be in accordance with the oft-cited statement that the domestic industry is defined by the exploitation of the property rights at issue. (See, e.g., Certain Composite Diamond Coated Textile Machinery Components, Inv. No. 337-TA-160 (1984); Certain Plastic Food Storage Containers, Inv. No. 337-TA-152 (1984); Games I, Inv. No. 337-TA-87 (1981)). In this case, however, the copyright owner has licensed a wide variety of goods having markedly different functions and selling at substantially different price levels. Complainant has licensed 48 domestic companies to produce products containing GREMLINS character depictions. (FF 190-91). At least 31 of those companies engage in relevant manufacturing activities within the United States. (FF 192-94). About one-half of the GREMLINS products royalty revenues are generated by products manufactured domestically.

(FF 199). Domestic licenses have been granted to include the use of the GREMLINS characters on hats, lunch boxes, painter caps, jerseys, posters, "Colorforms" playsets, toy cars, card games, patterns for costumes, blankets and baby sleepers, records, pajamas, and puffy stickers, to name just a few.

1. Products

Domestic industry as defined by the exploitation of the products covered by an intellectual property right has been established in an unbroken and incontestable line of cases. This definition, however, may not be appropriate in a copyright-based case when the creative material, which is the subject of the copyright, is incorporated in a diverse number of products. In some products the copyrighted images do not play a major role in the purchasing decision, while in other products the desire to obtain the image is virtually the sole reason for the purchase. (FF 124, 144-45). In such circumstances the domestic industry must be defined in accordance with the realities of the marketplace. (Copper Rod, 214 U.S.P.Q. at 898).

It is doubtful whether each product which bears a representation of a GREMLINS character is in competition with every other product bearing such a representation simply because they contain a GREMLINS character depiction. (See FF 128-33). For example, a key chain bearing a picture of a GREMLINS character, which sells for under a dollar, as a matter of common sense is not in competition with an item of clothing, also bearing a depiction of a GREMLINS character, which sells in the range of $10.00 to $20.00. The complainant's proposed findings Nos. 67-70, which in large part have been adopted by the administrative law judge, bear this out. Whether goods are in competition, whether one product will be purchased in lieu of another, depends upon

whether they have the same or similar price, use, and quality. The realities of the marketplace are that one product will substitute for another only when there is direct or close competition between the two. (United States v. E.I. du Pont de Nemours, & Co., 351 U.S. 377 (1956)). Broad definitions of competition for the disposable income of a consumer are not meaningful measures for the substitutability of one product for another and are rejected as a measure of competition by businessmen, courts, and this Commission. Under these circumstances we require a determination as to which segment or segments of the domestic licensed products are in competition with the infringing imports is required. The realities of the marketplace are that only licensed products that can be substantially injured by the imports are in close competition with the imports.

The "Gremlins" movie is a fantasy that appeals to children. (FF 115-16, 137, 142). The film recorded one of the highest gross ticket sales in 1984 during a relatively limited engagement. (FF 238). The movie was released for commercial distribution in June 1984 and withdrawn from distribution on November 1, 1984. (FF 187-88).

If a child enjoys viewing a film, there is generated a desire to possess a reminder of the film and its characters. This desire for momentoes is referred to in the licensing industry as the "souvenir value" of the film. (FF 117-21). There is reason to believe that the licensed products produced to exploit the souvenir value constitute a distinct market for GREMLINS character depictions. (FF 117-21, 134). The licensing of such products, however, has been deliberately limited by complainant's licensing agent in the belief that elimination or severe limitation of such low-priced products would en-

hance the overall attractiveness and profitability of the licensing program. (FF 134, 249). As a result, very few types of licensed souvenir products are present in the marketplace; they are apparently limited to puffy stickers and a series of picture cards showing scenes from the "Gremlins" film. Further, distribution of the puffy stickers product is limited only to Hallmark stores. (FF 147). These products generally sell at retail for substantially under one dollar.

With respect to products that have a definite utilitarian function, such as clothing, school lunch boxes, the inclusion of a GREMLINS character serves "as an added-on value" to the utilitarian function of the product. This added-on value is referred to as the "fantasy value." (FF 117). Such products sell at a substantially higher price than products whose primary purpose is to serve as a momento of the "Gremlins" film.

In the "souvenir" market, the utilitarian value of the product is distinctly secondary to the child's desire to obtain a depiction of the licensed character. (FF 118). The souvenir market is further characterized by impulse purchasing; that is, a large proportion of the purchases are made when the child sees the item in the store or on the shelf. Few purchases are made by individuals who actually go to a store with the intention of purchasing such an item. (FF 119-20). Such products have as their primary function the satisfaction of a child's desire to obtain a copy of the copyrighted fantasy characters and can be purchased by children using their own funds. (FF 117-19).

In contrast, the higher priced utilitarian goods are almost always purchased by a parent or adult, in conjuction with a child, with the funds of the adult. Such purchases are made not on impulse; a decision to enter the store

is usually deliberately made to obtain the product. (FF 117). These products, which include pictures of the GREMLINS characters, serve a more mixed function. Pajamas, for example, satisfy the need for bed clothing and only associate incidentally with the copyrighted characters.

In accordance with the realities of the market, there is "reason to believe" that "souvenir" licensed proucts are not in competition with higher priced utilitarian products, which the inclusion of a depiction of a GREMLINS character provides only an "added-on" fantasy value.

The unauthorized imports are virtually limited to the souvenir market for GREMLINS characters: GREMLINS jewelry sell wholesale at $9.00 per dozen (FF 200); GREMLINS key chains sell wholesale from $4.00 to $9.00 per dozen (FF 201, 205-06, 209, 212-13); GREMLINS pins sell wholesale at $5.00 per dozen (FF 209); GREMLINS puffy stickers sell wholesale from $2.50 to $3.00 per dozen (FF 209-10); and GREMLINS savings banks sell wholesale at 50 cents per bank (FF 214). The GREMLINS character depiction is the dominant characteristic of each product and they all sell at about the same price level, a level well within the discretionary spending limits of a child. Consequently, one domestic industry in which the question of possible injury caused by infringing imports should be evaluated is the souvenir market for GREMLINS character depictions.

It is apparent from the record that certain respondents ship to the United States infringing PVC Gizmo dolls. (FF 215, 217, 220-24). Whether dolls bearing a GREMLINS character depiction should be included in the souvenir market or constitute a separate category or domestic industry depends primarily upon the article itself. The lower priced, imported Gizmo dolls appear to belong more to the souvenir than the functional category.

Two domestic companies are licensed to produce plush dolls. (FF 153). The Hasbro Company manufactures these dolls in China (SPX 17), and the record is silent concerning whether there is any value added to them in the United States. (There is no evidence in the record regarding where the other licensee, Wallace Berrie, manufactures its plush dolls.) The infringing Gizmo dolls appear to have a retail value from $2.00 to $4.00, depending upon size, and are hard PVC plastic. The "Gizmo" character in the movie is a furry, cute, huggable creature, which in doll form would appeal primarily to young children and girls. (FF 116). The licensed Hasbro Gizmo doll is soft, furry, eminently huggable, and makes a sound which simulates the sound which Gizmo makes in the film. (SPX 17). The unlicensed Gizmo dolls are hard plastic, of decidedly inferior quality, and not very huggable.

Another licensee, the L.J.N. Company, domestically produces a PVC doll representing the GREMLINS character "Stripe." (SPX 1). The Stripe doll is substantially larger and more elaborate then the imported Gizmo PVC dolls. Unfortunately, there is no evidence in the record regarding its price. However, from the administrative law judge's experience, it appears to have at least a $15.00 retail value. There is no evidence that any Stripe dolls have been imported. There is no reason to believe that the imported Gizmo dolls would compete with or affect the sales of L.J.N.'s Stripe dolls.

Unlicensed painter's caps have also been imported and offered for sale. According to Irving Joel, President of the A.J.D. Cap Corp., a licensee, the "imported caps are generally inferior in quality and workmandhip" with respect to the licensed caps and undersell the licensed caps "by a substantial margin." (Joel Aff't, CX 13, paras. 6-8). The administrative law judge has

compared the imported cap (CPX 36) with the licensed cap (CPX 37) and finds that the quality of materials in the imported cap is so poor -- it is made of paper -- that the competition between the two products is not close. The imported cap is likely to disintegrate after a very few wearings.

Since the infringing products are almost entirely souvenir products incorporating GREMLINS character depictions, and they are not in competition with functional products that incorporate GREMLINS characters as an add-on to the primary purpose of the product, we need not concern ourselves further with the functional products. (See FF 120). (The functional products may involve several or many different markets, but none, except possibly dolls and painter's caps, would be affected by the imports.) Therefore, the administrative law judge is not required to rule upon the question of whether the utilitarian goods containing GREMLINS character depictions as an add-on "fantasy" value are a unitary market or contain several or many different markets.

2. Licensing

There is a second domestic industry involved in this investigation; namely, the actual licensing of copyrighted images or characters on products. (FF 111-35).

The existence of a film's character depictions on a wide variety of products of interest and use to children stimulates children who have not yet seen the film to view it. At the same time, the film stimulates a child's desire to purchase "souvenir" items and prompts them to encourage adults to purchase for them higher priced functional items bearing depictions of the

film's characters. (FF 117-20). Land, labor, and capital devoted to a service industry, as well as to an industry of manufactured goods, can constitute a domestic industry in an investigation under section 337. (See Certain Airtight Cast Iron Stoves, Inv. No. 337-TA-69 (1980)). This market includes the licensing activities designed to produce royalties by incorporating a film's copyrighted characters, the GREMLINS characters, in or on functional and souvenir products. (See FF 112, 115).

The licensing program for the motion picture "Gremlins" was planned long before the release of the film as an integral part of the package which included the film. The plan was to maximize profits from movie revenue and from royalty revenues of licensed GREMLINS products. (See FF 136-73, 191). The Commission has in the past stated that licensing royalties or revenues cannot by itself constitute a domestic industry. (See Miniature, Battery-Operated, All Terrain, Wheeled Vehicles, Inv. No. 337-TA-122 (1982)). The context of the licensing program in this investigation is totally different from that found in All Terrain Vehicles and other investigations in which the Commission previously considered this question. The type of licensing involved here has developed into an established industry with recognizable trade publications. (FF 111, 114). It is part of every film or television series where fanciful characters are created to appeal to children. Television series and other films, such as "E.T.," "Star Wars," and "Star Trek," have utilized character licensing programs as an integral part of their original profit-making domestic activity. (FF 113). In this investigation, as in predecessor programs, licensing agents are retained who specialize in children's character licensing programs. Large sums of money are invested in the planning of the licensing program and significant personnel are utilized in developing and executing it. (FF 111, 113-15, 117-27; see FF 3-4).

Thus, in this investigation we are concerned only with how the imports affect the following domestic industries: Souvenir products incorporating GREMLINS character depictions, and the licensing program for GREMLINS characters, dolls, and painter's caps.

V. Efficient and Economic Operation

In order to prevail under section 337, a complainant must establish that the domestic industry, as defined, is efficiently and economically operated. A traditional analysis of this question generally concerns itself with the following factors: (1) use of modern equipment and procedures; (2) substantial investment in research and development; (3) profitable operations; (4) successful advertising and promotions; and (5) effective quality control programs. See, e.g., Certain Composite Diamond Coated Textile Machinery Components, Inv. No. 337-TA-160 (May 29, 1984); Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, 218 U.S.P.Q. 348 (1982); Certain Slide Fastener Stringers and Machines and Components Thereof, Inv. No. 337-TA-85, 216 U.S.P.Q. 907 (1981). The industry at issue in this proceeding, however, does not lend itself to a traditional analysis. Instead, the administrative law judge must adduce from the record that there is sufficient evidence to establish a reason to believe that the industry for the licensing of products bearing representations of copyrighted GREMLINS character depictions is an efficient and economic operation for purposes of issuing temporary relief. Cf. Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 (1980).

Successful licensors conduct a character license merchandising program as a campaign to market the character itself by utilizing licensees that are carefully screened and selected to contribute to the overall marketing

effort. The licensor selects licensees that produce high quality merchandise that will appeal to children which projects an image consistent with the character as portrayed in the film or television series. (FF 121-27, 230-31).

The evidence shows that the products selected for the GREMLINS licensing program: (1) appeal to the audience to which the character was directed (FF 145); (2) are consistent with the image which the character sought to portray (FF 171); (3) cover a broad spectrum of merchandise to achieve high market exposure, with the exception of souvenir merchandise (FF 147); and (4) are manufactured at a high quality level with a view to ensuring that the products will be safe for and aesthetically appealing to children. (FF 145, 168-70, 172-73). Complainant examined each of the licensees' products several times before they were released into the retail market to assure quality control. (FF 163-64). Also, because of the importance of the surprise value of the characters appearance both to the success of the movie and the resultant demand for licensed products, complainant took every precaution to maintain the secrecy of the GREMLINS characters and the film. (FF 174-82). Finally, complainant worked closely with the licensees in developing guidelines for pre-release marketing and promotional activities so that the licensees would be able to successfully market their products while the veil of secrecy surrounding the GREMLINS characters remained intact. (FF 177).

For the foregoing reasons, I find that there is a reason to believe that the domestic industry consisting of the licensing program for GREMLINS characters in this investigation is to the extent it was exploited efficiently and economically operated.

VI. Injury

In a copyright infringement case, a small loss of sales may establish under section 337 the requisite injury to an efficiently and economically operated domestic injury. Bally/Midway Mfg. Co. v. U.S. Int'l Trade Comm'n, 714 F.2d 1117 (C.A.F.C. 1983). Less evidence is required to find "reason to believe" a violation exists then is required to find that a violation exists. (See Fluidized Apparatus, Comm'n Memorandum Op. 7-22). Also, even though there may be reason to believe a violation exists, the issuance of temporary relief is largely discretionary.

1. Products Industry

The imports in issue, with the exception of hard PVC Gizmo dolls, are largely products within the souvenir market, such as key chains and other low-priced trinket items, that have virtually no counterpart in the domestically produced products market because the licensor chose not to exploit this market segment. (FF 233). Second, evidence concerning the level of imports or market penetration is not apparent on the record. There is evidence of unlicensed importation, but no evidence relating the level of importation to the level of sales of domestically produced licensed products, so it is difficult to determine the significance of the imports. (FF 200-23). Next, only a small fraction of the unlicensed GREMLIN products that were imported were ever sold because of complainant's success in having the imported merchandise seized. (FF 225). Finally, the quality of the imported product is so low, and the quality of the licensed product so high, it is doubtful that the two are in competition. (CPX 1-39; SPX 1-37).

One licensed souvenir product that has a virtually identical counterpart in the imported products is puffy stickers. Hallmark was licensed to produce and sell puffy stickers in the United States, but it was only permitted to distribute and sell this product in Hallmark stores. (FF 147). It is unlikely that the imported stickers have displaced sales of the Hallmark stickers, or would have the tendency to do so, since Hallmark can exclude the imported stickers from its stores. Puffy stickers are a relatively inexpensive impulse purchase item usually purchased by children with their own funds. Purchase of imported stickers at other stores would not necessarily displace sales of the Hallmark stickers, but would more likely constitute added sales through an additional distribution channel. Finally, the only evidence of Hallmark's sales for puffy stickers demonstrates that a short time after the film was released (about one month), Hallmark reported it had already sold more then 50 percent of its projected sale for this item. (FF 248). At the same time, there is no evidence that imported puffy stickers have actually been sold to United States consumers. Some were shipped into the United States but were seized as a result of a district court suit filed by complainant. (FF 225).

Thus, there is no reason to believe that the infringing souvenir products would have the tendency to substantially injure the limited number of domestic souvenir products.

In the doll category, several infringing, inexpensive PVC dolls of the GREMLINS character Gizmo have been imported into the United States. First, The Hasbro Company, one of the two domestic licensees for plush Gizmo dolls, manufactures the dolls abroad, and there is no evidence of any domestic land,

labor, or capital involved in its sale in the United States. (SPX 1[illegible]). (There is no evidence of record as to the domestic activities of the second licensee for plush dolls, Wallace Berrie.) Moreover, in the film "Gremlins," the character Gizmo is an adorable, little furry creature. (FF 116). The licensed product closely simulates this furry creature. (SPX 17). The infringing products do not; they are not furry, but hard PVC plastic, and generally of a very inferior quality. (CPX 4, 13-14, 25). Most of the imports sell at about $2.00 to $2.50 wholsale, which would probably translate into a $4.00 to $5.00 retail price. (FF 201, 203, 205). The licensed, but foreign made, Hasbro product has a $7.50 suggested retail price. (SX 57(C)). For the price, the licensed product is far more desirable. Second, the L.J.N. Company makes an elaborate PVC doll representing the GREMLINS character Stripe. (SPX 1). In the film, when not handled according to the rules, Gizmo through two metamorphases becomes Stripe. Stripe obviously represents the evil which lurks deep down within the adorable Gizmo character, and is a snarling, ugly, destructive creature that bears not the slightest physical (or character) resemblance to Gizmo. There is no evidence of any importations of the Stripe doll. The licensed Stripe doll appears to be relatively expensive compared to the Gizmo dolls, although there is no evidence in the record concerning its price. There is no reason to believe that the importation of inexpensive, inferior quality Gizmo dolls would substitute for the purchase of an expensive Stripe doll.

With regard to painter's caps, we only know that one wholesaler offered them for sale for a brief time before they were seized, and that the quality of the import was far below the quality of the licensed product so that the two products are not closely or directly competitive. Thus, there is no reason to believe that importation of low quality painter's caps would substitute for or cause injury to the domestic licensee for such caps.

The evidence is conflicting upon the question whether souvenir items will displace sales of the higher priced, largely functional domestic products. The administrative law judge has evaluated the testimony of the several business executives that have given their depositions on this question and finds they generally support the view that only closely similar products are in competition. (FF 128). Those statements relied on by the parties to support the assertion that all GREMLINS licensed products are in competition are the result of leading questions and reflect an ambiguous and unclear notion of the type of competition under discussion. Clearly most of the deposition testimony upon which complainant relies reflects highly generalized statements about competition for the consumers' dollars. The spontaneous testimony of the businessmen clearly reflects a a view that low-priced, inferior quality souvenir items are not in competition with the licensed, high-quality GREMLINS functional products. (Id.). Taking this evidence into account and by evaluating the infringing and domestic items which have been submitted as physical exhibits in accordance with the price, use, and quality of the two sets of products, the administrative law judge finds that the infringing souvenir items are not substitutable for, or in competition with, the higher priced, higher quality, largely functional domestic products.

Thus, there is no reason to believe that the importation of souvenir products incorporating a GREMLINS character depiction have the tendency to substantially injure or destroy the sales of the functional or the limited number of domestically produced souvenir licenced products incorporating a GREMLINS character depiction.

2. License Industry

Although there may not be any reason to believe that the imports cause injury to the domestic product industries discussed above, there is reason to believe that the imports would have a tendency to cause substantial injury to the licensing program itself.

The presence of unauthorized infringing merchandise may endanger the overall marketing program because of a licensor's loss of control over product quality and safety. First, the licensor here decided to license products which have a high overall level of quality. (FF 169, 173). The infringing products generally are of a much lower quality. (FF 251). Second, it is possible that some of the imported products could be dangerous to children. Certainly, the licensor would have no opportunity to check for their safety. (FF 250). A number of the imported products also portray the characters in a manner inconsistent with the film, which could result in a dimunition of overall sales and royalties. (FF 231-32). This affects the future ability of complainant to enter into licensing agreements with manufacturers. (FF 135, 234-37; see FF 158; CX 13(C); CX 14(C)). Consequently, there is reason to believe that the infringing imports would have a tendency to substantially injure the licensing program for the two GREMLINS characters, Gizmo and Stripe.

Complainant, in addition, has argued that part of the injury caused by the unlicensed imports results from an oversaturation of GREMLINS merchandise. There is no reason to believe that there is a tendency to oversaturate the overall licensing program because of the importation and sale of the unauthorized souvenir items. The licensor decided not to include such products in the program in the belief it would benefit the overall program, but such deci-

sions are highly subjective. The correct number of licensees and products for a particular character license may vary widely. As Joseph Grant, President of LCA, testified, 100 licensees for one product may not reach the saturation level, whereas 50 for another may be too much. It depends upon the strength of the public's interest in a particular character, how long the character is going to be exposed to the public, and the types of products that are licensed. (Grant Dep. at 46).

The number of licensees for GREMLINS was limited because of the decision not to exploit certain product categories and because a licensee needed certain lead time to have the product available for the film release date. (Grant Dep. at 48, 74). No witness has stated that the availability of souvenir type products injured or would tend to injure the overall GREMLINS licensing program. The poor quality of the imported souvenir items would give reason to believe that injury to the overall program would result, but not merely the availability of souvenir type products. There is no reason to believe that oversaturation has occurred with respect to the GREMLINS merchandising program.

VII. Reason to Believe

On the basis of the record before the administrative law judge, there is reason to believe that respondents have violated section 337. Complainant has thus established the threshold for obtaining temporary relief. We must now determine whether, after balancing all factors, temporary relief should be granted.

VIII. Probable Success on the Merits

Complainant's probability of success on the merits appears high. The infringement of its copyrights is established without any doubt. (Op. 10-17). The definition of the domestic industry as a licensing program is novel under section 337, but it also seems clear that this program is no mere collection of royalties; it amounts to a service industry involving substantial domestic land, labor, and capital, which may properly constitute a domestic industry. (Op. 19-27). The domestic industry appears clearly to be efficiently and economically operated. (Op. 27-29; FF 214-24). The degree of injury to the licensing program does not appear to be quantifiable on the basis of the evidence presented, but we do know that large amounts of infringing goods were shipped to the United States and that there is a substantial capacity in Taiwan to ship additional large quantities of such goods should there be a marketing opportunity in the United States. (FF 200-24). The evidence thus far shows at least a tendency to cause substantial injury to the licensing program.

Therefore, I find that not only is there reason to believe that a violation of section 337 exists, but that this threshold has been exceeded such that there is a clear probability of success on the merits in this investigation.

IX. Immediate and Substantial Harm in the Absence of Temporary Relief

At first it was alleged that the market for licensing the GREMLINS characters was extremely short-lived because the film was short-lived; that is, because children that viewed the film tended to purchase GREMLINS merchandise,

or have it purchased for them, the sale of this merchandise would disappear or greatly diminish once the film was no longer popular or available for viewing. Therefore, since relief after popularity dims may be tantamount to no relief at all, temporary relief was necessary to protect the domestic industry. (See Memorandum in Support of Motion for Expedited Temporary Relief, at 23-28 (July 25, 1984)). For this reason complainant urged upon the Commission the necessity, not only for temporary relief, but for expedited temporary relief without a hearing. Complainant asserted that the movie had a limited and probably short life, and since the licensed products and the movie were interdependent, the industry would have vanished and would have been irreparably injured by the time permanent relief, or even temporary relief, could be ordered unless the temporary relief phase of this investigation could be expedited.

In an attempt to expedite temporary relief, the administrative law judge immediately reviewed the complaint, the motion for temporary relief, and the supporting exhibits and affidavits. A preliminary conference was held to gather the views of the parties concerning the procedures to be utilized in expediting this investigation.

After the preliminary conference, complainant seemed to change its view regarding the basis for temporary relief. In supplemental papers filed thereafter it was stated that the movie had been withdrawn from distribution, that the "current merchandising program based on this summer's initial release [of the "Gremlins" film] can therefore be expected to decline shortly after the Christmas season." (Supplemental Memorandum in Support of Motion for Expedited Temporary Relief, at 34 (Nov. 5, 1984)). It was also disclosed in

the supplemental papers that there are plans for a rerelease of the film in the summer of 1985 and for a release of a videotape of the movie, which would be sold in conjunction with a plush Gizmo doll, for the Christmas 1985 season. (FF 188). The complainant also plans a sequel to the "Gremlins" movie and therefore wishes to maintain the licensing program. The sequel is planned either for the summer of 1986 or 1987, but probably 1987. (FF 189). Thus, according to the changed position of the complainant, the existence of the industry is expected to be much longer-lived then originally anticipated.

There is reason to believe there is at least a tendency to substanially injure complainant's licensing program for GREMLINS characters caused by respondents' clear copyright infringements and shipments of these products to the United States. However, a tendency to substantially injure is not equivalent to a showing of immediate and substantial harm. Substantial harm requires a showing of injury to the domestic industry greater than that required to justify permanent relief. (Fluidized Apparatus, Comm'n Memorandum Op. 17, 20). The existence of some injury to the domestic industry is not by itself sufficient to show that there will be immediate and substantial harm to the industry in the absence of temporary relief. To establish immediate and substantial harm there must be a showing that during the interim period injury will occur which is greater than that necessary to establish a basis for permanent relief under section 337. (Id., Comm'n Memorandum Op. 22).

The complainant bases its immediacy argument on the impending Christmas selling season. The evidence that the Christmas selling season will be particularly important to the continuing viability of the merchandise licensing program is unconvincing. The "Gremlins" film has been withdrawn from distri-

bution as of November 1, 1984. (FF 188). In view of the fact that the movie is generally left in distribution so long as significant business is being done (FF 187), the fact that it was withdrawn from circulation prior to the Christmas selling season (Thanksgiving to Christmas) shows that it had declined significantly in popularity. There is a direct relationship between the popularity of the film and the success of the merchandising program. (FF 184, 237).

From June 1984 to the end of October 1984, the "Gremlins" film did over $15 million at the box office. It was the third most successful 1984 summer film behind "Ghostbusters" and "Indiana Jones and the Temple of Doom." (FF 238). However, three to six weeks after the release date of the film, sales of GREMLINS merchandise peaked, then began to decline. (FF 239). By mid-October the popularity of the film must have declined substantially because a decision was made to remove it from distribution at the end of October, only a few weeks before the start of the Christmas selling season.

The licensees reported great success and satisfaction with their sales of licensed merchandise. (FF 246-48). The only licensees that were dissatisfied were those that produced merchandise for young children. This was attributable to the fact that the film was not considered suitable for young children so many did not see it. (FF 246). As of September 30, 1984, U.S. licensees C* had paid approximately in royalties representing to C of retail sales of GREMLINS merchandise for the period June 1984 through September 1984. (FF 191).

Several witnesses testified about the importance of the Christmas selling season to the GREMLINS merchandise program. Joseph Grant, President of LCA, the licensing agent for the merchandise program, felt that although sales of

*C = Confidential

GREMLINS products were on the wane, they would probably pick up for Christmas because it is the biggest selling season of the year. (FF 239). Brad Globe, the individual in charge of the merchandise program for Amblin (a representative of the producer, Steven Spielberg), was not sure how important Christmas would be. The first quarter of selling "was very good," but Mr. Globe stated that he would have to check the second quarter royalty reports to determine what the level of business would be during the Christmas selling season. Whether character merchandise sales would rise during the Christmas selling season depends upon the strength of the movie and the timing of the release. (FF 240). Mr. Globe added that "E.T." and "Star Wars" sold well during Christmas (FF 245), but those films, unlike the "Gremlins" film, continued in distribution during the Christmas selling season. (FF 245).

Dan Romanelli, Vice President for Warner, stated that he was not sure as to the level of GREMLINS product in the retail stores; if the level was significant there could be substantial sales. (Romanelli Dep. at 59). Mr. Romanelli placed an advertisement in a trade magazine and mailed to retailers a flyer, both which are designed to urge retailers to continue to stock GREMLINS merchandise. The theme of the promotion is that the GREMLINS merchandise is "more than a summer romance." (FF 242). It is also claimed that J.C. Penny and Sears Roebuck will carry certain GREMLINS merchandise in their Christmas catalogs. Copies of the advertisement, the promotional flyer to retailers, and the Sears Roebuck and J.C. Penny ads have not been supplied.

Two other witnesses Mr. Owen and Ms. Young testified on this subject, but stated only that Christmas is an important selling season for retailing in general.

The administrative law judge is aware that the Christmas selling season is important to retailing, but it appears from the objectively verifiable evidence that the important selling period for GREMLINS character merchandise was the summer and fall of 1984 when children could view the movie (particularly the first three to six weeks after the release of the film). If the upcoming Christmas selling season was so important to the licensing program, documentary evidence to that effect should have been supplied. Major retailers could have been contacted to give affidavits or depositions concerning the level of expected sales during the Christmas selling season for GREMLINS merchandise based on the level of inventory. Evidence of licensee advertising of GREMLINS products would likely be present, but no such evidence is in the record. The administrative law judge specifically asked for evidence relating to movie attendance and product sales during the preliminary conference (Prelim. Conf., Tr. 15-16, 18-19), but such evidence was not provided in sufficient detail except in the deposition of Mr. Grant and to a very limited extent in the licensee survey. Major retailers could also have given evidence regarding the level of imported unlicensed GREMLINS merchandise, if any, which would be available for sale. Since sales will decline after Christmas and Christmas merchandise is purchased several months in advance, it does not appear that further importation is imminent until perhaps the rerelease of the film in the summer of 1985. The evidence that companies desire to export infringing products to the United States appears to cease after early or mid-August 1984. (CX 4). Permanent relief could easily be decided upon in advance of the rerelease, particularly in view of the record that has already been compiled.

Prior to its request that the Commission initiate this investigation, the complainant sought and received temporary relief in federal district court. In some cases the defendants have settled and the injunctions have been made permanent. In other cases the preliminary injunctions continue in force while the cases proceed. (FF 225). Pursuant to an express provision of the copyright laws permitting the seizure of infringing goods, much of the imported merchandise has been seized by complainant with the aid of federal district courts. The evidence that infringing imports currently continue is quite meager and is limited to anecdotal reports. In fact, it is quite unlikely that such imports will continue in the absence of the showing of the "Gremlins" film.

The concept of immediate and substantial harm appears to have arisen out of the similar notion of irreparable injury used in United States federal district courts as one of the factors in determining whether a preliminary injunction should issue. In federal district courts, in cases where the copyright infringement appears clear, irreparable injury is virtually presumed and the preliminary injunction is usually issued without the need to present much, if any, independent evidence of injury. (Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 525 (9th Cir. 1984); Apple Computer, Inc v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983); Atari, Inc. v. North American Phillips Electronic Corp., 672 F.2d 607, 620 (7th Cir. 1982); Wainwright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977)). Federal courts adopt this approach because injury constitutes part of the equitable consideration for deciding whether to award preliminary relief. Injury is not part of the copyright statute; however, in

section 337 investigations, the violation consists not only of infringement, but also a substantial injury or tendency to substantially injure a domestic industry. Once the threshold of injury under section 337 is found (i.e., once there is "reason to believe" that a violation of section 337 has occurred, which includes reason to believe that there is a tendency for substantial injury to an economically and efficiently operated domestic industry), then the Commission may use its discretion in deciding how much importance should be given to the irreparable injury factor in awarding temporary relief.

In order to meet the requirement of immediate and substantial harm, the level of lost sales during the Christmas selling season would have to cause greater injury to the overall merchandise licensing program than necessary to justify permanent relief. The injury would truly have to be irreparable. The evidence adduced on this point that complainant, in the absence of temporary relief during the Christmas selling season, will be caused immediate and substantial harm is unconvincing.

V. Harm, If Any, to Respondents

The third standard for determining whether temporary relief should be granted, i.e., harm, if any, to respondents, is presumed negative. The Commission has held that it is the obligation of respondents to set forth evidence to establish harm to their position by the issuance of temporary relief, especially since they would be allowed to continue to import the allegedly infringing article upon posting a bond. None of the respondents to this investigation responded to complainant's motion for expedited temporary relief or otherwise participated in this investigation such as to rebut the presump-

tion that they would not be harmed by the issuance of temporary relief. Therefore, given that respondents upon posting a bond are permitted to import the allegedly infringing articles and that if they prevail at the time of the Commission's final determination, or if the President disapproves of temporary relief, the bond will be refunded, harm to respondents upon a finding that complainant's motion should be granted is minimal, or nonexistent.

XI. Public Interest

The final standard for determining whether temporary relief should be granted, public interest, refers to those factors enumerated in sections 337(d) through 337(f): (1) public health and welfare; (2) competitive conditions in the United States economy; (3) production of like or directly competitive articles in the United States; and (4) United States consumers. The Commission considers these factors as overriding considerations in the administration of the statute such that if the effect of the issuance of temporary relief would have a greater adverse impact on the public interest than would be gained from protecting complainant's interests, relief should not be granted. Conversely, the conclusion that the public interest would not be impaired by temporary relief is not in and of itself sufficient reason to compel issuance of that relief where the other standards for determining whether such relief should be granted are found not to exist. The evidence of record demonstrates that the public interest would be served if the requested temporary relief is granted.

First, "it is in the public interest to preserve the integrity of laws protecting domestic industry's rights to intellectual property. . . ." (Copper Rod, 214 U.S.P.Q. at 899). The Copyright Act of 1976 recognizes that

it is in the public welfare to foster creativity by protecting the copyright owner's interest in the exclusive use and exploitation of his work. Second, competitive conditions in the United States are enhanced by recognizing the importance of licensing arrangements and by preserving the integrity of such arrangements. Complainant's licensees stated they were motivated to enter into a license arrangement with Warner specifically because of the expectation that complainant would take all reasonable steps to prevent the sale of infringing merchandise. (See FF 132-33, 135). Finally, it is apparent from the record that complainant did not in any way discriminate as to those persons it would consider as licensees except to follow the criteria that the quality of the licensees, the types of licensed products, and the quality of licensed merchandise were to be carefully controlled. No element of complainant's licensing program in any way prohibits the production of like or directly competitive articles in the United States provided that those articles do not include a GREMLINS character depiction which would infringe Warner's copyright. (FF 148).

For the foregoing reasons, a grant of temporary relief in this investigation will not adversely affect the public interest.

XII. Should the Commission Exercise its Discretion to to Order Temporary Relief in this Investigation

It is clear that repondent's articles without a doubt infringe complainant's copyrights. It is also well established that the unauthorized copying tends to injure complainant's licensing program and that this program constitutes an efficient and economically operated domestic industry. It is further

clear that no harm would come to repondents if temporary relief were ordered and that to do so would serve the public interest. On the other hand, the failure to order temporary relief would not result in immediate and substantial harm to the GREMLINS character licensing program.

In balancing these factors it must be kept in mind how they relate to one another. If a grant of temporary relief would not be in the public interest then no such relief should be granted. The public interest is an overriding consideration and, under the statute, must be present in order for temporary relief to be granted. The remaining factors relate to equitable considerations, which concerns the Commission's discretion whether or not to award temporary relief in a particular investigation.

The basic purpose of temporary relief is to preserve the status quo ante during the pendency of the investigation. Thus, it must be determined whether the facts are such that the failure to award temporary relief would irreparably harm the domestic industry. This primary equitable factor is reflected in the Commission's requirement that the applicant for temporary relief show that immediate and substantial harm would result in the absence of such relief. The evidence presented concerning such harm is unconvincing. On the other hand, the probability that the complainant will prevail on the merits is high, and the harm to respondents if temporary relief were granted is very low. The need for temporary relief is low, but the harm it will cause is also low.

In Fluidized Apparatus, the Commission held that the four factors in its temporary relief rule should be balanced. However, the Commission did not indicate the relative importance of each factor. (Comm'n Memorandum Op. 3-5, 22). Irreparable injury in federal district courts at one time was considered

essential in obtaining preliminary relief. In copyright infringement cases, federal courts no longer require independent evidence of such injury but presume it from the infringement. If the proof of injury meets the "reason to believe" threshold, as it does in this investigation, how much evidence of injury during the interim period is necessary to satisfy the immediate and substantial harm requirement? If injury during the interim period is slight, but the other factors strongly militate in favor of temporary relief, can it be granted under the rules? As interpreted in Fluidized Apparatus, injury greater than a tendency towards substantial injury must be shown during the interim period. (Comm'n Memorandum Op. 22). The evidence of record does not demonstrate this degree of injury.

In copyright infringement cases, federal courts have all but done away with the equitable factor of irreparable injury when infringement is clear, as it is in this case. The Commission can, if it wishes, follow the same path, but it would have to change its rule regarding immediate and substantial harm, or the interpretation of it, in order to do so.

In light of the above findings, complainant would most likely be entitled to permanent relief. It could probably obtain such relief by filing a motion for summary determination, provided that respondents continue in their posture of not participating in this investigation. Indeed, the administrative law judge inquired whether complainant wished to cast its present motion for temporary relief as an alternative motion for summary determination. Complainant declined to do so.

For the foregoing reasons, complainant's motion for expedited temporary relief in the matter of Certain Products with Gremlins Character Depictions is denied.

FINDINGS OF FACT

I. Jurisdiction

1. The U.S. International Trade Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, has jurisdiction over the subject matter of this investigation because the alleged unfair acts and unfair methods of competition involve importations of certain products with GREMLINS character depictions into the United States. Notice of Investigation, 49 Fed. Reg. 34,422-23 (Aug. 30, 1984).

II. The Parties

1. Complainant and Interested Persons

2. Warner Bros. Inc. (Warner) is a Delaware corportion whose principal place of business is 4000 Warner Boulevard, Burbank, California, 91522. Warner is a wholly-owned subsidiary of Warner Communications Inc., 75 Rockefeller Plaza, New York, New York, 10019. Warner's business includes making and distributing feature-length motion pictures and licensing the character rights from such movies. Complaint, para. 1.

3. The Licensing Company of America (formerly Licensing Corporation of America, hereinafter LCA) is the division of Warner Communications Inc. that acts as an agent in the licensing of rights to names, photographs, likenesses, logos, and similar representations or endorsements both of real persons and organizations, as well as fictional characterizations. LCA performs such functions for many owners of copyrights and trademarks, including Warner. Complaint, para. 7.

4. Amblin Entertainment, Inc. (Amblin) is engaged in the production of feature length motion pictures. Amblin is controlled by Steven Spielberg, who produced such motion pictures as "E.T.," "Raiders of the Lost Arc," "Indiana Jones and the Temple of Doom," as well as "Gremlins." Complainant, FF 4. Amblin worked closely with Warner and LCA throughout the design and implementation of the GREMLINS character licensing program. Globe Dep. at 9, 61-62; Romanelli Dep. at 9.

2. Respondents

5. Respondent Bethel Enterprises Company, located at 58 West 28th Street, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-5, Iken Aff't, at 3.

6. Respondent C. H. Trade, locoated at 20 West 27th Street, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 7.

7. Respondent Dai-Dai Industrial Corp. (also doing business as JC Imports and FADA Trading), located at 1204 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 8.

8. Respondent Dae Rim Trading, Inc., located at 43 West 30th Street, New York, New York, 10001, is engaged in the importation, marketing, whole- sale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 6.

9. Respondent Hope Industries, Inc., located at 1170 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-5, Iken Aff't, at 1-2; Response to Complaint, at 4 (Sept. 26, 1984).

10. Respondent Jim Trading Corp., located at 1181 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 1-2.

11. Respondent Komax General Corp. (also doing business as The Komax General Corp.), located at 1232 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 12.

12. Respondent Maxson Imports, Inc., located at 1214 Broadway, Room 412, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-7, Maida Aff't, at 2-3.

13. Respondent Motivic, Inc., located at 53 West 36th Street, New York, New York, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-7, Maida Aff't, at 3-4; CX-17, Chiou Dep.

14. Respondent Multinational Products Corp. (also doing business as Multinational Products), located at 1181 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 3-4; Letter from H.B. Kim, Multinational Products Corp. to U.S. Int'l Trade Comm'n (Sept. 12, 1984).

15. Respondent Samba Trading Corp. (also doing business as Samba Jewelry Corp.), located at 842 Avenue of the Americas, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 9-10.

16. Respondent Top Line, located at 1220 Broadway, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 9.

17. Respondent Young Man General Merchandise Company, located at 41 West 30th Street, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX-6, Cullen Aff't, at 4-5.

18. Respondent Chin Mei Co., Ltd., located at 150 Fu Te South Road, San Chung City, Taipei County, Northern Taiwan, is engaged in the manufacture and/or exportation of merchandise. CX 6, Young Aff't, at 24-26.

19. Respondent Crichton Trading Co., located at 58, Changan W. Road, 7th Floor, Taipei, Taiwan R.O.C., is a trading company. CX-17, Chin Deposition at 29-31, appx; Letter from James Chiu, General Mgr., Crichton Trading Co., to Sidney Harris, Administrative Law Judge (Sept. 18, 1984).

20. Respondent Founders Enterprises Ltd., located at P.O. Box 46-669, Taipei, Taiwan (address listed in the Notice of Investigation as 4th Floor, 34 Lane 81, Fu Hsing North Road, Sung Shan District, Taipei City, Northern Taiwan) is a trading company. CX 8, Young Aff't, at 5-7; Letter from Y.K. Chang, Director, Founders Enterprise, to Kenneth Mason, Secretary (Sept. 18, 1984).

21. Respondent Jar Jung Co., Ltd., located at 14 C. 8th Floor, No. 33 Roosevelt Rd. Sec.2, Taipei, Taiwan R.O.C. (address listed in the Notice of Investigation as P.O. Box 30-465, Taipei, Northern Taiwan) is a trading company. CX 8, Young Aff't, at 30-31; Letter from Jar Jung Co. to Kenneth Mason, Secretary (Sept. 19, 1984).

22. Respondent Kai Chen Industries Co., Ltd., located at P.O. Box 48594, Taipei, Taiwan, is engaged in the manufacture and/or exportation of merchandise. CX 8, Young Aff't, at 2-3.

23. Respondent Keyne Enterprise Co., Ltd., located at 1st Floor, 13 Lane 116, Chien Min Road, Shih Pai District, Taipei City, Northern Taiwan, is engaged in the manufacture and/or exportation of merchandise. CX 8, Young Aff't, at 16-19.

24. Respondent Ladies and Gentlemen Ornaments Co., Ltd., located at 2nd Floor, 117 San Yang Road, San Chung City, Taipei, Taiwan R.O.C., is engaged in the manufacture and/or exportation of merchandise. CX 8, Young Aff't, at 29-30; Letter from B.W. Yang, Proprietor, Ladies and Gentlemen Ornaments Co., to Kenneth Mason, Secretary (Sept. 17, 1984).

25. Respondent Lay Grand Co., Ltd., located at 5th Floor, No. 96, Sec. 1, Roosevelt Road, Taipei, Taiwan R.O.C., is engaged in the manufacture and/or exportation of merchandise. CX 8, Young Aff't, at 7-10; Letter from Gen. Mgr., Lay Grand Co., to U.S. Int'l Trade Comm'n (Sept. 21, 1984).

26. Respondent Lien Ho Plastic Co. Ltd. located at 2nd Floor, 4 Alley 2 Lane 325, Shui Yuan Road, Hsi Chih Toun, Taipei County, Northern Taiwan, is engaged in the manufacture and/or exportation of merchandise. CX 8, Young Aff't, at 26-29; Letter from Lien Ho Plastic Co. to U. S. Int'l Trade Comm'n (Sept. 21, 1984).

27. Respondent Lion City Industrial Co., Ltd., located at 1st Floor, 3 Alley 20 Lane 154 Sec. 3 Bar Der Road, Taipei, Taiwan (address listed in the Notice of Investigation as Lion City Industries, 1st Floor, 3 Alley 20 Lane 158, Pa Te Road, Section 3, Taipei City, Northern Taiwan), is engaged in the manufacture and/or exportation of merchandise. CX 18; Letter from Charles Perng, Gen. Mgr., Lion City Industrial Co., to Kenneth Mason, Secretary (rec'd Sept. 24, 1984).

28. Respondent Shine Land Inc., located at Fl., 8 No. 97 Sec. 2 Nan King E. Rd., Taipei, Taiwan, is engaged in the exportation of merchandise. CX 17, Chiou Dep. at 20-29, appx; Letter from Director, Shine Land Inc., to Kenneth Mason, Secretary (Sept. 30, 1984).

29. Respondent Shiuh Cha Trading Ltd., located at 8th Floor, 139 Keelung Road, Section 1, Taipei City, Northern Taiwan, is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 32.

30. Respondent Ta Hsin Co., Ltd., located at 2nd Fl., 171 Chung Hsiao Road, Section 1, San Chung City, Taipei County, Taiwan, is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 22-24; Letter from Y.H. Lai, President, Ta Hsin Co., to Kenneth Mason, Secretary (Sept. 18, 1984).

31. Respondent Te Feng Industrial Store located at 18 Alley 58 Lane 7, Li Ming Road, Nam Tun District, Taichung City, Central Taiwan R.O.C., is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 13-14; Letter from Tsern-Der Chang, Te Feng Industrial Store, to U.S. Int'l Trade Comm'n (Sept. 20, 1984).

32. Respondent The Superior Taiwan Corp., located at P.O. Box: 55-1266, Taipei, Taiwan R.O.C., is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 31; Letter from James Chao, Managing Director, The Superior Taiwan Corp., to Kenneth Mason, Secretary (Sept. 20, 1984).

33. Respondent Tiger Lion Enterprise Co., Ltd., located at 5th Floor, 7 Lane 342, Lung Chiang Road, Chung Shan District, Taipei City, Northern Taiwan, is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 19-22.

34. Respondent Y.C. Low Enterprise Co., Ltd., located at P.O. Box 48, 594 Taipei, Taiwan R.O.C. (address listed in the Notice of Investigation as 6th Floor, 470-472 PA TE Road, Section 4, Sung Shan District, Taipei City, Northern Taiwan), is engaged in the manufacture and exportation of merchandise. CX 8, Young Aff't, at 2-5; Letter from Louis Jong, Gen. Mgr., Y.C. Low Enterprise Co., to Kenneth Mason, Secretary (Oct. 17, 1984).

35. Respondent Ying Zan Enterprise Corp., located at P.O. Box 96-416 Taipei, Taipei, Taiwan (address listed in the Notice of Investigation as 5th Floor-1, 212 An Ho Road, Ta An District, Taipei City, Northern Taiwan), is a trading company. CX 8, Young Aff't, at 10-13; Letter from Stephen Gen, Mgr., to U.S. Int'l Trade Comm'n (Sept. 19, 1984).

36. Respondent Yu Il International Trading Corp. (also doing business as Yuil International Trading Corp.), located at 868 Avenue of the Americas, New York, New York, 10001, is engaged in the importation, marketing, wholesale, and distribution of toys, costume jewelry, and other merchandise. CX 6, Cullen Aff't, at 11.

III. Copyright Infringement

1. Copyright Ownership

37. Copyright Registration No. VAu 54-951 (the 54-951 copyright) is a pictorial artwork depicting the character "Stripe," the leader of the GREMLINS, as introduced in the motion picture "Gremlins." CX 1.

38. Copyright Registration No. VAu 54-952 (the 54-952 copyright) is a pictorial artwork depicting the character "Gizmo," the original "Mogwai" character, as introduced in the motion picture "Gremlins." CX 2.

39. Copyright Registration No. PAu 214-201 (the 214-201 copyright) is the motion picture entitled "Gremlins." CX 3.

40. The effective date of registration for the 54-951 and the 54-952 copyrights was December 30, 1983. CX 1-2.

41. The effective date of registration for the 214-201 copyright was June 29, 1984. CX 3.

42. The photocopies attached to the 54-951 and the 54-952 copyrights are representative of the artworks entitled "Stripe" and "Gizmo," respectively. CX 1-2.

43. Chris Joseph Columbus, a self-employed screenwriter, authored the original screenplay entitled "Gremlins" in 1983. The screenplay and Gremlins story was created by Mr. Columbus without reference to any prior stories or characters. SX 7, Columbus Aff't, at 1.

44. The rights to the original "Gremlins" screenplay were purchased by Amblin, a company owned by Steven Spielberg. SX 7, Columbus Aff't, at 1.

45. After the rights to the "Gremlins" screenplay were purchased, several changes to the screenplay were made, including the deletion of certain scenes, by Mr. Columbus, Mr. Spielberg, Joe Dante, Mike Finnell, and Warner. SX 7, Columbus Aff't at 1-2.

46. The final draft of the "Gremlins" screenplay, dated April 11, 1983, contains the original descriptions of the Gremlins characters that appeared in Mr. Columbus's original script. SX 7, Columbus Aff't, at 2; SX 9; see SX 10.

47. The Stripe and Gizmo pictorial artworks were created by Christopher James Walas, special effects designer and supervisor for Chris Walas, Inc. SX 8(C), Walas Aff't, at 1-3.

48. Mr. Walas became involved with the "Gremlins" film project through his acquaintances with the film's director, Joe Dante, and producer, Mike Finnell. SX 8(C), Walas Aff't, at 1.

49. Mr. Dante explained to Mr. Walas the effect the film's gremlin characters were to evoke and provided Mr. Walas with his rough storyboard depiction of the Gizmo character. Mr. Walas stated that it was his understanding that the Gizmo character was to be cute and loveable, and based roughly on a written description provided by Mr. Columbus. In creating the Gizmo character, Mr. Walas was cautious to avoid duplication of any creatures he or anyone else had previously developed. SX 8(C), Walas Aff't, at 1-2.

50. In creating the evil gremlins, of which Stripe is an example, Mr. Walas relied on a preconcieved image that he had created, but never used, of an evil, reptilian monster. Mr. Walas was able to finalize the appearance of this creature using Mr. Columbus's script as a rough guideline. SX 8(C), Walas Aff't, at 2.

51. The final appearance of the Gizmo character was created after Mr. Walas signed a contract with Pretorious Productions, Inc. Mr. Walas developed the evil gremlin characters after reaching a basic agreement with Pretorious Productions. Mr. Walas stated that while the designs for the gremlin characters were substantially completed prior to the actual signing of his contract with Pretorious Productions, it was his understanding throughout the negotiation of this contract that Pretorious Productions would ultimately contract with Warner and that the gremlin characters he developed would be the property of Warner. SX 8(C), Walas Aff't, at 2.

52. In a letter dated September 13, 1983, Pretorious Productions engaged the services of Chris Walas from Chris Walas, Inc., to design and construct all gremlin creatures described in the screenplay for the motion picture "Gremlins." SX 3(C) at Bates No. 200001-2.

53. In a letter dated September 14, 1982, Warner assumed the obligations of Pretorious Productions under the agreement it signed with Chris Walas, Inc., on September 13, 1982. SX 4(C).

54. The agreement between Chris Walas, Inc., and Pretorious Productions, as assigned to Warner, stated that "[t]he results and proceeds of Employee's [Mr. Walas's] services and the services of all other personnel engaged by you [Chris Walas Inc.] hereunder shall constitute a work-made-for-hire within the meaning of the U.S. Copyright Law and we shall be deemed the author and owner thereof for all purposes." SX 3(C) at Bates No. 200003.

55. The author of the works protected by the 54-951, the 54-952, and the 214-201 copyrights is defined by these copyrights as Warner Bros. Inc. The contribution of Warner as author of these works is defined as "work made for hire." CX 1-3.

2. Copying

56. Respondent Bethel Enterprises sold or offered for sale imported earrings, necklaces, and heart-shaped key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from Bethel Enterprises bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 5, Iken Aff't, at 3-4; CPX 26-28.

57. Respondent C. H. Trade sold or offered for sale imported plastic dolls and figurine key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from C.H. Trade bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 7; CPX 14-15.

58. Respondent Dai-Dai Industrial sold or offered for sale imported puffy stickers bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. A representative of Dai-Dai Industrial stated that more GREMLINS merchandise was expected in the near future. None of the GREMLINS merchandise seen at or purchased from Dai-Dai Industrial bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 8; CPX 16.

59. Respondent Dae Rim Trading sold or offered for sale imported plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from Dae Rim Trading bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 6-7; CPX 13.

60. Respondent Hope Industries sold or offered for sale imported puffy stickers, pictorial key chains, and plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. A representative of Hope Industries stated that he was awaiting the arrival of more plastic GREMLINS dolls. None of the GREMLINS merchandise seen at or purchased from Hope Industries bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 5, Iken Aff't, at 1-2; CPX 23-25.

61. Respondent Jim Trading sold or offered for sale imported figurine key chains and plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. A representative of Jim Trading agreed to extend to complainant's investigator a quantity discount on purchases of ten dozen or more GREMLINS key chains. The representative stated that these items could be readily supplied. None of the GREMLINS merchandise seen at or purchased from Jim Trading bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 1-2; CPX 1-2.

62. Respondent Komax General sold or offered for sale imported figurine key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchan-

dise seen at or purchased from Komax General bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 12-13; CPX 21-22.

63. Respondent Maxson Imports has sold or offered to sell imported three-dimensional molded and plush figurines, key chains, lapel buttons, visor caps, puffy stickers, and pins bearing unauthorized representations substantially similar to the GREMLINS character depictions. One of respondent's representatives directed prospective customers to visit Maxson Imports' showroom where additional infringing merchandise was offered for sale. Also, an employee of Maxson Imports acknowledged that the merchandise offered by respondent was not licensed. None of the GREMLINS merchandise seen at or purchased from Maxson Imports bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 7, Maida Aff't, at 2-3; CPX 29-32.

64. Respondent Motivic sold or offered for sale imported key chains, lapel buttons, and puffy stickers bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from Motivic bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 7, Maida Aff't, at 3-4; CPX 33-35.

65. Respondent Multinational Products sold or offered for sale imported puffy stickers, push-botton pins, and figurine and flat plastic key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen

at or purchased from Multinational bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 7, Cullen Aff't, at 3-4; CPX 3-7.

66. Respondent Samba Trading sold or offered for sale imported key chains and puffy stickers bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. A Samba Trading representative stated that the store expected to receive more such GREMLINS merchandise in the near future. None of the GREMLINS merchandise seen at or purchased from Samba Trading bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 9-11; CPX 18-19.

67. Respondent Top Line sold or offered for sale imported key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from Top Line bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 9; CPX 17.

68. Respondent Young Man General Merchandise sold or offered for sale imported figurine key chains, plastic dolls, address books, charm necklaces, and rings bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. A representative of respondent stated that a better price per package would be offered for quantity purchases of the key chains. None of the GREMLINS merchandise seen at or purchased from Young Man General Merchandise bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 4-6; CPX 8-12.

69. Respondent Yu Il International Trading sold or offered for sale imported key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. None of the GREMLINS merchandise seen at or purchased from Yu Il International Trading bore any identification indicating that it was manufactured by any licensee of, or authorized for sale by, complainant. CX 6, Cullen Aff't, at 11-12; CPX 20.

70. Respondent Y.C. Low Enterprise offered for sale for export to the United States ceramic savings banks bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. The ceramic banks are manufactured by a subcontractor for respondent, Kai Chen Industrial Co., Ltd., located in Taiwan. CX 8, Young Aff't, at 2-5, Attachment 1.

71. Respondent Founders Enterprise offered for sale for export to the United States plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS characterizations. CX 8, Young Aff't, at 5-7, Attachments 2-3.

72. Respondent Lay Grand offered for sale for export to the United States stuffed toys bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 7-10, Attachment 4.

73. Respondent Ying Zan Enterprise offered for sale for export to the United States plastic and stuffed dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 10-13, Attachment 5.

74. Respondent Te Feng Industrial Store offered for sale for export to the United States figurine key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 14-16, Attachment 6.

75. Respondent Keyne Enterprise offered for sale for export to the United States figurine and circular key chains and color stickers bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 16-19, Attachments 7-10.

76. Respondent Tiger Lion Enterprises offered for sale for export to the United States figurine key chains and plastic and stuffed dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 19-22, Attachment 11.

77. Respondent Ta Hsin offered for sale for export to the United States figurine key chains, plastic dolls, photoframes, and badges bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 22-24, Attachments 12-13.

78. Respondent Chin Mei Industrial offered for sale for export to the United States figurine and flat plastic key chains, stickers, photoframes, and plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 24-26, Attachments 14-16.

79. Respondent Lien Ho Plastic offered for sale for export to the United States figurine key chains and plastic dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 26-29, Attachment 17.

80. Respondent Ladies and Gentlemen Ornaments offered for sale brooches and badges bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 29-30, Attachment 18.

81. Respondent Jar Jung offered for sale plastic dolls, figurine key chains, and badges bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 30-31, Attachment 19.

82. Respondent The Superior Taiwan offered for sale knapsacks and plastic and stuffed dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 31, Attachment 20.

83. Respondent Shiuh Cha Trading offered for sale figurine key chains and plastic and stuffed dolls bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 8, Young Aff't, at 32, Attachment 21.

IV. Importation and Sale

84. On June 12, 1984, respondent Y.C. Low Enterprise indicated that as of June 1, 1984, it had shipped four 40-foot containers of GREMLINS savings banks to an unidentified U.S. buyer. Each container held 35,500 banks. The banks were shipped at the direction of the buyer to locations on the east and west coasts of the United States. CX 8, Young Aff't, at 3-4.

85. On June 12, 1984, Y.C. Low Enterprise stated that the GREMLINS ceramic banks advertised by respondent Kai Chen Industries were manufactured by that company on a subcontract basis. Y.C. Low Enterprise also indicated

that Kai Chen Industries was an associate company and that Y.C. Low Enterprise handled all inquiries and export matters for Kai Chen Industries. CX 8, Young Aff't, at 7-10.

86. On June 11, 1984, respondent Founders Enterprises indicated that it had exported 15,000 Gizmo PVC dolls to the United States. On June 19, 1984, Founders Enterprises indicated that it had exported 15,000 dolls, not to the United States, but to Canada. CX 8, Young Aff't, at 5-7.

87. Pursuant to discussions held on May 28, June 8, and June 25, 1984, respondent Lay Grand indicated that it had the capacity to produce approximately 2,500 dozen stuffed toys a month. Lay Grand also indicated that it had received an order from an unspecified Canadian buyer for 1,000 stuffed toys depicting a GREMLINS character. CX 8, Young Aff't, at 7-10.

88. On July 11, 1984, respondent Ying Zan Enterprises indicated that its production capacity was occupied until July 25, 1984, during which time 3,000 GREMLINS toys were being exported on a daily basis to the United States. CX 8, Young Aff't, at 10-13.

89. On June 28, 1984, respondent Te Feng Industrial Store had on its premises in excess of 1,000 PVC doll key chains depicting the Gizmo character. Te Feng Industrial Store indicated that the order for the key chains was from a Canadian buyer, but claimed that no exports had as yet been made. During a telephone conversation which took place on July 31, 1984, however, an employee of Te Feng Industrial Store stated that approximately 5,000 Gizmo key chains were manufactured on a daily basis, then forwarded to Taiwan trading companies for export. The employee indicated that the major market for the products was the United States. CX 8, Young Aff't, at 13-16.

90. On July 3, 1984, respondent Keyne Enterprise confirmed that it manufactured the following articles with GREMLINS character depictions: (1) PVC doll key chain; (2) circular PVC key chain; (3) PVC medallion; (4) PVC badge; and (5) color sticker. Keyne Enterprise also indicated that a large quantity of the merchandise had been exported to the United States and Europe. CX 8, Young Aff't, at 16-19, Attachment 9.

91. On June 27, 1984, respondent Tiger Lion Enterprises indicated that the following articles with GREMLINS character depictions could be provided: (1) two inch PVC Gizmo doll key chain; (2) six inch PVC Gizmo doll; and (3) eight inch stuffed Gizmo toy. Tiger Lion Enterprises indicated that a twelve inch Gizmo stuffed toy was being developed. Tiger Lion Enterprises also stated that its present production capacity for PVC Gizmo dolls was 30,000 pieces per month and that it had commenced exportation of the GREMLINS merchandise to the United States in early June 1984. CX 8, Young Aff't, at 19-22.

92. On a date uncertain, respondent Ta Hsin indicated that the following articles with GREMLINS character depictions could be provided: (1) seven inch PVC Gizmo doll; (2) PVC Gizmo key chain; (3) Gizmo photoframe; and (4) Gizmo badge. Ta Hsin stated that the GREMLINS merchandise had been ordered by a Taiwan trading company for export to Canada, the United States, and Europe. CX 8, Young Aff't, at 22-24.

93. On June 27, 1984, respondent Chin Mei Industrial indicated that it could provide the following articles: (1) six inch PVC Gizmo dolls; (2) two inch PVC Gizmo doll key chains; (3) PVC Gizmo badges; (4) photoframes and photoframe key chains; (5) telephone note pads; and (6) color stickers. Chin

Mei Industrial stated that the majority of the GREMLINS products were provided to Taiwan trading companies for export to the United States and Canada. CX 8, Young Aff't, at 24-26.

94. On July 4, 1984, respondent Lien Ho Plastic confirmed that it was able to offer PVC Gremlins dolls and PVC GREMLINS doll key chains. Lien Ho Plastic stated that a large number of exports had been made to the United States, Canada, and Europe through Taiwan trading companies. CX 8, Young Aff't, at 26-28.

95. The following companies advertised merchandise depicting GREMLINS characters in the July 16, 1984, edition of a Taiwan trade magazine, Exporter Semimonthly: (1) Ladies & Gentlemen Ornaments (advertised a brooch, a hair clip, and a badge depicting the Gizmo character); (2) Jar Jung (advertised a badge, a two inch PVC doll key chain, and an eight inch PVC doll depicting the Gizmo character); and (3) The Superior Taiwan Corporation (advertised a knapsack, a seven inch PVC doll, and a twelve inch stuffed toy depicting the Gizmo character). CX 8, Young Aff't, at 29-31, Attachments 18-20.

96. Respondent Shiuh Cha Trading in the July 1984 edition of Taiwan Houseware & Gift Magazine advertised a PVC doll, a PVC doll key chain, and a stuffed toy depicting the Gizmo character. CX 8, Young Aff't at 29-30, 32, Attachment 21.

97. Respondent Bethel Enterprises sold imported earrings, necklaces, and heart-shaped key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 5, Iken Aff't, at 3-4.

98. Respondent C. H. Trade sold imported plastic dolls and figurine key chains bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 7.

99. Respondent Dai-Dai Industrial sold imported puffy stickers bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 8.

100. Respondent Dae Rim Trading sold imported plastic dolls bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 6.

101. Respondent Hope Industries sold imported puffy stickers, key chains, and plastic dolls bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 5, Iken Aff't, at 1-2.

102. Respondent Jim Trading sold imported key chains and plastic dolls bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 1-2.

103. Respondent Komax General sold imported figurine key chains bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 12.

104. Respondent Maxson Imports sold imported three-dimensional molded unauthorized representations of the copyrighted GREMLINS character depictions, as well as key chains, lapel buttons, visor caps, puffy stickers, and pins bearing unauthorized representations of the GREMLINS characters. CX 7, Maida Aff't, at 2-3.

105. Respondent Motivic sold imported key chains, lapel buttons, and puffy stickers containing unauthorized representations of the copyrighted GREMLINS character depictions. CX 7, Maida Aff't, at 3-4.

106. Respondent Multinational Products sold imported puffy stickers, push-botton pins, and figurine and flat plastic key chains bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 3-4.

107. Respondent Samba Trading sold imported key chains and puffy stickers bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 9-10.

108. Respondent Top Line sold imported key chains bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 9.

109. Respondent Young Man General Merchandise sold imported key chains, plastic dolls, address books, charm necklaces and rings bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 4-6.

110. Respondent Yu Il International Trading sold imported key chains bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 11-12.

V. Domestic Industry Issues

1. The Licensing in General

111. The licensing industry is a rapidly expanding, multi-billion dollar industry. Young Dep. at 7; Grant Dep. at 13; Chojnacki Dep. at 33; CX 58; see also Reiss Dep. at 11.

112. Both licensees and licensors derive substantial revenues from their participation in licensing programs. Grant Dep. at 13; Owen Dep. at 13-15; Chojnacki Dep. at 32; CX-62(C); CX 19, Kletzky Aff't.

113. Licensing programs are developed in a wide variety of contexts. Grant Dep. at 8; Owen Dep. at 41. Character licensing is a discrete subset within the broad range of licensing programs. CX 20, Smith Aff't, para. 2; Reiss Dep. at 6; Chojnacki Dep. at 9; see CX 57. Many character licensing programs are conceived from a film script, such as "ET" and the "Star Wars" trilogy. Others are developed from a television series, e.g., "The A Team" and "Magnum P.I." In addition, a comparatively new phenomenon has emerged in which fanciful characters, originally appearing on greeting cards, are also created with the intention of merchandising those characters. Examples of such characters include "Strawberry Shortcake," "Care Bears," and "Rainbow Brite." In certain instances, television series or animated specials are developed around these characters to promote the merchandising effort, e.g., the little blue creatures called "Smurfs," robots called "Transformers," and "My Little Pony" which consists of a group of miniature collectible pastel-colored ponies posed in various stances. Reiss Dep. at 26; Young Dep. at 4; Globe Dep. at 20; Reiss Dep. at 6; Chojnacki Dep. at 9-11; Chojnacki Dep. at 23; Young Dep. at 3; Owen Dep. at 34-35, 41, 51; CX 56.

114. Television properties have successful merchandising histories because of their continuity. With a film, there may be only one relatively short-lived selling opportunity, and licensees are concerned about investing in a one-time opportunity. However, some films may have a longer life span

and resume at a later time. Also, sequels may be created which are based upon the same characters. The film may be subsequently sold as a videotape, converted to a television series, or later shown on television, all of which would tend to lengthen licensed character merchandising opportunities. The motion picture "Gremlins" had all the elements that appealed to potential licensees. Romanelli Dep. at 34, 65; Young Dep. at 22-24, 33; Owen Dep. at 54-55.

115. The basis for all character licensing programs is the appeal of the character. Characteristics such as "emotional appeal, uniqueness, [and] visual charm" distinguish an appealing character. Chojnacki Dep. at 22, 23, 38; Owen Dep. at 37-38, 49; Young Dep. at 4.

116. Gizmo is a huggable character that appeals to everyone. Stripe is both scary and mischievous, which appeals to little boys. Romanelli Dep. at 32-33. Older children are attracted to Stripe, younger children to Gizmo. Globe Dep. at 22.

117. Inherent to the success of licensed characters is their "fantasy value." Fantasy value derives from the fostering of the creative and imaginative powers of those exposed to the character, affording that group, largely children, the opportunity to enter the world of make-believe. Merchandise associated with such a character benefits from the fantasy value of the character when the consumer views it as a vehicle by which he or she might enter the unique world of the character. In this way, the abstract nature of fantasy value is transformed into a viable marketplace factor, serving as an added-on value to the utilitarian function of a tie-in product and rendering the product "appealing for more than it is, saleable for more than it is." Grant Dep. at 30-31; Globe Dep. at 56-59; CX 20, Smith Aff't, para. 7.

118. In the case of a character licensing program generated from a motion picture or television series, the popularity of the film or series strongly influences the appeal of the character. A positive viewing experience will foster in the viewer a desire to possess a reminder of the pleasant experience. This phenomenon has been termed "souvenir value," and in response to it, a souvenir market is created. In this market, the utilitarian value of a product becomes secondary to the customer's desire to possess the licensed character depiction as a reminder of the character or the film. Grant Dep. at 51; Young Dep. at 17, 28-29.

119. An ancillary benefit derived from the souvenir value of a character is the inclusion of the corresponding licensed merchandise in the impulse purchase market. Such products are incorporated into displays of items "which one has not necessarily gone to the store to seek out but rather is motivated by impulse to purchase." Grant Dep. at 54-56; see Young Dep. at 18-19. Impulse purchase items are sometimes referred to as "rack" products, probably selling under two dollars. Romanelli Dep. at 39.

120. The difference between an item that would be included in the impulse purchase market and one that would not is that an impulse product would, for example, be purchased because it immediately stimulates the child and thereby keeps the child occupied whereas a non-impulse product is "more of a commitment to a keeper, a keeper being something the child will covet and cherish, a gift or a long-life toy." Grant Dep. at 54-55.

121. Products selected for license should appeal to the audience to which the character is directed. In the case of a character derived from a motion picture, the merchandising program will be geared primarily toward products which would appeal to the film's audience. Chojnacki Dep. at 23.

122. Products selected for license must be consistent with the image which the character seeks to portray. CX 20, Smith Aff't, para. 3; Reiss Dep. at 12; Grant Dep. at 57.

123. In the case of merchandise licensing programs developed from film characters, licensors select products and create a merchandising program and image which support and reinforce the film itself. In this sense the licensing program operates as a supplement to conventional advertising for the film and is aimed at reinforcing the consumer's interest in seeing the film. Globe Dep. at 11, 28; Young Dep. at 31-33; Romanelli Dep. at 28-29.

124. The products selected for license must cover a broad enough spectrum of merchandise to achieve sufficient market exposure. A range of products is necessary in order to build royalty revenues. It is also a prerequisite to gaining acceptance by retailers. Shelf space is limited, and experience has shown retailers are more willing to merchandise character properties that cover a range of products and appeal to a broad spectrum of consumer demand. CX 20, Smith Aff't, at 4; Globe Dep. at 29-30; Grant Dep. at 31-32; Young Dep. at 17, 25.

125. Product selection is dictated by a concern over quality control. Licensors are concerned about the safety of products on which their characters appear. Maintaining control over the safety of licensed products by carefully selecting licensees and screening licensed merchandise is an essential element in achieving this objective. Reiss Dep. at 15-16; Romanelli Dep. at 47-48.

126. Succinctly stated the essential ingredients for a successful merchandise character license program, are selection of goods at various price points, high quality products and products which represent an accurate and consistent rendering of the character. Young Dep. at 14-15.

127. A further element of quality control is the necessity for the licensor to select as licensees only those manufacturers who have a reputation for maintaining uniformly high standards of production quality. The licensor must also monitor initial production activities to insure that these standards are being maintained. These quality control objectives are usually accomplished by contractual provisions obligating licensees to submit initial designs and preproduction models to the licensor for approval. Owen Dep. at 17; Young Dep. at 15; CX-20, Smith Aff't, para. 5.

128. Different products within a single licensing program do not necessarily compete with each other and, in fact, product licenses are selected so they will not compete with one another. Globe Dep. at 24; Romanelli Dep. at 15-16. The sale of Gizmo plush dolls does not affect the sale of other GREMLINS character merchandise. Owen Dep. at 45. Children that want the character Gizmo are "going to be satisfied by very little else other than the soft Gizmo doll." Owen Dep. at 47. The degree of competition among licensed products varies, but Gizmo and Stripe are so different that one would not substitute one for another even in their plush versions. Owen Dep. at 56-57. Where like products are sold through different distribution outlets and at different price ranges there is only a slight degree of competition. Owen Dep. at 55-56.

129. Different licensed products help each other to the extent that retailers are likely to give the licensed products more shelf space in the store if you have a number of licensed products. Globe Dep. at 24; FF 124.

130. Licensors strive to achieve a mix of products in the program that will complement other products in the line and reinforce the image sought to be conveyed to the consumer. Globe Dep. at 26, 29; Young Dep. at 14, 17, 25; Owen Dep. at 31-32, 46.

131. Licensors are aware of the fact that their character license merchandising programs are competing in the marketplace with other such products. Young Dep. at 31; Owen Dep. at 59-60.

132. Licensees pay licensors royalties for exclusive rights to merchandise a particular product. If others are allowed to produce the same or similar products without having to pay royalties, the economic incentive for licensees to participate in the program diminishes. Young Dep. at 44; Reiss Dep. at 23-24.

133. Licensees expect that the licensing program will be conducted in such a way as to justify the investment which they must make in producing, advertising, and distributing the product. Grant Dep. at 20-22; Young Dep. at 44; CX 20, Smith Aff't, paras. 6, 10.

134. The unauthorized GREMLINS products fall primarily in categories that the licensor did not license, such as key chains and souvenir products, which the licensor considered as cheap products to be specifically avoided in order to keep the image and the quality of the program fairly high. Romanelli Dep. at 38-39.

135. Warner's aggressive attack on unauthorized GREMLINS products is important to the licensing program. If licensees do not see concern on the part of the licensor as to these unauthorized products, they will not sign up to become licensees the next time they are approached; i.e., if Warner is not willing to protect the licensees, why should licenses make the investment. Romanelli Dep. at 58-59, 73.

2. The GREMLINS Character Licensing Industry

136. The GREMLINS character licensing industry was conceived in spring 1983. Steven Spielberg, the executive producer of the film "Gremlins" and owner of Amblin, and Warner's business affairs Vice President, Jim Miller, met with representatives of Warner and LCA to discuss what was viewed as the significant merchandising potential of the GREMLINS characters. Globe Dep. at 9; see Romanelli Dep. at 9.

137. When Dan Romanelli, Vice President of Merchandising for Warner, first read the "Gremlins" script he recognized immediately that it represented a great opportunity for a successful licensing program because (1) it was an excellent script, (2) it had unique fantasy characters never seen before that were both charming and scary at the same time, and (3) it had all the elements of a film that would spin off many diverse products that would appeal to children in the age category of six to twelve. Romanelli Dep. at 8-9.

138. In mid-April 1983, Mr. Romanelli and Brad Globe, who oversees Amblin's licensing and merchandising interests, began developing the GREMLINS licensing program with representatives of LCA and Michael Finnell, Producer of the motion picture "Gremlins." Globe Dep. at 9. Numerous meetings were held to perfect the marketing plan. Grant Dep. at 26.

139. Although virtually all characters from the movie were the subject of the licensing program, "Gizmo" and "Stripe" were the major characters licensed. Romanelli Dep. at 31-32.

140. The licensing team believed that the fantasy characters Gizmo and Stripe represented a unique, "once in a lifetime" merchandising opportunity because of their characteristics and the prospect of their acceptance by a

wide audience. It was anticipated that the sinister nature of the prankster Stripe and the warm, loyal personality of Gizmo, combined with the non-human appearance of the characters, would significantly boost the licensing program. Romanelli Dep. at 33; Globe Dep. at 19-20.

141. The fact that Steven Spielberg was affiliated with the film elicited a positive reaction on the part of LCA executives because of his extraordinary success in other fantasy appeal films. Spielberg's involvement generated confidence in the acceptability of both the film and the characters. Grant Dep. at 24-25; Globe Dep. at 61-62; Owen Dep. at 28.

142. As a result of Spielberg's involvement, Warner and LCA believed that the GREMLINS characters had that element of fantasy value which is the essential prerequisite for a successful licensing program. Globe Dep. at 56.

143. In planning its GREMLINS character licensing program, Warner as licensor and LCA as Warner's licensing agent adopted a selective licensing approach in which Warner determined in advance the general categories of products which it intended the licensing program to embrace. Grant Dep. at 27, 42; Globe Dep. at 9.

144. Warner, LCA, and Amblin established at the beginning of the licensing program 20 general product categories that would be attracted to the film and approached the best quality manufacturers. They gave the prospective licensees a script to read and some basic information about the film as it progressed. They then received product proposals from manufacturers, and where there was duplication, chose a winner. They were able to attract the high quality manufacturers to the program and, by mid-November 1983, closed off the program because of the lead time necessary to bring a product to market in time for the release date of the film. Romanelli Dep. at 9.

145. The products selected fell within five general categories: apparel, food products, toys and games, publishing and novelties. These categories were deemed to include a range of individual products that would appeal to the young consumers ages eight to fourteen to which the "Gremlins" film was primarily directed, though there were some products targeted above and below those age categories. Romanelli Dep. at 53, Ex. 5; Globe Dep. at 22.

146. Warner and LCA viewed the merchandising program as a supplement to conventional promotion of the "Gremlins" film and reviewed each product in the merchandising program to ensure that its appearance and the way in which it was advertised and promoted would tend to boost the film itself. Globe Dep. at 11-12.

147. In selecting products for the GREMLINS licensing program, Warner and LCA sought to include a range of products that would be wide enough to provide the overall program with broad exposure in the marketplace, to appeal to retailers, and to command retail exposure. Grant Dep. at 27, 42, 75. The licensor, however, did not wish to license inexpensive souvenir products such as puffy stickers. However, it did grant Hallmark a puffy sticker product license, which limited the stickers to its distribution stores. Also, T-shirt transfers were not licensed. Romanelli Dep. at 44, 49.

148. Warner used the following criteria to select the licensees for the GREMLINS licensing program: (1) the ability to create a character that would be supportive of the characters in the film; (2) the distribution possibilities of the licensee; (3) the financial ability to invest and create a successful product supported by advertising; (5) the commitment of the licensee to that product; and (5) a good working relationship between LCA and the potential licensee. Romanelli Dep. at 34-35.

149. A letter was sent to the potential licensees through LCA. The letter included an introduction to the movie "Gremlins," a basic description of who was involved in the movie and what the movie was about, and instructions how to get in touch with a representative at LCA. Romanelli Dep. at 20, Attachment 2(C).

150. If a potential licensee showed interest in the GREMLINS licensing program, a letter of confidentiality and nondisclosure agreement was sent to the potential licensee together with a script or a synopsis of the "Gremlins" movie. Romanelli Dep. at 20, Attachment 3.

151. Upon the licensee's review of the script, a meeting was held between LCA and the licensee, at which point an offer was made and an agreement drawn up. In some instances where there was more than one person interested in a license for a specific product, a bidding situation would arise. Romanelli Dep. at 20.

152. The licensors usually had one licensee per product category. However, in some cases an article lent itself to an expensive product as well as a less expensive retail type product. In such cases two products were licensed with price limitations specified. Romanelli Dep. at 15-17.

153. One product in the GREMLINS licensing program that has two licensees is the plush doll produced by both Hasbro and Wallace Berrie. Both licensees manufacture at different price points. Hasbro and Wallace Berrie offered a joint bid broken down so that Hasbro would sell in the toy stores and Wallace Berrie in the gift shops. Hasbro is a mass merchandiser selling to K Mart, J.C. Penney's, Sears, etc., whereas Wallace Berrie sells to department stores. Owen Dep. at 55-56; Romanelli Dep. at 17.

154. In the soft goods category (e.g., active wear knit top products), different licensees would produce the soft good for different age groups, specifically infants, toddlers, boys, and girls. Romanelli Dep. at 18-20.

155. Specific instructions were given to the licensees emphasizing how the product was to be marketed and the secret nature of the project. The product was to be marked "top secret" when it was shipped to the retailers and "not to be displayed until June 8." Romanelli Dep. at 23, 24-25.

156. The demand for the product was greater than anticipated. There was sufficient experience between Amblin and LCA to judge when there was a sufficient number of licensed products to give the film good representation. Romanelli Dep. at 11.

157. Warner and LCA made a decision to cease granting further licensees and closed the program in approximately before the film was released. Response by Complainant to the Commission Investigative Attorney's First Set of Interrogatories (Confidential Version), No. 6(b); CX 29; Grant Dep. at 46-48.

158. At a meeting with the licensees that took place in mid-November 1983, the licensees were provided materials describing Warner's method for promoting the movie "Gremlins." This information demonstrated to the licensees the commitment the studio had to the film, how important the secrecy requested by the licensor was to the marketing of the film, and how "Gremlins" was going to be the major film for Warner during the summer of 1984. "There was an enthusiasm in the room that was shared by all the licensees that they had themselves a very important product, . . . it was the perception of everybody there that they needed to follow the rules in order to maximize the results." Romanelli Dep. at 23-27.

159. Warner and LCA furnished prospective licensees detailed sketches of the characters prepared by an artist hired specifically for the purpose of providing consistent renderings of the characters for use by licensees. Also, actual clips of the characters from the film were released to the licensees to enable them to put together renderings of GREMLINS products. Globe Dep. at 16, 16-A, 17; Romanelli Dep. at 22.

160. LCA's standard contract with Warner's licensees contains provisions

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161. Any promotional material used by a licensee in marketing a product had to be approved by the studio and Amblin, be positive, and reinforce the film. Romanelli Dep. at 27-28.

162. Whatever the licensor did with respect to the licensing program for GREMLINS merchandise was meant to be supportive of the film "Gremlins." If there was something that the licensor was doing that they thought might detract from the movie, they reviewed it carefully with the movie's producer to make sure it would not impact negatively on the film. There was substantial coordination between Mr. Finnell, Amblin, and Warner at all points of the merchandising program to make sure everyone was comfortable with the direction of the licensing program. Romanelli Dep. at 29.

163. All of the products of the licensees proposed for the GREMLINS licensing program had to go through the approval process of LCA, Warner, and Amblin. In some instances, the products were rejected if they were not accurately reflective of the movie characters or supportive of the licensing program. Romanelli Dep. at 36-37.

164. There were several stages of production in which the product was sent to Warner for approval. On the final product, Warner looked to see that the product had the trademark and copyright notice and that the image represented supported the characters from the film. Many of the products went back many times for changes to the details on the characters. Romanelli Dep. at 70.

165. A promotional license is one in which a manufacturer uses a character license product to promote his own products, such as cereal, hamburgers, soft drinks, etc. See SX 29(C); SX 30(C); SX 36(C); SX 46(C); SX 47(C).

166. The practice of working with the licensees in the design of the product applied also to the promotional licensees since there was a great deal of media associated with the promotional licensees. The promotional licensees were an important part of the GREMLINS project because while they were advertising on television, offering a specific premium, they supported the box office at the same time by attracting the public to the film. Romanelli Dep. at 41-42, 70.

167. The licensor attempted to maintain a balance both in the number of product and promotional licensees. First, the promotional licenses were balanced so that one ran in June, one in July, and one in August, rather than three in June, so that the television promotion was spread out during the life of the film. They also balanced the product licensees by having quality products on the shelves, "not the schlock merchandise that would have a negative impact, . . . that every time you went into a store you would see good quality product out there that would, if anything have a positive effect of wanting to see the movie and wanting to buy the product." Romanelli Dep. at 43.

168. The primary concern in selecting the GREMLINS licensees was that the manufacturing be at a high quality level. Romanelli Dep. at 39-40; FF 134, 144, 147.

169. LCA selected as licensees only those companies which it felt were capable of supplying high-quality merchandise and turned down companies which failed to meet Warner's quality standards. Grant Dep. at 27, 42, 51; Romanelli Dep. at 36-A; FF 134, 148.

170. Warner and LCA took steps to ensure that the artistic renderings of the licensed characters were satisfactory. There were instances when products were rejected because of the artwork. Romanelli Dep. at 36, 36-A; FF 126, 159.

171. Warner and LCA selected products which were consistent with the image LCA wished the GREMLINS license program to project. Grant Dep. at 50-51, 57; Romanelli Dep. at 39, 46-47; FF 146.

172. Warner and LCA selected products with a view to ensuring that they would be safe. Romanelli Dep. at 47-48.

173. Warner examined each of the licensee's products before it was released into the retail market to assure that it was of satisfactory quality. Romanelli Dep. at 69; FF 160-64.

174. From the outset of the merchandising program, LCA and Warner maintained a strict campaign of secrecy as to the story-line of the "Gremlins" motion picture and the visual appearance of the GREMLINS characters. This element of secrecy was continued up until the planned public release of "Gremlins" on June 8, 1984, which also marked the opening of the GREMLINS retail sales program. Grant Dep. at 27; Romanelli Dep. at 26; Globe Dep. at 26.

175. LCA and Warner took every conceivable precaution to maintain the secrecy of the GREMLINS characters and the film. No potential licensee was allowed to see depictions of the characters or the movie script until he had signed a Letter of Confidentiality and a Non-Disclosure Agreement. Romanelli Dep. at 21.

176. The licensing team, including LCA, Warner, and Amblin, impressed upon the licensees the confidentiality of the GREMLINS merchandising program. It was stressed to each licensee that the secrecy campaign was critical to the success of the film and the merchandising program. CX 23; CX 24; CX 27; Owen Dep. at 27.

177. LCA and Warner worked closely with the licensees in developing a set of guidelines for the pre-release marketing and promotional activities. These guidelines included:

> (a) Licensees were allowed to show prototype and preproduction samples of GREMLINS products to buyers after approval by LCA's quality control personnel;
>
> (b) Licensees were not allowed to leave samples with buyers except where such samples were to be used to prepare retail catalogs for release subsequent to June 10, 1984;
>
> (c) Licensees were permitted to leave descriptive literature about the GREMLINS film, its promotion campaign, etc. with prospective customers as long as such material emanated from LCA or Warner;
>
> (d) Licensees were prohibited from leaving any pictures, drawings, or graphic representations of either the GREMLINS products or GREMLINS characters with prospective customers without express written approval by LCA; and
>
> (e) Licensees were permitted to exhibit GREMLINS prototype products at trade shows, exhibitions and in private showrooms only if such demonstrations were made in a secured area that was not accessible to the general public or media, and only if the merchandise was secured at all times.

CX 28; Romanelli Dep. at 24.

178. LCA sent each licensee constant written reminders of the secrecy campaign and their confidentiality obligation. In addition to the guidelines mentioned in the previous proposed finding, LCA directed that a number of other steps be taken. Among those steps were the following:

> (a) Ensuring that products not be shipped so as to arrive for retail distribution prior to the actual release date of the motion picture;
>
> (b) Requiring each employee working on the GREMLINS project to sign a Confidentiality Agreement;
>
> (c) Requiring that all artwork be locked in an office at night and carefully checked by supervisors;
>
> (d) Authorizing receipt of slides depicting the GREMLINS characters by any licensee only after consideration of the product development needs of that licensee; and
>
> (e) Authorizing samples to be released for photography by major retail catalogs only where the catalog producer has signed a Confidentiality Agreemand and has agreed not to release the catalog until after June 10, 1984.

CX 26; CX 27; CX 33.

179. The meeting with all the licensees held at the studio in mid-November 1983 was not only to bring them up to date on the film and the program but also to stress and emphasize the secret nature of the program. Romanelli Dep. at 23, 25.

180. LCA sent a letter to all licensees on March 27, 1984, advising them what steps they should take regarding the use of GREMLINS labels so as to prevent an inadvertent breach of secrecy. CX 50.

181. Letters were sent by LCA to all the major retailers -- including K-Mart, Sears, Toys R Us, J.C. Penneys, and others -- emphasizing the secrecy of the movie and that the product they would be receiving should not be exposed prior to the release of the movie. Romanelli Dep. at 23, 25.

182. When LCA and Warner learned that one of their Canadian Licensee's mailboxes had been vandalized and that slides containing GREMLINS depictions had been stolen, efforts were made to try to recover the slides and minimize the risk to the secrecy campaign. CX 44.

3. Relationship Between Film and Merchandising

183. The best time to introduce new products or new designs of products is when there is a new film being introduced. Young Dep. at 30.

184. The merchandising program did not in any way affect the content of the motion picture "Gremlins" itself. However, for a merchandising program to be successful there has to be a very successful movie. The window for a successful merchandising program is usually the summer release where there is the most exposure in terms of box office with children out of school and a product readily available on the shelves for their purchase. The most business in terms of box office receipts, as well as products, will be a summer release. Romanelli Dep. at 30-31.

185. A licensed merchandising program does not have a significant effect on the box office of a film. Globe Dep. at 27-28, 32.

186. In addition to a movie sequel, the market longevity of the product could be extended through other media forms, such as a television spinoff or cartoon, where the product can also be advertised. In addition, the success of the product in the marketplace will ensure its longevity, as could licensee advertising. Owen Dep. at 55; Young Dep. at 33; FF 114.

187. A movie generally stays in distribution as long as people want to go see it and significant business is being done, and sales of character merchandise are at their peak when there is a consistent exposure of the character through the medium, i.e., the film or television series. Young Dep. at 29 30; Globe Dep. at 27.

188. The original "Gremlins" movie was pulled from release on November 1, 1984. It will be put back into release in theaters in the summer of 1985 for six to eight weeks and then pulled again. It will then come out for Christmas 1985 as a home video tape release tied in with a product sale -- a plush toy with the home video tape for $29.95. The home video and rerelease of the motion picture "Gremlins" would have occurred whether or not there was a merchandising program. Romanelli Dep. at 64.

189. A sequel to the "Gremlins" movie is being planned for release either in the summer of 1986 or the summer of 1987, but most probably 1987, with more focus on Gizmo and Stripe. Romanelli Dep. at 63.

190. Warner has licensed 54 domestic companies to sell GREMLINS items in the United States. Six of the domestic companies have been granted promotional licenses that enable them to use GREMLINS products to promote the sale of other consumer items. CX 4.

191. According to the product descriptions provided, Warner has licensed 48 domestic companies to sell 168 products with GREMLINS character
C depictions, and domestic licensees have paid approximately in royalties from licensed sales in the United States based on product sales
C of to at retail during the period June 1984 through September 1984. About half of the royalties resulted from sales of domestically products products. CX 19; CX 4.

192. Of the 48 domestic companies licensed to sell GREMLINS items, 36 of these companies responded to a questionnaire requesting commercial data relating to each firm's operations. SX 17(C)-57(C).

193. Of the 36 domestic companies licensed to sell GREMLINS items that responded to the questionnaire, one company indicated that it had not produced or sold any licensed items. SX 52(C).

194. Of the 35 domestic companies licensed to sell GREMLINS items that have produced or sold a licensed item and that responded to the questionnaire, 26 manufacture all their items in the United States, four manufacture all their items outside the United States, and five manufacture their items both inside and outside the United States. SX 58(C); see SX 7(C)-57(C).

195. Of the 35 domestic companies licensed to sell GREMLINS items that have produced or sold a licensed item and responded to the questionnaire, all these companies conduct some type of major activity other than manufacturing or production in the United States: (1) sales (30 companies); (2) supply of material or components (27 companies); (3) quality control (25 companies); (4) packaging (24 companies); (5) repair (14 companies); (6) management or administration (7 companies); (7) product development (6 companies); and (8) distribution related activities (4 companies). SX 58(C); see SX 17(C)-57(C).

196. It is impossible to accurately determine from the data available the actual number of employees who at one time or another were employed in the United States in the actual production, sale, or any other activity related to GREMLINS products licensed for sale in the United States. A sample tabulation of the maximum number of domestic workers utilized by the

33 licensees who responded to this question when asked, however, indicates that close to 6,000 individuals were employed by these companies for a period of time in an activity directly related to the exploitation of the license agreement. SX 58(C); see SX 17(C)-57(C).

197. It is impossible to accurately determine from the data available the total aggregate sales of the GREMLINS items manufactured in the United States. However, the Commission investigative attorney's sampling of twelve items (hats, lunch boxes, painter caps, jerseys, posters, "Colorforms" play-sets, toy cars, card games, patterns for costumes, blankets and sleepers, records, and pajamas) indicates that total aggregate sales for these items equals at least 5,816,800 units at an aggregate wholesale value of at least $11,209,400. Staff Supplemental FF C38; see SX 58(C).

198. No foreign companies licensed to sell GREMLINS products are given a right by Warner to sell their goods in the United States. Romanelli Dep. at 74.

199. Warner estimates that approximately one half of the royalty revenues it receives are generated by GREMLINS products manufactured in the United States. CX 16(C), Bell Aff't, at 3.

V. Injury and Harm to the Domestic Industry

200. Respondent Bethel Enterprises sold imported earrings ($9.00 per dozen), necklaces ($9.00 per dozen), and heart-shaped key chains ($9.00 per dozen) bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 5, Iken Aff't, at 3-4.

201. Respondent C. H. Trade sold imported plastic dolls ($2.50 a piece) and figurine key chains ($6.00 per dozen) bearing unauthorized representations substantially similar to the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 7.

202. Respondent Dai-Dai Industrial sold imported puffy stickers bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 8.

203. Respondent Dae Rim Trading sold imported plastic dolls ($30.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 6.

204. Respondent Hope Industries sold imported puffy stickers, key chains, and plastic dolls bearing unauthorized representations of the copyrighted GREMLINS character depictions. One package containing 12 sets of GREMLINS puffy stickers and one package containing one dozen round GREMLINS key chains sold for a total amount of $4.00. CX 5, Iken Aff't, at 1-2.

205. Respondent Jim Trading sold imported key chains (either $3.00 or $5.00 per dozen) and plastic dolls ($30.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 1-2.

206. Respondent Komax General sold imported key chains (yellow figurine key chains sold for $5.00 per dozen, brown figurine key chains for $6.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 12.

207. Respondent Maxson Imports sold imported three-dimensional molded unauthorized representations of the copyrighted GREMLINS character depictions, as well as key chains, lapel buttons, visor caps, puffy stickers, and pins

bearing unauthorized representations of the GREMLINS characters. In order to purchase any of the infringing GREMLINS merchandise, a person had to buy a minimum of $200.00 in merchandise. CX 7, Maida Aff't, at 2-3.

208. Respondent Motivic sold imported key chains, lapel buttons, and puffy stickers containing unauthorized representations of the copyrighted GREMLINS character depictions. CX 7, Maida Aff't, at 3-4.

209. Respondent Multinational Products sold imported puffy stickers ($2.50 per dozen), push-botton pins ($5.00 per dozen), and key chains (figurine key chains cost $6.00 per dozen, flat plastic key chains cost $4.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 3-4.

210. Respondent Samba Trading sold imported key chains ($6.00 per package) and puffy stickers ($3.00 per package) bearing unauthorized representations of the copyrighted GREMLINS character depictions. Samba Trading purchased packages of the GREMLINS key chains for $5.00 per dozen. CX 6, Cullen Aff't, at 9-10.

211. Respondent Top Line sold imported key chains ($5.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 9.

212. Respondent Young Man General Merchandise sold imported key chains ($6.00 per dozen), plastic dolls, address books, charm necklaces and rings bearing unauthorized representations of the copyrighted GREMLINS character depictions. The following items were purchased from Young Man General Merchandise for a total of $33.60: three 6 inch GREMLINS dolls; two dozen GREMLINS figurine key chains; one dozen GREMLINS address books; one dozen GREMLINS charm necklaces; and one dozen GREMLINS rings. CX 6, Cullen Aff't, at 4-6.

213. Respondent Yu Il International Trading sold imported key chains ($9.00 per dozen) bearing unauthorized representations of the copyrighted GREMLINS character depictions. CX 6, Cullen Aff't, at 11-12.

214. On June 12, 1984, respondent Y.C. Low Enterprise indicated that it had the present capacity to produce 18,000 GREMLINS savings banks per month. Y.C. Low Enterprise quoted terms of $0.50 (U.S.) per bank, with delivery in 30 days or less. Y.C. Low Enterprise also indicated that as of June 1, 1984, it had shipped four 40-foot containers of GREMLINS savings banks to an unidentified U.S. buyer. Each container held 35,500 banks. The banks were shipped at the direction of the buyer to locations on the east and west coasts of the United States. CX 8, Young Aff't, at 3-4.

215. On June 11, 1984, respondent Founders Enterprises indicated that it had the present capacity to ship 80,000 to 100,000 Gizmo PVC dolls a month. On June 19, 1984, Founders Enterprises indicated that it had the present capacity to ship 300,000 Gizmo PVC dolls a month. Founders Enterprises quoted terms of $2.10 (U.S.) per eight inch Gizmo PVC doll and $1.10 (U.S.) per six inch Gizmo PVC doll. Founders Enterprises also indicated that it had exported 15,000 Gizmo PVC dolls to the United States. On June 19, 1984, Founders Enterprises indicated that it had exported 15,000 dolls, not to the United States, but to Canada. CX 8, Young Aff't, at 5-7.

216. Pursuant to discussions held on May 28, June 8, and June 25, 1984, respondent Lay Grand indicated that it had the capacity to produce approximately 2,500 dozen stuffed toys a month. Lay Grand also indicated that it had received an order from an unspecified Canadian buyer for 1,000 stuffed

toys depicting a GREMLIN character. Lay Grand quoted terms of $2.60 (U.S.) per toy, FOB Taiwan, with a minimum order of 200, delivery 45 to 60 days after receipt of an order. CX 8, Young Aff't, at 7-10.

217. On July 11, 1984, respondent Ying Zan Enterprises indicated that its daily production capacity was approximately 3,500 to 4,500 pieces and that it had available toys depicting the Gizmo character consisting of a two inch PVC doll key chain ($8.00 (New Taiwan) per piece, FOB Taiwan), a six inch PVC doll ($33.00 (NT) per piece, FOB Taiwan), and a nine inch stuffed toy ($90.00 (NT) per piece, FOB Taiwan). Ying Zan Enterprises also indicated that its production capacity was occupied until July 25, 1984, during which time 3,000 GREMLINS toys were being exported on a daily basis to the United States. CX 8, Young Aff't, at 10-13.

218. On June 28, 1984, respondent Te Feng Industrial Store had on its premises in excess of 1,000 PVC doll key chains ($8.00 (New Taiwan) per piece) depicting the Gizmo character. Te Feng Industrial Store indicated that the order for the key chains was from a Canadian buyer, but claimed that no exports had as yet been made. During a telephone conversation which took place on July 31, 1984, however, an employee of Te Feng Industrial Store stated that approximately 5,000 Gizmo key chains were manufactured on a daily basis, then forwarded to Taiwan trading companies for export. The employee indicated that the major market for the products was the United States. CX 8, Young Aff't, at 13-16.

219. On July 3, 1984, respondent Keyne Enterprise confirmed that it manufactured the following articles with GREMLINS character depictions: (1) PVC doll key chain ($4.00 (New Taiwan) per piece); (2) circular PVC key chain ($5.00 (NT) per piece); (3) PVC medallion ($4.00 (NT) per piece);

(4) PVC badge ($3.00 (NT) per piece); and (5) color sticker ($1.20 (NT) per piece). Keyne Enterprise also indicated that a large quantity of the merchandise had been exported to the United States and Europe and that because the GREMLINS products were extremely popular, a stock of several thousand were maintained to supply urgent demand. CX 8, Young Aff't, at 16-19, Attachment 9.

220. On June 27, 1984, respondent Tiger Lion Enterprises indicated that the following articles with GREMLINS character depictions could be provided: (1) two inch PVC Gizmo doll key chain ($9.00 (New Taiwan) per piece); (2) six inch PVC Gizmo doll (price quoted for seven inch PVC doll was $30.00 (NT) per piece); and (3) eight inch stuffed Gizmo toy (price quoted for nine inch stuffed toy was $95.00 (NT) per piece). Tiger Lion Enterprises indicated that a twelve inch Gizmo stuffed toy was being developed ($110.00 (NT) per piece). Tiger Lion Enterprises also stated that its present production capacity for PVC Gizmo dolls was 30,000 pieces per month and that it had commenced exportation of the GREMLINS merchandise to the United States in early June 1984. CX 8, Young Aff't, at 19-22.

221. On a date uncertain, respondent Ta Hsin indicated that the following articles with GREMLINS character depictions could be provided: (1) seven inch PVC Gizmo doll ($42.00 (New Taiwan) per piece); (2) PVC Gizmo key chain ($8.00 (NT) per piece); (3) Gizmo photoframe ($4.00 (NT) per piece); and (4) Gizmo badge ($7.80 (NT) per piece). Ta Hsin also indicated that production capacity for the seven inch PVC Gizmo doll was approximately 200,000 pieces per month and for the Gizmo badge approximately 60,000 pieces per month. Ta Hsin stated that the GREMLINS merchandise had been ordered by a Taiwan trading company for export to Canada, the United States, and Europe. CX 8, Young Aff't, at 22-24.

222. On June 27, 1984, respondent Chin Mei Industrial indicated that it could provide the following articles: (1) six inch PVC Gizmo dolls ($45.00 (New Taiwan) per piece); (2) two inch PVC Gizmo doll key chains ($4.00 (NT) per piece); (3) PVC Gizmo badges; (4) photoframes ($7.60 (NT) per piece) and photoframe key chains ($4.00 (NT) per piece); (5) telephone note pads ($4.50 (NT) per piece); and (6) color stickers ($2.40 (NT) per piece). Chin Mei Industrial stated that the majority of the GREMLINS products were provided to Taiwan trading companies for export to the United States and Canada. CX 8, Young Aff't, at 24-26.

223. On July 4, 1984, respondent Lien Ho Plastic confirmed that it was able to offer PVC GREMLINS dolls and PVC GREMLINS doll key chains and provided a sample of a six inch PVC Gizmo doll and a two inch PVC Gizmo doll key chain. Lien Ho Plastic stated that GREMLINS dolls were extremely popular and that a large number of exports had been made to the United States, Canada, and Europe through Taiwan trading companies. CX 8, Young Aff't, at 26-28.

224. U.S. Customs Service has made three seizures of unlicensed GREMLINS imports. The country of origin in each case was Taiwan.

> (a) On August 7, 1984, at Los Angeles, California, Customs seized 38 cartons containing 1,800 counterfeit Gizmo dolls valued by Customs at $21,600.
>
> (b) On August 29, 1984, at Seattle, Washington, Customs seized 37 cartons containing 24,403 pieces of counterfeit cabbage patch dolls and GREMLINS key chains, small purses, and paper stickers. The shipment was valued by Customs at $32,131.
>
> (c) On September 13, 1984, at JFK International Airport in New York, Customs seized 16 cartons containing 1,000 pieces of counterfeit GREMLINS merchandise valued by Customs at $950.

CX 61(C).

225. Paragraphs 48 and 49 of the Complaint describe 14 copyright infringement actions filed by Warner against various importers that also happen to be named respondents in this investigation. The present status of those litigations is as follows:

> (1) The action against Motivic resulted in a consent decree in which Motivic paid Warner a sum of money for past damages and agreed to halt all future infringing activity. As a result of this consent order, the litigation has been terminated. Complainant has filed a motion to terminate this investigation as to respondent Motivic based on the consent order.
>
> (2) The action against Maxson Imports has resulted in a judgment against Maxson for damages and the entry of a permanent injunction. Complainant and respondent have been in negotiations concerning the possible termination of the investigation based on the entry of a consent order. The proposed agreement is currently being reviewed by the Commission investigation attorney.
>
> (3) The actions filed on July 2, 1984, by Warner in the U.S. District Court for the Southern District of New York against twelve additional respondents are still pending. Temporary restraining orders were converted by the court into preliminary injunctions against each of the following respondents: Dai Rim Trading; C. H. Trade; Dai-Dai Industrial; Hope Industries; Jim Trading; Komax General; Multinational Products; Bethel Enterprises; Samba Trading; Top Line;; Young Man General Merchandise; and Yu Il International Trading. The parties are currently discussing discovery schedules and other preliminary matters.

CX 64.

226. The production of the GREMLINS merchandise is a relatively cheap and simple matter. The economies of scale involved are small because the final product is the result of either an inexpensive machinery or assembly operation with supply and processes (mold production, cutting of fabric, printing, and coloring) subcontracted out to suppliers of inexpensive components. Set-up costs are low and capital expenditures are minimal. CX 8, Young Aff't, at 32.

227. Stickers and badges can be easily manufactured by a single machine process involving printing, cutting, addition of adhesive surface, and lamination, which allows thousands of pieces to be produced daily. CX 8, Young Aff't, at 33.

228. The cost of a mold for a plastic GREMLINS doll is approximately $2,500. Once a mold is obtained and incorporated into a plastic injection machine, 10 to 30 dolls can be produced per minute. CX 8, Young Aff't, at 33.

229. The prices offered by the Taiwanese respondents for infringing GREMLINS merchandise averaged from approximately $0.03 for color stickers to approximately $2.75 for 12-inch stuffed toys. These prices represent an average ten percent mark-up for manufacturers and a 15 percent mark-up for trading companies. CX 8, Young Aff't, at 33-34.

230. Essential factors for a successful licensing program are a well-rounded selection of goods at various price points, selection of appropriate product categories for each type of character, high quality products, and a consistent image of the character for all mediums in which the character is portrayed. Young Dep. at 14-15.

231. The essence of the license is the single character that runs through all the product lines. The character must be depicted the same throughout the products; if it is not, the overall license is damaged. Owen Dep. at 23.

232. There is no control over the image that an unlicensed manufacturer is using, and unlicensed articles can damage the image that is trying to be maintained in the licensing program. Young Dep. at 27.

233. The unauthorized GREMLINS items consist primarily of PVC dolls, plush toys as well as categories that were not licensed, such as key chains and cheaper products, which Warner specifically avoided in order to keep the image and quality of its program fairly high. Romanelli Dep. at 39.

234. The factors a potential licensee might consider before becoming a licensee include: (1) is the character adaptable to their product line; (2) has the licensor been successful in past licensing programs; (3) what will the licensor do in terms of maintenance of quality, amount of promotion, and amount of money spent to promote the character; and (4) how will the licensor monitor the licensing program. Owen Dep. at 6.

235. The presence of infringing merchandise in the market harms a licensing company's ability to license future products if exclusive licenses cannot be guaranteed to the potential licensees. Young Dep. at 44.

236. If a licensor cannot be effective in controlling counterfeiting and protecting the goodwill of its clients, manufacturers and licensees will not want to do business with the licensor and its reputation will be damaged. Reiss Dep. at 40.

237. There is a direct relationship between the popularity of a film and the eventual success of the merchandise associated with the film. Globe Dep. at 34.

238. The motion picture "Gremlins" was the third most successful film of the summer of 1984 behind "Ghostbusters" and "Indiana Jones and the Temple of Doom." Globe Dep. at 34.

239. The market for GREMLINS products peaked in mid-summer, approximately three to six week after the release date of the film. The market for GREMLINS items will pick up around the Christmas season only because it is the biggest selling season of the year, if there is merchandise in the stores. Grant Dep. at 30, 60-61; Globe Dep. at 34.

240. Whether sales of merchandise associated with a movie will rise during the Christmas selling season depends on when the movie is released. "If you have a summer release and it is a strong movie, you very likely will have good sales through Christmas." Globe Dep. at 35.

241. In addition to a movie sequel, the market longevity of the product could be extended through other media forms, such as a television spinoff or cartoon where the product can also be advertised. The longevity of the market also depends upon the success of the product in the marketplace. Owen Dep. at 55.

242. Warner currently is running a trade advertisement in all trade magazines and is sending a mailer out from LCA to every major and minor buyer at the retail level. The trade campaign is called "more than a summer romance" and there is a picture of Gizmo and Strip arm in arm, with a listing of all the licensees, espousing the success of the movie and advice to retailers to continue stocking the shelves because of anticipated demand. Romanelli Dep. (C), at 61.

243. Warner has produced a 60-second public service anti-drug spot for ACTION, an anti-drug organization in Washington, D.C., with a variety of stars and Gizmo. Gizmo is the only fantasy character in the message. Romanelli Dep. (C), at 62.

244. Stores purchase most of their Christmas selling season product two to four months before Christmas. "[I]f something is hot they will generally . . . buy a certain amount of it for the Christmas season, because a lot of people make their purchases for Christmas in November, or earlier, just to get it out of the way." Globe Dep. at 35-36.

245. The motion pictures "E.T." and "Star Wars" sold very well through the Christmas selling season, but the films continued to run through this period. Globe Dep. at 35; Young Dep. at 21-24.

246. Most licensees reported very positive sales of copyrighted GREMLINS products. The only licensees that reported disappointing sales were those who produced products designed for very young children. The reason for these disappointing sales was the fact that the movie was not appropriate for small children. Globe Dep. 42-42-A, 45-46.

247. Sales of the plush Gizmo dolls, by licensees Wallace Berrie and Hasbro "have been enormously successful," as have the articulated figures sold by L.J.N., which was "tremendous." Globe Dep. at 45; SPX 1.

248. Also, Hallmark sold all their products "very well" and Topps did "extremely well." Globe dep. at 45; SPX 2.

249. Infringing imports in evidence in this investigation include key chains, puffy stickers, and other trinkets bearing representations of GREMLINS characters, which LCA deliberately refused to license. This infringing merchandise in unlicensed categories tends to injure LCA's overall GREMLINS licensing program. Romanelli Dep. at 39; Grant Dep. at 57.

250. Having no control over the infringing products, the licensor has no assurance that they will be safe. In the event of injury resulting from an unsafe infringing product, complainant faces the risk of potential liability. Owen Dep. at 49-50.

251. Having no control over the infringing products, the licensor has no assurance that they will embody faithful artistic renderings of the licensed characters or will be consistent with the image that the merchan-

dising program seeks to portray. Infringing imports in evidence in this investigation contain a number of products with character depictions that have a cheap appearance and demonstrates shoddy workmanship, and are inconsistent with the uniform artistic levels represented by licensed products. This merchandise detracts from the high quality image which Warner and LCA sought to project. CX 20, Smith Aff't, para. 5; CX 13(C), Joel Aff't; Romanelli Dep. at 38-39; Globe Dep. at 38-39.

252. Lost revenues or sales to infringing items cannot be quantified, though estimates of such lost sales can be made. Globe Dep. at 47-48.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this investigation. 19 U.S.C. 1337.

2. There is a reason to believe that there is a violation of section 337 in that:

a. Complainant is owner of Copyright Registration Nos. VAu 54-951, VAu 54-952, and PAu 214-201;

b. Copyright Registration Nos. VAu 54-951, VAu 54-952, and PAu 214-201 are valid and enforceable;

c. Certain respondents have imported into and/or sold in the United States products bearing character depictions which infringe complainant's copyrights;

d. A domestic industry exists which consists of a merchandise licensing program devoted to the marketing and collection of royalties from the sale of products incorporating GREMLINS character depictions;

e. The domestic industry at issue in this investigation is efficently and economically operated; and

f. Respondents acts have the tendency to substanially injure the domestic industry.

3. The probability that complainant will succeed on the merits in the permanent relief phase of this investigation is substantial.

4. If temporary relief is not granted in this investigation, the domestic injury will not suffer immediate and substantial harm.

5. If temporary relief is granted in this investigation, respondents will not suffer substantial harm.

6. If temporary relief is granted in this investigation, such relief will not adversely impact the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.

Based on the foregoing opinion, findings of fact, conclusions of law, and the record as a whole, and having considered all pleadings and arguments as well as proposed finding of fact and conclusions of law, the administrative law judge finds that there is reason to believe that there is a violation of section 337 in the unauthorized importation into and sale in the United States of certain products with GREMLINS character depictions. It is the administrative law judge's INITIAL DETERMINATION, however, that pursuant to the factors set forth in Rule 210.24(e), complainant's motion for temporary relief under subsections 337(e) and (f) should be and is denied. (Motion Docket No. 201-1.)

The administrative law judge hereby CERTIFIES to the Commission this Initial Determination together with the record of the temporary relief phase of this investigation.

In accordance with Rule 210.44(b), all material found to be confidential by the administrative law judge under Rule 201.6(a) is to be given in camera treatment for five years from the termination date of this investigation.

The Secretary is instructed to serve a public version of this Initial Determinatoin upon all parties of record and the confidential version upon all counsel of record who are signatories to the protection order issued by the administrative law judge on September 4, 1984.

This Initial Determination shall become the determination of the Commission thirty days after its date of service, unless the Commission within

those thirty days shall have ordered review of this Initial Determination, or certain issues herein, pursuant to 19 C.F.R. §§ 210.54(b) or 210.55. 19 C.F.R. § 210.53(h).

Any party to this investigation may request a review by the Commission of this Initial Determination by filing with the Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. A petition for review shall be filed within five days after the service of this Initial Determination, except that a party who has not responded to this motion for temporary relief pursuant to 19 C.F.R. § 210.24(c) may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the subject motion. 19 C.F.R. § 210.54(a).

So ordered.

Sidney Harris
Administrative Law Judge

Issued: December 10, 1984

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	Investigation No. 337-TA-201
CERTAIN PRODUCTS WITH "GREMLINS" CHARACTER DEPICTIONS	

NOTICE OF COMMISSION DECISION NOT TO REVIEW INITIAL DETERMINATION

AGENCY: U.S. International Trade Commission.

ACTION: Nonreview of initial determination denying complainant's motion for temporary relief.

SUMMARY: The Commission has determined not to review the administrative law judge's initial determination (ID) in the above-captioned investigation denying the complainant's motion for a temporary exclusion order. The Commission adopted that portion of the administrative law judge's ID finding that there is no immediate and substantial harm to the domestic industry. The Commission took no position on the other issues discussed in the ID.

FOR FURTHER INFORMATION CONTACT: William Perry, Esq., Office of the General Counsel, U. S. International Trade Commission, telephone 202-523-0499.

SUPPLEMENTARY INFORMATION: On July 25, 1984, complainant Warner Bros., Inc., filed a complaint under section 337 and a motion for expedited temporary relief. On August 22, 1984, the Commission instituted an investigation under section 337 to determine whether there are unfair methods of competition and unfair acts in the importation of certain "Gremlins" character depictions into the United States, or in their sale, by reason of alleged infringement of: (1) U.S. Copyright Reg. No. VAu 54-951; (2) U.S. Copyright Reg. No. VAu 54-952; and (3) U.S. Copyright Reg. No. PAu 214-201, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The notice of investigation named 31 respondents.

On December 10, 1984, the administrative law judge issued an ID denying complainant's motion for temporary relief. The Commission received no petitions for review of the ID from any party to the investigation or comments from any Government agency.

The authority for the Commission's action is contained in section 337 of the Tariff Act of 1930 and in section 210.53 of the Commission's Rules of Practice and Procedure (49 F.R. 46,137 (Nov. 23, 1984), to be codified at (19 C.F.R. § 210.53)).

Notice of this investigation was published in the Federal Register of August 30, 1984 (49 F.R. 34422-23).

Copies of the public version of the ID and all other nonconfidential documents filed in connection with this investigation are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, telephone 202-523-0161.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: January 14, 1985

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF COMMISSION DECISION NOT TO REVIEW INITIAL DETERMINATION, was served upon Gary Rinkerman, Esq., and upon the following parties via first class mail, and air mail where necessary, on January 14, 1985.

Kenneth R. Mason, Secretary
U.S. International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

FOR COMPLAINANT WARNER BROS. INC.

William N. Walker, Esq.; Robert D. Bannerman, Esq.;
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RESPONDENTS

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(Cont'd)

CERTIFICATE OF SERVICE - Page 2

RESPONDENTS (continued)

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Taipei, Taiwan

Keyne Enterprise Co. Ltd.
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Ladies and Gentlemen Ornaments Co. Ltd.
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117 San Yang Road
San Chung City
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Lay Grand Co. Ltd.
Fifth Floor
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Lien Ho Plastic Co. Ltd.
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4 Alley 2 Lane 325
Shui Yuan Road
Hsi Chih Toun
Taipei County
Northern Taiwan

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CERTIFICATE OF SERVICE - Page 3

RESPONDENTS (continued)

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Section 3
Taipei City
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Shine Land Inc.
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Section 2
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Taipei, Taiwan

Shiuh Cha Trading Ltd.
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Section 1
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Ta Hsin Co. Ltd.
2nd Floor
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Section 1
San Chung City
Taipei County
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(Cont'd)

CERTIFICATE OF SERVICE - Page 4

RESPONDENTS (continued)

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Chung Shan District
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Y.C. Low Enterprise Co. Ltd.
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Chin Mei Co. Ltd.
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C.H. Trade
20 West 27th Street
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(Cont'd)

RESPONDENTS (continued)

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New York, New York 10001

Jim Trading Corp.
1181 Broadway
New York, New York 10001

Komax General Corp.
(also d/b/a The Komas General Corp)
1232 Broadway
New York, New York 10001

Motivic Inc.
53 West 36th Street
New York, New York 10001

Multinational Products Corp.
(also d/b/a Multinational Products)
1181 Broadway
New York, New York 10001

Samba Trading Corp.
(also d/b/a Sambe Jewelry Corp.)
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Top Line
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New York, New York 10001

Young Man General Merchandise Co.
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Yu Il International Trading Corp.
(also d/b/a Yuil International Trading Corp.)
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RESPONDENTS (continued)

Dai-Dai Industrial Corp.
d/b/a JC Imports &FADA Trading
1204 Broadwav
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RESPONDENTS (continued)

Dae Rim Trading, Inc.
41 West 30th Street
New York, New York 10001

Jim Trading Corp.
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New York, New York 10001

Komax General Corp.
(also d/b/a The Komas General Corp)
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1181 Broadway
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CERTIFICATE OF SERVICE - Page 6

RESPONDENTS (continued)

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MEMORANDUM OPINION OF COMMISSIONERS
ECKES AND ROHR

With regard to the initial determination on temporary relief in Certain Products with Gremlins Character Depictions, Inv. No. 337-TA-201, we agree with the administrative law judge (ALJ) that there is no immediate and substantial harm to the domestic industry. However, we request that the ALJ, in reaching his final determinations on the definition of the domestic industry and on substantial injury in this case, consider the discussions of domestic industry in the Commission opinion in Certain Coin-Operated Audiovisual Games and Components Thereof (viz Rally-X and Pac Man), Inv. No. 337-TA-105, USITC Pub. 1267 (1982), and in the opinion of the Court of Appeals for the Federal Circuit in Schaper Manufacturing Co. v. U.S. International Trade Commission, 717 F.2d 1368 (1983).

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