

*In the Matter of*

**CERTAIN BATTERY-POWERED  
RIDE-ON TOY VEHICLES AND  
COMPONENTS THEREOF**

Investigation No. 337-TA-314  
(Commission Decision of  
April 9, 1991)

**USITC PUBLICATION 2420**

**AUGUST 1991**

United States International Trade Commission  
Washington, DC 20436

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**COMMISSIONERS**

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Washington, DC 20436**

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

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CERTAIN BATTERY-POWERED ) Investigation No. 337-TA-314  
RIDE-ON TOY VEHICLES )  
AND COMPONENTS THEREOF )  
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)

NOTICE OF ISSUANCE OF EXCLUSION ORDER

AGENCY: U.S. International Trade Commission

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commission has issued an exclusion order containing both general and limited provisions in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Marc A. Bernstein, Office of the General Counsel, U.S. International Trade Commission, telephone 202-252-1087.

SUPPLEMENTARY INFORMATION: The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.56 and 210.58 of the Commission's Interim Rules of Practice and Procedure (19 C.F.R. §§ 210.56, 210.58).

On May 15, 1990, Kransco, of San Francisco, Calif., filed a complaint with the Commission alleging violations of section 337 in the importation of certain battery-powered ride-on toy vehicles and components thereof. The complaint alleged infringement of claims of five U.S. patents owned by Kransco: (1) claim 1 of U.S. Letters Patent Des. 299,666 ("the '666 patent"); (2) claim 1 of U.S. Letters Patent Des. 292,009 ("the '009 patent"); (3) claims 1 through 6 of U.S. Letters Patent 4,709,958 ("the '958 patent"); (4) claims 1, 2, 4, 8, 9, 16, and 19 of U.S. Letters Patent 4,558,263 ("the '263 patent"); and (5) claims 1 through 4 of U.S. Letters Patent 4,639,646 ("the '646 patent").

The Commission instituted an investigation into the allegations of Kransco's complaint and published a notice of investigation in the Federal Register. 55 F.R. 25179 (June 20, 1990). Chien Ti Enterprise Co., Ltd., of Taipei, Taiwan, was named as respondent.

On December 5, 1990, the presiding administrative law judge (ALJ) issued an initial determination (ID) granting the motion of complainant Kransco for summary determination. The ID concluded that a violation of section 337 had been established in the importation of certain battery-powered ride-on toy vehicles and components thereof by reason of infringement of the five patents

at issue.

On January 4, 1991, the Commission determined on its own motion to review the ID's findings and conclusions concerning importation. The Commission determined not to review the remainder of the ID. The notice of review specifically requested that the parties file briefs discussing the issue under review, and solicited comments from the parties, interested government agencies, and any other persons concerning the issues of remedy, the public interest, and bonding.

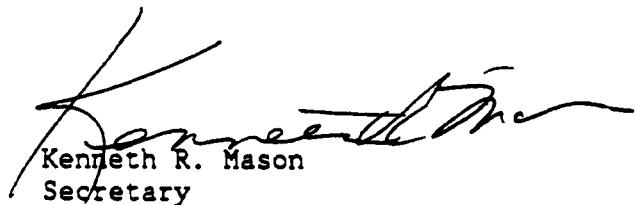
Complainant Kransco and the Commission investigative attorney each filed a brief and a reply brief addressing both the issue under review and matters pertaining to remedy. Respondent Chien Ti did not file a brief. No comments were filed by interested government agencies or other persons.

Having examined the record in this investigation, including the ID, the Commission determined that there has been an importation or sale for importation of infringing battery-powered ride-on toy vehicles by respondent Chien Ti. The Commission accordingly affirmed the ID's conclusion that a violation of section 337 has been established.

The Commission determined that the appropriate form of relief is a general exclusion order directed to products that infringe the '666 or '009 patents and a limited exclusion order directed to products that infringe the claims at issue of the '958, '263, or '646 patents. The Commission further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the aforementioned relief. The Commission has established that bond under the exclusion order during the Presidential review period shall be in the amount of 40 percent of entered value of imported articles covered by the claims at issue of the '666, '263, or '958 patents, and 19 percent of entered value of imported articles covered by the claims at issue of the '009 or '646 patents.

Copies of the Commission's orders, the opinion issued in connection therewith, 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, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-252-1000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

By order of the Commission.



Kenneth R. Mason  
Secretary

Issued: April 9, 1991

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

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	)	
CERTAIN BATTERY-POWERED	)	Investigation No. 337-TA-314
RIDE-ON TOY VEHICLES	)	
AND COMPONENTS THEREOF	)	
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ORDER

On May 15, 1990, Kransco filed a complaint with the Commission alleging violations of section 337 in the importation of certain battery-powered ride-on toy vehicles and components thereof. The complaint alleged infringement of claims of five U.S. patents owned by Kransco: (1) claim 1 of U.S. Letters Patent Des. 299,666 ("the '666 patent"); (2) claim 1 of U.S. Letters Patent Des. 292,009 ("the '009 patent"); (3) claims 1 through 6 of U.S. Letters Patent 4,709,958 ("the '958 patent"); (4) claims 1, 2, 4, 8, 9, 16, and 19 of U.S. Letters Patent 4,558,263 ("the '263 patent"); and (5) claims 1 through 4 of U.S. Letters Patent 4,639,646 ("the '646 patent").

The Commission instituted an investigation into the allegations of Kransco's complaint and published a notice of investigation in the Federal Register. 55 F.R. 25179 (June 20, 1990). Chien Ti Enterprise Co., Ltd., was named as respondent.

On December 5, 1990, the presiding administrative law judge (ALJ) issued an initial determination (ID) granting the motion of complainant Kransco for summary determination. The ID concluded that a violation of section 337 had been established in the importation of certain battery-powered ride-on toy vehicles and components thereof by reason of infringement of the five patents at issue.

On January 4, 1991, the Commission determined on its own motion to review the ID's findings and conclusions concerning importation. The Commission determined not to review the remainder of the ID. The notice of review specifically requested that the parties file briefs discussing the issue under review, and solicited comments from the parties, interested government agencies, and any other persons concerning the issues of remedy, the public interest, and bonding.

Complainant Kransco and the Commission investigative attorney each filed a brief and a reply brief addressing both the issue under review and matters pertaining to remedy. Respondent Chien Ti did not file a brief. No comments were filed by interested government agencies or other persons.

Having examined the record in this investigation, including the ID, and the arguments submitted by the parties in their briefs and replies thereto, the Commission has determined that there has been an importation or sale for importation of infringing battery-powered ride-on toy vehicles by respondent Chien Ti. The Commission accordingly affirms the ID's conclusion that a violation of section 337 has been established.

Having determined that there is a violation of section 337, the Commission considered the questions of the appropriate remedy, bonding during the Presidential review period, and whether the statutory public interest considerations preclude the issuance of a remedy. The Commission considered the submissions of the parties and the entire record in this investigation. The Commission has determined that the appropriate form of relief is a general exclusion order directed to products that infringe the '666 or '009 design patents and a limited exclusion order directed to products that infringe the claims at issue of the '958, '263, or '646 product patents. The Commission

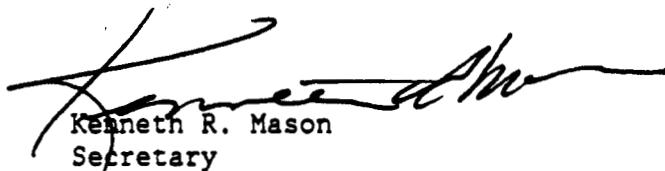
has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the aforementioned relief. The Commission has established that the bond during the Presidential review period shall be in the amount of 40 percent of entered value of imported articles covered by claims at issue of the '666, '263, or '958 patents, and 19 percent of entered value of imported articles covered by the claims at issue of the '009 or '646 patents.

Accordingly, it is hereby ORDERED THAT --

1. Battery-powered ride-on toy vehicles and components thereof covered by claim 1 of U.S. Letters Patent Des. 299,666 are excluded from entry into the United States for the remaining term of the patent, except under license of the patent owner.
2. Battery-powered ride-on toy vehicles and components thereof covered by claim 1 of U.S. Letters Patent Des. 292,009 are excluded from entry into the United States for the remaining term of the patent, except under license of the patent owner.
3. Battery-powered ride-on toy vehicles and components thereof manufactured abroad by or on behalf of Chien Ti Enterprise Co., Ltd., of Taipei, Taiwan, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related entities, or their successors or assigns, that are covered by claims 1, 2, 3, 4, 5, or 6 of U.S. Letters Patent 4,709,958 are excluded from entry into the United States for the remaining term of the patent, except under license of the patent owner.
4. Battery-powered ride-on toy vehicles and components thereof manufactured abroad by or on behalf of Chien Ti Enterprise Co., Ltd., of Taipei, Taiwan, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related entities, or their successors or assigns, that are covered by claims 1, 2, 4, 8, 9, 16, or 19 of U.S. Letters Patent 4,558,263 are excluded from entry into the United States for the remaining term of the patent, except under license of the patent owner.
5. Battery-powered ride-on toy vehicles and components thereof manufactured abroad by or on behalf of Chien Ti Enterprise Co., Ltd., of Taipei, Taiwan, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related entities, or their successors or assigns, that are covered by claims 1, 2, 3, or 4 of U.S. Letters Patent 4,639,646 are excluded from entry into the United States for the remaining term of the patent, except under license of the patent owner.

6. In accordance with 19 U.S.C. § 1337(1), the provisions of this Order do not apply to battery-powered ride-on toy vehicles and components thereof imported by or for the United States.
7. The articles identified in paragraphs (1), (3), and (4) of this Order are entitled to entry into the United States under bond in the amount of forty (40) percent of their entered value from the day after this Order is received by the President, pursuant to 19 U.S.C. § 1337(j)(3), until such time as the President notifies the Commission that he approves or disapproves this Order, but, in any event, no later than 60 days after the date of receipt of this Order by the President.
8. The articles identified in paragraphs (2) and (5) of this Order are entitled to entry into the United States under bond in the amount of nineteen (19) percent of their entered value from the day after this Order is received by the President, pursuant to 19 U.S.C. § 1337(j)(3), until such time as the President notifies the Commission that he approves or disapproves this Order, but, in any event, no later than 60 days after the date of receipt of this Order by the President.
9. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Interim Rules of Practice and Procedure, 19 C.F.R. § 211.57.
10. A copy of this 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, and the Federal Trade Commission.
11. Notice of this Order shall be published in the Federal Register.

By order of the Commission.



Kenneth R. Mason  
Secretary

Issued: April 9, 1991

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

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In the Matter of )  
CERTAIN BATTERY-POWERED )  
RIDE-ON TOY VEHICLES )  
AND COMPONENTS THEREOF )  
) Investigation No. 337-TA-314  
)  
)

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COMMISSION OPINION ON THE ISSUE UNDER REVIEW, AND ON  
REMEDY, THE PUBLIC INTEREST, AND BONDING

I. BACKGROUND

On May 15, 1990, Kransco filed a complaint with the Commission under section 337 of the Tariff Act of 1930. The complaint alleged that Chien Ti Enterprise Co., Ltd. ("Chien Ti"), a Taiwanese corporation that manufactures and exports children's toys, was violating section 337 by exporting to the United States rideable toy vehicles that infringe claims of five U.S. patents owned by Kransco.<sup>1</sup> The complaint alleged that Chien Ti had imported two toy vehicle models -- a "Jeep" model and a "Racer" model -- that infringed these patent claims. The Commission published notice of an investigation into Kransco's complaint in the Federal Register on June 20, 1990, naming Chien Ti

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<sup>1</sup> These patent claims are: (1) claim 1 of U.S. Letters Patent Des. 299,666 ("the '666 patent"), covering the ornamental design of a toy vehicle utilized in Kransco's POWER WHEELS Jeep model; (2) claim 1 of U.S. Letters Patent Des. 292,009 ("the '009 patent"), covering the ornamental design of a toy vehicle utilized in Kransco's POWER WHEELS Suzuki Quad Racer model; (3) claims 1 through 6 of U.S. Letters Patent 4,709,958 ("the '958 patent"), which disclose a two-part body for a child's rideable vehicle; (4) claims 1, 2, 4, 8, 9, 16, and 19 of U.S. Letters Patent 4,558,263 ("the '263 patent"), which disclose a circuitry arrangement for a dynamic braking system in a child's battery-powered riding toy; and (5) claims 1 through 4 of U.S. Letters Patent 4,639,646 ("the '646 patent"), which disclose a system of motor-control switches and circuitry design for use in children's riding toys.

as respondent.<sup>2</sup>

On December 5, 1990, the presiding administrative law judge (ALJ) issued an initial determination (ID) granting the motion of complainant Kransco for summary determination. The ID concluded that a violation of section 337 had been established in the importation of certain battery-powered ride-on toy vehicles and components thereof by reason of infringement of the five patents at issue.

On January 4, 1991, the Commission determined on its own motion to review the ID's findings and conclusions concerning importation. The Commission determined not to review the remainder of the ID. The notice of review specifically requested that the parties file briefs discussing the issue under review, and solicited comments from the parties, interested government agencies, and any other persons concerning the issues of remedy, the public interest, and bonding.

Complainant Kransco and the Commission investigative attorney (IA) each filed a brief and a reply brief addressing both the issue under review and matters pertaining to remedy. Respondent Chien Ti did not file a brief. No comments were filed by interested government agencies or other persons.

This opinion explains the basis for the following Commission determinations:

(1) We have determined that there has been a sale for importation of infringing battery-powered ride-on toy vehicles by respondent Chien Ti. Accordingly, we affirm the ID's conclusion that a violation of section 337 has been established.

(2) We have issued a general exclusion order directed to products that

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<sup>2</sup> 55 Fed. Reg. 25179 (June 20, 1990).

infringe the '66 or '009 design patents and a limited exclusion order directed to products that infringe the claims at issue of the '958, '263, or '646 product patents.

(3) We have concluded that the public interest considerations articulated in section 337(d) do not preclude issuance of relief in this investigation.

(4) We have determined that bond under the exclusion order during the Presidential review period shall be in the amount of 40 percent of entered value of imported articles covered by the claims at issue of the '666, '263, or '958 patents, and 19 percent of entered value of imported articles covered by the claims at issue of the '009 or '646 patents.

## II. THE ISSUE UNDER REVIEW

Kransco's complaint is based on section 337(a)(1)(B)(i). That section proscribes:

The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under Title 17, United States Code.

The sole issue under review is whether the "importation" requirement of the above provision has been satisfied. We conclude that importation has been demonstrated, because the record shows that Chien Ti made numerous shipments of infringing vehicles to the United States through a trading company, Qunsan Enterprise Co., Ltd. ("Qunsan").<sup>3</sup>

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<sup>3</sup> Because we have concluded that the Qunsan shipments satisfy the section 337 importation requirement, we need not also determine whether the ID correctly found the importation requirement satisfied on the basis of its finding that Chien Ti had made a direct shipment of two infringing battery-powered ride-on toy vehicles to J&L Meyer, Inc., which had ordered the vehicles from Chien Ti  
(continued...)

The pertinent facts concerning the Qunsan shipments are not in dispute. Chien Ti itself admitted that it has sold its Jeep and Racer toy vehicle models to Qunsan and that Qunsan then exported these models to the United States.<sup>4</sup> Chien Ti additionally sent a facsimile to J&L Meyer, Inc. on December 21, 1989, stating that it knew that its toys were being exported to Miami, San Francisco, and Long Beach, among other places.<sup>5</sup>

The ALJ correctly found from this record that "Chien Ti knew that toy vehicles it sold to Qunsan were exported to the United States,"<sup>6</sup> but did not determine the legal significance of this finding. The statute itself, however, expressly states that section 337 proscribes "the sale for importation," as well as importation, by the "owner, importer or consignee" of infringing articles.<sup>7</sup> Indeed, longstanding Commission precedent holds that a section 337 violation can be found when a foreign manufacturer sells infringing goods to a foreign trading company with the knowledge that the goods will subsequently be exported to the United States, even if the

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<sup>3</sup>(...continued)

at the request of complainant Kransco. Nor need we address Kransco's assertion that the importation requirement was satisfied by a shipment of a Chien Ti vehicle to Manley Toys (U.S.A.) Ltd.

<sup>4</sup> Chien Ti Response to Staff's First Set of Interrogatories, Interrogatory 13, appended to Benson Affidavit. Qunsan's export activities are substantiated by numerous order confirmation forms from Qunsan for Jeep and Racer vehicles that Chien Ti submitted in response to an IA document production request. See Chien Ti Response to Staff Document Production Requests, Exhibit 9, appended to Benson Affidavit.

<sup>5</sup> Shapiro Affidavit, ex. 7.

<sup>6</sup> ID at 5-6.

<sup>7</sup> 19 U.S.C. § 1337(a)(1)(B).

manufacturer does not itself export or deal directly with U.S. importers.<sup>8</sup>

Consequently, the ALJ's finding that Chien Ti knew that Qunsan was exporting to the United States infringing Jeep and Racer model toy vehicles compels the legal conclusion that section 337's importation requirement has been satisfied with respect to all five Kransco patents at issue. In light of this conclusion and the ID's rulings on validity, infringement, and domestic industry which we determined not to review, we determine that a violation of section 337 has been established.

### III. REMEDY

Complainant Kransco has requested issuance of a general exclusion order covering each of the five patents at issue. The IA, by contrast, supports issuance of a general exclusion order with respect to the '666 and '009 patents and a limited exclusion order with respect to the three product patents.

In considering whether to issue a general exclusion order, we have traditionally balanced complainant's interest in obtaining complete relief against the public interest in avoiding the disruption of legitimate trade that such relief may cause.<sup>9</sup> Thus we determined in Certain Airless Paint Spray Pumps<sup>10</sup> that a complainant seeking a general exclusion order must prove

<sup>8</sup> Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29, USITC Pub. 863, Commission opinion at 10-11 (February 1978). The Pipe and Tube opinion expressly held that the foreign manufacturer should be considered an "owner" for purposes of the "owner, importer, or consignee" requirement. Id. at 13. See also Certain Plastic Light Duty Screw Anchors, Inv. No. 337-TA-279, slip op. at 31-32 (ALJ 1988), adopted, 53 Fed. Reg. 51328 (December 21, 1988).

<sup>9</sup> See, e.g., Certain Dynamic Random Access Memories, Inv. No. 337-TA-242, USITC Pub. 2034 at 84 (November 1987).

<sup>10</sup> Inv. No. 337-TA-90, USITC Pub. 1199 at 18 (May 1981).

"both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." Factors relevant to demonstrating whether there is a "widespread pattern of unauthorized use" include:

- (a) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers;
- (b) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent at issue;
- (c) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.<sup>11</sup>

Factors relevant to showing whether "certain business conditions" exist include:

- (a) an established market for the patented product in the U.S. market and conditions of the world market;
- (b) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;
- (c) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;
- (d) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or
- (e) the cost to foreign manufacturers of retooling their facility to produce the patented article.<sup>12</sup>

With respect to the criterion of "widespread pattern of unauthorized use," the record contains information suggesting that there is a pattern of use of the design patents at issue. Kransco has submitted documents purporting to show that five foreign manufacturers, in addition to Chien Ti,

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<sup>11</sup> Id. at 18-19.

<sup>12</sup> Id. at 19.

produce vehicles alleged to infringe the '666 patent, and that two foreign manufacturers, in addition to Chien Ti, produce vehicles that arguably infringe the '009 patent.<sup>13</sup> Kransco has not demonstrated that such use is "unauthorized." There has been no determination that any of the vehicles that Kransco describes as infringing actually infringes the design patents at issue. To the contrary, Kransco concedes that no manufacturer, except for respondent Chien Ti, currently sells or markets the allegedly infringing vehicles in any country where Kransco has patent rights.<sup>14</sup> In recent cases, however, we have indicated that we may consider evidence of widespread foreign manufacture of products that would be likely to be found infringing if sold in the United States pertinent to our examination of whether a "widespread pattern of unauthorized use" exists.<sup>15</sup>

By contrast, Kransco has failed to submit evidence purporting to show even a pattern of use for any of the three product patents at issue. With respect to the '958 patent, Kransco has submitted evidence indicating merely that one non-respondent manufacturer produces a vehicle that allegedly

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<sup>13</sup> Kransco has submitted material indicating that it can establish a prima facie case that these vehicles infringe the pertinent design patents.

<sup>14</sup> Kransco Brief on Remedy at 17.

<sup>15</sup> See Certain Strip Lights, Inv. No. 337-TA-287, Commission Opinion at 5 & n.8 (October 3, 1989) (unpublished opinion) (allegation that at least eight Taiwanese factories operated by non-respondent manufacturers produced a product like that of complainant used to support determination that "widespread pattern of unauthorized use" exists); Certain Chemiluminescent Compositions and Components Thereof, Inv. No. 337-TA-285, Commission Opinion at 10 (August 17, 1989) (unpublished opinion) (although "hesitant" to rely heavily on information, Commission references complainant's documented allegations concerning foreign manufacture of allegedly infringing product by numerous non-respondents); Certain Vinyl-Covered Foam Blocks, Inv. No. 337-TA-178, USITC Pub. 1604, Commission Opinion at 2 (November 1984) (existence of numerous non-respondent foreign manufacturers of purportedly infringing product supports issuance of general exclusion order).

infringes the patent.<sup>16</sup> Kransco has not submitted evidence that any manufacturer other than Chien Ti produces a vehicle that infringes the '263 and '646 patents.

The record contains considerable information indicating the existence of business conditions that would encourage new foreign entrants to enter the U.S. market. Confidential information concerning sales revenue and volume furnished by Kransco indicates that there is an established market in the United States for the products utilizing the patents at issue.<sup>17</sup> Additionally, marketing and distribution networks in the United States appear to be available for potential importers and foreign manufacturers of toy vehicles. Kransco has submitted deposition testimony of a toy distributor, who has no apparent pecuniary interest in the outcome of this investigation, indicating that foreign toy manufacturers have ready access to the U.S. market.<sup>18</sup> Moreover, as previously discussed, numerous foreign manufacturers already produce allegedly infringing vehicles, and, according to Kransco, the plants of over ten additional foreign manufacturers could be retrooled to produce such vehicles.<sup>19</sup> The retooling costs, although not insignificant in absolute terms, do not appear to be especially great in relationship to the historic size of the U.S. market for products utilizing the patents at

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<sup>16</sup> See McCormack Aff.

<sup>17</sup> See Ex. A to Beyer Declaration.

<sup>18</sup> See McCarville dep. at 13-14 ("I'm happy to work on a very small commission for a couple of container loads. Any of us would in our business.").

<sup>19</sup> Kransco Brief on Review, Attachment C to Exhibit F.

issue.<sup>20</sup>

With respect to the two design patents at issue, complainant Kransco's strong showing with respect to the "business conditions" prong of the Spray Pumps test is not matched for the "widespread pattern of unauthorized use" prong. We have nonetheless determined to issue a general exclusion order with respect to the '666 and '009 design patents for four reasons. First, Kransco has shown that numerous manufacturers worldwide produce vehicles that appear to infringe the design patents,<sup>21</sup> and that many others have the potential for manufacturing infringing vehicles. Second, Kransco's fears of imminent importation of infringing vehicles manufactured by entities other than respondent Chien Ti appear to be well-founded in light of the representations of TCV Industrial Co., Ltd., that its Jeep-like toy vehicles -- which allegedly utilize the design of the '666 patent -- will soon be marketed in the United States.<sup>22</sup> Consequently, issuance of a limited exclusion order may be insufficient to accord Kransco complete relief against infringing imports. Third, issuing a general exclusion order in this investigation would not subvert the Commission's policy of "encourag[ing] complainants to include in an investigation all those foreign manufacturers which it believes have entered, or are on the verge of entering, the domestic market with infringing

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<sup>20</sup> See Kransco Brief on Review at 18-19, ex. F. (providing confidential data concerning retooling costs).

<sup>21</sup> The applicable legal standard for finding infringement of a design patent is whether the two designs in question are substantially the same in the eyes of an ordinary observer, giving such attention as a purchaser usually gives. See Gorham Co. v. White, 81 U.S. (14 Wall.) 511 (1872); see generally 1 D. Chisum, Patents § 1.04[1] (1990).

<sup>22</sup> Kransco Reply Brief on Review, Attachment 2.

articles."<sup>23</sup> There is nothing in the record to suggest that any manufacturer other than Chien Ti had entered or was about to enter the U.S. market with infringing vehicles at the time this investigation was instituted.<sup>24</sup> Fourth, we do not believe that a general exclusion order limited to the design patents will be difficult for the Customs Service to administer, or will unduly restrain trade. Application of the standard for finding legal infringement of a design patent, which, as noted, concerns the similarity of designs in the eyes of an ordinary observer, does not require technical expertise or specialized equipment.

A number of the considerations militating in favor of issuance of a general exclusion order with respect to the design patents are not applicable to the three product patents at issue. Kransco has not made any showing of a "widespread pattern of unauthorized use" with respect to two of the product patents, and its showing with respect to the '958 patent is not strong. Consequently, we believe that the potential that a limited exclusion order will accord Kransco incomplete relief is much less significant with these patents. Buttressing this belief is testimony from Kransco's own official indicating that the vehicles' design, as opposed to their construction or mechanical systems, is a prime reason for their popularity with consumers.<sup>25</sup>

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<sup>23</sup> Spray Pumps, Commission Opinion at 18 n.1.

<sup>24</sup> Compare Crystalline Cefadroxil Monohydrate, 15 U.S.P.Q.2d 1263, 1275-77 (ITC 1990) (issuance of limited exclusion order which would not accord complainant complete relief not inequitable when complainant made conscious decision not to name as respondents all foreign manufacturers importing allegedly infringing product).

<sup>25</sup> Kransco's Senior Vice President for Marketing, Research and Development submitted testimony to the ALJ stating that:

[I]t is my opinion that the consumers of the POWER WHEELS Jeep and  
(continued...)

We consequently have issued a limited exclusion order with respect to the three product patents at issue.

#### IV. PUBLIC INTEREST

Section 337 instructs the Commission to consider the effect of any remedy "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."<sup>26</sup> The legislative history of this provision, added to section 337 by the Trade Act of 1974, indicates that the Commission should decline to issue relief when the adverse effect on the public interest would be greater than the interest in protecting the patent holder.<sup>27</sup>

We do not believe that either of these concerns is implicated in the instant investigation. We agree with Kransco and the IA that an adequate supply of ride-on toy vehicles is not necessary to ensure public health, safety, or welfare in the United States. In any event, the record indicates

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<sup>25</sup>(...continued)

Suzuki are young children and their parents and that the overall style and appearance of these vehicles is a prime factor in their decision to buy the toy.

Glover Affidavit, ¶ 6.

<sup>26</sup> 19 U.S.C. § 1337(d),(f).

<sup>27</sup> See S. Rep. 1298, 93d Cong., 2d Sess. 197 (1974). The Commission has declined to grant relief on public interest grounds in only three cases. See Certain Fluidized Supporting Apparatus, Inv. No. 337-TA-182/188, USITC Pub. 1667 (October 1984) (temporary relief denied when domestic industry could not provide adequate supply of medical product useful to public health); Certain Inclined-Field Acceleration Tubes, Inv. No. 337-TA-67, USITC Pub. 1119 (December 1980) (relief denied when exclusion order would have stifled nuclear structure research programs in public interest); Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60, USITC Pub. 1022 (December 1979) (relief denied when domestic industry could not provide adequate supply of product needed for automobiles to satisfy federal energy efficiency requirements).

that an adequate supply of such vehicles will exist even upon issuance of an exclusion order.<sup>28</sup> Consequently, we conclude that the public interest does not preclude granting relief.

#### V. BONDING

Both the IA and Kransco have requested that the respondent's bond for the Presidential review period be computed on the basis of the difference between respondent's and complainant's list prices. We agree that use of this computation method, which we have utilized in numerous prior proceedings,<sup>29</sup> is appropriate. Because the record indicates that the list prices of the Kransco Jeep and Kransco Suzuki exceed those of the infringing Chien Ti models by 40 percent and 19 percent respectively, we agree with the IA that these figures provide the appropriate bond computations. Kransco has provided and we can discern no justification for its request that we discount Chien Ti's list prices, but not Kransco's, in computing the bond.

Accordingly, we have established the bond pertaining to the Chien Ti Jeep at 40 percent of entered value. We have additionally established the bond pertaining to the Chien Ti Racer at 19 percent of entered value.

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<sup>28</sup> Ten manufacturers sell in the United States non-infringing ride-on toy vehicles that compete with Kransco's. Kransco Brief on Review at 23, ex. G.

<sup>29</sup> See, e.g., Certain Crystalline Cefadroxil Monohydrate, 15 U.S.P.Q.2d 1263, 1281-82 (ITC 1990); Certain High Intensity Retroreflective Sheeting, Inv. No. 337-TA-268, USITC Pub. 2121 at 12 (September 1988); Certain Foam Earplugs, Inv. No. 337-TA-1884, USITC Pub. 1671 at 4 (March 1985).

CERTAIN BATTERY-POWERED  
RIDE-ON TOY VEHICLES  
AND COMPONENTS THEREOF

INVESTIGATION NO. 337-TA-314

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF ISSUANCE OF EXCLUSION ORDER, was served upon Daniel Duty, Marc Bernstein and the following parties via first class mail, and air mail where necessary on April 10, 1991.

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

On Behalf of Complainant: Kransco

Stuart E. Benson  
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David A. Miller  
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Respondent

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Fu Ying Road  
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Room 3264, Main Justice  
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Washington, DC 20530

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

In the Matter of )  
CERTAIN BATTERY-POWERED )  
RIDE-ON TOY VEHICLES )  
AND COMPONENTS THEREOF )  
) Investigation No. 337-TA-314  
)

NOTICE OF DECISION TO REVIEW  
CERTAIN PORTIONS OF  
AN INITIAL DETERMINATION;  
REQUEST FOR WRITTEN SUBMISSIONS

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review certain portions of an initial determination (ID) issued on December 5, 1990, by the presiding administrative law judge (ALJ) in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Marc A. Bernstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-252-1087.

SUPPLEMENTARY INFORMATION: On May 15, 1990, Kransco filed a complaint with the Commission alleging violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation of certain battery-powered ride-on toy vehicles and components thereof. The complaint alleged infringement of claims of five U.S. patents owned by Kransco: claim 1 of U.S. Letters Patent Des. 299,666; claim 1 of U.S. Letters Patent Des. 292,009; claims 1 through 6 of U.S. Letters Patent 4,709,958; claims 1, 2, 4, 8, 9, 16, and 19 of U.S. Letters Patent 4,558,263; and claims 1 through 4 of U.S. Letters Patent 4,639,646. The Commission instituted an investigation into the allegations of Kransco's complaint and published a notice of investigation in the Federal Register. 55 F.R. 25179 (June 20, 1990).

On October 16, 1990, Kransco filed a Motion for Summary Determination pursuant to Commission interim rule 210.50. The Commission investigative attorney (IA) cross-moved for a summary determination of no violation with respect to one of the five patents at issue.

On December 5, 1990, the presiding ALJ issued an ID concerning the motions for summary determination. The ID granted Kransco's motion in its entirety, denied the IA's cross-motion, and concluded that a section 337 violation exists with respect to each of the five patents at issue.

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No petitions for review of the ID were filed, and no agency comments were received. Having examined the record in the investigation, including the ID, the Commission has determined on its own motion to review section 1 of the ID, titled "Importation of the Products in Issue," and not to review the remainder of the ID. The Commission is particularly interested in the following issues:

1. Whether a section 337 violation may properly be based on shipments of infringing goods to the United States that have been solicited by or on behalf of the complainant.

2. Whether the shipment by respondent Chien Ti Enterprise Co., Ltd. of one Jeep model and one Racer model to J & L Meyer, Inc., satisfies the requirement of section 337(a)(1)(B) that there be an "importation into the United States, [a] sale for importation, or [a] sale within the United States after importation by the owner, importer, or consignee. . . ."

In connection with final disposition of this investigation, the Commission may issue (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) a cease and desist order that could result in a respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors that the Commission will consider include the effect that an exclusion order and/or cease and desist order have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

#### Written Submissions

The parties to the investigation are requested to file written submissions on the issues under review. Additionally, the parties to the investigation, interested government agencies, and any other persons are encouraged to file written submissions on remedy, the public interest, and bonding. Kransco and the IA are also requested to submit a proposed exclusion order and/or proposed cease and desist order(s) for the Commission's consideration. Written submissions, including any proposed orders, must be filed by February 4, 1991, and reply submissions must be filed by February 14,

1991.

Persons filing written submissions must file with the Office of the Secretary the original document and 14 copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 C.F.R. 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

**Additional information**

Copies of nonconfidential versions 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, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-252-1000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

By order of the Commission.



Kenneth R. Mason  
Secretary

Issued: January 4, 1991



CERTAIN BATTERY-POWERED  
RIDE-ON TOY VEHICLES  
AND COMPONENTS THEREOF

337-TA-314

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF DECISION TO REVIEW CERTAIN PORTIONS OF AN INITIAL DETERMINATION; REQUEST FOR WRITTEN SUBMISSIONS was served upon Daniel Duty, Marc Bernstein and the following parties via first class mail, and air mail where necessary on January 4, 1991.

*Kenneth R. Mason*  
Kenneth R. Mason, Secretary  
U. S. International Trade Commission  
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Respondent

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**Pennsylvania Avenue & Tenth Street, N.W.**  
**Washington, DC 20530**

P U B L I C   V E R S I O N

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

In the Matter of )  
CERTAIN BATTERY-POWERED RIDE-ON )  
TOY VEHICLES AND COMPONENTS )  
THEREOF )

Investigation No. 337-TA-314

INITIAL DETERMINATION ON MOTION FOR SUMMARY DETERMINATION  
ORDER NO. 6

On October 16, 1990, complainant Kransco filed a motion for summary determination. (Motion No. 314-5.) The Commission's Office of Unfair Import Investigations, which is an independent party in this case, filed a response partially supporting the motion, and filed a cross-motion for partial summary determination. Complainant opposed the cross-motion. The respondent, Chien Ti Enterprise Co., Ltd., filed a one-page response to complainant's motion, without affidavits or other supporting documents.

Kransco's motion requests a summary determination that there is no genuine issue as to any material fact in this case, and a finding in complainant's favor on all issues. The Commission's rule currently in effect for summary determination motions is attached hereto as Exhibit A.

Chien Ti's opposition to the motion for summary determination does not comply with the Commission's Rule on summary determination motions. Chien Ti is not represented by counsel in this case, although it appears to have an attorney in Taiwan. Although Chien Ti has declined to retain counsel because it is a small company, it is not in default. It has responded to the discovery requests of the staff, and it has agreed to have its president

attend the hearing in January if the motion for summary determination is denied. Complainant is entitled to succeed in a motion for summary determination if the motion and supporting documents are adequate and the facts are not opposed by respondents or the staff in the manner required by the Commission's Rules. The administrative law judge may have an obligation to give some assistance to a party who is not represented by counsel, and this is usually in the form of clarification of the procedural requirements. Copies of the Commission's Rules of Practice have been furnished to both complainant and respondent, and a certain amount of additional procedural help has been given to both outside parties. But there is a limit to the amount of procedural assistance that can be given to one party without risking unfair treatment of another party.

The letter from respondents opposing the motion for summary determination denies some of the allegations of fact in the declarations attached to complainant's motion for summary determination, but it is not in the form required by the rule. No further effort to explain the requirements of the rule were made because in Chien Ti's letter opposing the motion, it did not state any specific facts that would raise a genuine issue of material fact in connection with this motion. Chien Ti merely denied generally the charges in the complaint relating to importation, and argued that the declarations attached to complainant's motion for summary determination were unfair because they were made by employees and lawyers employed by Kransco. Bias on the part of the witness does not bar his testimony.

Kransco has submitted adequate documents in the form required by the Commission's rule to support a motion for summary determination in its favor. There is no genuine issue of fact that must be litigated.

To succeed in this motion, Kransco must prove (a) that there is no genuine issue of material fact and (b) that Kransco is entitled to summary determination in its favor on the following issues:

1. That Chien Ti has imported into the United States or sold for importation into the United States certain battery-powered children's ride-on vehicles and components thereof.
2. That by importing these vehicles or selling them for importation Chien Ti has infringed the claims of the patents in issue, which are valid.
3. That there is a domestic industry.

Complainant Kransco has submitted affidavits, depositions and admissions containing facts that would be admissible at trial. No opposing affidavits or other documents have been offered by respondent Chien Ti.

Many facts stated in the affidavits would not be admissible in evidence if the witness signing the affidavit had attempted to testify to the same facts at the hearing. In a summary determination motion, the complainant can rely only upon facts stated in an affidavit if those facts would be admissible at the hearing, i.e., the witness signing the affidavit could have testified to the same facts at the hearing. Inadmissible facts have not been relied upon herein.

The parts of the papers relied upon by complainant that can be used to establish facts in the manner allowed in a summary determination motion are unopposed, except on the issue of the domestic industry. They show that there is no genuine issue of fact in this case that must be litigated. The domestic industry issue, discussed below, raises an issue of law.

1. IMPORTATION OF THE PRODUCTS IN ISSUE

While generally denying importation or sale in the United States of the product in issue, Chien Ti has made the following specific admissions:

1. Chien Ti shipped one Jeep model and one Racer model to J & L Meyer, Inc., a U.S. company, on December 31, 1989. (Response to Staff Interrogatory No. 47 [Benson aff. Ex. 7], Response to Kransco Interrogatory No. 61 [Benson aff. Ex. 2], Response to the Complaint, ¶ 3 [Benson aff. Ex. 5].)
2. Chien Ti "promoted" its products with J & L Meyer, Inc. and Manley Toys (U.S.A.) Ltd. (Response to the Complaint, ¶ 3.)
3. Chien Ti shipped 4 samples of the mini car to Manley's Hong Kong office. (Response to the Complaint, ¶ 3.)

The December 31, 1989 shipment to Meyer was in response to a purchase order sent by Meyer following preliminary inquiries by Meyer regarding Chien Ti's toy vehicle products. The inquiries were initiated by Meyer at the request of complainant Kransco. Kransco wanted to find out whether Chien Ti was shipping its toy vehicles to the United States. (Shapiro aff., ¶¶ 2-4.) Except for this shipment which was solicited by the complainant, there is little evidence of direct shipments by Chien Ti to the United States.

Complainant submitted parts of the deposition of A. J. McCarville, who testified that Chien Ti made direct shipments to Manley Toys in New York, but Chien Ti denies this. Chien Ti's denial is not based on facts stated in an affidavit or any other document in a form that could be considered as an opposition to facts stated under oath in a summary determination motion. Mr. McCarville testified that Chien Ti sent three toy jeep vehicles from Taiwan to Manley Toys in New York. These toy vehicles have not been sold to customers. Two were shown at a toy fair and evoked little customer interest. Manley ordered no more toy vehicles from Chien Ti. Mr. McCarville is employed by Manley Toys (Benson aff. ¶ 2) but the deposition excerpt does not disclose

4. The control circuit of claim 1 wherein the second switch is effective in its run position to connect the motors in parallel with one another and to a source of battery power and in its brake position to connect the motors in parallel to a relatively low resistance load to achieve dynamic braking of the motors.
  8. The control circuit of claim 1, wherein the first had actuatable switch comprises a double pole-double throw switch.
  9. The control circuit of claim 1, wherein the dead mean switch is foot actuatable by a child on the toy.
16. A wheeled riding toy for a child comprising:

direct current motor means gear reduction coupled in driving relation to respective toy wheels;

storage battery means;

first means for connecting the storage battery means to the direct current motor means for toy operation, said first means including a hand grip controllable switch;

and second means for disconnecting the motor means from the battery means and connecting the motor means to a resistive load for dynamic braking of the toy, said second means including a run-brake switch normally biased to connect the battery means to the motor means and a foot depressible pivotally mounted lever arrangement readily accessible to a child's foot to be depressed actuating the run-brake switch from its normal position to dynamically brake the toy.

19. A wheeled riding toy for a child comprising:

a pair of direct current motors gear reduction coupled in driving relation to respective toy wheels;

a pair of like storage batteries;

first means for connecting the batteries in series and to the motors in parallel with each other for high speed toy operation and in parallel and to the motors in parallel with each other for low speed toy operation, the first means including a switch normally biased to an open circuit condition to preclude application

of battery power to the motors and manually operable to a closed circuit condition by a child on the toy, the switch remaining in the closed circuit condition only as long as it is held there by the child and

second means for disconnecting the motors from the batteries and connecting the motors to a resistive load for dynamic braking of the toy, the second means comprising a switch normally biased toward a position for connecting the batteries to the motor and further including a foot actuatable lever accessible to a child on the toy for overriding the second means bias and moving the switch to a position to achieve dynamic braking.

A. The '958 patent

The '958 patent, U.S. Patent No. 4,709,958, is a utility patent in which Lawrence R. Harrod is the named inventor. The patent has been assigned to complainant. The patent claims relate to a child's vehicle.

Complainant submitted an affidavit of Jerry Wise, who is the Director of Research and Technology of Power Wheels, Inc., a subsidiary of Kransco. He is responsible for the detailed design and development of Power Wheels products after the style and configuration have been established. His experience at Power Wheels since June 1988 qualifies him to testify as an expert witness on facts relating to design and the way in which the toys worked. (Wise aff., ¶ 1.) He would be qualified by his experience to testify about the comparison that he made between the Power Wheels Jeep and the Chien Ti Jeep, the comparison that he made between the Chien Ti Jeep and the claims of the '958 patent, and the comparisons that he made between the Power Wheels Jeep and Suzuki models and the claims of the '958, '666, '646 and '009 patents. He would not be qualified to testify about what Roger Harrod had done unless he participated in the work.

Chien Ti admitted in its answers to the staff's second set of interrogatories that its Jeep contains all of the elements of claim 1 of the '958 patent. (See Benson Aff., Ex. 7, Interrogatory Nos. 19-24.)

Mr. Wise stated that the construction of the Chien Ti Jeep is virtually identical to the construction claimed in claims 1 through 6 of the '958 patent. (Wise aff., ¶ 6.) His affidavit is unopposed.

It is found that claims 1-6 of the '958 patent are infringed by the Chien Ti Jeep.

B. The '263 patent

The '263 patent, U.S. Patent No. 4,558,263, is a utility patent in which Timothy S. Harris and Lawrence R. Harrod are the named inventors. The patent, which relates to a child's riding toy with a dynamic braking system, has been assigned to complainant.

Chien Ti admitted in its answers to the staff's second set of interrogatories that its Jeep contains all of the elements of claim 1. (See Benson aff., Ex. 7, Interrogatory Nos. 25-30.)

Complainant submitted the affidavit of Wallace G. Walter, a patent attorney. Mr. Walter also has an undergraduate degree in engineering as well as experience in the design, analysis and testing of electrical circuits. (Walter aff., ¶¶ 1-3.) This training and experience would qualify him as a technical expert with respect to how the toys work, which is an issue of fact. To the extent that Mr. Walter made legal conclusions in his affidavit, some of these statements cannot be considered here because they would not be admissible if the case went to hearing. In my hearings, an attorney cannot testify about any legal issue related solely to U.S. patent law. A technical expert, however, can make some legal conclusions if his legal conclusion cannot be separated readily from the issue of fact about which he is testifying. For example, the issue of infringement raises mixed issues of fact and law. As a technical expert, Mr. Walter could analyze the toys and testify as to the facts that prove infringement. After concluding his analysis of the pertinent parts of the toys and how they work, he could state his opinion that the product contained all of the elements of the claim and that it therefore infringed a particular claim of a patent. He could not

testify abstractly about what else would infringe the claims, and he could not testify as to what constitutes infringement under the patent law.

Mr. Walter examined, tested and analyzed the electrical wiring in the Chien Ti Jeep and in the Chien Ti Racer. (Walter aff., ¶¶ 6-7.) He compared the electrical wiring and the braking systems in these two toys to the claims in issue of the '263 and '646 patents. (Id., ¶ 8.)

Mr. Walter states that claims 1, 2, 4, 8, 9, 16, and 19 of the '263 patent read on the Chien Ti Jeep. (Id., Ex. 3.) I assume from this and other statements in his affidavit that he could testify that he found each element of each of these claims in the Chien Ti Jeep. The Walter affidavit is unopposed. The facts stated in the Walter affidavit, if offered in evidence, would support a finding that these claims were infringed by the Chien Ti Jeep. It is found that claims 1, 2, 4, 8, 9, 16, and 19 of the '263 patent are infringed by the Chien Ti Jeep.

#### C. The '646 patent

The '646 patent, U.S. Patent No. 4,639,646, is a utility patent in which Timothy S. Harris and Lawrence R. Harrod are the named inventors. The patent, which relates to a two-pedal, three-way control system for a child's riding toy, has been assigned to complainant.

Chien Ti was asked in the staff's second set of interrogatories (Numbers 31-38) whether its Racer contained each of the elements of claim 1 of the '646 patent, except that Chien Ti was not asked whether the location of the spring-biased switching means was connected between the battery power supply and the forward/reverse switch as required by claim 1. Chien replied that each of the other elements of claim 1 was present in its Racer. (See Benson aff., Ex. 7.)

Mr. Walter inspected the Chien Ti Racer and concluded that all of the elements of claims 1-4 were found in the Chien Ti Racer, except for the location of the spring-biased switching means (the foot pedals). (Walter aff., Ex. 4.)

Claim 1 requires that the spring-biased switching means be connected between the battery power supply and the forward/reverse switch, but in the Chien Ti Racer, the two foot pedals are connected between the forward/reverse switch and the motors.

Mr. Walter concluded that claims 1, 2, 3, and 4 of the '646 patent read on the Chien Ti Racer. (Walter aff., Ex. 4.) From this and other statements made in his affidavit, I assume that Mr. Walter could testify that he found all of the elements of each of the claims (except the location of the foot pedals in the electrical circuit) in the Chien Ti Racer. The Walter affidavit is unopposed.

Because one element of claim 1 is missing in the Chien Ti Racer, the question raised by this patent is whether the Chien Ti Racer infringes the '646 patent under the doctrine of equivalents.

If a product does not literally infringe a claim, but performs substantially the same function in substantially the same way to obtain the same result, it can be found to infringe under the doctrine of equivalents. An additional requirement has been added under the current interpretation of the doctrine of equivalents by the Federal Circuit: the doctrine permits a finding of infringement when an element of a claim is missing in the accused product only if the equivalent of that element is found in the accused product.

In theory, the doctrine of equivalents is inconsistent with another patent doctrine, that the claim measures the scope of the patent monopoly. As Judge Hand stated, when "the scope of the claims has been enlarged as far as the words can be stretched, on proper occasions courts make them cover more than their meaning will bear.... At times they resort to the 'doctrine of equivalents' to temper unsparing logic and prevent an infringer from stealing the benefit of the invention." Royal Typewriter Co. v. Remington Rand, Inc., 168 F.2d 691, 692 (2d Cir.), cert. denied, 335 U.S. 825 (1948).

The manner in which the doctrine is applied depends to a certain extent upon the contribution of the patent to the art (a greater contribution entitles the claims to a broader scope) and, as Judge Hand stated, to the degree to which it is necessary to depart from the meaning of the claims to reach a just result. The manner in which the doctrine is applied may vary from case to case, with the importance of the patent contribution and to some extent with the individual judge's sense of fairness. See Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605 (1950).

Under the '646 patent, the question is whether there is an element in the Chien Ti Racer that is equivalent to the missing element in the claims of the '646 patent, (the element relating to the location of the foot pedals), and if so, whether all of the other requirements of the doctrine of equivalents have been met. For the purposes of this patent, it is unnecessary to find that the contribution of the '646 patent was major. The location of the foot pedals in the electrical circuit allows them to perform precisely the same function as the location of the spring-biased switching means in claim 1, i.e., no driving current will normally be supplied to the motor drive means. "Normally" means

when both foot pedals are not depressed, and there is an open circuit between the power source and the motor drive.

In the preferred embodiment of the '646 patent, the child must be sitting down "safely aboard" before the car begins to move, because the child must depress two foot pedals at the same time before the vehicle will move. There are two batteries that can be connected either in series or in parallel so that either high or low voltage may be connected to the motor drive. When the car is in forward, and both pedals are pressed down, the car can move forward at either of two speeds. The two forward speeds are controlled by a hand switch. When the car is in reverse, the motor drive is connected only to the low voltage by a separate circuit, so the car moves more slowly and at only one speed. There is a forward/reverse switch between the batteries and the motor drive, and it must be in the forward position to receive high voltage. When the forward/reverse switch is put in forward, a dynamic braking system goes into operation unless the left foot pedal is pressed by the child to connect the motor drive to the battery power supply. When both pedals are pressed, the car will go forward. When the right pedal is released, the car will coast. When the left pedal is released, the brake system will operate.

All of these features are found in the Chien Ti Racer, although the vehicle depicted in the '646 patent looks like a Jeep, and the Chien Ti Racer looks like a motorcycle. All of the elements of claim 1 of the '646 patent are found in the Chien Ti Racer, except for the location of the foot pedals in the electrical circuitry.

The main objects of the invention of the '646 patent were the safety features. (See Col. 2). The change in the location of the foot pedals (the

spring-biased switching means) in the electrical circuit makes no difference with respect to these safety features.

Claim 1 requires that the spring-biased switching means be located between the forward/reverse switch and the battery power supply, so that when both foot pedals are up, in their normal position, the battery power supply is disconnected from the reversing switch. Claims 2-4 are dependent from claim 1.

On the Chien Ti Racer, one foot pedal is on each side of the motorcycle, and these are the spring-biased switching means. They are connected in the electrical circuit between the forward/reverse switch and the motor. When the pedals are up, in their normal position, they disconnect the forward/reverse switch from the motor. The switching means in the Chien Ti Racer and in the '646 patent perform the same function: they disconnect the power source from the motor. Both operate in substantially the same way (they disconnect the power source in the battery from the motor by blocking electrical current). Both obtain the same result; the vehicle will not move when both pedals are not depressed. The location of the switching means in the Chien Ti Racer is functionally equivalent to the location of the switching means in the claim. The location of the switching means in the accused product is an adequate substitute for the missing element in claim 1.

The facts stated in the Walter affidavit, if offered into evidence, would support a conclusion of infringement under the doctrine of equivalents. It is concluded that the Chien Ti Racer infringes claims 1-4 of the '646 patent under the doctrine of equivalents.

D. The '666 and the '009 design patents

The '666 patent, U.S. Design Patent No. D 299,666, and the '009 patent, U.S. Design Patent No. D 292,009, are design patents in which Lawrence R. Harrod is the named inventor. Both patents have been assigned to complainant, and both are attached hereto in Exhibit B. The patents claim ornamental designs for a ride-on toy vehicle as shown and described in the figures in the patents.

A design patent is infringed if, "in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other." Gorham Co. v. White, 81 U.S. (14 Wall.) 511 (1871) at 528. The Federal Circuit also requires that the infringing product include "the novelty in the patented device which distinguishes it from the prior art." Avia Group International, Inc., 853 F. 2d 1557, 1565 (Fed. Cir. 1988). In Ashley v. Weeks-Numan Co., 220 F. 899 (2d Cir. 1915), the court held that "the patentee of a design patent is entitled, not only to the exact design shown in his drawing of the patent, but also to the protection of the court against the making and marketing of inkstands which contain the dominant features of the design described in the specification." 220 F. at 903.

Although the test for finding infringement of a design patent is whether the two designs are substantially the same "in the eye of an ordinary observer, giving such attention as a purchaser usually gives," the Supreme Court also included the requirement "if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other,

the first one patented is infringed by the other." The Federal Circuit, however, has held that the trademark test of confusion of the purchaser is not applicable to design patents, noting that a product with a substantially similar design can infringe a design patent even if the design cannot be seen by the purchaser. Unette Corporation v. Unit Pack Co., Inc., 228 U.S.P.Q. 933, 934 (Fed. Cir. 1986).

Complainant offered no admissible evidence as to what an ordinary observer or purchaser of the toy cars would have thought when comparing the Chien Ti toy cars to the designs in the patents, rather than to complainant's toys. Although no admissible evidence was offered as to whether the design met the Gorham test, in the absence of such evidence, the determination of this issue may be left to the trier of fact, subject to review by the appellate courts.

It is found that an ordinary person who was interested in toy riding vehicles but who had not seen the Chien Ti toys or the drawings in the '666 design patent before and who made a casual comparison of the Chien Ti toys to the drawings in the '666 design patent would have seen few noticeable distinctions. For example, some features of the design that were important to the inventor were the proportions and dimensions of the Jeep. Similar proportions and dimensions are found in the Chien Ti Jeep. Some design details are similar. For example, the seat design (one seat looks like two seats) is similar in the Chien Ti Jeep and the '666 design patent. There are design differences, such as the height of the front grill and the shape or placement of lights, but these differences probably would not have been retained for long in the memory of the ordinary casual observer.

Complainant's affidavits indicate that the ordinary customer would be confused when he saw complainant's Jeep and respondent's Jeep. Some of the similarities between the two Jeeps are not claimed in the '666 patent. Both Jeeps use the same red and black colors. But the colors are not claimed in the design patent. There are also some striking differences between complainant's Jeep and the Chien Ti Jeep, such as the emblems on the hoods and the name "JEEP" that appears only on complainant's toy. But the emblems and the name "JEEP" are not claimed in the design patent. Confusion of the consumer who sees the toys of complainant and respondent is not the issue here. The Chien Ti Jeep must be compared to the drawings in the patent, not to the Kransco toy.

It is found that the Chien Ti Jeep infringes the '666 patent in its overall appearance and in design details that were important to the inventor in distinguishing his design from other designs.

Using the same test, it is found that the Chien Ti Racer infringes the '009 design patent. It has the same overall appearance as the designs in the '009 patent. The inventor thought that the tower effect of the body of the vehicle forming the base of the handlebars was important to his design. This tower effect is found in the Chien Ti Racer. Not only is there is a similarity in overall appearance, there is also a surprising similarity in some design details. For example, both the Chien Ti Racer and the '009 patent drawings have a roll-bar at the front of the vehicle, and both have a similar elongated seat. There is enough similarity in design to support a finding of infringement.

It is found that the Chien Ti Racer infringes the '009 patent.

### 3. THE DOMESTIC INDUSTRY

In order to prove a violation of § 337 in this patent-based investigation, complainant must prove that a domestic industry relating to the articles protected by the patents concerned exists, or is in the process of being established. A domestic industry is considered to exist if there is in the United States, with respect to the articles protected by the patents--

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in [the patent's] exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3).

The position taken by the staff in the cross-motion for summary determination is that there is no domestic industry in connection with the '646 patent, but that there is a domestic industry with regard to the '958, '263, '666 and '009 patents. Respondent Chien Ti has offered no evidence or argument relating to this issue.

#### A. The uncontested patents

The Kransco Jeep utilizes the '666 (two-part body) and the '958 (Jeep design) patents. (Wise aff., ¶ 4.) The Kransco Suzuki utilizes the '009 (Suzuki design) and '263 (power lock brake) patents. (Id.)

The toy vehicles in issue are manufactured in Kransco's plant in Fort Wayne, Indiana. (Beyer aff., ¶ 6.) It is unnecessary to detail here the level of Kransco's investment in plant, equipment, and research and development, or the employment of labor and capital, in the domestic exploitation of these patents. The amount of this investment is substantial and uncontested, and the details can be found in the Beyer declaration.

B. The '646 patent

The '646 patent relates to the two pedal power control unit. The Kransco Jeep formerly used this unit. (Wise aff. ¶ 4.) This unit formerly was manufactured in Fort Wayne. (Beyer aff., ¶ 13.) Kransco has not used this patent in any model since February 1989, but some models with this unit still are being sold at the retail level. (Beyer aff., ¶¶ 13, 15.) Kransco maintains inventories of this unit for repair of the older models. These inventories are packed and shipped to consumers or authorized service dealers when a toy is still under warranty, or sold to them when it is no longer under warranty. (Beyer aff., ¶ 15.) In 1989, Kransco shipped [ C ] of these replacement units. In 1990, Kransco had shipped [ C ] units through July 31. (*Id.*) It is not clear from the record how many units were replaced free of charge, but Kransco incurred expenses whether it charged for the parts or gave them away. Kransco admits that it has no plans to manufacture any more of these units when the current stock is depleted. (Memorandum in support of complainant's motion, p. 27.)

The facts regarding the status of this unit are not in dispute. The dispute is a legal one, and can be resolved in a motion for summary determination. The staff contends (1) that Kransco's past investments in equipment, labor and capital for production of this patented device are insufficient to establish the existence of a domestic industry where production of the device has been abandoned, and (2) that Kransco's current activities with respect to this unit are so insignificant as to demonstrate that there is no longer a domestic industry.

Kransco contends that there is still a domestic industry under this patent, and I agree. The fact that complainant is not manufacturing the

patented product at the present time does not prevent a finding that there is a domestic industry. By listing three different ways to demonstrate the existence of a domestic industry, the statutory language of the 1988 amendments to § 337 makes it clear that the requirement of domestic manufacture has been abandoned. In the legislative history, Congress stated that the definition of domestic industry "does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated are taking place in the United States." H.R. Rep. No. 100-40, 100th Cong., 1st Sess. 157 (1987).

The statement from the legislative history was made in the context of companies that invest in research in the United States, for example, but have their products manufactured abroad. It does not focus on the question of when the investment and activities underlying the domestic industry must take place.

This case raises an issue of timing. The domestic industry issue in this case is whether there must be significant activities taking place in the United States at the time of the infringement, or whether the patent is entitled to protection based on substantial past expenditures in the United States relating to the development and exploitation of the patent. Here, there were research and development costs in the United States, but the patented product was manufactured in the United States as well. All the expenditures relating to the patented product have been made in the United States. The issue here is whether a patent owner who clearly had a domestic industry when the invention was developed and the patent was obtained should lose his patent protection against foreign imports under Section 337 merely because his sales of the patented product have declined or even stopped. In

this case, the complainant has stopped practicing the patent on his new toys because it is producing an improved model. Should the patent owner have to prove that he is still manufacturing the patented product or that he has substantial other costs directly related to the patent in the United States at the time of the infringement, or is he entitled to protection based on his past expenditures in the United States relating to the extensive costs incurred in the development and exploitation of the patent?

Kransco invested substantial capital in buildings, labor, equipment, and research to develop the invention that is the subject of the '646 patent and to obtain the patent and to develop a commercial product that would practice the patent. These expenditures occurred in the United States. To take away Kransco's patent protection merely because it has improved its product would not make any sense, nor would it encourage anyone else to do research to obtain patents and manufacture patented products in the United States if the patent protection is so easily lost. I do not think that it was the intention of Congress to require that all of the costs that make up a domestic industry be incurred at the exact moment that the patent is infringed. Often the lion's share of the research and development costs are incurred before a patent is obtained.

But even if Kransco's expenditures in the United States relating to the patent must occur at the time of the infringement, Kransco has met this test. Kransco still has an inventory of the dual control power pedal unit that is the subject of the patent, and some of these units are still sold as replacement parts to stores or individual purchasers when the warranties on their toys have expired. The dual control unit is a safety feature on the toy. Furnishing replacement parts would be significant to the complainant

even if it did not bring in substantial income. Making replacement parts available generates good will for the company. The toys are expensive, and parents who spend this much for a toy would expect a U.S. company to make replacement parts available for repairs. Section 337 should protect small industries as well as large ones. The current sales of the unit may be few, and the costs of replacing these parts free may not be large, but they meet the criteria of the statute.

As long as Kransco is still replacing any of these units, all of the prior costs relating to the development and exploitation of the patent should be considered along with the current expenditures relating to replacement parts when determining whether there is a domestic industry.

In my opinion, Kransco would be entitled to protect its '646 patent even if its inventory of the units covered by the patent had been exhausted because Kransco made the investment in the United States that resulted in the patent that may now be exploited by another in the United States. But this issue is not reached in this case.

The purpose of the domestic industry requirement is to prevent the ITC from becoming a forum for resolving disputes brought by foreign complainants whose only connection with the United States is ownership of a U.S. patent. See *Id.* at 156-157. Finding a domestic industry in this case is consistent with the Congressional purpose for § 337. It is found that there is a domestic industry in connection with each of the patents in issue.

#### **CONCLUSIONS**

The complainant has submitted enough information in affidavits or in depositions or in written admissions made by the respondent to support a finding that at least some of the products in issue have been imported and

that the respondent is interested in exporting more of them into the United States.

The affidavits submitted by Kransco contain assertions of fact that are unopposed by affidavits submitted by respondent. The facts that would be admissible in evidence are adequate to support a finding that the respondent has infringed each of the patent claims in issue. The statements in the affidavits about the legal issues were not considered.

Finally, it is found that there is a domestic industry. There are no other genuine issues of material fact that need to be decided in this case, and no issues remain that must go to trial. There is a violation of Section 337.

Complainant's motion for summary determination is granted, and the hearing scheduled to commence on January 22, 1991 is cancelled.<sup>1</sup> The record on which this initial determination is based, which consists of all the pleadings, including the motions decided here, oppositions to the motions, the documents attached to these papers, and the four toys submitted with the complaint, is certified to the Commission.

The staff's cross-motion for summary determination is denied.

Janet D. Saxon

Janet D. Saxon  
Administrative Law Judge

Issued: December 5, 1990

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<sup>1</sup> Pursuant to § 210.53(h) of the Commission's Rules, this initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.54, or the Commission pursuant to § 210.55 orders on its own motion a review of the initial determination or certain issues therein. For computation of time in which to file a petition for review, refer to §§ 210.54, 201.14, and 201.16(d).

## APPENDIX A

### 210.50 Summary determinations.

(a) **Motions for summary determinations.** Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after twenty (20) days following the date of service of the complaint and notice instituting the investigation, and any other party, or a respondent, may so move at any time after the date of publication in the FEDERAL REGISTER of the notice of investigation. Any such motion by any party, however, must be filed at least thirty (30) days before the date fixed for any hearing provided for in § 201.41.

(b) **Opposing affidavits; oral argument; time and basis for determination.** Any nonmoving party may, within ten (10) days after service of the motion, file opposing affidavits. The administrative law judge may in his discretion or may at the request of any party set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) **Affidavits.** Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The administrative law judge may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary determination is made and supported as provided in this rule, a party opposing the motion may not rest upon mere allegations or denials in his pleadings; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for hearing. If no such response is filed, a summary determination, if appropriate, shall be rendered.

(d) **Refusal of application for summary determination; continuances and other orders.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present facts essential to justify his opposition, the administrative law judge may refuse the application for summary determination or may order a continuance to permit affidavits to be obtained or depositions or other discovery to be had, or make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) **Order establishing facts.** If on motion under this rule a summary determination is not rendered upon all the allegations for all the relief asked and a hearing is necessary, the administrative law judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the investigation. The facts so specified shall be deemed established.

(f) Order of summary determination. An order of summary determination shall constitute an initial determination of the administrative law judge under § 210.53 or § 210.24(e)(17).

APPENDIX B

U.S. Letters Patent 4,709,958

What is claimed is:

1. A child's rideable vehicle comprising, in combination;
  - first and second complementary plastic body portions;
  - one of said body portions being the front and the other of said body portions being the rear of a body for a child's vehicle;
  - a frame including first and second longitudinal frame members each with an intermediate portion;
  - first and second inverted generally U-shaped sill portions on said first body portion adapted to overlie the intermediate portion of said first and second longitudinal frame members, respectively;
  - first and second inverted generally U-shaped sill portions on said second body portion adapted to overlap and be complementary to said first body portion sill portions;
  - an alignment aperture in each said sill portion; and fasteners securing said overlapped sill portions to said frame at said alignment apertures.
2. A rideable vehicle as set forth in claim 1, including a unitary post on each of said sill portions of said second body portion, and said posts being received in said alignment apertures of said first body portion.
3. A rideable vehicle as set forth in claim 1, including a seam edge on each of said body portions; and
  - said fasteners securing said overlapped sill portions to said frame with said seam edges of said first and second body portions closely adjacent.
4. A rideable vehicle as set forth in claim 1, wherein said body portions overlap; and

- a part of said first body portion closely overlying the proximal end of said second body portion.
5. A rideable vehicle as set forth in claim 4, including a hook on said proximal end of said second body portion;
- a part of said frame engaged by said hook; and
- said part of said first body portion closely overlying said hook to retain said hook on said frame.
6. A rideable vehicle as set forth in claim 1, including a floor pan on one of said body portions with a hook on one end thereof;
- a transverse member in said frame; and
- said hook disposed on said transverse member to support said one end of said floor pan from said frame.

U.S. Letters Patent 4,639,646

What is claimed is:

1. A child's riding toy comprising:

motor drive means;

reversing switch means connected to the motor drive means and having a forward position and a reverse position;

battery power supply means connected to the reversing switch means to supply a plurality of levels of driving current up to a predetermined maximum level through the reversing switch means in one polarity to the motor drive means when the reversing switch means is in its forward position;

a separate connection means connected from the battery power supply means to the reversing switch means for only supplying less than said predetermined maximum level of driving current through the reversing switch means in an opposite polarity when the reversing switch means is in its reverse position, whereby a maximum driving current supplied to the motor

drive means when the reversing switch means is in its reverse position is less than and of opposite polarity to the predetermined maximum level of driving current supplied to the motor drive means when the reversing switch means is in its forward position;

the battery power supply means comprising means to supply, selectively, high and low battery voltages to the reversing switch means, thereby to supply said driving current in one polarity to the motor drive means when the reversing switch means is in its forward position;

Spring-based switching means connected between the battery power supply means and the reversing switch means normally to disconnect the battery power supply means from the reversing switch means, whereby no driving current will normally be supplied to the motor drive means, the spring-biased switching means being actuatable by a driver of the toy to supply the driving current to the motor drive means in a polarity determined by a position to which the reversing switch is set; and

a dynamic braking load connected to the spring-biased switching means to be connected thereby to the reversing switch means when the spring-biased switching means is in a normal position, whereby current generated by the motor drive means when the spring-biased switching means is not actuated can flow through the dynamic braking load.

2. The toy of claim 1 in which the spring-biased switching means comprises a first spring-biased switch connected to the reversing switch means and in series between the reversing switch means and the battery power supply means, the dynamic braking load being connected to the first spring-biased switch, and a second spring-biased switch connected the first spring-biased switch to the battery power supply means to allow the driving current from the battery power supply means to flow through the first spring-biased switch only when the second spring-biased switch is actuated by the driver operating the toy.
3. The toy of claim 2 in which the first and the second spring-biased switches are located at different places on the toy to be actuated by different parts of the body of the driver operating the toy, whereby the driver must be properly in position on the toy to actuate both of the first and second spring-biased switches

simultaneously to supply the driving current to the motor drive means.

4. The toy of claim 3 further comprising foot-support means to support both feet of the driver operating the toy, the first spring-biased switch being located on the foot-support means to be actuated only by one foot of the driver, and the second spring-biased switch being located on the foot-support means to be actuated, at the same time as the first spring-biased switch, only by the other foot of the driver.

U.S. Letters Patent 4,558,263

What is claimed is:

1. In a battery powered electric motor driven child's riding toy of the type having a pair of direct current motors directly coupled in driving relation to respective driven wheels, a control circuit for selectively energizing the motors comprising:
  - a first hand actuatable switch for selectively providing one of two possible battery voltages to the motors connected in parallel;
  - a dead man switch which when closed forms a part of the circuit interconnecting the motors and the batteries, the dead man switch normally biased to an open circuit condition and operable to a closed circuit condition by a child on the toy;
  - a second switch, serving as a run-brake switch, normally biased to its run position; and
  - a foot actuatable brake lever operable by a child on the toy to move the run-brake switch to its brake position, the run-brake switch when in the run position connected in circuit between the motors and the batteries, and when in the brake position opening the circuit between the motors and the batteries to preclude the supply of battery power to the motors whereby battery power can be supplied to the motors only when both the dead man switch is closed and the run-brake switch is in the run position.
2. The control circuit of claim 1 wherein the toy includes a pair of batteries with the first switch selectively providing series and parallel interconnection of the batteries.

how Mr. McCarville knew that Chien Ti made a direct shipment of toys to Manley Toys in New York, and whether his knowledge was based on hearsay. Chien Ti admits that it sent samples to Manley Toy's Hong Kong office (see above). It is possible that the toy vehicles about which Mr. McCarville testified were sent to New York by Manley employees in Hong Kong, and that Mr. McCarville was unaware of this. This deposition excerpt, standing alone, is inadequate to prove a direct shipment of the toys from Chien Ti in Taiwan to Manley Toys in New York, although it is likely that if the entire deposition had been submitted, there would have been enough information to qualify Mr. McCarville to testify. There is not enough information to determine whether all the facts he stated in his affidavit would have been admissible at the hearing.

In response to the staff's document requests, Chien Ti submitted four "order confirmations" (Nos. 106, 951, 972, and 114, dated 10/30/89, 12/15/89, 2/9/90, and 4/25/90, respectively) showing that a Taiwanese trading company, Qunsan Enterprise Co., Ltd., purchased Chien Ti Jeep and Racer models in Taiwan for shipment to "Long Beach." (Benson aff., Ex. 3.) Chien Ti stated that "we guess the term 'Long Beach', which appears on the Order Confirmations, refers to Long Beach in the United States." (Response to staff's Interrogatory No. 41, Benson aff. Ex. 7.) Chien Ti also stated in a letter dated Dec. 21, 1989, to Paul Shapiro of J & L Meyer, Inc., that "we know that our goods [were] exported to CHILE, MIAMI, SAN FRANCISCO, LONG BEACH, VENEZUELA, etc." In the same letter, Chien Ti stated that it had only exported through a local trading company and not directly to U.S. customers, although it expressed an interest in doing so. (Shapiro aff., Ex. 7.) At least after the first Order Confirmation, Chien Ti knew that toy vehicles it

sold to Qunsan were exported to the United States. No facts were offered as to how many Chien Ti toy vehicles Qunsan exported to the United States.

It is found that Chien Ti has exported to the United States at least two of the toy vehicles in issue.

Kransco proved only one direct shipment of toys by Chien Ti to the United States, and this shipment was solicited by the complainant itself. If the Commission finds a violation of § 337, that fact could be considered in connection with determining what remedy would be appropriate. Regardless of whether the shipment was solicited, complainant has established that these toys were imported into the United States.

## 2. VALIDITY AND ENFORCEABILITY OF THE PATENTS IN ISSUE

Three utility patents and two design patents are in issue. Under Section 282 of the Patent Act, the patents are presumed to be valid. The respondent has not asserted any affirmative defense that any of the patents in issue is invalid, nor has respondent alleged any affirmative defense that any of the patents is unenforceable. The patents therefore must be found to be valid and enforceable.

## 3. INFRINGEMENT OF THE PATENT CLAIMS IN ISSUE

The next question is whether Chien Ti has infringed the five patents in issue. Copies of the patent claims in issue are attached in Appendix B. Kransco has provided adequate facts in the form required by the rule on summary determination motions to support a finding that each of the patents in issue has been infringed by Chien Ti when the applicable law is applied to these facts. The utility patent claims are relatively straightforward, and no issues of claim construction have been raised.

U.S. Letters Patent Design 299,666

and

U.S. Letters Patent Design 292,009

THESE PATENTS ARE ATTACHED



U. S DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

January 22, 1990  
(Date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office  
of U.S. Patent Design 299,666.

By authority of the  
COMMISSIONER OF PATENTS AND TRADEMARKS

*C.A. Jane*  
Certifying Officer.

**United States Patent [19]**

**Harred**

[11] Patent Number: Des. 299,666

[12] Date of Patent: .. Jan. 31, 1989

**[54] RIDE-ON TOY VEHICLE**

[73] Inventor: Lawrence R. Harred, Fort Wayne, Ind.

[73] Assignee: Kremco, San Francisco, Calif.

[10] Term: 14 Years

[21] Appl. No.: 815,028

[22] Filed: Dec. 30, 1983

[52] U.S. Cl. D21/134

[58] Field of Search D21/128-140;  
D12/1, 12, 24, 27, 28, 93; 446/433, 440, 451,  
465, 466

**[56] References Cited  
PUBLICATIONS**

Toys Turn Toward Tomorrow catalog, 1984, p. 10.  
"Gold Digger" Vehicle; p. 14. Tiny Mighty Vehicle.

Primary Examiner—Charles A. Rademacher  
Attorney, Agent, or Firm—Kolach, Hartwell &  
Dickinson

**[57] CLAIM**

The ornamental design for a ride-on toy vehicle, as shown and described.

**DESCRIPTION**

FIG. 1 is a perspective view of a ride-on toy vehicle showing my new design;

FIG. 2 is a side elevational view thereof;

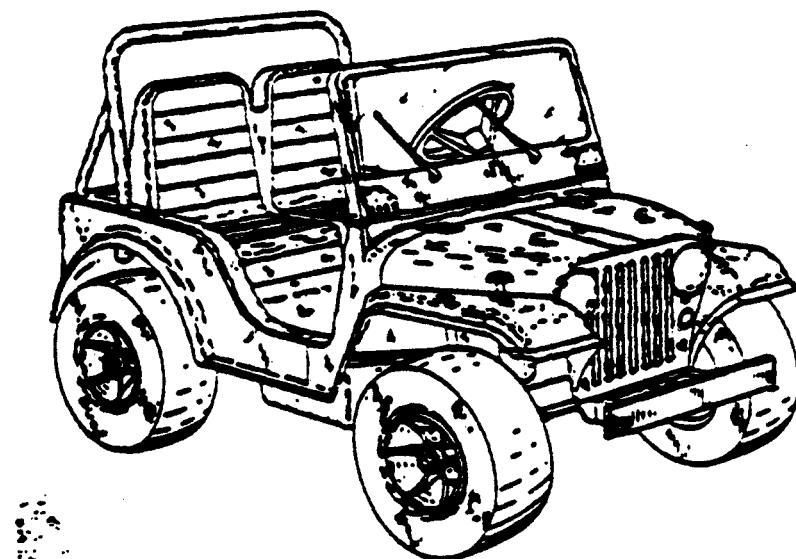
FIG. 3 is a side elevational view of the opposite side than shown in FIG. 2;

FIG. 4 is a top plan view thereof;

FIG. 5 is a front elevational view thereof;

FIG. 6 is a rear elevational view thereof; and

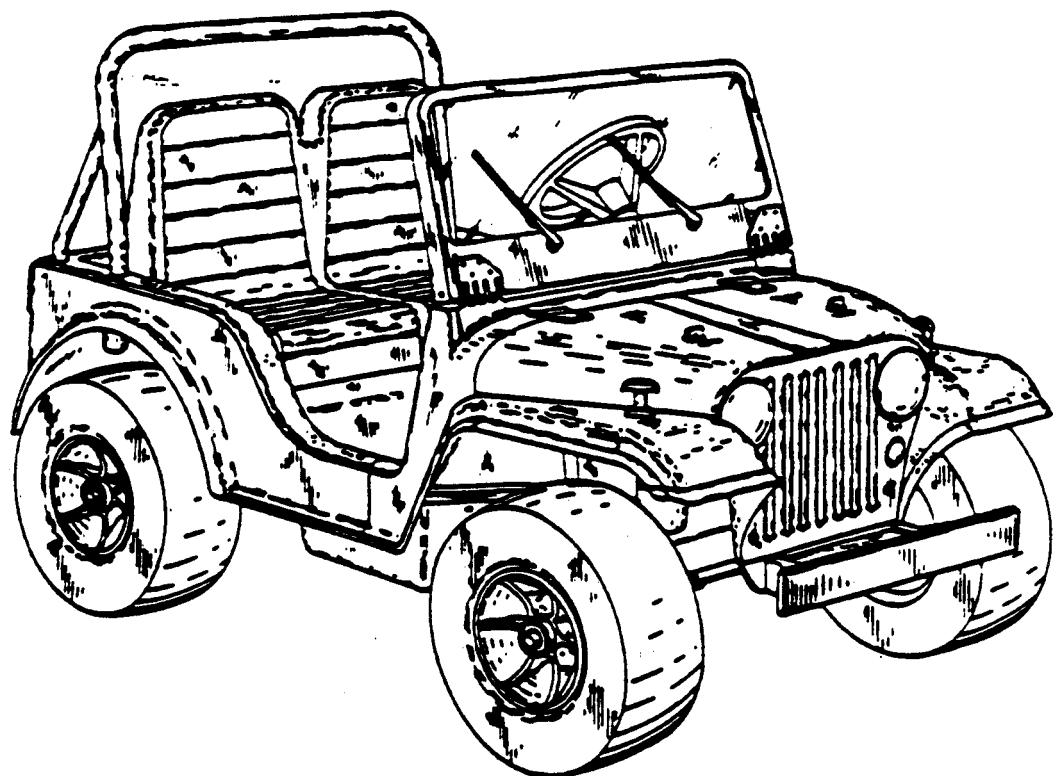
FIG. 7 is a bottom plan view thereof.



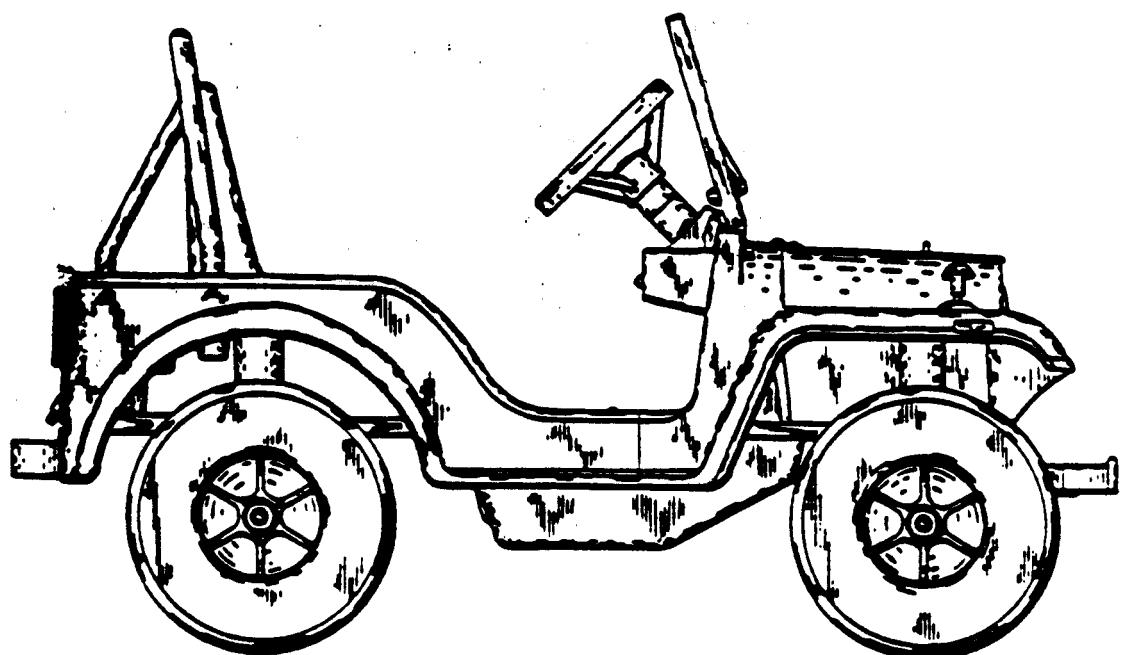
U.S. Patent Jan. 31, 1989

Sheet 1 of 4

D299,666



F - I - G. 1

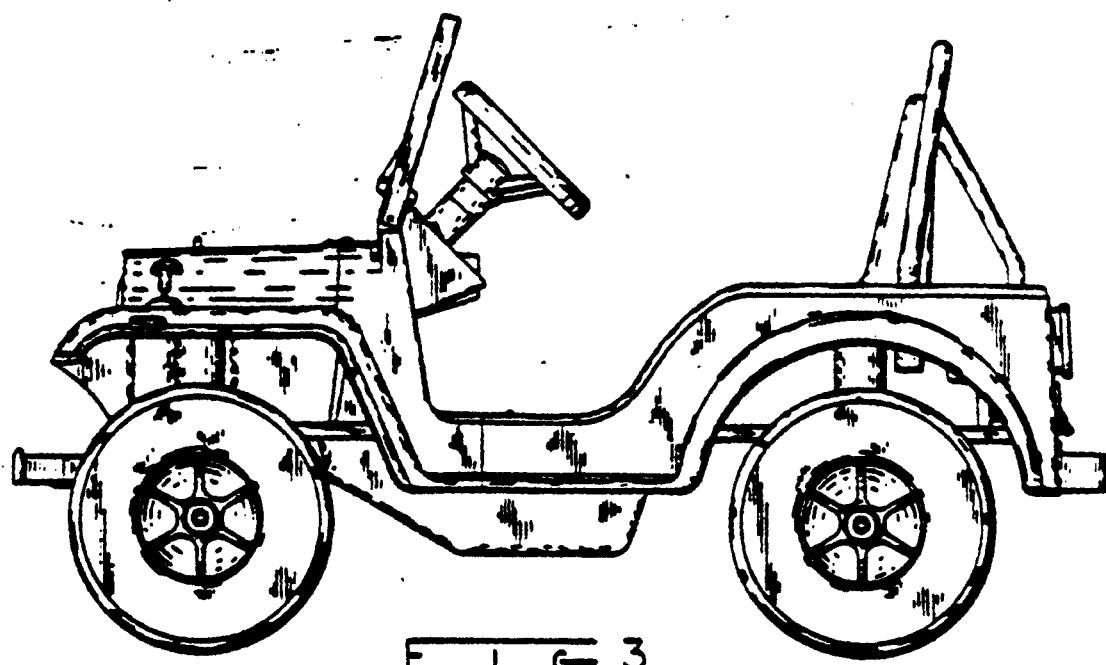


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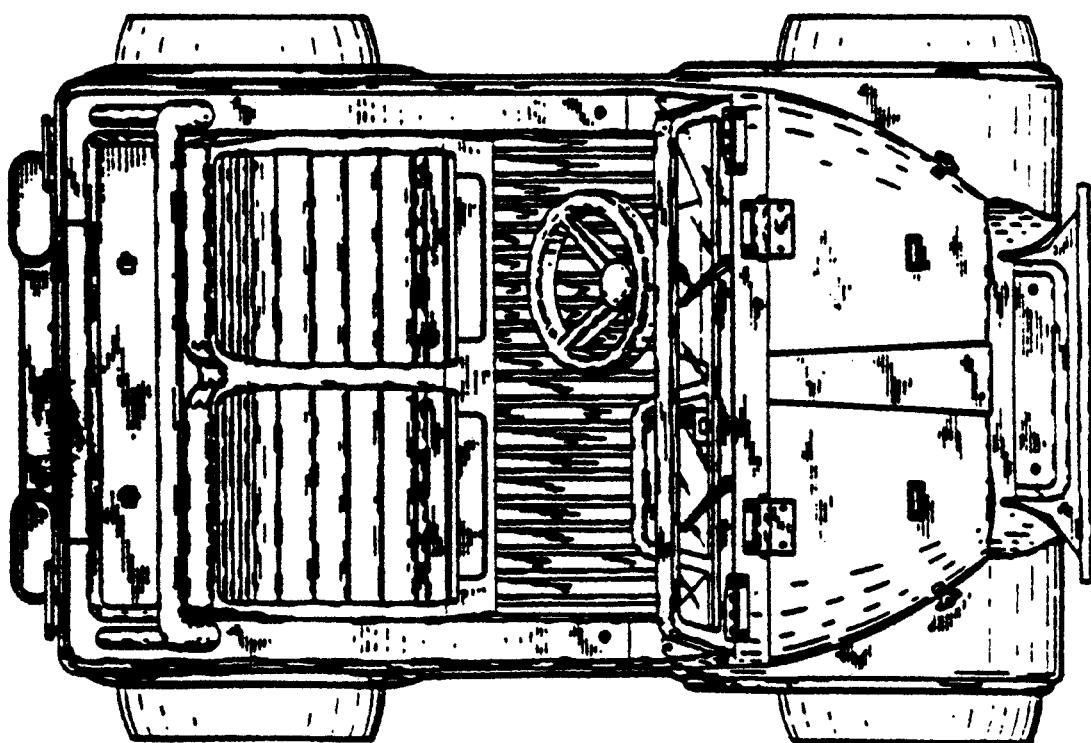
U.S. Patent Jan. 31, 1989

Sheet 2 of 4

D299,666



F 1 G 3

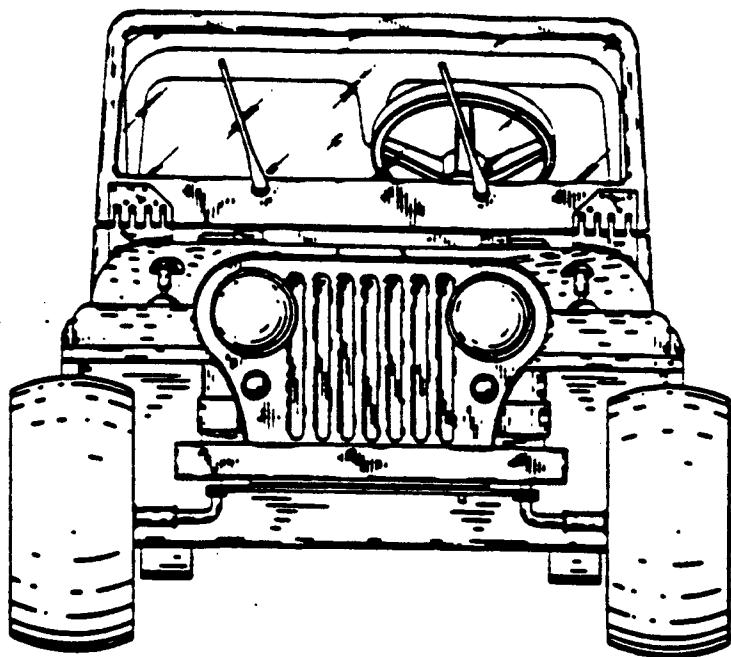


F 1 G 4

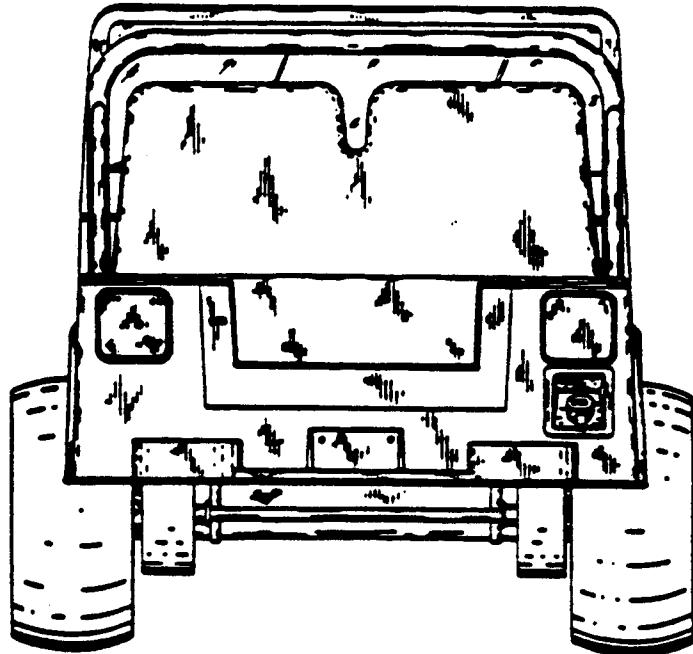
U.S. Patent Jan. 31, 1989

Sheet 3 of 4

D299,666



F I G. 5

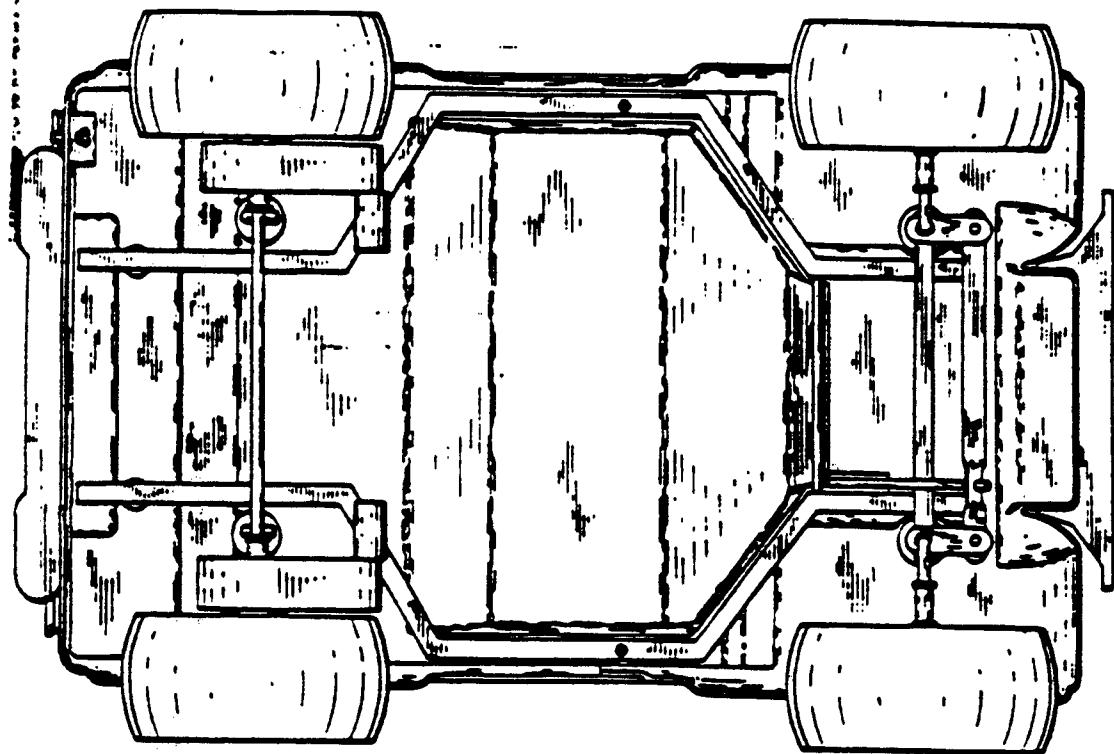


F I G. 6

U.S. Patent Jan. 31, 1989

Sheet 4 of 4

D299,666



F I G - 7

5 (12-80)

U. S DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

January 22, 1990  
(Date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office  
of U.S. Patent Design 292,009.

By authority of the  
COMMISSIONER OF PATENTS AND TRADEMARKS

*Ed. Fane*

Certifying Officer.

**United States Patent** [19]  
**Harrod**

[11] Patent Number: Des. 292,009  
[45] Date of Patent: .. Sep. 22, 1987

[54] RIDING TOY

[75] Inventor: Lawrence R. Harrod, Fort Wayne,  
Ind.

[73] Assignee: Krausco Manufacturing, Inc., San  
Francisco, Calif.

[80] Term: 14 Years

[21] Appl. No.: 738,880

[22] Filed: May 29, 1985

[52] U.S. Cl. .... D21/76

[58] Field of Search ..... D21/71, 73, 76, 78,  
D21/77, 79, 80; D12/110, 111, 112, 280/1.11  
R. 1.193, 87.01, 87.02

[56] References Cited

**U.S. PATENT DOCUMENTS**

D 58,259 6/1921 Phillips ..... D21/80  
D. 261,784 11/1981 Fisher ..... D21/78

D 276,034 10/1984 Makra et al. .... D12/110  
D 285,947 9/1986 Blumenthal ..... D21/76  
3,116,073 12/1963 Ott ..... 280/87.02 R

Primary Examiner—Charles A. Rademaker  
Attorney, Agent, or Firm—Kotsch, Hartwell &  
Dickinson

[57] **CLAIM**

The ornamental design for a riding toy, as illustrated  
and described.

**DESCRIPTION**

FIG. 1 is a side perspective view of a riding toy show-  
ing my new design;

FIG. 2 is a right side elevational view thereof;

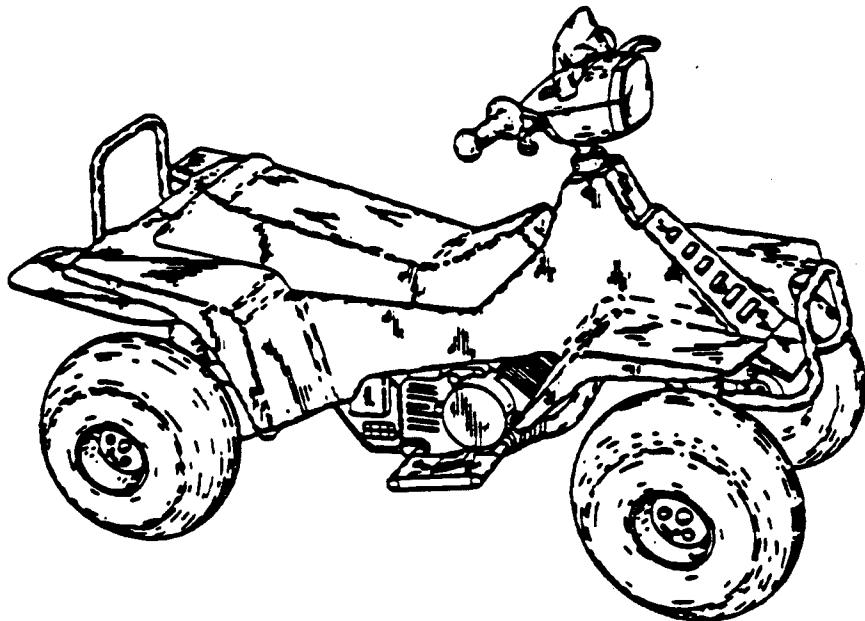
FIG. 3 is a left side elevational view thereof;

FIG. 4 is a front elevational view thereof;

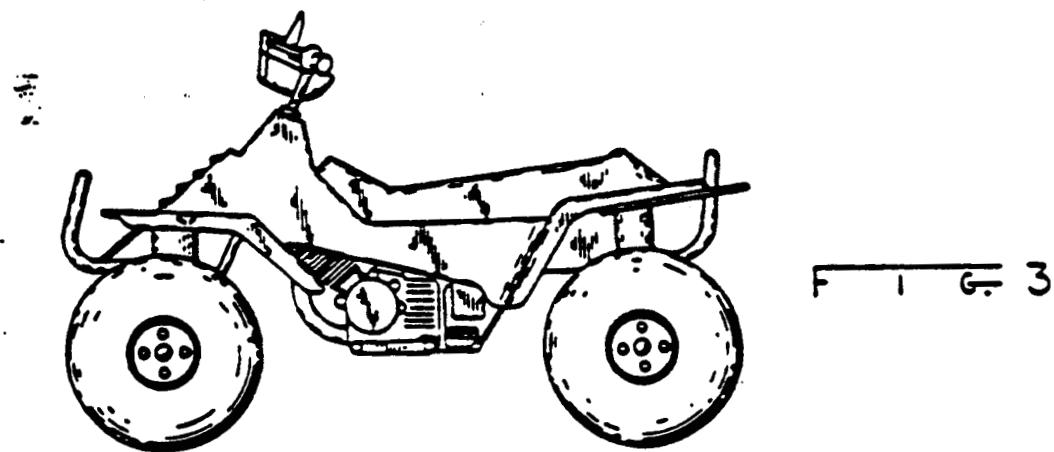
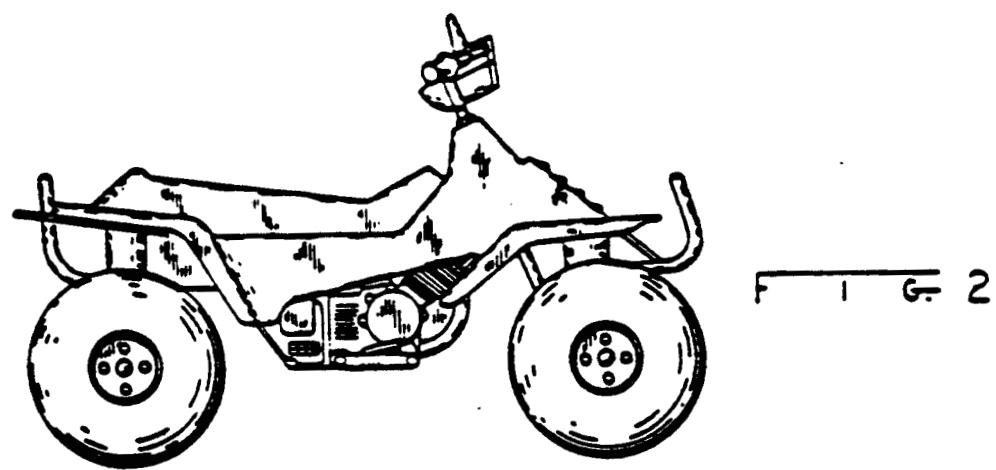
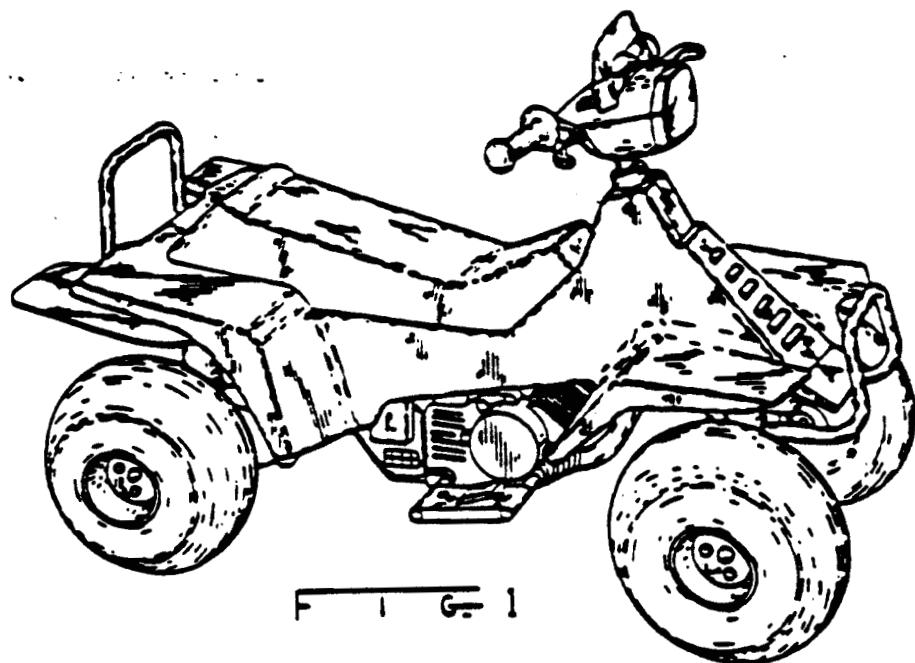
FIG. 5 is a rear elevational view thereof;

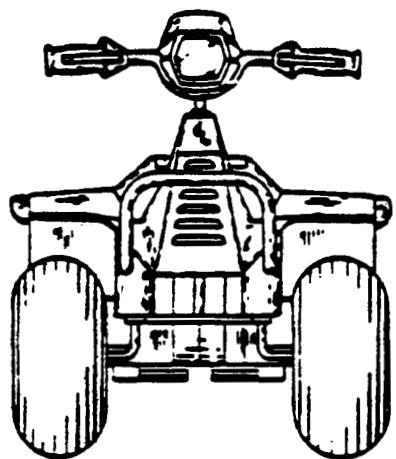
FIG. 6 is a top plan view thereof; and,

FIG. 7 is a bottom plan view thereof.

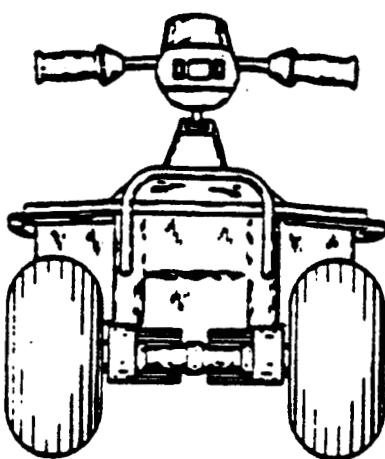


U.S. Patent Sep. 22, 1987 Sheet. 12 Des. 292,009

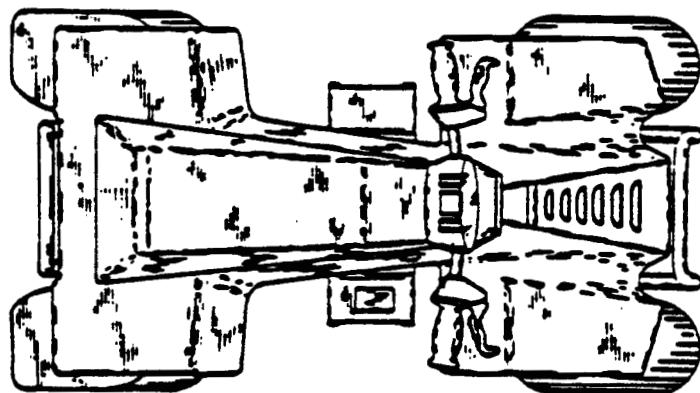




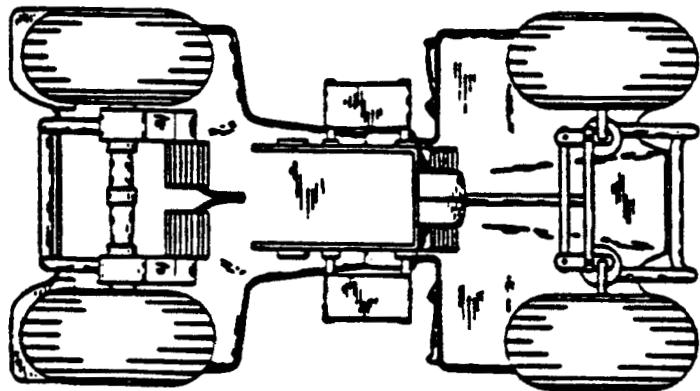
F I G. 4



F I G. 5



F I G. 6



F I G. 7

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

In the Matter of

CERTAIN BATTERY-POWERED  
RIDE-ON TOY VEHICLES  
AND COMPONENTS THEREOF

Inv. No. 337-TA-314

MOTION BY COMPLAINANT  
KRANSCO FOR SUMMARY OF DETERMINATION

FILED ON BEHALF OF COMPLAINANT:

KRANSCO  
160 Pacific Avenue  
San Francisco, California 94123  
(415) 433-8350

COUNSEL FOR COMPLAINANT:

Stuart E. Benson  
James B. Lewis  
David A. Miller  
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Three Embarcadero Center  
San Francisco, California 94111  
(415) 393-2000

RESPONDENT:

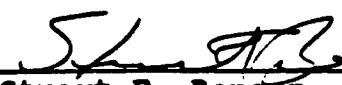
CHIEN TI ENTERPRISE  
CO., LTD.  
No. 13, Lane 227  
Fu Ying Road  
Hsin-Chuang  
Taipei, Taiwan  
Republic of China

Complainant Kransco, pursuant to 19 C.F.R. § 210.50(a), moves for summary determination in its favor upon all of the issues to be determined in this investigation. The Memorandum of Points and Authorities, attached hereto, along with the Affidavits and Exhibits attached to it, establish that there is no genuine issue as to any material fact and that Kransco is entitled to a summary determination as a matter of law. Kransco therefore requests that an order of summary determination be issued pursuant to 19 C.F.R. § 210.50(f) on all issues in this investigation.

Dated: October 16, 1990

Respectfully submitted,  
McCUTCHEON, DOYLE, BROWN & ENERSEN

By:

  
\_\_\_\_\_  
Stuart E. Benson  
Counsel for Complainant  
Kransco

MOTION BY COMPLAINANT  
KRANSCO FOR SUMMARY OF DETERMINATION

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

In the Matter of

CERTAIN BATTERY-POWERED  
RIDE-ON TOY VEHICLES  
AND COMPONENTS THEREOF

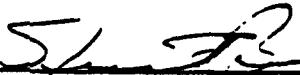
)  
Inv. No. 337-TA-314  
)  
)  
)

CERTIFICATE OF SERVICE

I, Stuart E. Benson, hereby certify that copies of the Motion by Complainant Kransco for Summary Determination, were served by hand upon the Administrative Law Judge, Janet D. Saxon (2 copies), and upon the following parties on October 16, 1990 as indicated below:

Daniel Morgan Duty  
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International Trade Commission  
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Hsin-Chuang  
Taipei, Taiwan  
Republic of China  
(Service by Air Courier)



Stuart E. Benson

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

---

In the Matter of )  
CERTAIN BATTERY-POWERED )  
RIDE-ON TOY VEHICLES )  
AND COMPONENTS THEREOF )  
)  
Inv. No. 337-TA-314

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSCO'S MOTION FOR SUMMARY DETERMINATION  
19 C.F.R. § 210.50

---

FILED ON BEHALF OF COMPLAINANT:

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San Francisco, California 94123  
(415) 433-8350

COUNSEL FOR COMPLAINANT:

Stuart E. Benson  
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(415) 393-2000

RESPONDENT:

CHIEN TI ENTERPRISE  
CO., LTD.  
No. 13, Lane 227  
Fu Ying Road  
Hsin-Chuang  
Taipei, Taiwan  
Republic of China

[ PUBLIC VERSION ]

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF FACTS . . . . .	1
A. Kransco And The Subject Patents And Products . . . . .	1
B. Chien Ti And Its Infringing Products . . . . .	4
C. Procedural Background . . . . .	4
II. ARGUMENT . . . . .	6
A. There Is No Genuine Issue As to Any Material Fact That Chien Ti's Activities With Respect To Its Jeep And Racer Models Constitute A Violation Of 19 U.S.C. § 1337 . . . . .	6
1. Chien Ti Has Imported And Sold For Importation Into The United States Its Jeep And Racer Models . . . . .	7
2. The Chien Ti Jeep And Racer Infringe The Kransco Patents . . . . .	9
a. The Chien Ti Jeep Infringes The '666 (Kransco Jeep Design) Patent . . . . .	10
b. The Chien Ti Racer Infringes The '009 (Kransco Suzuki Design) Patent . . . . .	14
c. The Chien Ti Jeep Infringes The '958 (Two-Part Body) Patent . . . . .	17
d. The Chien Ti Jeep Infringes The '263 (Power Lock Brake) Patent . . . . .	18
e. The Chien Ti Racer Infringes The '646 (Dual Control Power Pedal) Patent . . . . .	19

B. There Exists a Domestic Industry, As Defined In 19 U.S.C. § 1337(a)(3), Relating To Battery-Powered Ride-On Toy Vehicles Protected By The Kransco Patents . . . . .	21
1. Kransco Has Made Significant Investment In Plant And Equipment Relating To Ride-On Toy Vehicles Covered By The Kransco Patents . . . . .	21
a. Investment In Fort Wayne Plant . . . . .	21
b. Investment In Equipment . . .	23
2. Kransco Employs Significant Human Labor In Connection With The Models At Issue . . .	24
3. Kransco Has Made A Substantial Investment In The Exploitation Of The Kransco Patents . . . .	25
4. Kransco Has Made A Substantial Investment In The Exploitation Of The '646 Patent . . . . .	27
III. CONCLUSION . . . . .	29

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
Gorham Company v. White, 81 U.S. (14 Wall.) 511 (1872) . . . . .	11,12,15
Graver Tank & Manufacturing Co. v. Linde Air Products Co., 339 U.S. 605 (1950) . . .	17,19,20
Lannom Manufacturing Company, Inc. v. U.S. International Trade Commission, 799 F.2d 1572 (Fed. Cir. 1986) . . . . .	10
Litton Systems, Inc. v. Whirlpool Corporation, 728 F.2d 1423 (Fed. Cir. 1984) .	13,16
Paper Converting Mach. Co. v. FMC Corp., 409 F.2d 344 (7th Cir.) cert. denied 396 U.S. 877 (1969) . . . . .	17
Syntex Pharmaceuticals International, Ltd. v. K-Line Pharmaceuticals, Ltd., 721 F. Supp. 653 (D.N.J. 1989) app. dismissed, 905 F.2d 1525 (Fed. Cir. 1990) . . . . .	10,17,19
<u>STATUTES AND CODES</u>	
19 C.F.R. § 210.50 . . . . .	1,6
19 C.F.R. § 210.50(b) . . . . .	7
19 C.R.F. § 210.50(e) . . . . .	9
19 U.S.C. § 1337 . . . . .	4,6,7,9 10,29
19 U.S.C. § 1337(a)(1)(B) . . . . .	5,6,21
19 U.S.C. § 1337(a)(2) . . . . .	5,6,21
19 U.S.C. § 1337(a)(3) . . . . .	7,21 27,28
35 U.S.C. § 112 . . . . .	10



Complainant Kransco submits this brief in support of its motion pursuant to 19 C.F.R. § 210.50 for summary determination of all issues to be determined in this investigation.

### I. STATEMENT OF FACTS

#### A. Kransco And The Subject Patents And Products

Complainant Kransco is a San Francisco-based manufacturer and marketer of toys and recreational products. Among the products it manufactures and sells are battery-powered ride-on toy vehicles for children. All of Kransco's ride-on toy vehicles are manufactured by its Power Wheels, Inc. division and sold under the Power Wheels® trademark. Power Wheels, Inc. is based in Fort Wayne, Indiana, and has a large manufacturing facility there.

Kransco is the owner by assignment of the five patents at issue here. The patents, hereafter collectively referred to as the "Kransco patents," are these:

(1) U.S. Design Patent No. D 299,666. The '666 patent covers the ornamental design, including the configuration and surface ornamentation, of the Kransco Jeep toy vehicle.

(2) U.S. Design Patent No. D 292,009. The '009 patent covers the ornamental design, including the configuration and surface ornamentation, of the Kransco

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

Suzuki Quad Racer (the Kransco "Suzuki" or "Quad Racer") toy vehicle.

(3) U.S. Patent No. 4,709,958. The invention covered by the '958 patent is a two-part body for a child's riding toy.

(4) U.S. Patent No. 4,558,263. The invention covered by the '263 patent is the incorporation of a cost-effective dynamic braking system in a child's battery-powered ride-on toy, and the circuitry arrangement for such a braking system. The embodiment of this invention is the so-called "power lock brake."

(5) U.S. Patent No. 4,639,646. The invention covered by the '646 is the so-called "dual control power pedal," comprising a cost-effective system of motor-control switches and circuitry design, which enables the toy vehicle to be driven forward at different speeds but limits the speed in reverse, and for safety purposes requires the child to be fully and properly aboard the vehicle before it can be put into motion.<sup>1</sup>

---

<sup>1</sup> Certified copies of each of the Kransco patents and of the assignments of the patents to Kransco were submitted with Kransco's Complaint as Exhibits 1 through 16. For ease of reference, copies of these patents and assignments are submitted herewith in the Appendix to this memorandum.

Samples of the Kransco and Chien Ti vehicles to which the patents pertain were submitted with the Complaint as Physical Exhibits 1-4. Declaration of Paul Shapiro, ¶ 4; Declaration of Stuart E. Benson, ¶ 9.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
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Kransco currently manufactures 15 models of battery-powered ride-on toy vehicles. Six of the 15 utilize at least one of the Kransco patents, including the Kransco Suzuki; the Kransco Jeep and three slight variations of the Jeep called the Safari, Laredo, and Renegade; and the Kransco Fire Truck. (Declaration of Thomas Beyer ("Beyer Decl."), ¶ 4).

An actual Kransco Jeep was submitted with Kransco's complaint as Physical Exhibit 1. The Kransco Jeep utilizes two of the five Kransco patents, namely, the '666 (two-part body) and the '958 (Jeep design) patents. See Declaration of Jerry Wise ("Wise Decl."), ¶ 4.<sup>2</sup>

An actual Kransco Suzuki was submitted with Kransco's complaint as Physical Exhibit 2. The Kransco Suzuki utilizes two of the Kransco patents, namely the '009 (Suzuki design) and '263 (power lock brake) patents. Wise Decl., ¶ 4.

In addition, until February 1989 the Kransco Jeep (as well as other models) utilized the dual control power pedal covered by the '646 patent. Since that time, Kransco has continued to maintain in inventory, sell and service dual control power pedal units for replacement in the Jeep and in several other older models equipped with the device.<sup>3</sup> Models

---

<sup>2</sup> In addition, the Kransco Fire Truck utilizes a two-part body which is covered by the '958 patent. Wise Decl., ¶ 4.

<sup>3</sup> Besides the Jeep, the following Kransco models at one time contained the patented dual control power pedal: the High Rider, the Big Foot, the Hot Rod, the Classic Convertible and the Gus Guzzler. The dual control power pedal was used in these models until February, 1989. Beyer Decl., ¶ 13.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

containing the dual control power pedal device are still being sold at the retail level. Beyer Decl., ¶15.

B. Chien Ti And Its Infringing Products

Respondent Chien Ti is a Taipei, Taiwan-based corporation engaged in the manufacture and sale, including exportation from Taiwan, of battery-powered ride-on toy vehicles. (Chien Ti Response to Complaint, ¶ 1). Among the models it manufactures and sells are the Chien Ti "Jeep"<sup>4</sup> and the Chien Ti "Racer," both of which are sold under the name "Chipper Automatic Mini Car." (Ibid.) Actual copies of the Chien Ti Jeep and Racer were submitted with Kransco's Complaint as Physical Exhibits 3 and 4, respectively.

As discussed in detail below, the Chien Ti Jeep is nearly identical to the Kransco Jeep, and infringes three of the Kransco patents, namely the '666 (design), '958 and '263 patents. The Chien Ti Racer is virtually identical to the Kransco Suzuki, and infringes the '009 (design) and '646 patents.

C. Procedural Background

On May 15, 1990, Kransco filed a complaint pursuant to 19 U.S.C. § 1337, based on the importation and the sale for importation into the United States by Chien Ti, and the sale after importation, of infringing Chien Ti Jeep and Racer

---

<sup>4</sup> Chien Ti's Jeep model is so named in its marketing material. However, the name "Jeep" does not appear on the vehicle itself.

vehicles. For relief, Kransco requests an order excluding from entry into the United States battery-powered ride-on toy vehicles, and their components, which infringe one or more of the Kransco patents, and a cease and desist order or orders halting the importation, sale for importation, and sale after importation by Chien Ti of infringing toy vehicles and their components. On June 8, 1990, Kransco amended its complaint to reflect newly discovered evidence of direct shipments by Chien Ti of its Jeep vehicles to the United States.

On June 12, 1990, the Commission issued a Notice of Investigation to determine whether there is a violation of Section 337(a)(1)(B).<sup>5</sup> Chien Ti responded to the complaint, denying importation or sale for importation, on about August 2, 1990, and has also responded, albeit tardily and only

---

<sup>5</sup> Specifically, the Commission ordered, in part, that an investigation be instituted to determine:

Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain battery-powered ride-on toy vehicles and components thereof by reason of alleged infringement of: (1) Claim 1 of U.S. Letters Patent Des. 299,666, (2) claims 1, 2, 3, 4, 5, and 6 of U.S. Letters Patent 4,709,958, (3) claims 1, 2, 3, and 4 of U.S. Letters Patent 4,639,646, (i) claim 1 of U.S. Letters Patent Des. 292,009, and (5) claims 1, 2, 4, 8, 9, 16, and 19 of U.S. Letters Patent 4,558,283, and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSCO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

partially, to interrogatories and document requests by Kransco and O.U.I.I. Staff. Kransco now moves pursuant to 19 C.F.R. § 210.50 for summary determination in its favor as to all issues to be determined in this investigation. As we demonstrate below, there is no genuine issue as to any material fact relevant to the determination that Chien Ti's activities with respect to its Jeep and Racer vehicles constitute a violation of Section 337.

## II. ARGUMENT

### A. There Is No Genuine Issue As To Any Material Fact That Chien Ti's Activities With Respect To Its Jeep And Racer Models Constitute A Violation Of 19 U.S.C. § 1337

Section 337, 19 U.S.C. § 1337, provides that it is unlawful to (1) import into the United States, sell for importation, or sell within the United States after importation articles that (2) infringe a valid and enforceable United States patent, if (3) an industry in the United States, relating to the articles protected by the patent, exists or is in the process of being established. 19 U.S.C. §§ 1337(a)(1)(B) and (a)(2). The investigation in this case seeks to determine whether there has been a violation of this portion of Section 337 with respect to the Chien Ti Jeep and Suzuki and the Kransco patents.

The Commission Regulations provide that summary determination must be granted "if the pleadings and any depositions, admissions on file and affidavits show there is no genuine issue as to any material fact and that the moving party

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

is entitled to summary determination as a matter of law."

19 C.F.R. § 210.50(b). In this case, the record reveals that there is no genuine issue of fact that Chien Ti's actions with respect to its Jeep and Racer models constitute a violation of Section 337. In particular, the record shows that:

(1) Chien Ti has imported and sold for importation into the United States both its Jeep and its Racer toy vehicles;

(2) these models together infringe all of the Kransco patents at issue; and

(3) a domestic industry, as defined under 19 U.S.C. § 1337(a)(3), exists in connection with the production and sale by Kransco of ride-on toy vehicles utilizing the Kransco patents.

Accordingly, Kransco is entitled as a matter of law to summary determination of all issues to be determined in this investigation. A general exclusion order against all infringing toy vehicles and a cease and desist order against Chien Ti should be issued.

1. Chien Ti Has Imported And Sold For Importation Into The United States Its Jeep And Racer Models

By its own admission, Chien Ti has both imported and sold for importation into the United States its Jeep and Racer models. Chien Ti has admitted shipping both its Jeep and Racer vehicles directly to J & L Meyer, Inc., a New Jersey toy retailer. Chien Ti's Response to Complaint, ¶ 3, and its

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
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Response to Interrogatory No. 61 of Kransco's First Set of Interrogatories to Chien Ti (attached as Exhibits 5 and 2 to the Declaration of Stuart E. Benson ("Benson Decl."), filed herewith). The Chien Ti vehicles were shipped by air from Taipei to New York. Declaration of Paul Shapiro (Shapiro Decl.) ¶ 4 and Exhibits 3, 4 and 5 thereto.

Chien Ti also sold and imported its Jeep vehicles directly to Manley Toys, USA, Ltd. ("Manley USA"), in New York City. Alfred J. McCarville, the President of Manley USA testified [

] A. McCarville Depo. Tr., at 8-15, attached as Exhibit 1 to the Benson Decl.

In addition to direct importation, Chien Ti has sold its Jeep and Racer vehicles [

] See Response by Chien Ti to Interrogatory No. 13(a) of the Commission Staff's First Set of Interrogatories, attached to the Benson Decl. as Exhibit 3.  
[

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

] Thus, in a December 21, 1989 facsimile to Mr. Shapiro, Chien Ti's president, Fantine Chang, said that Chien Ti vehicles were shipped by a Taiwanese trading company to the ports of Miami, San Francisco and Long Beach, and stated that Chien Ti was searching for a United States buyer to "promote [its] products well." See Exhibits 6 and 7 to Shapiro Decl.

In short, by its own admission and otherwise, Chien Ti indisputably has both imported and sold for importation into the United States its Jeep and Racer vehicles. Chien Ti's mere general denials do not raise a genuine issue on that score. 19 C.F.R. § 210.50(e). Summary determination should be granted on the issue of importation.

2. The Chien Ti Jeep And Racer Infringe  
The Kransco Patents

The second element of a Section 337 violation in this case is the infringement by the accused products of a valid and enforceable United States patent. Each of the Kransco patents and its individual claims is presumed valid pursuant to

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

35 U.S.C. § 282. This statutory presumption is conclusive of a patent's validity in actions before the Commission if no defense of invalidity is raised. See Lannom Manufacturing Company, Inc. v. U.S. International Trade Commission, 799 F.2d 1572 (Fed. Cir. 1986). In this case, validity has not been challenged.<sup>6</sup> Accordingly, the Kransco patents must be considered valid as a matter of law. Id.

The sole issue before the Commission as to this element of Section 337 is whether or not Chien Ti vehicles infringe the Kransco patents. As we demonstrate below, they do. Accordingly, summary determination should be granted in favor of Kransco on the issue of infringement as to all of the Kransco patents. See, e.g., Syntex Pharmaceuticals International, Ltd. v. K-Line Pharmaceuticals, Ltd., 721 F. Supp. 653 (D.N.J. 1989) (motion for summary judgment granted on finding of literal infringement), app. dismissed, 905 F.2d 1525 (Fed. Cir. 1990).

a. The Chien Ti Jeep Infringes The '666 (Kransco Jeep Design) Patent

The '666 patent describes the design of a ride-on toy vehicle. The patent is embodied in the Kransco Jeep. (Wise Decl. ¶ 10) The Chien Ti Jeep infringes the '666 patent.

---

<sup>6</sup> See Chien Ti's Response to Complaint (Benson Decl., Exh. 5) (no allegation of invalidity); Chien Ti's Answers relating to Commission Investigative Staff's First Set of Interrogatories, No. 13 (Benson Decl., Exh. 3); Chien Ti's Responses to Kransco's First Set of Interrogatories, No. 31 (Benson Decl., Exh. 6).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

The Supreme Court established the test for infringement of design patents in Gorham Company v. White, 81 U.S. (14 Wall.) 511, 528 (1872):

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

A comparison of the Chien Ti Jeep to the '666 patent reveals that the design of the Chien Ti Jeep is substantially similar to the design taught in the patent. The vehicle's design embodies almost all of the features of the patent, such that the overall effect of the design is the same as that embodied in the patent.

This can be seen clearly by comparing the Chien Ti Jeep to the Kransco Jeep, which embodies the patent.<sup>7</sup> The overall effect of the Chien Ti Jeep is strikingly similar to that of the Kransco Jeep. Compare Physical Exhibit 1 with Physical Exhibit 3. Essentially all of the individual features of the Chien Ti Jeep are identical or very similar to those of the Kransco Jeep. (Wise Decl. ¶ 11) The only visible

---

<sup>7</sup> The comparison between the two toy vehicles is appropriate in determining infringement of the '666 patent, because the Kransco Jeep reflects the patent except that the shape of the supporting frame is somewhat different. (Wise Decl., ¶ 10) That detail is of no consequence in the overall design and appearance of the toy vehicle.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
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difference in design is in the front of the two vehicles. Even here, however, the Chien Ti Jeep embodies the essential feature of the Kransco Jeep: a grill with vertical bars, albeit of a somewhat different configuration. This will not avoid the confusion caused by the overall similarity of the two vehicles.

It is well settled that differences in some individual features from the patented design do not avoid infringement of the patent. The test of infringement is the overall effect. The Supreme Court in Gorham made this clear in applying the infringement test to the facts before it in that case:

Still, though variances in the ornament are discoverable, the question remains, is the effect of the whole design substantially the same? Is the adornment in the White design used instrumentally to produce an appearance, a distinct device, or does it work the same result in the same way, and is it, therefore, a colorable evasion of the prior patent, amounting at most to a mere equivalent?

81 U.S. (14 Wall.) at 530. There is no doubt about this here. The Chien Ti Jeep has substantially the same design and is in fact strikingly similar to the Kransco Jeep.<sup>8</sup>

---

<sup>8</sup> The striking similarity is obviously the product of Chien Ti's having simply copied the Kransco Jeep. Perhaps the most telling evidence of this is the fact that the Chien Ti Jeep incorporates [ ] of the Kransco Jeep's body construction. Thus, the Kransco Jeep and the Chien Ti Jeep each contain grooves in the rear body part (as described in claim 7 of '958 patent). The grooves in the Kransco Jeep were [ ] included [ ] in order to accommodate supporting rods from the frame as described in

(Footnote continued on next page.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

Chien Ti's infringement of the '666 patent is further demonstrated by examining the novelty embodied in the Kransco Jeep. The novelty of the '666 patent is appropriated by the Chien Ti Jeep.

The point-of-novelty inquiry, discussed in Litton Systems, Inc. v. Whirlpool Corporation, 728 F.2d 1423, 1444 (Fed. Cir. 1984), asks whether the accused device appropriates the novelty which distinguishes the patented device from the prior art. The Kransco Jeep was designed to give a semblance of realism by using features drawn from several models of full-size Jeeps and modified to create the desired effect. (Wise Decl., ¶ 9.) The novelty of the design is this combination of features in a ride-on toy vehicle. Chien Ti has copied this combination of features. In doing so, it has appropriated the novelty which distinguishes the '666 patent from prior art.<sup>9</sup> The appropriated novelty is the

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(Footnote continued from preceding page.)

claim 7 of the '958 patent. [

] and the Kransco Jeep includes them to this day. Wise Decl., ¶ 7. The fact that the Chien Ti Jeep also includes these [ ] grooves is compelling evidence that Chien Ti simply copied the Kransco Jeep.

<sup>9</sup> Kransco contends that the full-size Jeep vehicle is not material prior art in the patent sense, since a functional full-size vehicle is quite different from a toy for children. However, it does provide useful points of comparison, since the toys are intended to create a semblance of realism.

(Footnote continued on next page.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

ornamental design of the Kransco Jeep, including its configuration and surface ornamentation, which is purely nonfunctional. There are countless designs possible for a ride-on toy vehicle. Hence, there is no functional reason for Kransco's design to be copied. This is demonstrated in the Wise declaration at ¶ 12 and Exhibit 2 thereof.

There is no issue as to who are "the ordinary observers" of battery-operated ride-on toy vehicles. They are children three to seven years old and their parents and relatives. They choose ride-on toy vehicles based on the overall appearance of toys they have seen in advertisements. Declaration of E. Alexander Glover, ¶ 4. These consumers are certain to be confused by the Chien Ti Jeep. In many cases they will not see the two toys side by side. Their only guide when they see the Chien Ti Jeep will be their memories, and when they do, they will see an almost exact copy of the Kransco Jeep.

b. The Chien Ti Racer Infringes The '009 (Kransco Suzuki Design) Patent

The '009 patent describes the design of a ride-on toy vehicle. The patent is embodied in the Kransco Suzuki Quad Racer. (Wise Decl. ¶ 14). The Chien Ti Racer infringes the '009 patent.

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(Footnote continued from preceding page.)

While some of the features listed above may be present on other vehicles or toy vehicles, the novelty in Kransco's Jeep design is the unique combination of the listed features, in combination with the other features of the vehicle, in a distinctive and attractive design for a ride-on toy vehicle.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

Applying the Gorham standard, a comparison of the Chien Ti Racer to the '009 patent reveals that the design of the Chien Ti Racer is substantially similar to the design taught in the patent. The Chien Ti vehicle's design embodies almost all of the features of the patent, and the overall effect of the design is the same as that embodied in the patent.

This can be seen clearly by comparing the Chien Ti Racer to the Kransco Quad Racer, which embodies the patent.<sup>10</sup> They are identical in their distinctive and attractive overall appearance. (Compare Physical Exhibit 2 with Physical Exhibit 4). Essentially all of the individual features of the Chien Ti Racer are identical or very similar to those of the Kransco Suzuki. (Wise Decl. ¶ 15). The few features that are different on the Chien Ti Racer do nothing to change the overall appearance of the toy and consequently will not prevent confusion between the two vehicles. The Chien Ti Racer has substantially the same design as, and is strikingly similar to, the Kransco Suzuki. As with the Jeep, consumers are children three to seven years old and their parents and relatives, who base their decisions on the general appearance of toys they have seen advertised. (Glover Decl. ¶ 4). They are certain to be confused by this almost exact copy.

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<sup>10</sup> A comparison between the two toy vehicles is appropriate in determining infringement of the patent because the Kransco Suzuki reflects the patent in every respect except the rear roll bar, a small windshield, and somewhat larger wheels (Wise Decl. ¶ 14), minor details that do not alter the overall design and appearance of the vehicle.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

Chien Ti's infringement of the '009 patent is further confirmed by examining the novelty embodied in the Kransco Suzuki as discussed in Litton. The novelty of the '009 patent is appropriated by the Chien Ti Racer. The Kransco Suzuki Quad Racer was designed to give a semblance of realism by using features drawn from various makes of all-terrain vehicles and modified to create the desired effect. (Wise Decl., ¶ 13). The novelty of the design is this combination of features in a ride-on toy vehicle. Chien Ti has copied this combination of features in a ride-on toy vehicle. In doing so, it has appropriated the novelty which distinguishes the '009 patent from prior art.<sup>11</sup> The appropriated novelty is the ornamental design of the Kransco Suzuki, including its configuration and surface ornamentation, which is purely nonfunctional. There are countless designs possible for a ride-on toy vehicle. Hence, there is no functional reason for Kransco's design to be copied. This is demonstrated in the Wise declaration at ¶ 16 and Exhibit 2 thereof.

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<sup>11</sup> As noted earlier (n. 9), Kransco contends that the full-size Suzuki vehicle is not material prior art in the patent sense, since a functional full-size vehicle is quite different from a toy for children. As with the Kransco Jeep, while some features of the Kransco Suzuki may be present on other vehicles or toy vehicles, the novelty in Kransco's Suzuki design is the unique combination of the features in a distinctive and attractive design for a ride-on toy vehicle.

c. The Chien Ti Jeep Infringes The '958 (Two-Part Body) Patent

The '958 patent describes a novel two-part body for a child's ride-on toy vehicle. The Chien Ti Jeep literally infringes claims 1 through 6 of the '958 patent.<sup>12</sup> There is literal infringement if an accused device falls clearly within the terms of the patent's claims, such that the claims read on the accused structures. Graver Tank & Manufacturing Co. v. Linde Air Products Co., 399 U.S. 605, 607 (1950) ("In determining whether an accused device . . . infringes a valid patent, resort must be had in the first instance to the words of the claim. If an accused matter falls within the claim, infringement is made out and that is the end of it."); Paper Converting Machine Co. v. FMC Corp., 409 F.2d 344, 353-54 (7th Cir. cert. denied, 396 U.S. 877 (1969)); Syntex Pharmaceuticals, supra, 721 F. Supp. at 660, 665 (citing Graver Tank).

In this case, claims 1 through 6 of the '958 patent literally read on the Chien Ti Jeep. Chien Ti has admitted this with respect to Claim 1. See Chien Ti's Response to Interrogatory Nos. 19-24 of the Commission Staff's Second Set of Interrogatories (Benson Decl., Exhibit 7). It is equally true with respect to claims 2 through 6, in addition to claim 1, as shown in Mr. Wise's declaration. Wise Decl., ¶¶ 5-6.

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<sup>12</sup> The Kransco Jeep embodies the invention as described in these claims. See Wise Decl., ¶ 10.

d. The Chien Ti Jeep Infringes the  
'263 (Power Lock Brake) Patent

The invention covered by the '263 patent is a cost-effective dynamic braking system in a battery-powered ride-on toy and the circuitry arrangement for such a braking system. The Chien Ti Jeep infringes Claims 1, 2, 4, 8, 9, 16, and 19 of the '263 patent.<sup>13</sup>

Chien Ti has admitted that Claim 1 of the '263 patent literally reads on the braking system and circuitry in its Jeep model. See Chien Ti's Answers relates to Commission Investigative Staff's Second Set of Interrogatories Nos. 25-30 (Benson Decl., Exhibit 7). With respect to the remaining claims, the Declaration of Wallace G. Walter ("Walter Decl."), ¶¶ 12-30, and Exhibits 1 and 3 thereto, demonstrates that each element of these claims (as well as claim 1) is embodied in the Chien Ti Jeep's braking system and its electrical circuitry. The Chien Ti Jeep therefore literally infringes Claims 1, 2, 4, 8, 9, 16, and 19 of the '263

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<sup>13</sup> The Kransco Suzuki embodies the elements of each of these claims. See Wise Decl., ¶ 4.

patent. Graver Tank, 339 U.S. at 607; Syntex Pharmaceuticals, 721 F. Supp. at 605. <sup>14</sup>

e. The Chien Ti Racer Infringes The  
'646 (Dual Control Power Pedal)  
Patent

The '646 patent covers certain electrical circuitry for high and low speed and forward and reverse operation of a battery-powered ride-on toy in conjunction with a dynamic braking mechanism. The Chien Ti Racer model infringes Claims 1, 2, 3 and 4 of the '646 patent under the doctrine of equivalents.<sup>15</sup>

Chien Ti has admitted that, with the exception of the location in the circuit of the power switch described in the patent, the electrical circuitry contained in its Racer model embodies that described in Claim 1 of the '646 patent. See Chien Ti's Answers Relating to Commission Investigative Staff's Second Set of Interrogatories Nos. 31-38 (Benson Decl., Exhibit 7). This is also true with respect to Claims 2, 3 and 4. Walter Decl., ¶¶ 31-50 and Exhibits 2 and 4.

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<sup>14</sup> The only arguable difference between the elements in Claims 16 and 19 of the '263 patent and the braking control circuitry employed by the Chien Ti Jeep is this: the patent describes the use of a "hand grip controllable" (Claim 16) or "manually operable" (Claim 19) switch to connect the batteries to the motor; the Chien Ti Jeep uses a switch activated by a foot pedal. However, the foot pedal switch is literally "hand grip controllable" and "manually operable." Walter Decl., ¶ 23. Thus, the Chien Ti Jeep literally infringes these claims.

<sup>15</sup> Kransco's dual control power pedal device incorporates these four claims of the '646 patent. See Wise Decl., ¶ 4.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

The difference in location of the power switch in the patent and in the Chien Ti Racer is that in the patent the switch is located in the circuit between the batteries and the forward/reverse switch, while in the Chien Ti Racer it is located between the motors and the forward/reverse switch. This difference does not obviate infringement. To the contrary, the two locations are substantial equivalents. In both the patent and the Racer, the power switch is the means to supply or cut off power to the motors. Its precise location in the circuit is of no practical significance to that function since it will complete or interrupt the circuit wherever it is found. Thus, the arrangement in the Racer performs substantially the same function in substantially the same way to obtain the same result as the arrangement in the patent claims. Walter Decl., ¶¶ 48-50. Therefore, the Chien Ti Suzuki infringes the '646 patent under the doctrine of equivalents. Graver Tank, 389 U.S. at 608.

\* \* \* \*

In sum, the record shows that the Chien Ti Jeep infringes the relevant claims of the '666, '958 and '263 patents, and that the Chien Ti Racer infringes the relevant claims of the '009 and '646 patents. Accordingly, summary determination should be granted on the issue of infringement of each of the Kransco patents.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

B. There Exists A Domestic Industry, As Defined In 19 U.S.C. § 1337(a)(3), Relating To Battery-Powered Ride-On Toy Vehicles Protected By The Kransco Patents

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The final element of a violation of section 337(a)(1)(B) is the existence of a domestic industry relating to articles covered by the patents at issue.

19 U.S.C. § 1337(a)(2). Paragraph (a)(3) of section 337 states that a domestic industry within the meaning of paragraph (a)(2) shall be considered to exist if there is in the United States, with respect to the articles protected by the patents at issue, either:

- (1) significant investment in plant and equipment;
- (2) significant employment of labor or capital; or
- (3) substantial investment in the exploitation of the patents, including engineering, research and development, or licensing.

As we demonstrate below, Kransco meets the test of domestic industry under any or all of these three criteria with respect to each of the five patents at issue.

1. Kransco Has Made Significant Investment In Plant And Equipment Relating To Ride-On Toy Vehicles Covered By The Kransco Patents

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Kransco's investment in plant and equipment satisfies the first criterion.

a. Investment In Fort Wayne Plant

Kransco manufactures 15 different models of children's battery-powered ride-on vehicles, including the Jeep and Suzuki

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

models, at its Power Wheels® manufacturing facility in Fort Wayne, Indiana. Beyer Decl., ¶ 6. In 1989, revenues from Power Wheels® sales were [ ] Of that amount, [ ] or approximately [ ] of Power Wheels® total revenues was generated by the Jeep models (including the standard Jeep and Safari models),<sup>16</sup> while [ ] or approximately [ ] of 1989 total revenues were generated by the Suzuki models.<sup>17</sup> Beyer Decl., ¶ 5.

Kransco purchased the Fort Wayne facility for [ ] in 1988. Kransco has spent an additional [ ] renovating the facility. It is not possible to determine how much of these plant expenditures have been devoted to the production of the Jeep or Suzuki models [ ]

[ ] However, by [ ], approximately [ ] of the total [ ] spent on the plant and renovations to it can be attributed to the production of the Jeep and Suzuki models. Beyer Decl., ¶ 6.

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<sup>16</sup> Of the [ ] in total revenues generated by the Jeep models in 1989, [ ] were generated by the standard Jeep, and [ ] by the Jeep Safari model.

<sup>17</sup> Although other models besides the Jeep and Suzuki models utilize the Kransco patents, see Section I.A., above, for simplicity and clarity we focus on the Jeep and Suzuki models.

b. Investment In Equipment.

Kransco's new purchases of major equipment for its Fort Wayne manufacturing facility totalled [ ] in 1987, [ ] in 1988, [ ] in 1989, and [ ] in 1990, through June 30. Beyer Decl., ¶ 10. This equipment is used in the production of the models utilizing the patents at issue (Beyer Decl., ¶ 10) as well as for other models. It is not possible to determine how much of these expenditures have been devoted to the production of any given model. Ibid. However, Exhibit B to the Beyer Decl. sets forth estimates of the amount spent on major purchases of equipment for each of the models incorporating the Kransco patents derived by [

] Thus, for example, based on [ ] from 1987 through June 30, 1990 Kransco spent an estimated \$6,624,558 on equipment relating to production of the Jeep model and [ ] on equipment relating to the production of the Suzuki model. Ibid.

In addition, Kransco has spent a significant amount of money on tooling and retooling machinery specifically to produce each of the subject Power Wheels® models. Kransco does maintain this information on a model-by-model basis. Thus, for example, from 1986 through June 30, 1990, Kransco spent [ ] on tooling and retooling the for Jeep models and

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

[ ] in tooling and retooling for the Suzuki. Beyer Decl., ¶ 11. The amounts spent on tooling and retooling for each of the models incorporating the Kransco patents are set forth in Exhibit C to the Beyer Decl.

2. Kransco Employs Significant Human Labor In Connection With The Models At Issue

Kransco employs a significant number of people at its Fort Wayne facility, including [

] All of these employees perform work relating exclusively to Power Wheels® products. Beyer Decl., ¶ 12. Estimates of Kransco's human resources devoted annually to the production of each of the relevant models, [

] are set forth in Exhibit D to the Beyer Decl. For example, in 1989, Kransco employed the equivalent of [ ] employees exclusively to produce its Jeep models, and the equivalent of [ ] employees exclusively to produce the Suzuki model. Total estimated salary and payroll for the production of the Jeep and Suzuki models for 1989 was approximately [ ] for the Jeep models and [ ] for the Suzuki.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

3. Kransco Has Made A Substantial Investment In The Exploitation Of The Kransco Patents.

Kransco exploits the patents at issue through its Power Wheels® division; it does not license their use in the United States. Kransco does not maintain separate statistical data reflecting the amount of money spent to exploit any individual patent, including those at issue here. However, the patented inventions are integral parts of the models in which they are used, and Kransco has made a substantial investment exploiting each such model embodying the patents.

Thus, for example, for the years 1987, 1988 and 1989, Kransco's total operational and capital expenditures for its Fort Wayne Power Wheels® facility, including expenses for advertising and defective returns, were [

] respectively. Beyer Decl., ¶ 9.

[

] the portions devoted to Kransco's investment in exploiting the patents embodied in the Jeep and Suzuki (currently all of the Kransco patents except the '646 patent, which is used as a replacement part): 1987: [ ] ; 1988: [ ] ; 1989: [ ]. Except for a small allocated portion of Kransco's engineering-related expenses, these amounts do not include any operational and

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

capital expenditures for Kransco's headquarters and other facilities outside of Fort Wayne. Beyer Decl., ¶ 9.

Kransco also has an active research and development program for its ride-on toy vehicles. The main research and development facility is located in Fort Wayne. Kransco employs [ ] research and development persons there on a full-time basis, including [ ] degreed engineers. The Fort Wayne research and development facility covers approximately [ ] and includes [

]. In addition to these 14 full-time professional R&D employees, Kransco regularly employs consultants with expertise in [

] For the years 1987, 1988, and 1989, Kransco's product development expenses for the Fort Wayne facility were [ ] [ ] and [ ] respectively. The Fort Wayne research and development budget for 1990 is [ ]. Based on [

approximately [ ] of the current Fort Wayne research and development activities and expenditures relate to the Suzuki and Jeep models or their components. Beyer Decl., ¶ 16.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

**4. Kransco Has Made A Substantial  
Investment In The Exploitation Of The  
'646 Patent**

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Kransco has made and continues to make a substantial investment in the exploitation of the '646 patent within the meaning of Section 337(a)(3). Kransco used the dual control power pedal, which it manufactured in Fort Wayne, as original equipment in certain of its models until February, 1989.<sup>18</sup> Beyer Decl. ¶ 13. From 1985 through 1989, Kransco sold [ ] toy vehicles incorporating the dual control power pedal. Based on Kransco's standard costs for material and labor in producing the device, which was [ ] in 1989, Kransco spent approximately [ ] in producing dual control power pedal units during this period. Ibid.

Although it no longer manufactures the device, Kransco continues to maintain in inventory and to ship remaining dual control power pedal units for replacement in older models incorporating the device. [

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]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

] Some of the units are shipped under warranty, while the others are not. For those that are not covered by warranty, Kransco charges [ ] , depending on the model, for each unit, plus shipping charges. In 1989, Kransco shipped [ ] dual control power pedal replacement units. It has shipped [ ] units through July 31, 1990. Beyer Decl., ¶ 15.

Besides this replacement activity, prior models of Power Wheels® vehicles incorporating the dual control power pedal device are still being sold at the retail level. Beyer Decl., ¶ 15.

Accordingly, given Kransco's prior investment in labor and capital in producing the dual control power pedal and the vehicles incorporating the device, combined with the current activities relating to the sale and shipment of the device for replacement in older models and use in prior models, Kransco has made, and is continuing to make, a significant investment in exploiting the '646 patent within the meaning of Section 337(a)(3).

\* \* \* \*

In sum, by any of the measures set forth in 19 U.S.C. § 1337(a)(3), a domestic industry exists relating to the Kransco Power Wheels® ride-on toys covered by the Kransco

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
[PUBLIC VERSION]

patents. Therefore, the Commission should grant summary judgment in favor of Kransco on the issue of the existence of a domestic industry.

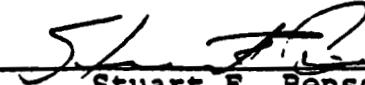
III. CONCLUSION

There is no genuine issue of material fact that Chien Ti's activities with respect to its Jeep and Racer models constitute a violation of 19 U.S.C. § 1337. Accordingly, the Commission should grant Kransco's motion for summary determination of all issues to be determined in this investigation.

Dated: October 15, 1990.

Respectfully submitted,

MCCUTCHEN, DOYLE, BROWN & ENERSEN

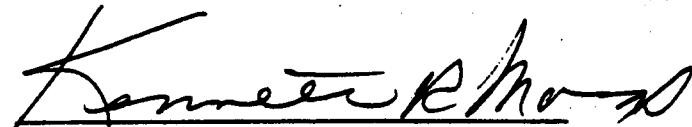
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
COMPLAINANT KRANSKO'S MOTION FOR SUMMARY DETERMINATION  
19 C.F.R. § 210.50



CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Public Version Initial Determination was served by hand upon Daniel M. Duty, Esq., and upon the following parties via first class mail, and air mail where necessary, on December 6, 1990.



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