UNITED STATES TARIFF COMMISSION

CONVERTIBLE GAME TABLES AND COMPONENTS THEREOF

Report on Investigation No. 337-34 Conducted Under the Provisions of Section 337 of Title III of the Tariff Act of 1930, as Amended

TC Publication 705
Washington, D.C.
December 1974

UNITED STATES TARIFF COMMISSION

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UNITED STATES TARIFF COMMISSION
Washington, D.C.

December 20, 1974

In the matter of an investigation with regard to the importation and domestic sale of certain convertible game tables and components thereof	Docket No. 34 Section 337 Tariff Act of 1930, as amended

INTRODUCTION

On October 26, 1972, ATI Recreation, Inc., of Miami Lakes, Fla., (now Ebonite Corp., successor), hereinafter referred to as complainant, 1/ filed a complaint with the United States Tariff Commission requesting relief under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), alleging unfair methods of competition and unfair acts in the importation and sale of certain convertible game tables. Complainant alleged that its U.S. Patent No. D223,539 and its trademark application for the trademark "TRIO" protect certain convertible game tables and that the importation and sale of convertible game tables by Armac Enterprises, Inc., and Sears, Roebuck & Co., both of Chicago, Ill., have the effect or tendency to destroy or substantially injure an efficiently and economically operated industry in the United States.

1/ The terms "complainant" and "respondent" frequently appear in this report. Commissioner Leonard wishes to enter the following: The use of these terms is limited to serving as a convenient means of identifying certain parties before the Commission and is not to be construed, by implication or otherwise, as an indication that the Commission proceedings are adjudicatory as opposed to factfinding.

Notice of complaint received and the institution by the Commission of a preliminary inquiry into the issues raised in this complaint was published in the Federal Register of November 17, 1972 (37 F.R. 24473). Interested parties were given until December 28, 1972, to file written views pertinent to the subject matter. On December 26, 1972, Armac Enterprises, Inc. (hereinafter referred to as respondent) filed a motion for postponement of all further proceedings in this matter. Sears, Roebuck & Co. filed its reply to the complaint on December 27, 1972, indicating that it was not an importer of convertible game tables, that it was not seeking pool table manufacturers in Taiwan, and that, in the opinion of its patent counsel, U.S. Patent No. D223,539 was not being infringed by the convertible game tables sold by Sears.

Complainant filed its response to the motion for postponement by respondent on January 8, 1973.

On January 22, 1973, complainant filed a supplemental complaint with the Commission alleging certain other unfair methods or unfair acts on the part of respondent. Among these unfair methods and unfair acts were infringement of a newly issued mechanical patent covering the subject convertible game tables U.S. Patent No. 3,711,099), the establishment of a false regular price of the subject tables, and the making of false representations as to the sponsorship given to the subject tables. Relief was requested by complainant from these alleged

unfair methods or unfair acts under section 337 apart from the relief requested in its original complaint. 1/

Having conducted a preliminary inquiry in accordance with section 203.3 of the Commission's Rules of Practice and Procedure (19 CFR 203.3), the U.S. Tariff Commission, on August 30, 1973, ordered a full investigation, authorized the issuance of a subpoena duces tecum to be served upon respondent, and scheduled a hearing on the subject matter of the investigation for October 15, 1973. Notice of the investigation and of the date of the hearing was given in the Federal Register of September 12, 1973 (38 F.R. 25236).

On October 1 and 2, 1973, pursuant to the Commission's subpoena, respondent's books, documents, and records were inspected and testimony pertaining thereto was obtained from the firm's officers. On October 3, 1973, respondent filed a motion to reschedule the date of the hearing. The Commission denied this motion on October 4, 1973, and the interested parties were notified of this decision.

The scheduled hearing was held October 15-17, 1973. Complainant and respondent made appearances of record at this hearing. On October 17, 1973, the hearing was adjourned to be resumed on November 16, 1973. By public notice issued November 1, 1973, the Commission rescheduled the resumption of the hearing to February 5, 1974 (38 F.R. 30797). The hearing resumed on February 5, 1974, during which the parties and the Commission submitted testimony and documents; it was adjourned on the same date.

1/ Even though requested by the Commission to do so, Sears declined to take any position with respect to infringement of U.S. Patent No. 3,711,099.

On March 4, 1974, the Commission sent to the President its recommendation that he issue a temporary exclusion order. Notice of this action was published in the Federal Register of March 7, 1974 (39 F.R. 8979).

On May 2, 1974 the President issued the recommended temporary order of exclusion and directed the Secretary of the Treasury to enforce it.

On May 31, 1974, Ebonite Corp. filed a petition with the Commission in which it advised that, effective May 16, 1974, it had acquired substantially all the assets and liabilities of the ATI Recreation Division of All-Tech Industries, Inc. 1/ In this petition Ebonite Corp. requested permission to succeed to ATI's complaint before the Commission. By public notice issued August 26, 1974 (39 F.R. 31711) the Commission ordered a hearing for the purpose of affording complainant and all interested parties the opportunity to present evidence as to this acquisition and as to the effects of an acquisition regarding certain aspects of the Commission's investigation. During the hearing, which was held as scheduled on September 12, 1974, Ebonite Corp., the only party that appeared, submitted testimony and documents.

1/ On Mar. 1, 1973, ATI Recreation, Inc., was reorganized as a division of the parent firm.

FINDINGS, CONCLUSION, AND RECOMMENDATION OF THE COMMISSION 1/

The Commission finds unfair methods of competition and unfair acts in the unlicensed importation and sale of convertible game tables (whether imported assembled or not assembled) by reason of their being made in accordance with the claim(s) of U.S. Patent No. 3,711,099, or in the importation and sale of the table top(s) therefor (unless either table top (if imported separately) is for sale or for use other than the combination purposes covered by said patent, and the importer so certifies). 2/ The Commission also finds that the effect or tendency of these unfair methods of competition and unfair acts is to substantially injure an industry, 3/ efficiently and economically operated, in the United States.

1/ Commissioner Minchew did not participate in the decision.

2/ Vice Chairman Parker dissents in part and finds no unfair methods of competition and unfair acts in the separate importation and sale of the table top(s), on the ground that these table top(s) are staple articles in commerce suitable for a substantial noninfringing use within the meaning sec. 271(c) of title 35 of the United States Code (35 U.S.C. 271(c)).

Commissioner Ablondi is of the opinion that not only should convertible game tables (whether imported assembled or not assembled) made in accordance with the claim(s) of U.S. Patent No. 3,711,099 or the table top(s) therefor be excluded from entry into the United States, but also any component of these tables (including individual components of the base pedestal assembly), if imported separately, should be excluded from entry if intended for use in connection with these tables. He maintains that the language of sec. 337 provides sufficient latitude to permit a recommendation of this type, which language--

> is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair. (In re Von Clemm, 43 C.C.P.A. (Customs) 58-59, 229 F.2d 443 (1955). See also In re Northern Pigment Co., 22 C.C.P.A. (Customs) 166, 71 F.2d 447.)

3/ The Commission notes that virtually all of the assets and liabilities of ATI, the original complainant in this investigation, were acquired by Ebonite Corp. on May 16, 1974. Ebonite has petitioned the Commission to allow it to succeed to ATI's complaint. The Commission accepts Ebonite's petition to succeed.

The Commission therefore concludes that there is a violation of section 337 of the Tariff Act of 1930 and recommends that, in accordance with subsection (e) of section 337, 1/ the President issue an exclusion order to forbid entry into the United States of convertible game tables (whether imported assembled or not assembled) made in accordance with the claim(s) of U.S. Patent No. 3,711,099, or the table top(s) therefor, until expiration of the patent, except when (1) the importation is under license of the owner of U.S. Patent No. 3,711,099 or (2) in the case of the table top(s), either table top (if imported separately) is for sale or for use other than the combination purposes covered by said patent, and the importer so certifies. 2/

1/ Sec. 337(e) of the Tariff Act of 1930 reads as follows:

> Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall direct that the articles concerned in such unfair methods or acts, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, refuse such entry. The decision of the President shall be conclusive.

2/ By virtue of his finding as contained in footnote 2, p. 5, Vice Chairman Parker's recommendation is limited to the following: that the President issue an exclusion order to forbid entry into the United States of convertible game tables (whether imported assembled or not assembled) made in accordance with the claim(s) of U.S. Patent No. 3,711,099, until expiration of the patent, except when the importation is under license of the owner of U.S. Patent No. 3,711,099.

Commissioner Ablondi's recommendation is defined by the scope of his finding as set forth in footnote 2, p. 5.

STATEMENT OF CHAIRMAN BEDELL AND COMMISSIONERS
LEONARD, MOORE, AND ABLONDI

On October 26, 1972, a complaint was filed with the U.S. Tariff Commission by ATI Recreation, Inc. (now Ebonite Corp., successor), of Miami Lakes, Fla., under section 337 of the Tariff Act of 1930. A supplemental complaint was filed with the Commission on January 22, 1973. The complaint, as supplemented, requested that the Commission recommend to the President that certain imported convertible game tables be barred from entry into the United States.

Section 337 of the Tariff Act of 1930 declares unlawful unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is (a) to destroy or substantially injure an efficiently and economically operated domestic industry, or (b) to prevent the establishment of such an industry, or (c) to restrain or monopolize trade and commerce in the United States. 1/

1/ The effect or tendency of unfair practices to prevent the establishment of an efficiently and economically operated domestic industry or to restrain or monopolize trade and commerce is not at issue here.

The Commission's determination is based upon a finding of unfair methods of competition and unfair acts, within the meaning of section 337, in the importation and sale of a so-called convertible game table made in accordance with the claim(s) of U.S. Patent No. 3,711,099, or the table top(s) therefor.

Unfair methods of competition and unfair acts are found by the Commission to exist in the unlicensed importation and sale of convertible game tables (whether imported assembled or not assembled) by reason of their being made in accordance with nearly all of the claims of U.S. Patent No. 3,711,099, or in the importation and sale of the table top(s) therefor (unless either table top (if imported separately) is for sale or for use other than the combination purposes covered by said patent, and the importer so certifies).

The Domestic Industry Concerned

The domestic industry under consideration consists primarily of that portion of Ebonite's operations which are engaged in the manufacture of the patented convertible game tables. 1/ The investigation discloses that these operations of Ebonite are economically and efficiently operated, using modern and efficient manufacturing equipment and employing up-to-date management techniques.

The Domestic Product

The product manufactured by the domestic producer (i.e., the "Gambit," "Butcher Block,"or "Nova" model) is a multipurpose article of furniture suitable for use as a rebound pool table, 2/ a dining table, and a poker table. Suitability for these alternate uses is achieved by two tops, one of which is usable on both sides.

In the "Gambit" and "Butcher Block" models (which constitute the bulk of domestic production under the patent at this time) both tops are circular, have the same diameter, and are constructed primarily of wood. The rebound-pool table top encloses a recessed octagonal-shaped playing surface bounded by eight rebound rails of equal length. A number of obstacle rebound posts are found within the recessed playing surface. Two ball collectors are attached on the underside of the pool table top in such a manner that they can easily be put out of the way to allow for the unobstructed use of the table as a dining or poker table. The flat surface of the second

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1/ Ebonite is by assignment the owner of U.S. Patent No. 3,711,099, which was issued on January 16, 1973. This patent has never been litigated before the courts, and Ebonite has never granted a formal license to any party for production or sale of the patented convertible game table.

2/ In this report the term "rebound pool" is synonymous with "bumper pool," a term used in the claims of the patent. The latter term has been registered as a trademark to a party not involved in this proceeding.

top is suitable as a dining table and for other uses requiring a flat top. The reverse surface of the second top, by virtue of strategically placed individual recesses having sufficient depth to accommodate the securing or placing therein of beverage glasses and chips, is ideally suited for a game such as poker.

The "Nova" model has two rectangular (not circular) tops and a four-sided (not octagonal) recessed rebound-pool playing surface bounded by four (not eight) bumper rails. In all other respects, the composition, features and uses of the table tops in the "Nova" model are virtually identical with those found in the "Gambit" and "Butcher Block" tops.

The entire assembly in each model, including both tops and the base, is generally delivered to the ultimate consumer in knocked-down condition in two cartons. One carton contains the two table tops; the second, the components of the base pedestal.

In the "Gambit" model the base pedestal includes four legs, a planar shelf for fastening the legs together, and the requisite hardware. In the "Butcher Block" model the base pedestal includes four legs, crossmember means for fastening the legs to each other and to the bottom of the rebound-pool table top, and the requisite hardware. In the "Nova" model the base pedestal includes two legs, crossmember means for fastening the legs to each other and to the bottom of the rebound-pool table top, and the requisite hardware.

The components in the two cartons can easily be transformed into the complete product with the aid of instructions provided by the manufacturer. The planar shelf in the "Gambit" model and the cross-member means in the "Butcher Block" and "Nova" models are first fastened to the legs. The pool table top is then firmly affixed to the upper ends of the legs (or the legs and crossmembers, as the case may be). The reversible top may thereafter be placed on the pool table top with the desired side up; if correctly positioned, the perimeters of the two table tops will be congruous.

The Imported Product 1/

With the exception of the configuration of the table tops, 2/ the imported product appears to be virtually identical to the domestic product described above even to the extent of having the same octagonal-shaped rebound-pool playing surface (as in the "Gambit" and "Butcher Block" models) on the pool table top and, on the second top, a surface having strategically placed individual recesses with sufficient depth to accommodate the securing or placing therein of beverage glasses and chips, which type of surface, as noted above, is ideally suited for a game such as poker (this feature is found in all three models of the domestic product).

1/ The imported product is currently manufactured in Taiwan, Republic of Chi Two major importers of this product include Armac Enterprises, Inc., of Chicago, Ill., and Sunshine Cover & Tarp Co. of Los Angeles, Calif.

2/ The imported table tops are octagonal in shape. The independent claims of the patent, however, do not require that the table tops have a particular configuration.

The imported product enters U.S. ports and is delivered to the importer's customers, like the domestic product, in knocked-down condition packed in two cartons. One contains the two tops, and the other contains the components of the base pedestal and instructions for assembly.

Final assembly of the components of the imported product is accomplished in basically the same manner as that of the components of the domestic product.

The Patent in Question

The domestic product is made in accordance with the claim(s) of U.S. Patent No. 3,711,099. We find that the "Gambit" model is made in accordance with all claims in this patent; that the "Butcher Block" model is made in accordance with claims 3, 4, 5, 8, 10, 14, and 15 in this patent; and that the "Nova" model is made in accordance with claims 3, 5, 8, 10,and 15 in this patent. 1/ We also find that the imported product is made in accordance with all claims of this patent except dependent claims 9 and 11. 2/

1/ See pp. A-6 through A-10 of the report.

2/ Claim 9 refers to a planar shelf including "a plurality of arcuate cut-out sections positioned between adjacent legs." The imported product does not display such cut-out sections. Claim 11 refers to the top of the table as being "substantially circular in configuration." The imported product has an octagonal top.

Taking independent claim 3 1/ as exemplary of the independent claims of the patent, we conclude that the heart of the invention lies in the peculiar combination created by the two table tops, which lend themselves to at least three different uses. The first table top has an upper surface "consisting essentially of a bumper [rebound] pool game playing surface," 2/ while the second table top, depending upon which surface is to be used, can be employed either as a "flat smooth surface" or as a "second game means." 3/ The second top is "removably positionable upon the first top." 4/ Therefore, the entire assembly may be used as a rebound-pool (which is the same as a bumper-pool) table, a dining table (which is "flat" and "smooth"), or a poker table (poker is a game and, as such, can certainly be a "second game"). Such an assembly and the uses thereof are found in both the domestic and the imported products.

A significant element of claim 3 is that the "pair" of "ball collection means" (i.e., ball collectors) are "removable" from the lower surface of the pool table top to permit unobstructed use of the table as a dining or poker table. 5/ This feature is present in both the domestic and the imported products.

1/ See pp. A-8 through A-10 of the report.
2/ Ibid.
3/ Ibid.
4/ Ibid.
5/ Ibid.

The Commission also notes the reference in claim 3 to another significant element incorporated in both the domestic and imported products, i.e., "support means have an upper end and a lower end," 1/ which permits the employment of any form of pedestal assembly in connection with this table. Under claim 3, the four-legged type of pedestal assembly is but one of a variety of such forms.

The domestic and imported products embody certain features, such as an octagonal-shaped rebound-pool playing surface (as in the "Flipper" imported model and "Gambit" and "Butcher Block" domestic models) on the rebound-pool table top and, on the second top, a surface having strategically placed individual recesses to facilitate playing the game of poker (this feature is found in the imported product and in all three models of the domestic product), which are more specific than, but still wholly within, the coverage of claim 3 of U.S. Patent No. 3,711,099, which requires only a rebound-pool playing surface having a "plurality of opposed rectilinear surfaces" 2/ (not necessarily eight) and a surface on the second top which can be used as a "second game means" 3/ (there is no reference in claim 3, or in any other claim of this patent, to recesses of the kind which are particularly adapted to playing poker as opposed to other card games). Although a manufacturer has a wide range of choices provided him in making tables, the manufacturer of this imported product apparently went to the extent of appropriating even the domestic producer's choice of specifics.

1/ Ibid.
2/ Ibid.
3/ Ibid.

The Unfair Method of Competition and Unfair Act in the Importation of the Patented Product

Sets of components are imported and ultimately assembled into convertible game tables. These game tables, which are imported and assembled without license, are covered by nearly all of the claim(s) of U.S. Patent No. 3,711,099. The Commission has long held that the unlicensed importation of a product which is patented in the United States is an unfair method of competition and unfair act within the meaning of section 337. 1/ In the case at hand, the Commission notes that it has no reason to believe that U.S. Patent No. 3,711,099 would be unenforceable in a court of law.

An additional issue in the investigation arises in connection with the two tops of the patented table, if imported apart from other components. As previously stated, the combination uses permitted by the two tops are the heart of the invention covered by the patent. To permit such tops to be separately imported would render the exclusion order wholly ineffective. Accordingly, if the two tops of the patented table are imported apart from the other components, the recommended order of exclusion would forbid their entry.

It is conceivable that either of two tops may be separately imported for other than the combination uses provided for in the patent. If either of the two tops is so imported, the recommended order of exclusion would permit its release by the U.S. Customs Service in the event such top is not for sale or for use for the combination purposes covered by the patent, and the importer so certifies.

1/ See In re Von Clemm, 43 C.C.P.A. (Customs) 56, 229 F.2d 441, 443 (1955); In re Orion Co., 22 C.C.P.A. (Customs) 149, 71 F.2d 458, 465 (1934); In re Northern Pigment Co., 22 C.C.P.A. (Customs) 166, 71 F.2d 447, 455 (1934); and Frischer & Co. v. Bakelite Corp., 17 C.C.P.A. (Customs) 494, 39 F.2d 247, 260, cert. denied 282 U.S. 852 (1930). See also U.S. Tariff Commission, Pantyhose . . ., TC Publication 471, 1972; Lightweight Luggage . . ., TC Publication 463, 1972; and Articles Comprised of Plastic Sheets Having An Openwork Structure . . ., TC Publication 444, 1971.

Effect or Tendency to Injure

To be unlawful under the statute, the unfair method of competition and unfair act must have "the effect or tendency . . . to destroy or substantially injure an industry, efficiently and economically operated, in the United States." The injury standard set forth in the statute has been met in this case: the offending imports do have "the effect or tendency . . . to substantially injure" the industry in question.

In 1973, imports of unlicensed convertible game tables accounted for a substantial part of the apparent U.S. consumption of convertible game tables described in U.S. Patent No. 3,711,099. Although one importer experienced a high rate of defects in its imported tables with the result that he could not sell a significant number of those imported in 1973, it has been demonstrated that the foreign capacity and the intention to penetrate and capture a very substantial portion of the U.S. market (a market originally developed by ATI, Ebonite's predecessor, and now being developed by Ebonite) do exist. In the absence of a permanent exclusion order barring the importation of the offending convertible game tables, there is no doubt that imports of such tables would capture an ever-increasing share of the U.S. market.

Import competition had a damaging effect on the selling price of the domestic unit and on the profitability of the domestic industry involved in the manufacture of the patented convertible game tables. It contributed to the collapse of the efforts of ATI (Ebonite's predecessor) to license its patent to another domestic producer. As successor to ATI, Ebonite has become heir to the negative implications of this event. Ebonite has also inherited the difficulties associated with (1) the cutback in orders for convertible game tables suffered by ATI and (2) the fact that one of ATI's largest customers had begun to question seriously ATI's prices--both occasioned by import competition. Further, the evidence indicates that Ebonite has inherited difficulties associated with the fact that ATI's plans for (1) expanding its plant facilities, (2) embarking on a more ambitious program of capital expansion, (3) further increasing the number of persons employed in its plant, and (4) pursuing a more vigorous research and development effort had to be set aside because of the uncertainties attendant to intense import competition.

The evidence before the Commission also indicates that Ebonite Corp. is presently losing sales of its convertible game tables to lower priced imported convertible game tables which were entered prior to the effectuation of the temporary exclusion order and kept in inventory until very recently. Ebonite has also suffered a loss in profitability by virtue of the royalties it was entitled to, but did not receive, from sales of these imported tables.

Convertible game tables are novel, leisure-time products. Their market life is estimated to be considerably shorter than that of standard items of furniture. As a result, in the absence of a permanent exclusion order, the adverse impact of substantial imports on the operations of Ebonite would be more significant than if the article had a longer life expectancy in the market.

Based upon the foregoing considerations, the unlicensed importation of convertible game tables which are covered by nearly all of the claims of U.S. Patent No. 3,711,099, or the table top(s) therefor, has the effect or tendency to substantially injure that portion of Ebonite's operations which are engaged in the manufacture of the patented convertible game table.

ADDITIONAL STATEMENT OF COMMISSIONERS LEONARD, MOORE, AND ABLONDI 1/

In addition to our determination of unfair methods of competition and unfair acts concerning the patent issues involved, it is our view that Armac Enterprises, Inc., an importer of the subject convertible game tables has, through its wholly owned subsidiary, Rozel Industries, Inc., engaged in the deceptive trade practice of advertising a fictitious regular price for the imported tables.

The facts reveal that three prices (i.e., $229, $249,and $299) were advertised on one day, December 26, 1972, as each being the regular price of convertible game tables in different retail outlets in the Chicago area owned and operated by Armac Enterprises, Inc., through its wholly owned subsidiary, Rozel Industries, Inc. The sale price in each case was $199.

The fact that three different prices were advertised on one day by the same concern as each being the regular price of convertible game tables in the Chicago area would indicate that none of the advertised prices were bona fide.

1/ Chairman Bedell concurs with this statement.

Responses to the Commission's subpoena indicate that no documentation exists which would reveal the name of a single purchaser who bought a convertible game table from Armac Enterprises, Inc., or Rozel Industries, Inc., for $299, the highest advertised regular price. Nor did the Commission's investigation reveal that the product was ever openly and actively offered for sale, honestly and in good faith, at $299 for a reasonably substantial period of time in the recent, normal course of business. The information submitted to the Commission shows that the highest price at which substantial sales of these tables were made to the public on a regular basis for a reasonable period of time in the recent, normal course of business was much lower than $299.

Advertisements heralding a regular price of $299 have appeared on a number of occasions since December 26, 1972. We find that each such advertisement (whether in a newspaper or on a flyer in one of the retail stores handling sales of convertible game tables) was calculated to deceive the purchaser by leaving him with the impression that he was getting a real bargain, that is, that he was acquiring an article at a significantly lower price than its regular price, whereas in fact he was not.

Such deceptive pricing of imported tables is determined herein to constitute an unfair practice under section 337.

To the extent that sales of the imported product have been, or may be, facilitated by the deceptive pricing practices complained of, we

believe there is a "tendency . . . to . . . substantially injure" the domestic industry in question. 1/

Although we have concluded that the deceptive pricing practices constitute an unfair practice in the "sale by the owner, importer, consignee, or agent of either . . ." of the imported tables and, as such, are properly subject to the jurisdiction of the Commission under section 337, we have not made a formal finding on this basis

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1/ Commissioner Leonard notes in this connection that the deceptive pricing practices complained of involved six retail stores in the Chicago area. In his view, notwithstanding the limited geographical extent of these practices, the deceptive pricing practices, while perhaps not having "the effect . . . to . . . substantially injure" have without doubt "the . . . tendency . . . to . . . substantially injure" that portion of Ebonite's operations engaged in the manufacture of the patented tables (the domestic industry herein). The establishment of such higher fictitious regular prices allowed for the making of deceptive price comparisons by the consumer. When consideration is given to the similarity between the domestic and imported products, to the fact that each fictitious regular price established for the imported table was representative of an apparently bona fide regular price of the ATI (now Ebonite) table, and to the facts before the Commission which indicate that the effects of these unfair pricing practices still exist in the market today, it is not unreasonable to conclude that sales of the imported product were fostered, and are still being fostered, to the detriment of the manufacturer of the domestic product.

In additional support of his view that these unfair pricing practices have the tendency to substantially injure the domestic industry in question, Commissioner Leonard also notes that there is at times a certain inherent spillover effect which may result from local pricing practices. He concludes that even though not so intended, the pricing practices of Armac Enterprises, Inc., and Rozel Industries, Inc., in the Chicago area would appear to have served as suggestions on pricing to national retailers handling sales of imported convertible game tables purchased from Armac Enterprises, Inc., all to the further detriment of the manufacturer of the domestic product.

nor have we recommended an exclusion order based thereupon for the reason that an exclusion order issued on the basis of the patent infringement is a more complete and effective remedy that applies in rem to all unlicensed imports of the patented product. 1/

1/ Commissioner Leonard points out that an exclusion order based upon the advertising of a fictitious regular price would be a less comprehensive remedy than one issued on the basis of the patent since it would run only against Armac Enterprises, Inc., and/or Rozel Industries, Inc. He also points out that it would probably be a remedy of much shorter duration. In his view, should there be a resumption of import trade in convertible game tables by the above-named concerns at the time the patent expires (May 2, 1986) or is terminated, the matter of the advertising of a fictitious regular price might be examined anew by the Commission and an appropriate recommendation could then be formulated.

STATEMENT OF VICE CHAIRMAN PARKER

I concur with that part of the Commission's findings and recommendations with respect to unfair methods of competition and unfair acts which are applicable to the unlicensed importation and sale of convertible game tables (whether imported assembled or not assembled) by reason of their being made in accordance with the claim(s) of U.S. Patent No. 3,711,099, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States. I disagree with that part of the Commission's findings and recommendations which relate to separate table top(s), as I find no violation of section 337 with respect to the importation and sale of separate top(s).

To the extent consistent with my findings and recommendations, I concur with the Commission's statement of reasons.

The claim(s) in U.S. Patent No. 3,711,099 clearly do not cover table top(s) per se. What is claimed under the patent is a combination comprising a whole table. Therefore, a determination of contributory infringement pursuant to the provisions of section 271(c) of title 35 of the United States Code would be the only proper basis for the exclusion of table top(s) separately. The evidence does not support such a determination. The table top(s) (whether taken together or singly) are capable of moving in commerce as marketable items in their own right, and are capable of being used for purposes not covered by the patent. As such, they are staple articles of commerce suitable for a substantial noninfringing use within the meaning of section 271(c) of title 35 of the United States Code, and are not, therefore, properly the subject of an exclusion order.

With respect to the other unfair trade practices, relating to false pricing and false sponsorship, allegedly engaged in by respondent, Armac Enterprises, Inc., and/or Rozel Industries, Inc., I find that the evidence does not establish a violation of section 337.

INFORMATION DEVELOPED DURING THE PRELIMINARY INQUIRY

Product Description

Convertible game tables are a type of multifunctional furniture which, by reversing or rearranging certain of the constituent parts, can be used for different purposes. In this report, the term "convertible game table" refers specifically to a combination table designed for and capable of use as (a) a rebound pool table of the type marketed under the registered trademark "Bumper Pool," (b) a card table, or (c) a dining table. Modification of the table for these alternate uses is achieved by the placing, removal, and/or reversal of one or more of its constituent tops. Such tables are generally 48 to 52 inches in diameter, round or octagonal in shape, and seat six to eight people in the card-playing or dining configuration. The multiple uses to which such a table can be put make it especially suited for homes, apartments, or condominiums where space is at a premium.

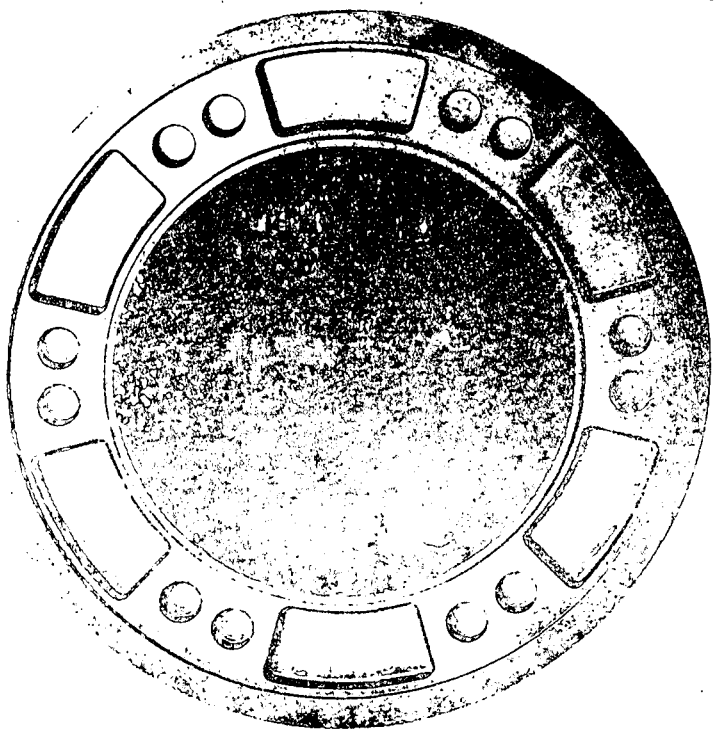
Rebound pool (sometimes referred to as carom pool) was developed during the early 1950's as a billiard modification in which a number of rubber-clad bumper posts (obstacles) are placed in the center of the playing surface. "Bank shots" are required to propel the balls around the obstacles. As a result, rebound pool utilizes many billiard skills, but permits a greatly reduced playing surface. Moreover, since rebound pool is still in a relatively early state of development, the game lends itself to certain experimentation. For example, the tables under consideration have eight "rails" or sides, while conventional billiard tables have four.

In the card-playing configuration, convertible game tables are of convenient height, allow adequate leg room, and provide a nondistracting playing surface upon which playing cards are easily handled. They also incorporate various player conveniences, such as receptacles for beverage containers, ash trays, poker chips, and the like, on the periphery of the playing surface.

As a dining table, such tables provide a smooth, stable, and easily cleaned surface. Some features, such as stability, are desirable in all configurations.

The convertible game table sold by complainant, All-Tech Industries, Inc., under the trade name "GAMBIT" is shown in figure 1. The convertible game table sold by respondent, Armac Enterprises, Inc., under the trade name "FLIPPER" is shown in figure 2. The convertible game table sold by Sears is shown in figure 3.

Figure 1.--All-Tech Industries, Inc. (complainant):
Model 524, "GAMBIT"



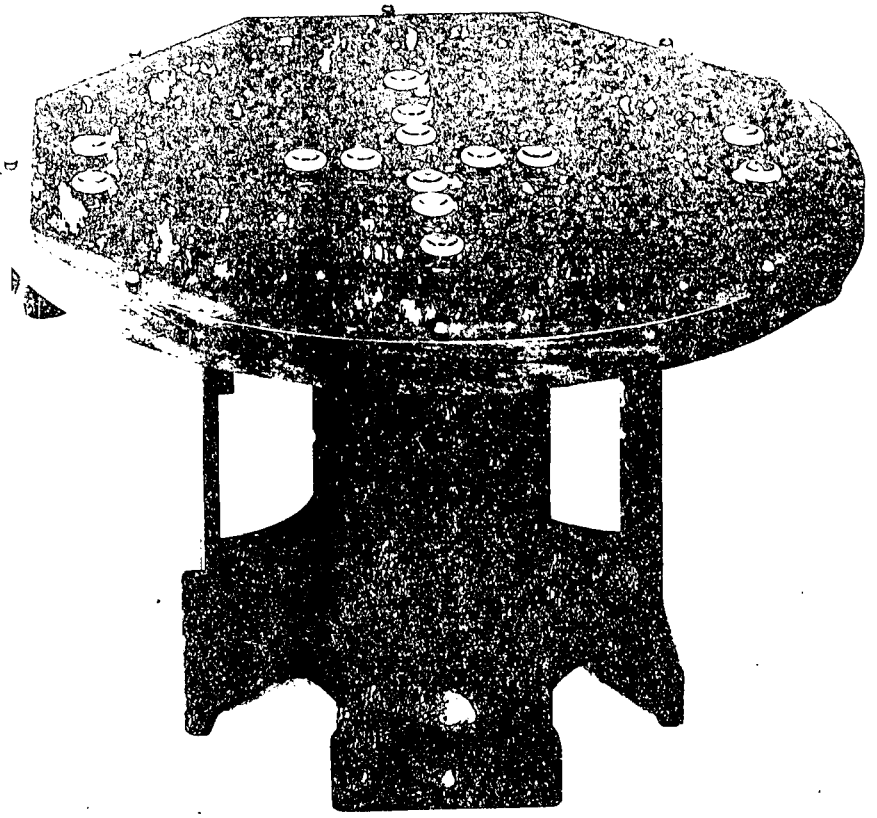
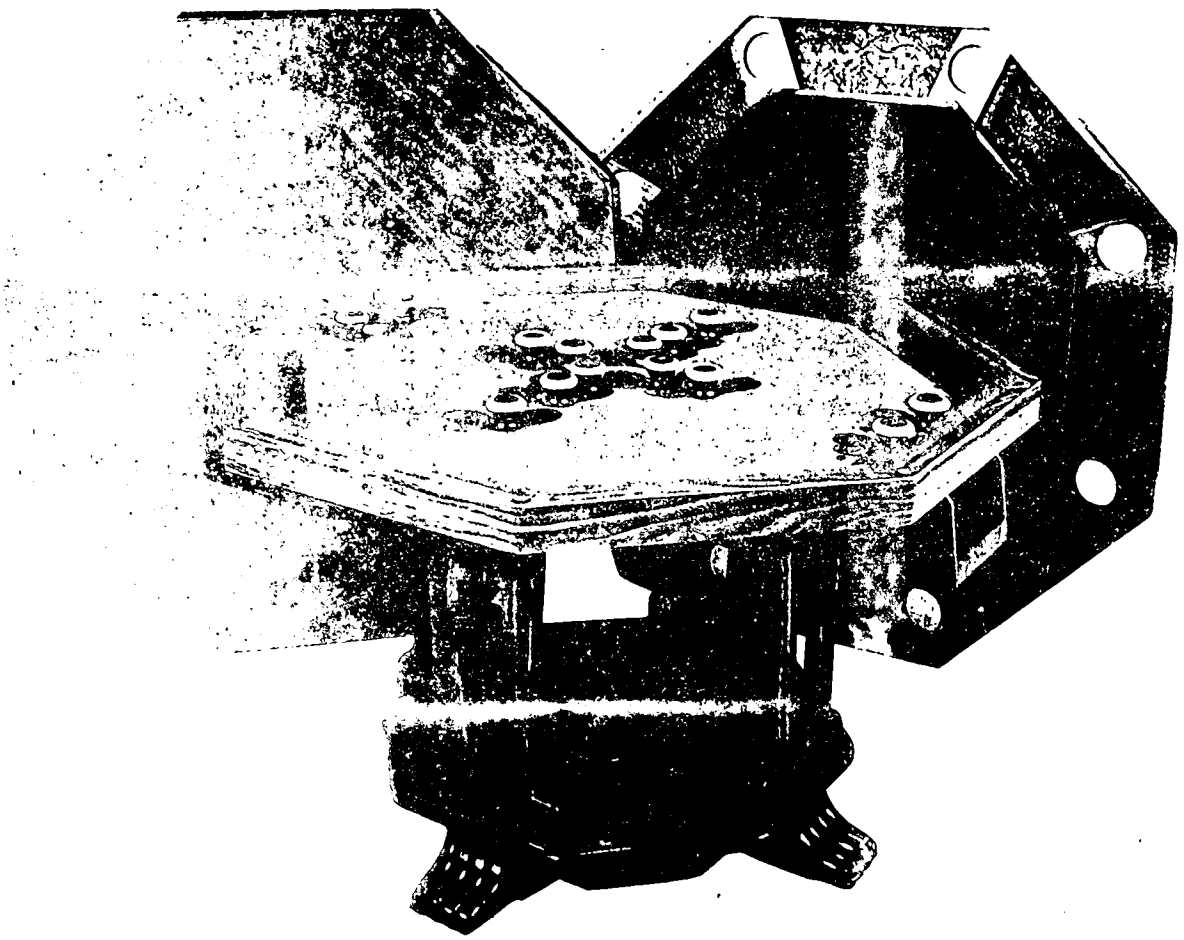


Figure 2 --Armac Enterprises, Inc. (Respondent): Model 333, "FLIPPER"



#333 146 lbs.

The unique, versatile 3 in 1 game table. This table is so functional that it will probably be used more than any other piece of furniture.

Use it as a dinnette or dinner table. Then just flip the lightweight top over and convert it to an 8 player card table. Remove the lightweight top and behold, a six sided professional quality pool-o-game table.

- Quality Construction
- Beautiful Mica Walnut Finish
- 48" Diameter 30" High
- Octagon Designed Top To Seat 8 Comfortably
- Lightweight Convertible and Removable Top
- Card Table Has Recessed Glass and Ashtray Holders, Felt Playing Surface and Separate Poker Chip Sections
- The Flipper Table Features Wool Cloth, Wooden Bumpers with Rubber Rings, Molded Rubber Cushions, Leg Levelers and Removable Hide-A-Way Ball Return Storage Boxes
- Complete with 2 Cues, 10 Balls, Chalk and Instructions

MANUFACTURED BY ARMAC ENTERPRISES, INC.

3900 SOUTH UNION AVENUE CHICAGO, ILLINOIS 60609

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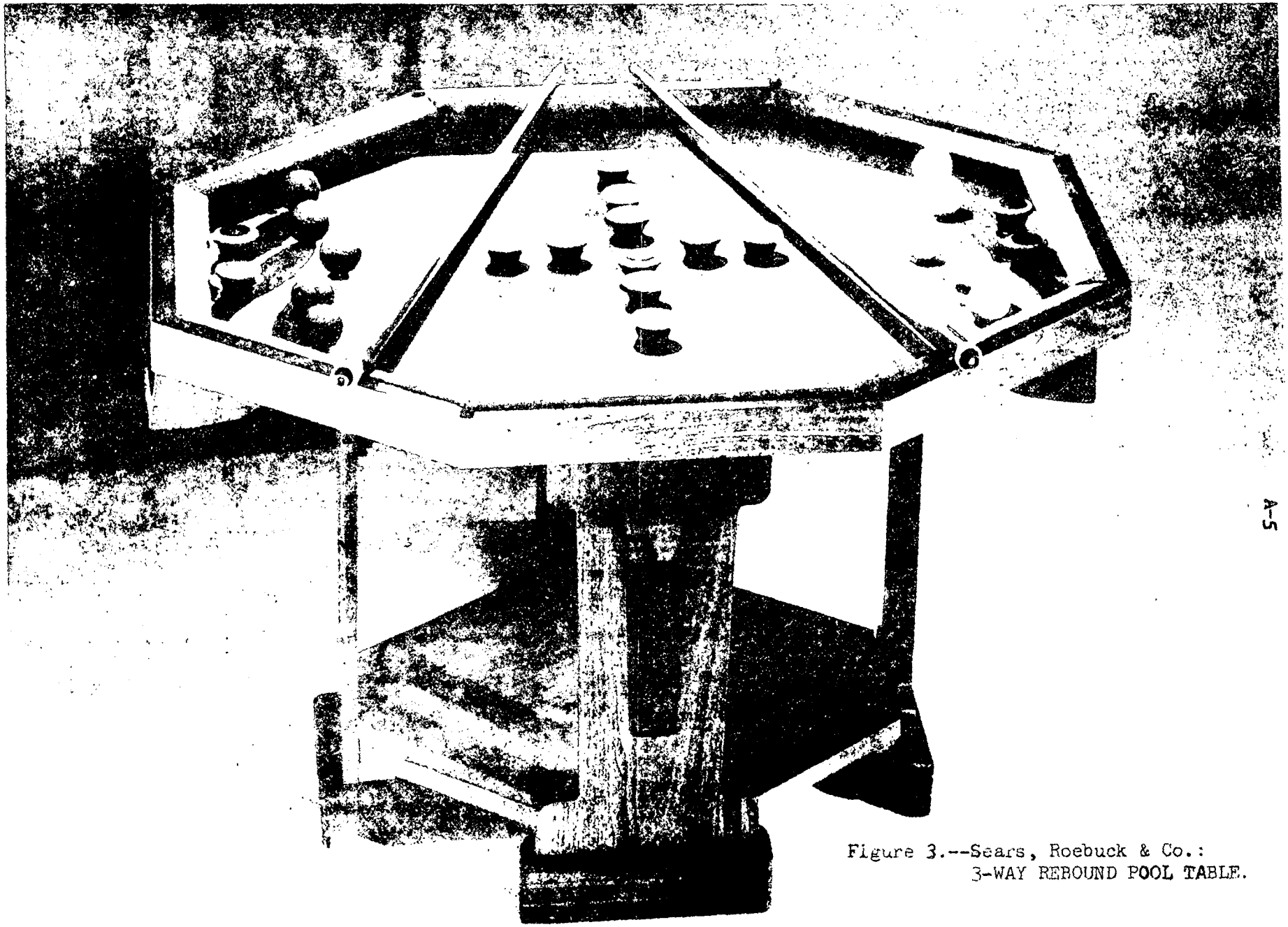

Figure 3.--Sears, Roebuck & Co.:
3-WAY REBOUND POOL TABLE.

Claims of the U.S. Patents Involved

U.S. Design Patent No. D223,539

U.S. patent laws provide for the granting of design patents to persons who invent a new, original, and ornamental design for a manufactured article. 1/ Design patents protect only the appearance of an article, not its structure or utilitarian feature. 2/ A design patent may be granted for 3-1/2 years, 7 years, or 14 years at the election of the applicant. 3/ The complainant's patent No. D223,539, a design patent, runs for a term of 14 years. Only one claim is permitted in a design patent. The claim of patent No. D223,539 is as follows:

> The ornamental design for a convertible table for utility, games, and bumper pool, as shown and described. 4/

U.S. Patent No. 3,711,099

Patents issued pursuant to the provisions of 35 U.S.C. 101 5/ are normally designated as process patents, mechanical patents, product patents, or composition of matter patents, according to the patentable element. The item sought to be patented must be (1) novel and (2) useful to satisfy the requirements of the statute. U.S. Patent No. 3,711,099 6/ is a mechanical patent for a convertible table for "utility,

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1/ 35 U.S.C. 171 provides:

171. Patents for designs

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

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

2/ It is the appearance itself, no matter how caused, that is the patentable element. Gorham Mfg. Co. v. White (81 US 511).

3/ The term(s) of a design patent are provided for in 35 U.S.C. 173.

4/ U.S. Patent No. D223,539 is reproduced in appendix A.

5/ 35 U.S.C. 101 provides:

101. Inventions patentable

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

6/ U.S. Patent No. 3,711,099 is reproduced in appendix A.

games, and bumper pool." The term of such a patent normally runs for a period of 17 years from the date of issuance; 1/ however, in this case, the assignee filed a terminal disclaimer whereby that portion of the term of the patent subsequent to May 2, 1986--the expiration date of the design patent--has been disclaimed. 2/

Pertinent summary information relating to Patents Nos. D223,539 and 3,711,099 is as follows:

Summary of Patent Information

Patent No.	Owner or assignee	Date filed	Date issued	Date expires	Number of claims
D223,539	All-Tech Industries, Inc.	5-17-71	5-2-72	5-2-86	1
3,711,099	ATI Recreation, Inc. 1/	11- 3-71	1-16-73	5-2-86 2/	15

1/ Now ATI Recreation Division of All-Tech Industries, Inc.
2/ That portion of the term of this patent subsequent to May 2, 1986, has been disclaimed.

U.S. Patent No. 3,711,099 contains 4 independent and 11 dependent claims. The claims of this patent are summarized in the left-hand column on the next several pages opposite illustrations of the complainant's GAMBIT table. The elements of each claim are identified by a number and letter designation placed adjacent to the proper location on the illustration.

1/ The term of such a patent is provided for in 35 U.S.C. 154.
2/ 35 U.S.C. 253 permits any patentee or applicant to disclaim or dedicate to the public the entire term or any terminal part of the term. According to complainant's counsel, the terminal disclaimer in this case renders a potential issue of "double patenting," moot since no patent monopoly is sought which would extend the term of the mechanical patent beyond that of the design patent previously issued.

laim 1

A combination flat top, game table nd bumper pool game table assembly omprising in combination,

(1a) leg support means having an upper end and a lower end,

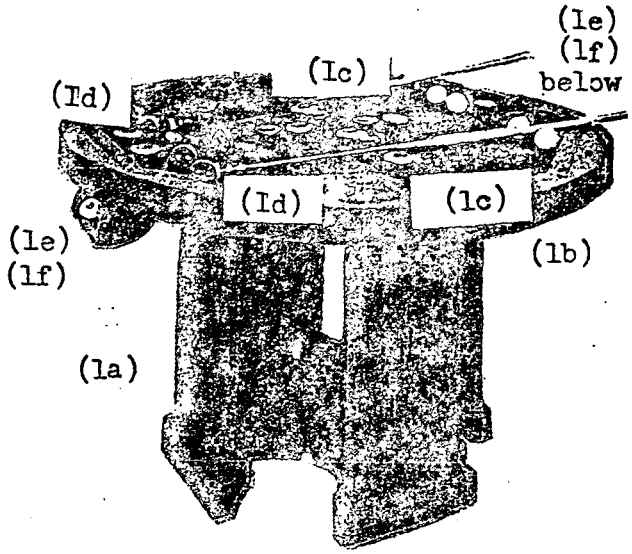
(1b) a first top having a lower surface fixedly secured on said upper end of said leg support means and an upper surface consisting essentially of a bumper pool game playing surface,

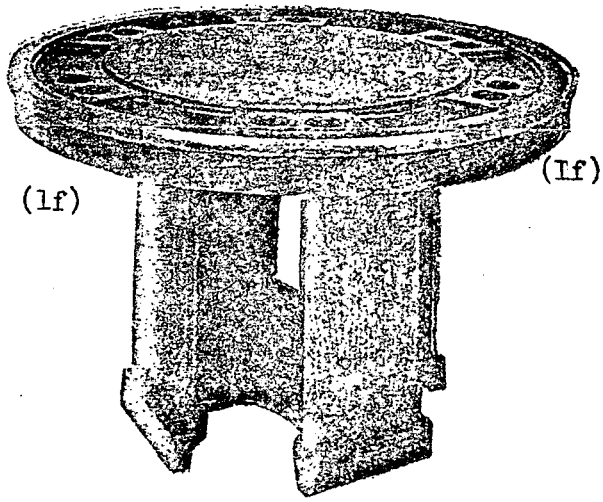
(1c) said bumper pool game playing surface being bounded by a plurality of opposed rectilinear surfaces and including a plurality of obstacle bumper posts positioned substantially centrally on said bumper pool game playing surface,

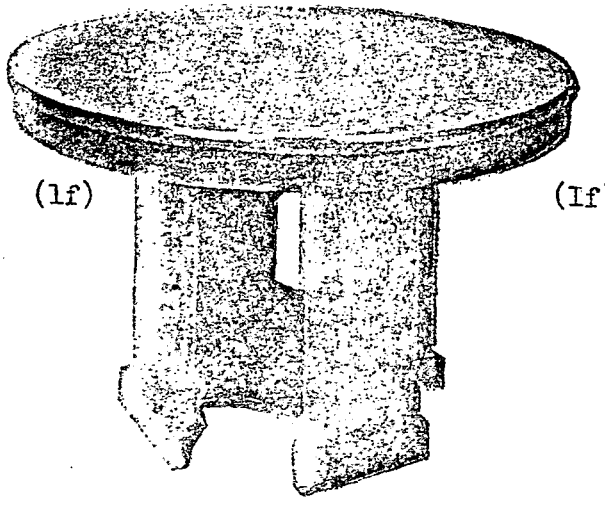
(1d) said bumper pool game playing surface being substantially imperforate and having a pair of oppose ball apertures, one each of said ball apertures being disposed adjacent one of said rectilinear surfaces,

(1e) a pair of ball collection means mounted on the lower surface of said first top and each of said pair of ball collection means being in a position in open communication with and directly below one of said ball apertures,

(1f) said ball collection means being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table,







(1g) said leg support means including a plurality of legs,

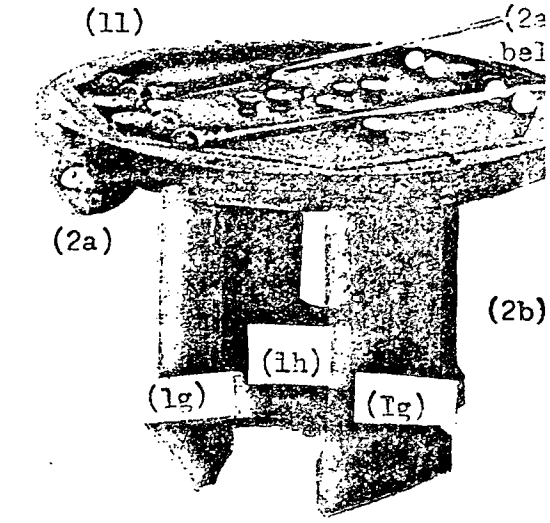
(1h) a substantially planar shelf member positioned adjacent the lower ends of said legs and secured to each of said legs adjacent the periphery of said planar shelf member,

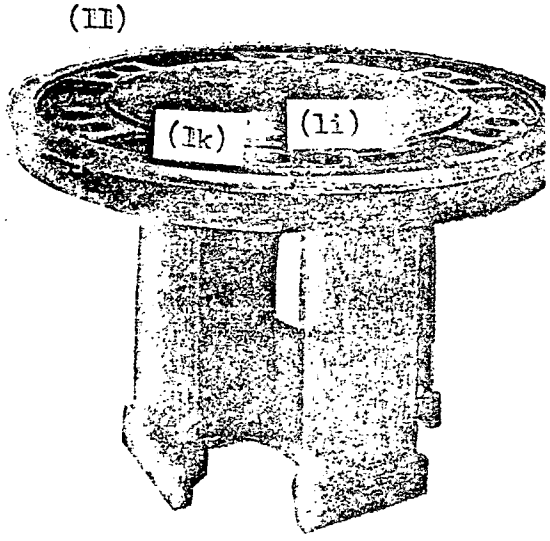
(1i) a second top forming a second game means and being removably positionable upon said first top,

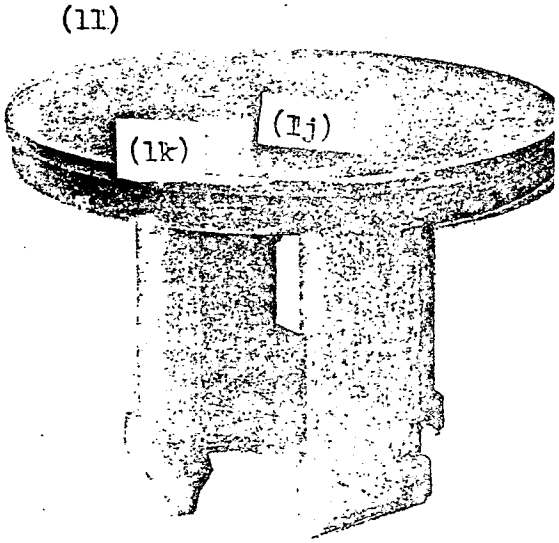
(1j) a third top forming a flat smooth surface and being removably positionable upon said first top,

(1k) said second and third tops comprising a single top having one surface formed as a flat smooth top and the opposed surface formed into said second game means,

(1l) whereby said table assembly may be utilized as a flat top table with said third top positioned and supported upon said first top, and said assembly may be utilized as a second game means when said second top is exposed, and may be utilized as a bumper pool game when said first top is exposed.







Claim 2

Repeats all the elements of claim 1 and adds:

(2a) each of said ball collection means being disposed between a corresponding leg and the outer periphery of said first top,

(2b) each of said legs having a length dimension extending downwardly from said lower surface of said first top, and a width dimension which is substantial but less than one-half the length dimension.

laim 3

Repeats elements 1b, 1d, 1e, 1f, 1i, 1j, k, 11, and 2a. It deletes those elements f claim 1 and claim 2 referring to the "legs" nd a "planar shelf," the reference in claim 2 o the length and width dimensions of the legs, nd recasts certain others into new elements eading:

(3a) support means having an upper end and a lower end,

(3b) a bumper rail surrounding said bumper pool game playing surface defining a plurality of opposed equal rectilinear surfaces,

(3c) a plurality of obstacle bumper posts positioned substantially centrally and symmetrically on said bumper pool game playing surface.

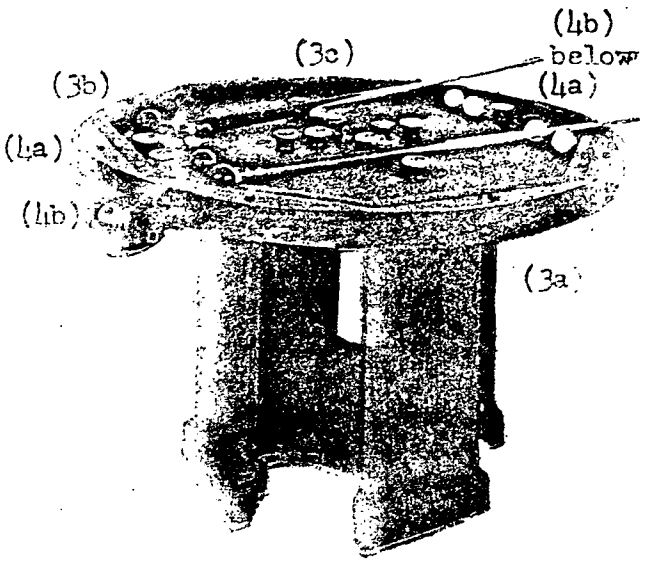
Claim 3 is regarded by complainant as roviding the broadest protection.

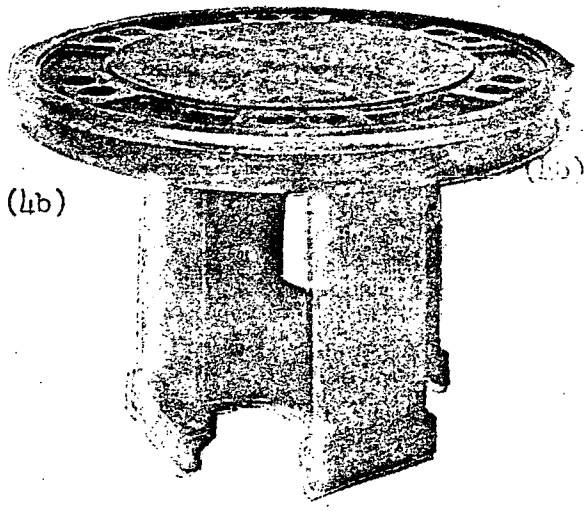
laim 4

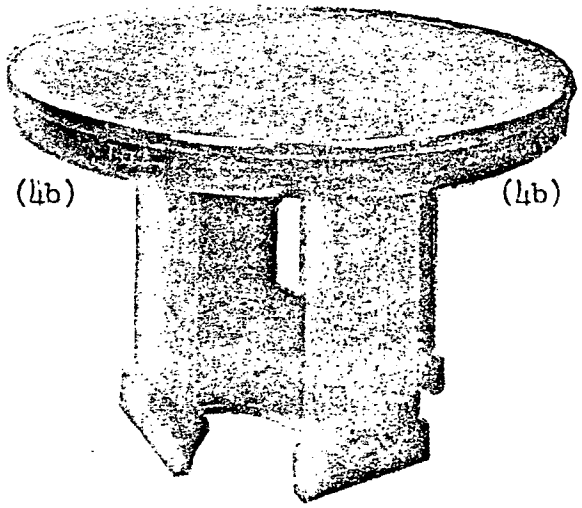
Repeats elements 1a, 1b, 1c, 1d, 1e, 1g, 1i, j, 1k, 11, 2a, and 2b, but deletes the eference to a "planar shelf" found in claims and 2. It adds:

(4a) each of said ball apertures being bounded on opposed sides thereof by an obstacle bumper post,

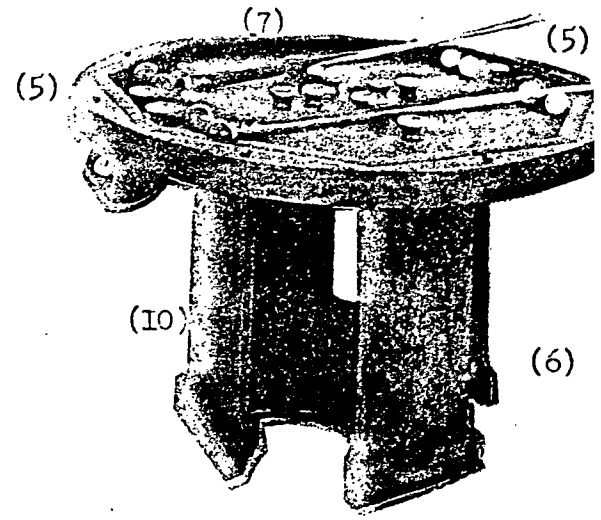
(4b) said ball collection means consisting of a pair of ball racks, each of said ball racks being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table and permitting utilization of said table for other functions.







Claims 5 through 15 are dependent claims in that they add elements to one or more of the four independent claims above. Thus--

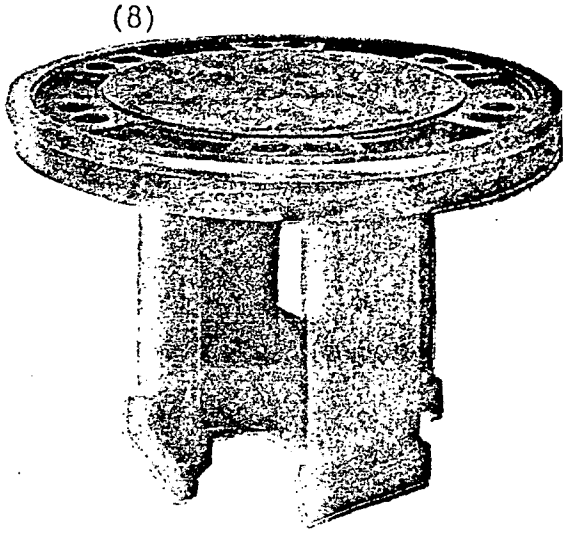


Claim 5

Incorporates claim 3 and adds ". . .wherein, each of said apertures is flanked by a pair of bumpers."

Claim 6

Incorporates claim 1 and adds: ". . .wherein said planar shelf member is positioned horizontally with respect to each of said legs."

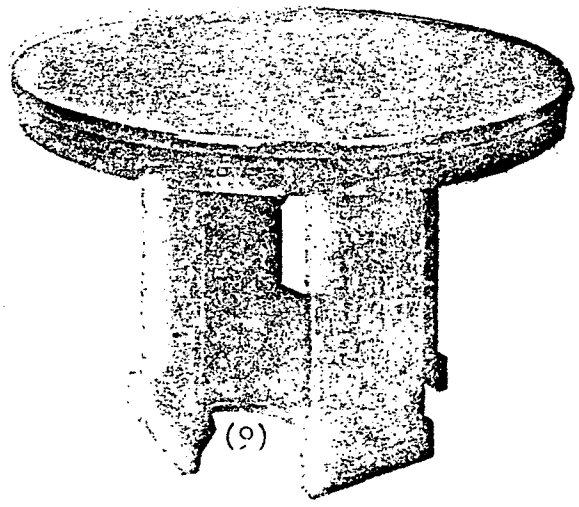


Claim 7

Incorporates claim 1 and adds: ". . .wherein said bumper pool game playing surface is recessed and is bounded by said plurality of opposed rectilinear surfaces, and each of said rectilinear surfaces is provided with resilient bumper means secured thereto."

Claim 8

Incorporates claim 3 and adds: ". . .wherein said game playing surface of said second top is formed into a card game playing surface including a plurality of player convenience apertures."



Claim 9

Incorporates claim 1 and adds: ". . .wherein said planar shelf member includes a plurality of arcuate cut-out sections positioned between adjacent legs, thereby to provide occupant convenience sitting positions about said table."

Claim 10

Incorporates claim 3 and adds: ". . .wherein said support means comprises a series of four legs for supporting said first top, each of said legs being fixedly secured to the lower surface of said first top and extending downwardly therefrom to an underlying support surface."

laim 11

Incorporates claim 1 and adds: ". . . wherein ach of said first and second tops are sub- tantially circular in configuration."

laim 12

Incorporates claim 1 and adds: ". . . wherein aid pair of ball collection means is positioned etween a corresponding leg and the outer eriphery of said first top."

laim 13

Incorporates claim 1 and adds: ". . . where- n each of said pair of ball collection eans comprises a ball rack formed by a ottom wall, side walls, a back wall, and partial front wall."

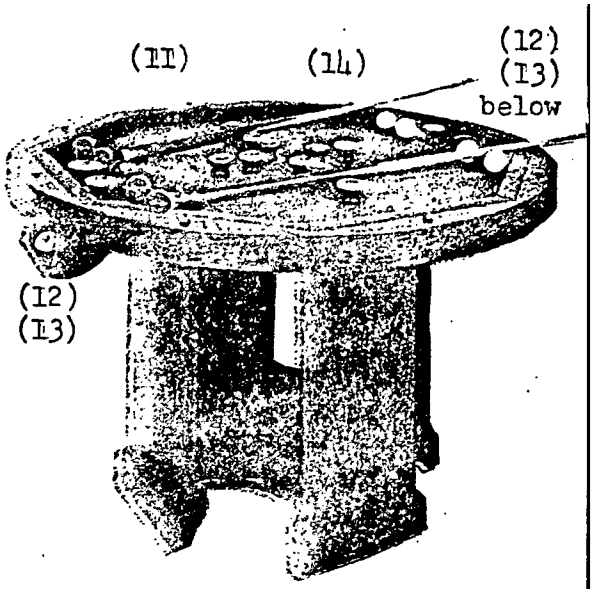
laim 14

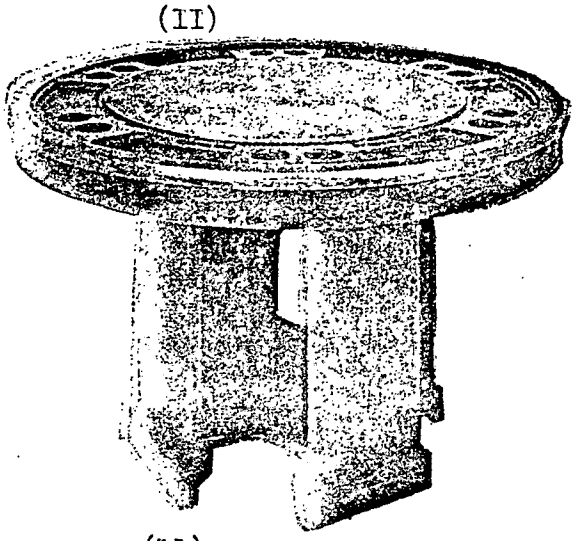
Incorporates claim 3 and adds: ". . . wherein aid bumper pool rail surrounding said bumper ool game playing surface defines an overall ctagonally shaped bumper pool ball game playing rface for said bumper pool ball game."

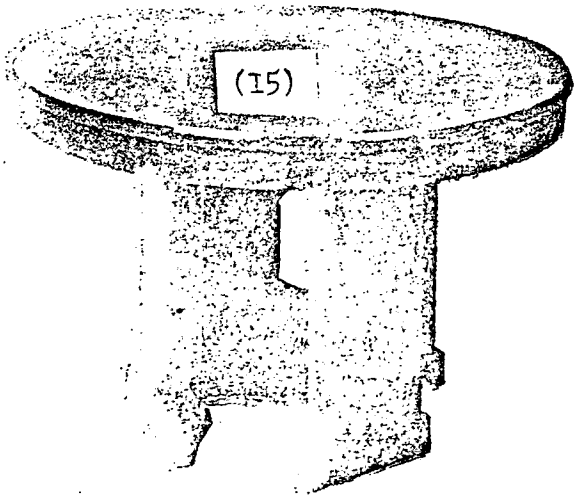
laim 15

Incorporates claim 3 and adds: ". . . wherein aid third top forming said flat smooth surface s covered with a plasticized material, there- y to form a smooth and protected table top."

These claims establish the limits of the atent monopoly. Each independent claim escribes a complete invention, and each ndependent claim includes the elements ecessary to make the invention operative. ependent claims possess no legal significance part from the independent claim(s) which they ncorporate.







Complainant's Allegations

In its complaint as supplemented, the complainant alleged certain unfair methods of competition and unfair acts for which it requested relief under section 337. These consist of (1) infringement of its Patents Nos. D223,539 (the design patent issued on May 2, 1972) and 3,711,099 (the mechanical patent issued on January 16, 1973); (2) respondent Armac's use of the trademark "TRIO" (complainant had asserted its ownership of a U.S. trademark application serial No. 416,491 for the trademark "TRIO," as well as its ownership of a U.S. trademark application serial No. 407,363 for the trademark "GAMBIT"); (3) false pricing; (4) failure to comply with country-of-origin marking; (5) false representation of sponsorship; and (6) "palming off."

Patent infringement

Complainant has asserted that each of its patents for convertible game tables has been infringed by convertible game tables imported and sold by respondent.

U.S. Patent D223,539.--The complainant has alleged that its design patent has been infringed by the convertible game tables imported and sold by respondent, that such infringement constitutes an unfair method of competition or an unfair act, and, hence, relief under section 337 is warranted. Complainant stated that a comparison of the drawings of the design patent with a photograph of respondent's convertible game table "reveals a construction which, to the average purchaser, is identical

with that of the complainant's product, and as embodied in the complainant's patent rights." 1/

U.S. Patent 3,711,099.--Complainant alleged that respondents' convertible game tables infringed each and every claim of its mechanical Patent No. 3,711,099 and that their importation and sale constitutes an unfair method of competition and an unfair act for which relief may be provided under section 337.

Other unfair acts

Complainant alleged certain other unfair acts or unfair methods of competition for which relief was sought under section 337, apart from the relief sought in connection with infringement of its design and mechanical patents.

1/ ATI's complaint, p. 6. The respondent's table used in this comparison (as illustrated in fig. 2) embodies certain changes arising from litigation concerning the design patent (ATI Recreation, Inc., v. Armac Enterprises, Inc., Civil Action No. 72 C 1129), which is discussed in the section entitled "Litigation History."

Use of the trademark "TRIO".--The complainant, as the owner of U.S. trademark application No. 416,491 for the trademark "TRIO", alleged that it has used, or is using, this trademark in connection with its convertible game tables and further alleged that respondent has caused to be published in a trade catalog a game table which was imported and which respondent purported to sell to the public under the trademark "TRIO". 1/ The presentation to the trade of photographs of the copy of complainant's table with this trademark is alleged to constitute another unfair act in the importation of articles into the United States for which relief may be provided under section 337.

False pricing.--Complainant alleged that respondent established a false regular price for convertible game tables in its eight retail outlets in violation of the Federal Trade Commission's Guides Against Deceptive Pricing and in violation of the Uniform Deceptive Trade Practices Act of the State of Illinois. 2/ Complainant indicated that, based upon its information and belief, "the tables sold which are advertised with the regular price of $249.00 or other regular price above $199.00 have never been sold by respondents at the advertised regular price." 3/ It is also alleged that this pricing pattern was

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1/ See fig. 4.

2/ Commissioner Ablondi points out that there is a statute, viz, section 5(a) of the Federal Trade Commission Act (15 U.S.C., sec 45(a)) that declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce".

3/ ATI's supplemental complaint, p. 2. The allegation is that all sales were effectuated at a price lower than the advertised regular price.

"the subject of suggestions to other customers." 1/ Such unfair pricing is alleged to be an unfair act for which relief would be justified under section 337.

Failure to mark with country of origin.--Complainant alleged that respondent's imported convertible game tables were not marked with the country of origin in violation of 19 U.S.C. 1304. 2/ It is alleged by complainant that a direct violation of another portion of the Tariff Act is a further act in unfair competition justifying the exclusion order requested under section 337.

False representation of sponsorship.--Complainant alleged that respondent represented in its advertisements that the trademark "FLIPPER"

1/ Ibid.

2/ The pertinent parts of sec. 304 of the Tariff Act of 1930 (19 U.S.C. 1304) read as follows:

(a) Marking of Articles.--Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. . . .

* * * * * * *

(c) Additional Duties for Failure to Mark.--If at the time of importation any article (or its container . . .) is not marked in accordance with the requirements of this section . . . there shall be livied, collected, and paid upon such article a duty of 10 per centum ad valorem . . .

(d) Delivery Withheld Until Marked.--No imported article held in customs custody for inspection, examination, or appraisement shall be delivered until such article and every other article of the importation (or their containers) . . . shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (c) of this section has been deposited.

was registered, 1/ whereas, based upon complainant's information and belief, it was not. Complainant further alleged that the dolphin, which appears in respondent's trademark, is intended to inspire the belief in the customer that respondent's product has the sponsorship of those persons associated with the television program "Flipper." It is finally alleged that respondent had generated advertisements for mail-order sales and had adopted the name "UNIROYAL" as a mailing address. Based upon complainant's information and belief, respondent intended to imply sponsorship of the well-known automobile tire company of that name, but in fact had no such sponsorship or consent to use the trademark "UNIROYAL." It is alleged that these acts of false representation as to sponsorship constitute a violation of the Uniform Deceptive Trade Practices Act of the State of Illinois, and, as illegal acts, are acts in unfair competition for which relief may be obtained under section 337.

Allegation of "palming off".--Complainant alleged that, based upon its information and belief, Sears, Roebuck & Co., through a third party, approached Nichols Pools of Bristol, Pa., to acquire 150 of ATI's convertible game tables trademarked "GAMBIT." These tables were then shipped in ATI's GAMBIT cartons to fill orders for the convertible game table advertised in the Sears catalog. 2/ Complainant also indicated that certain complaints relating to the subject table have come to it as a

1/ A circled "R" appears on this trademark.

2/ The convertible game table shown in the Sears catalog was supplied to Sears by respondent.

result of the shipment by Sears, Roebuck & Co. of tables in the ATI GAMBIT carton. It is alleged by complainant that this constitutes a further unfair act based upon misrepresentation to the trade and supports the relief requested under section 337.

Respondent's Contentions

Respondent's pleading, filed with the Commission on December 26, 1972, consisted of a motion for a postponement (under sec. 201.14 of the Commission's Rules of Practice and Procedure) of all further proceedings before the Commission pending a final decision of the U.S. District Court for the Northern District of Illinois, Eastern Division, on a suit filed by respondent against the complainant. (See section on litigation history.) By letter dated April 27, 1973, respondent submitted to the Commission a legal memorandum pertaining to whether its convertible game tables infringed U.S. Patent No. 3,711,099. 1/ This action was followed by a letter from respondent dated May 11, 1973, relating to the economy and efficiency of the complainant's operations.

Motion for postponement

Respondent alleged in its pleading that the litigation in the district court involves the same issues as those referred to in the complaint before the Commission, and that the decisions of the court will be res judicata as between the same parties on the same issues in any proceeding before the Commission. As a consequence, respondent urged the Commission to grant its request for a postponement under section 201.14, and requested oral argument on this request pursuant to section 201.12(d).

1/ Respondent initally requested confidential treatment of this memorandum. During the public hearing respondent's attorney introduced the same memorandum with amendments as nonconfidential exhibit No. 27.

By a submission filed with the Commission on January 8, 1973, complainant opposed the request to postpone and cited In re Von Clemm (229 F2d 44) as being totally dispositive of the subject. 1/

Patent infringement

Prior to the conclusion of the Commission's preliminary inquiry, respondent had taken a formal position before the Commission only with

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1/ See the section of this report entitled "Litigation History" for respondent's suit in the U.S. District Court.

The Commission had the discretion either to deny or to grant respondent's motion for a postponement. Under sec. 201.14, the Commission could on its own motion order a postponement or, upon a showing of good cause, it could order a postponement on the motion of any party.

The provisions in sec. 337(c) which relate to the Commission's obligations to investigate, hear, and review such cases are mandatory in their application and nowhere are they limited in scope by an exception which would permit a suspension of proceedings brought before the Commission merely by virtue of the circumstance that a court of law had concurrent jurisdiction, since the remedies afforded successful complainants before the Commission differed from, and, as indicated in sec. 337(a), were "in addition to any other provisions of law. . . ." Complainant correctly cited In re Von Clemm as the authority for continuing Commission jurisdiction in the face of pending litigation of the questions of patent validity and infringement in court.

While respondent's complaint in the district court is patent related in the sense that there are allegations that complainant has published infringement charges as to a pending patent application and that complainant has misrepresented the outcome of a prior lawsuit pertaining to the design patent, the Commission proceedings could be affected only in the event that the district court concurred with respondent in its conclusion that complainant's acts constituted a misuse of its patent privileges. However, the possibility that the district court may make such a finding at some time in the future would not present any legal impediment to the Commission's acting under sec. 337 now. In re Orion Co., 22 C.C.P.A. 149 (1934).

Insofar as respondent Armac's request for oral argument on its motion for a postponement is concerned, it will be noted that the rules do not provide for oral argument at the preliminary inquiry stage of the proceedings. Sec. 201.12(d) cited by respondent is applicable only after conclusion of the testimony at a public hearing.

respect to U.S. Patent No. 3,711,099. It had not developed a position before the Commission with respect to U.S. Patent No. D233,539, although it supplied a copy of the final judgment rendered by the district court on August 28, 1972, in ATI Recreation, Inc., v. Armac Enterprises, Inc. Sears, Roebuck & Co., on the other hand, had gone on record before the Commission with an opinion relating to whether U.S. Patent No. D233,539 was being infringed by the convertible game tables sold by Sears.

U.S. Patent D223,539.--The information conveyed orally by respondent's attorneys to the Commission 1/ was that respondent's imported convertible game tables did not infringe U.S. Patent No. D223,539.

In its letter to the Commission dated December 22, 1972, Sears, Roebuck & Co. maintained that, in the opinion of its patent counsel, the tables sold by Sears (see fig. 3) in no way infringed complainant's design patent.

U.S. Patent 3,711,099.--In the letter to the Commission 1/ dated April 27, 1973, respondent's counsel concluded that the imported convertible game tables do not infringe U.S. Patent No. 3,711,099. A copy of a legal memorandum was attached to this letter. The author of the memorandum concluded that--

> . . . each of the claims in the Milu patent contains limitations not met by the table sold by Armac Industries, [sic] Inc. (ARMAC). Accordingly, the ARMAC table does not infringe the Milu patent. 2/

1/ Vice Chairman Parker notes that the information referred to was delivered to the Commission's staff.

2/ Legal memorandum from E. F. Friedman to Robert L. Austin dated Apr. 26, 1973, p. 1. The Milu patent is the same as U.S. Patent No. 3,711,099; Ernest Milu is the inventor who assigned this patent to ATI Recreation, Inc.

Specifically, the author stated that (1) the language "consisting essentially of a bumper pool game playing surface" (emphasis supplied) found in all four independent claims precludes the addition of support cushions which support the removable top having the dining and card-playing surfaces, as are found on the convertible game table imported by respondent; (2) the language "obstacle bumper posts positioned substantially centrally . . ." (emphasis supplied) found in all four independent claims must exclude a table such as that imported by respondent, which has bumper posts located near its edge; (3) the language "bumper pool game playing surface being substantially imperforate . . ." (emphasis supplied) found in all four independent claims must exclude a table such as that imported by respondent, which has apertures as shown in the prior art; (4) the language in claims 1 and 2 referring to a planar shelf member positioned adjacent to the lower ends of the legs and secured to each of said legs "adjacent the periphery of said planar shelf member" (emphasis supplied) would exclude a table such as that imported by respondent, which attaches four legs to the top of the shelf at a distance inside the edge of that shelf; (5) the language in claims 2, 3, and 4, which requires disposition of each ball collection means "between the support means and the outer periphery of said first top" must exclude a table such as that imported by respondent, whereon the ball collection means extends beyond the outer periphery of the pool-table top; (6) the reference to arcuate cutout sections in the lower shelf in claim 9 must exclude a table such as that imported by respondent, which has no arcuate cutout

sections; (7) the requirement of claim 11 that both table tops have a substantially circular configuration must exclude a table such as that imported by respondent, which has an octagonal configuration; (8) the limitation in claim 13 to the effect that the ball collection means must include a bottom wall, side walls, a back wall, and a partial front wall must exclude a table such as that imported by respondent, which includes a single curved wall; (9) the requirement in claim 10 that the four legs for supporting the pool-table top extend "downwardly therefrom to an underlying support surface" must exclude a table such as that imported by respondent, whereon the legs only go to another position of the table rather than extending downwards to an underlying support surface.

The memorandum further disclosed that all of the features shown and claimed by this patent, if given a broad interpretation, are old in the art and have seen use before. Therefore, it is maintained that if the validity of the patent is to be preserved, each feature must be narrowly construed.

Other unfair acts

The allegations of complainant relating to the use of the trademark "TRIO," false pricing, failure to mark with country of origin, false representation of sponsorship, and "palming off" were not formally answered by respondent or by Sears, Roebuck & Co. 1/ Accordingly, during the Commission's preliminary inquiry, information as to respondent's position on

1/ The allegation relating to "palming off" had been directed by complainant in its supplemental complaint against Sears, Roebuck & Co.

these issues was obtained in the course of conversations with its representatives.

Use of the trademark "TRIO".--Respondent denied that it has used the trademark "TRIO" in connection with its tables since August 28, 1972, the date on which the district court ordered it to cease and desist from using this trademark (see section on litigation history). It has since used the trademark "FLIPPER."

False pricing.--Respondent denied that it has established a false regular price for its convertible game tables, and, as evidence thereof, furnished the Commission 1/ with photocopies (see app. B) of four retail sales slips showing sales of the imported convertible game tables for cash in the amount of $299.00 each. 2/ According to the dates on these sales slips, the sales were made during the period August 15-26, 1972.

Failure to mark with country of origin.--Respondent denied that the subject imports were not marked with the country of origin. 3/

False representation of sponsorship.--Respondent conceded that it acted improperly in representing in its advertisements that the trademark "FLIPPER" was registered when in fact it only had a pending trademark for

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1/ See footnote 1, p. A-21.

2/ These receipts did not contain the names of the purchasers; verification of these sales through the purchasers was thus impossible.

3/ The Commission requested the Bureau of Customs (now U.S. Customs Service) to investigate respondent's alleged failure to mark the subject imports with the country of origin. On April 11, 1973, the Commission received a letter from Customs stating that it had found that the underside of each table examined was indelibly marked "Made in Taiwan" in letters approximately three fourths of an inch high, and that the marking was readily legible. Customs was of the opinion that the marking described was sufficiently conspicuous to meet the requirements of 19 U.S.C. 1304 for an article of furniture of that kind.

that name. 1/ Prior to the public hearing respondent had not taken any position with respect to complainant's allegations that it had falsely represented that it had the sponsorship of Uniroyal 2/ and that it had the sponsorship of the persons producing the television program "Flipper."

Allegation of "palming off".--Sears, Roebuck & Co. conceded that it had purchased a number of complainant's convertible game tables to fill orders for the table advertised in its catalog. It maintained, however, that in each subsequent retail sale of this table the customer was fully informed that he was receiving a substitute article which he could, at his election, accept or reject.

1/ Respondent halted the use of the circled "R" in its advertisements. On September 4, 1973, however, the name "FLIPPER" was registered as a trademark for respondent's use.

2/ Complainant's attorney indicated to the Commission (see footnote 1 on p. A-21) on June 5, 1973, at the Commission offices at Washington, D.C., that he had received a letter from Uniroyal indicating that it was possible that Uniroyal might have worked out an arrangement with respondent which would have allowed respondent to use the name "UNIROYAL" in its trade circulars in connection with credit sales of these tables.

Litigation History

Complainant's design patent and the trademarks "TRIO," "THREE IN ONE", 1/ "FLIPPER," "TRIPLET," and "THREE WAY" were the subjects of a final judgment rendered on August 28, 1972, by the U.S. District Court for the Northern District of Illinois, Eastern Division. 2/ The final judgment affirmed an earlier court order dated May 19, 1972, 3/ directing:

> 1. That defendant Armac Enterprises, Inc., its officers, agents, employees, representatives, controlled subsidiaries, and other persons, firms, or corporations in privy with it, cease and desist from representing to any customer or person in the trade that it is, can, or will market a convertible game table under the trademark "TRIO" or "THREE IN ONE" and,
>
> 2. That defendant Armac Enterprises, Inc., immediately cease and desist from the making, using, or selling of any convertible game table in infringement of Exhibit B Des. Pat. 223,539 by the making, using, or selling of a table base substantially identical to Exhibit D (page 4) 4/ attached to the complaint in this action (emphasis supplied), and,
>
> 3. That plaintiff ATI Recreation, Inc., shall not be heard to assert against defendant that the trademarks FLIPPER, TRIPLET, or THREE WAY infringe its trademarks, and,
>
> 4. That both parties shall pay their own costs, attorney's fees, and other expenses of this action, and,

---

1/ Complainant, in its complaint before the Commission, does not allege that respondent used the trademark "THREE IN ONE" in connection with its convertible game table.

2/ ATI Recreation, Inc. v. Armac Enterprises, Inc., Civil Action No. 72 C 1129.

3/ Neither party had appealed the order.

4/ See fig. 4.

5. That the parties shall in good faith consult with regard to defendant's proposed non-infringing redesign and report to this Court on June 23, 1972, at 10 a.m. as to the same.

This earlier judgment,in relating only to the base of the convertible game table, left open the question as to whether the table top also infringed the design patent. 1/ In the final judgment the court also decreed that the parties had met the obligations of paragraph 5 of the order of May 19, 1972. 2/

Insofar as the design patent is concerned, the net result was that the court found neither infringement nor noninfringement of the design patent by the imported convertible game tables.

On September 28, 1972, the respondent filed a suit against complainant in the same court alleging that complainant's publication of infringement charges as to a patent application pertaining to the subject

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1/ Respondent indicated to the Commission (see footnote 1, on p. A-21) on Apr. 24, 1973, at the time of the staff visit to its facilities, that the table shown in exhibit D (fig. 4) referred to in the court order was actually complainant's table (with an octagonal top) and that the identifying legend "Armac Enterprises, Inc.," and the name "TRIO" which appear thereon were included only to enable Armac Enterprises, Inc., to test the market potential for such a table and not to imply that it had imported or sold, or would import or sell, that particular table. There is no evidence which would indicate that respondent did import or sell a convertible game table having a base exactly like that shown on exhibit D. The imports to be seen by the Commission (see footnote 1 on p. A-21) incorporate changes in the design of the base, most apparent of which are the clawlike apendages which appear at the bottom of the legs.

2/ In the course of several conversations with the Commission (see footnote 1 on p. A-21) both complainant and respondent maintained that they did "in good faith" consult with regard to a proposed noninfringing design, that they failed to reach a mutually satisfactory compromise, and that they reported this state of affairs to the court. Since the parties had done all that was required of them by the order, (i.e., consult in good faith) the order was then made final by the court.

"THE TRIO" STOCK NO. 333

ARMAC

ENTERPRISES, INC.

3900 South Union Street
Chicago, Illinois, 60609
Phone : (312) 927 - 3100

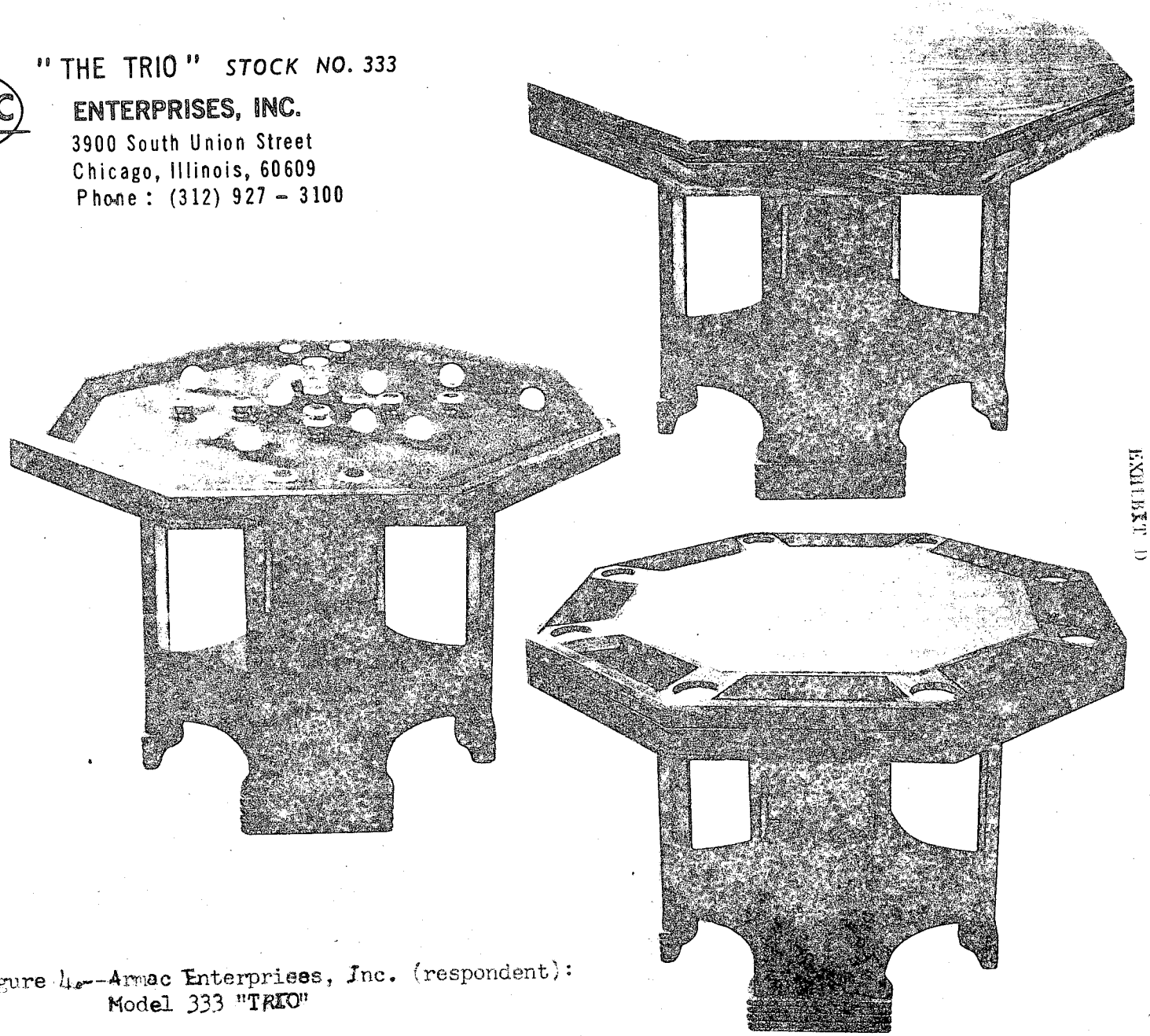

Figure 4.--Armac Enterprises, Inc. (respondent): Model 333 "TRIO"

EXHIBIT 1

convertible game tables and complainant's publication of false descriptions of a prior lawsuit pertaining to the same 1/ constituted, inter alia, unlawful restraint of trade, trade libel, slander, disparagement and unfair competition, deceptive trade practices, misuse of complainant's patent privileges, and misuse and abuse of the district court's jurisdiction. The relief sought by respondent in this suit consisted of an injunction restraining complainant from denying it right of access to a pending mechanical patent application, an injunction prohibiting complainant from filing or prosecuting any patent application, and punitive and treble damages. 2/ On November 6, 1972, the court ordered that pending trial both parties were enjoined from discussing the prior related case except by publication of the final order in that case and that both parties were enjoined from using the threat of a lawsuit on a patent which had not been issued.

Shortly after its receipt of a copy of the complaint filed with the Commission, respondent on December 19, 1972, filed a motion in the District

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1/ In a supporting motion to the court for a preliminary injunction respondent alleged that during the period Sept. 25-28, 1972, at a trade show in Chicago, complainant displayed a letter from complainant's counsel indicating that ATI had been "successful" in its suit against Armac for infringement of its design patent and indicating that the four independent claims of the mechanical patent which had been "indicated allowable" were infringed by the present Armac table. In two affidavits attached to this motion there were references to the July 1972 issue of "Sporting Goods Business," in which the court order was characterized as a "cease and desist order . . . issued to . . . Armac" (there is no reference to the cease and desist order issued to ATI) to prevent it from making, using, or selling "any convertible game table or table base" (the court order only referred to the base) substantially identical to"TRIO"or"THREE IN ONE."

2/ Respondent was unsuccessful in its attempts to enjoin complainant from filing or prosecuting the subject mechanical patent application, since U.S. Patent No. 3,711,099 was issued on Jan. 16, 1973. Also moot is respondent's attempt to enjoin complainant from denying it right of access to complainant's pending patent application.

Court for the Northern District of Illinois seeking to restrain complainant from further prosecuting its case before the Commission on the grounds that (1) ATI had violated the court order of November 6, 1972, by charging respondent with infringement of a pending patent application in its complaint before the Commission; (2) the district court's jurisdiction was exclusive until that jurisdiction was exhausted; (3) the claims against respondent in the complaint before the Commission were barred by rule 13, Federal Rules of Civil Procedure, 1/ (4) the new complaint before the Commission contained false representations made in bad faith; and (5) respondent could not even defend itself against the allegations contained in the complaint before the Commission by virtue of the court order of November 6, 1972.

On December 20, 1972, the District Court for the Northern District of Illinois relieved respondent from that portion of the court order of November 6, 1972, which would have prevented it from referring to court litigation in proceedings before the Commission. On February 22, 1973, the court denied respondent's motion to restrain complainant from further prosecuting its case before the Commission.

1/ Respondent maintained that the issues presented to the Commission by complainant related to whether competition in the marketing of convertible game tables had been fair or unfair, and related to whether or not there had been infringement of patents and trademarks; as such, these issues should have been presented to the district court as counter claims.

U.S. Tariff Treatment

Imports of convertible game tables are dutiable under tariff item 734.40 of the Tariff Schedules of the United States (TSUS). This item provides for tables of wood specially designed for games. The current rate of duty applicable to item 734.40 is 8 percent ad valorem. This rate became effective January 1, 1972, and reflects the fifth and final stage of a concession granted by the United States in the sixth (Kennedy) round of trade negotiations under the General Agreement on Tariffs and Trade; prior to the Kennedy Round, the rate of duty, which had been in effect since the adoption of the TSUS on August 31, 1963, was 16-2/3 percent ad valorem.

U.S. Imports

To develop data on imports of convertible game tables the Commission sent a questionnaire to Armac Enterprises, Inc., the then only known importer of such tables. In addition, the Commission asked all known domestic producers of pool and billiard tables to indicate whether they were also importers of convertible game tables. One other possible U.S. importer came to light--Sunshine Cover & Tarp. Co. of Los Angeles--but no information had been obtained from this concern prior to the conclusion of the preliminary inquiry.

The nature of respondent's importation

Counsel for respondent reported that "Armac does not import complete tables, but only a kit of parts which is short the hardware for fastening all these parts together." This hardware was added to the kit in the United States. 1/ Respondent reported that its convertible game tables

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1/ In response to the Commission's query to known domestic producers of pool tables, Armac reported "domestic production" of convertible game tables for 1972. This response (and the one above) raised the following issues: (1) Could Armac be considered a domestic manufacturer of convertible game tables from imported parts (components) by virtue of its adding hardware to the imported components? (2) Would Armac's alleged violation of sec. 337 of the Tariff Act then involve contributory infringement? Regarding the latter, 35 U.S.C. 271 provides that--

> Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

were imported from the Republic of China (Taiwan) and customarily entered through the ports of Chicago, New York, and Los Angeles.

Quantity of imports by respondent

During the course of the preliminary inquiry, the Commission--despite repeated attempts at clarification--was unable to resolve certain conflicts in respondent's replies to the Commission's questionnaire, in the information obtained in followup inquiries, and in information the Commission had obtained from independent sources. Nevertheless, it was established that respondent did import allegedly infringing covertible game tables during 1972, and that almost all imports of this product took place during the latter part of the year. It was also established that the estimated volume of such imports was substantial when compared with the output of the patented convertible game tables produced by the complainant during calendar year 1972. Most of the tables imported by respondent in 1972 were sold in that year, as was evidenced by the number of retail sales of the allegedly infringing convertible game tables by a major customer of respondent.

The U.S. Industry Involved and Its Environs

U.S. producers of billiard and pool tables

About 55 firms in the United States are engaged in the manufacture of pool and billiard tables. Official statistics on U.S. production, shipments, and so forth, are not collected annually. In 1967, however, the last year for which such data are available, U.S. shipments of billiard and pool tables (including interplant transfers, if any) amounted to 364,000 tables. 1/

In connection with its preliminary inquiry, the Commission requested all known manufacturers of billiard and pool tables to report certain economic data, by type of table, for the period 1968-72. Statistical data from this survey were not available during the course of the preliminary inquiry, but were subsequently tabulated as follows:

1/ U.S. Department of Commerce, 1967 Census of Manufactures, Industry series, Sporting and athletic goods, n.e.c., SIC Code 3949, December 1969.

Multipurpose game tables (including convertible game tables) and all other types of billiard and pool tables: Sales by domestic producers, 1968-72 1/

Year	Multipurpose game tables 2/	Other billiard and pool tables
	Quantity (units)	
1968	3/	472,541
1969	3/	498,332
1970	3/	637,477
1971	21,990	624,021
1972	31,483	754,587
	Value	
1968	3/	$31,165,313
1969	3/	34,463,408
1970	3/	34,500,397
1971	$820,643	38,084,951
1972	1,907,807	46,040,216

1/ One producer reported data on a fiscal-year basis with the period ending Oct. 31.

2/ Any combination table which by the rearranging of certain of its constituent parts can be converted for different uses, one of which is for playing a game.

3/ Data not shown because it would reveal the operations of an individual concern.

Source: Compiled from data submitted by domestic producers in response to Tariff Commission questionnaires.

U.S. producers of convertible game tables

All-Tech Industries, Inc., the complainant and assignee of the subject patents, is one of the larger U.S. manufacturers of billiard and pool tables, and produces convertible game tables manufactured in accordance with U.S. Patent Nos. D223,539 and 3,711,099. As of the conclusion of the preliminary inquiry, the complainant had not licensed

any other firm to produce convertible game tables protected by these patents.

Complainant has sold convertible game table top assemblies to Schubert Industries, Inc., and to Chromcraft Corp. (a subsidiary of Mohasco Industries, Inc.). These two firms manufacture furniture apart from pool tables. To the convertible game table tops purchased from the complainant, Schubert and Chromcraft add bases and, in some instances, matching chairs of their own design and sell the completed ensemble. Complair referred to Schubert and Chromcraft as "effective" licensees; however, inasmuch as no royalties are involved, they more resemble contract purchasers. In collecting data on the U.S. industry manufacturing convertible game tables protected by the subject patents, the Commission directed its inquiry to the complainant and requested separate data for top assemblies sold separately.

In addition to the firms mentioned above, two others, Superior Industries Corp., of New Haven, Conn., and the Fischer Division of Questor Corp., California, Mo., have entered into, or are planning to enter into, domestic production of certain types of convertible game tables. Superior's table, trademarked "THE FULL HOUSE" (fig. 5), was offered for sale and included in Superior's price list effective April 1, 1973. Fischer's table, trademarked "TRIESTE" (fig. 6), entered into production on June 1, 1973. Both tables are based on the same general concept as the patent holder's, inasmuch as they are convertible game tables designed for rebound

Patent Pending

the full house™

CUES . . . CARDS . . . CAVIAR all belong here! **The full house** is a graceful dining table with a lustrous look of select furniture. Turn the dining top over and **the full house** becomes a card table that seats eight. Remove the top completely and you are ready to enjoy the popular game of carom pool.

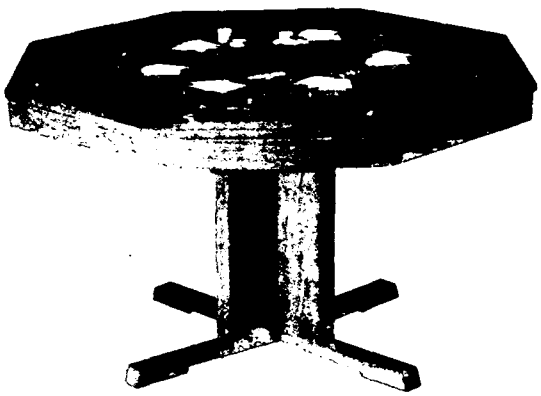
Features:

- **Dining Top/Card Table Top** • Constructed of new materials found in quality furniture • The tops are finished in attractive walnut grain.
- **Card Table Top** • Offers built-in ashtray, glass, poker chip and snack tray sections for maximum convenience and enjoyment • Playing surface is covered with top grade fabric.
- **Non-Sliding Dining Table** • Card Table Top locks firmly into carom table frame.

Carom Pool Table

- Exclusive sliding carom ball box can be recessed when not in use.
- Chrome-plated designer-styled bumpers.
- Top grade gum rubber cushions.
- Rich green wool blend cloth.
- New pedestal leg design easily attached to table base.
- Deluxe carom balls.
- Two cues.

Specifications: FH-50
Overall Dimensions—50" x 30" high, *Weight*—170 lbs.



SUPERIOR INDUSTRIES CORP.

"The company that put the pool table into the home"

SI Company

P. O. Box 1803
New Haven, Conn. 06507

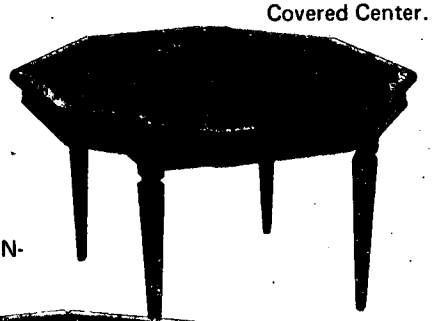
Phone (203) 934-6651
Factory: 351 Morgan Lane, West Haven, Conn.

Fischer TRIESTE

A DIVISION OF QUESTOR CORP.

CONTEMPORARY FURNITURE DESIGN
Walnut Stained Hand-Rubbed Satin Finish

SIDE FOR DINING
Attractive Octagonal Top with Wide, Walnut-Stained Wood Perimeter. Durable Black Vinyl Covered Center.



Includes Matching CONVERTIBLE Top.

SIDE FOR GAMES
Seats Eight Comfortably. Eight Vinyl-Lined Recessed Chip Trays and 16 Receptacles for Glasses and/or Ash Trays. Matching Black Vinyl Playing Surface.

This exciting game appeals to all members of the family. The requirements for little space makes it ideal for the apartment or homes where indoor recreation space is limited. The quality-furniture craftsmanship and design of the table and convertible top is a pleasing addition to all periods of furniture styling.

Figure 6.— Fisher Division Questor Corp.: "TRIESTE"

STD. GREEN RED BLUE GOLD AVOCADO

Rebound Billiard Table Available in Choice of Standard Green - Avocado - Red - Blue or Gold Wool/Nylon Billiard Cloth. Deluxe Jumbo Plastic Rebound Posts, Rubber Rebound Rings — Large Profile Rubber Rail Cushions. ¾" Re-inforced. High-Density Particle Board Playfield. Matching Contemporary Designed Leg with Adjustable Leg Levelers.

Accessories include: Set of Cast Phenolic Balls — Two 48" Deluxe Cues — Chalk — Playing Instructions.

OVER ALL MEASUREMENTS:
Model No. 1530 (When ordering, specify color)
Rebound Table 52" x 29" High
Convertible Top 55" x 1-7/8" Deep
Shipping Weight 145 Lbs.

QUESTOR

pool, cards, and dining. Moreover, Superior indicated that it has a patent application for its own table.

All-Tech Industries, Inc.

All-Tech Industries, Inc., was incorporated in 1953. Until late 1967 the firm was engaged solely in the manufacture of leisure-time products, of which billiard tables were the most important. In late 1967 All-Tech embarked on an acquisition program and subsequently diversified its activities.

ATI Recreation, Inc., was incorporated in April 1972 as a wholly owned subsidiary of All-Tech. As part of its organizational activity, ATI acquired All-Tech's Leisure Time Products Division. At that time, ATI was expected to become a public corporation; however, the public sale of ATI's common stock did not take place, and on March 1, 1973, ATI was reorganized again as a division of the parent firm. Data relating to All-Tech refers specifically to that portion of All-Tech formerly identified as ATI Recreation, Inc.

Facilities.--All-Tech maintains four leased facilities, each of modern design and construction. The main plant comprises some 90,000 square feet (on one story) and is devoted to the production of home-type, knocked-down pool tables, professional pool tables, and coin-operated tables. The building also contains All-Tech's corporate offices. It is located within the Miami Lakes Industrial Park near Miami, Fla. A 40,000-square-foot warehouse used primarily for storage and shipping of finished goods and a 20,000-square-foot warehouse used principally for storage of raw materials are nearby.

Convertible game tables are manufactured in a separate leased facility about 8 years old situated in Hialeah, Fla. It is about 3 miles from All-Tech's other buildings. The single-story building encompasses 20,000 square feet of floor space and is well lighted and airy.

Plant and operations.--During March 21-23, 1973, the Commission 1/ visited ATI's convertible game table plant. It was observed that except for small areas devoted to other activities, virtually the entire plant is used to manufacture convertible game tables.

Convertible game tables are manufactured in preassembled stages. Playfields, tops, and side walls are cut to size in the main assembly area. Numerous stages and work stations are involved, but, in general, they involve attaching (by screws or glue) various subassemblies in place, finishing, and inspection.

The table is packed into two separate cartons, one containing the top assembly and accessories, and the other containing the pedestal base components. The final purchaser assembles the table in his own home. Most of the tools and equipment employed--radial arm and table saws, miters, routers, hand saws, electric and pneumatic hand tools, and glue guns--are of general-purpose design. On the basis of the plant inspection and interviews with company representatives, the impression was that the plant was efficiently and economically operated.

Production and sales.--Complainant reported that it began manufacture of the convertible game table described in U.S. Patent Nos. D223,539 and

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1/ See footnote 1 on p. A-21.

3,711,099 during the first quarter of 1971. 1/ By October 31, 1971, 2/ All-Tech's production of the subject patented game tables represented only a relatively minor portion of All-Tech's production of billiard and pool tables. During the first full year of production (fiscal year 1972), the number of convertible game tables and separate top assemblies produced by complainant jumped to almost a third of complainant's total output of billiard and pool tables. Based on data for the first 6 months in complainant's fiscal year 1973, it was estimated that output of convertible game tables and separate top assemblies during the full fiscal year would be significantly higher than during fiscal year 1972. Output during the first 6 months was already well in excess of one-third of complainant's total production of billiard and pool tables during the same period. According to a company representative, the Hialeah plant was operating at about full capacity in fiscal year 1973.

Complainant's sales of billiard and pool tables have generally corresponded with production. The volume of complainant's sales of billiard and pool tables (including the subject patented tables) more than tripled between fiscal years 1968 and 1972. On a value basis,

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1/ Complainant's design patent application was dated May 17, 1971, and its mechanical patent application was dated Nov. 3, 1971. In its suit against Armac (Civil action No. 72 C 1129; May 5, 1972), counsel for complainant stated: "Plaintiff [All-Tech] commenced manufacture of its convertible game tables approximately 18 months ago" (p. 3). This statement suggests that production of convertible game tables actually began about November 1970. Complainant's convertible game table, however, underwent considerable prototype development.

2/ Complainant was generally unable to provide economic data except on a fiscal year--November 1-October 31--basis.

however, the sales only doubled. The divergent trends represent a change in product mix; whereas in earlier years sales included large numbers of coin-operated tables, which are larger and more expensive, sales in later years were increasingly composed of less expensive home-type tables.

Complainant reported that the subject patented table was first offered for sale in early 1971; sales in fiscal year 1971 about equaled production. In fiscal year 1972 production exceeded sales, and in the first 6 months of fiscal year 1973, sales exceeded production.

Employment and man-hours.--Based on size of the labor force, complainant is classified as a small manufacturing concern. 1/ From fiscal year 1968 to fiscal year 1972 its employment nearly doubled. 2/ In the last 2 years (fiscal years 1971 and 1972), much of the personnel increase was accounted for by production and related workers employed on the subject patented tables. By virtue of the plant's location and non-unionized workforce, the division probably has a relatively low wage structure. In October 1972, complainant's average hourly wage rate in the convertible game table plant was thought to be lower than the published average hourly earnings for production workers engaged in the manufacture of furniture and fixtures. 3/

Man-hours worked by production and related workers devoted to the subject convertible game tables increased fourfold from fiscal year 1971

1/ The Small Business Administration classifies manufacturing concerns with 250 to 1,000 employees as a small business.

2/ Based on total number employed as of Oct. 31 of each year.

3/ Conceptual difficulties prevent direct comparisons between complainant's wage rate, computed on the basic hourly rate for a 40-hour week, and, for example, average hourly earnings ($3.12 in October 1972) for production workers engaged in the manufacture of furniture and fixtures, as published by the U.S. Department of Commerce. Basically, the wage rate represents the pay stipulated for a given unit of time, while earnings refer to the actual return to the worker for a stated period of time. Thus, earnings include, for example, vacation, sick leave, and overtime.

to fiscal year 1972. The latter year, of course, represents the first full year of convertible game table operations. From fiscal year 1971 to fiscal year 1972, output per man-hour increased by about 30 percent.

Financial data.--Complainant submitted profit-and-loss data for overall division operations and for convertible game tables alone.

Annual net sales for the ATI Recreation Division about doubled from 1968 to 1972. For the 6 months ended April 30, 1973, net sales indicated a further increase.

Net operating profits have fluctuated. In 1969 they were slightly higher than in 1968; they declined substantially in 1970, then sharply increased in 1971. In 1972, a reversal occurred and a net operating loss was reported. Another net operating loss was sustained for the 6 months ended April 30, 1973. In its annual report for fiscal year 1972, 1/ the parent organization offered the following explanation:

> Fourth quarter operations continued to reflect the unfavorable operating conditions experienced in the third quarter. As previously reported, third quarter operations were affected adversely by losses sustained by our Leisure Time Products Division "ATI Recreation" . . . [which] posted additional losses in the fourth quarter.
>
> In the last few years our Leisure Time Products Division has captured a major position in the growing home game and billiard table industry. A year ago we reported that sales were ahead 25% in 1971 over 1970 and that profits improved by 55%. In the first half of 1972, sales and profits continued to climb and after receiving a substantial contract from Montgomery Ward we were encouraged to undertake a public stock offering. A subsidiary corporation - ATI Recreation, Inc. - was

1/ All-Tech Industries, Inc., Annual Report, 1972.

> formed for this purpose from the Leisure Time Products Division but later was merged back into All-Tech when we decided it prudent to withdraw the planned underwriting because of market conditions.
>
> Sales in the Leisure Time Products Division increased nearly 40% for the year as a whole. While first half profits were well above the same 1971 period, we sustained substantial losses in the second half due mainly to problems associated with overly ambitious expansion in business volume which resulted in a reduced gross profit margin. Higher manufacturing costs were experienced due to our inability to achieve a satisfactory flow of raw materials to accommodate the increased sales. We also incurred substantial startup costs in new production operations, including those related to a new product line, the Gambit. We already have and further expect substantial future sales and profits from the Gambit line. Finally, cost increases of raw materials, such as lumber, which have already captured national attention, and natural imported slate, which is sensitive to international currency fluctuations, contributed to further shrinkage in our gross profit margins on our fixed price contracts.
>
> As of the first quarter of 1973 . . . the Leisure Time Products Division [is] again profitable - reflecting corrective actions taken earlier by management.
>
> In the Leisure Time Products Division, we have firmed prices and revised variables to cover changes in raw material prices. We have also made several important organizational changes aimed at strengthening operations and internal cost control and assuring lowest possible material and component part prices.

In the first full year of production (fiscal year 1972) net sales of convertible game tables were five times higher than in the previous fiscal year. For the 6 months ended April 30, 1973, net sales of convertible game tables were nearly as large as the previous year's total.

In fiscal year 1971, operations on convertible game tables were almost at a break-even point. In both fiscal year 1972 and the first 6 months of fiscal year 1973 net operating losses were sustained.

The following table presents the change in unit costs to produce three different models of game tables.

All-Tech Industries, Inc.: Indexes of unit costs of production of convertible game tables, fiscal years 1971 and 1972 and Nov. 1, 1972-Apr. 30, 1973

(Fiscal year 1972=100)

Description	Year ended Oct. 31--		Nov. 1, 1972-Apr. 30, 1973
	1971	1972	
48-inch top assembly only	-	100.0	103.3
48-inch Gambit	-	100.0	103.3
52-inch Gambit	95.5	100.0	103.2

An official of the firm indicated that one of the major reasons for the increase in the unit costs of production was an extraordinary rise in the price of lumber. He cited as an example that in August 1971 a purchase of lumber was made at nearly $300 per thousand board feet but in March 1973, the firm purchased lumber at about $500 per thousand board feet.

Conditions of Competition

Channels of distribution and marketing

Complainant sells its convertible game tables nationwide to sporting goods distributors, to mass merchandisers, to the premium trade, and, regarding top assemblies, to furniture manufacturers. Important customers for convertible game tables include Montgomery Ward & Co. and, for top assemblies only, Chromcraft.

Complainant advertises in publications aimed at sporting goods buyers, retailers, and those in charge of sales incentive programs (i.e., the premium trade). Complainant also provides promotional materials to customers for incorporation in their own advertising. In addition, complainant participates in the annual sporting goods and premium trade shows.

Respondent's convertible game tables are also supplied through sporting goods distributors and mass merchandisers (Sears, Roebuck & Co. has been a purchaser of respondent's convertible game tables). Respondent, through a wholly owned subsidiary--Rozel Industries, Inc.--owns and controls the "Minnesota Fats" sporting goods retail stores situated in the Chicago area, which sell the imported convertible game tables directly to the public. Respondent also relies on advertisements in trade publications and participates in trade shows.

U.S. demand and apparent U.S. consumption

At the conclusion of the preliminary inquiry there was no clear indication of how large the market for convertible game tables might be;

it did appear, however, that a considerable market potential existed. Billiards and pool became increasingly acceptable as a form of home entertainment during the 1960's. Moreover, the trend towards smaller housing units favors multifunctional and space-serving furnishings of which the convertible game table is a prime example. On the other hand, convertible game tables have a certain novel appeal. Such products normally do not have long market lifespans, and, in this regard, it is significant that the complainant was willing to forfeit 3 years of patent protection by disclaiming that portion of the mechanical patent which would have extended beyond the time period covered by the design patent.

At the conclusion of the preliminary inquiry uncertainty in the import data prevented the calculation of precise data on apparent U.S. consumption of convertible game tables. On the basis of available evidence, however, it was known that U.S. consumption of convertible game tables was growing rapidly and that imports by respondent accounted for a significant and rising share of the market.

Price comparisons

To develop price data on convertible game tables, the Commission requested complainant and respondent to submit all convertible game table price lists issued since they began marketing such tables. In addition, the Commission requested the firms to report the average net selling price (quarterly) for the period January 1, 1970, through March 31, 1973. Average net selling prices were to be computed on the basis of certain sales-volume categories with a 2-percent cash discount

on payment within 10 days and less freight (separately reported) when paid by the seller. Specifications included 48-inch and 52-inch convertible game tables, top and base combinations, and 48-inch top assemblies sold separately.

Published prices.--The table on the following page shows published prices (f.o.b. Miami Lakes or f.o.b. Chicago) for convertible game tables sold complete with balls and cues. As shown, complainant increased the published price for the 52-inch table from $160.00 in November 1971 to $185.00 in February 1973 (i.e., by 15 percent). The published price for complainant's 48-inch table was stable at $145.00. The 1972 published price for respondent's imported table, however, was $135.00; at this level it underpriced complainant's 52-inch table by 25 percent and complainant's 48-inch table by 7 percent. Although complainant raised the list price of both tables in April 1973, the price increases were subsequently rolled back--for the 48-inch table, to $138.00, the lowest price in the period under consideration. In the April 1973 published list price, complainant's 48-inch table was being offered for $2.40 per table less than the 1973 published price for respondent's 48-inch table ($140.40). By comparison, the price of Superior Industries' convertible game table, THE FULL HOUSE, was listed at $130.00, while the price of Fischer's TRIESTE was $170.00 (f.o.b. factory).

Convertible game tables: Published prices for ATI Recreation Division's 52-inch and 48-inch convertible game tables (with accessories) and for Armac Enterprises' 48-inch convertible game table (with accessories), specified months November 1971 to April 1973

(Price per table)

Month and year of price list	Complainant ATI Recreation Division, f.o.b. Miami Lakes, Fla.		Respondent Armac Enterprises, f.o.b. Chicago,
	52-inch table	48-inch table	48-inch table
November 1971	1/ $160.00	-	-
February 1972	-	-	$135.00
July 1972 2/	3/ 180.00	3/ $145.00	-
February 1973	3/ 185.00	3/ 145.00	140.40
April 1973	3/ 214.00	3/ 151.00	-
	3/ 185.00	3/ 138.00	-

1/ Price for 6 to 50 tables.

2/ In March and July 1972 ATI published special price lists for premium programs. In these price lists ATI was offering retail prices, in effect, to various customers for use as incentive awards or other premium. ATI's 48-inch convertible game table is first listed in such a premium program. Price lists for this "premium program" were as follows:

Mar. 1, 1972--$170 each for 1/2 truckload of 52-inch tables and $154 each for 1/2 truckload of 48-inch tables; July 1, 1972--$217 each for 1/2 truckload of 52-inch tables and $187 each for 1/2 truckload of 48-inch tables.

3/ Price for 11 to 60 tables.

Source: Compiled by the U.S. Tariff Commission from price list data supplied by the complainant and the respondent.

Average net selling prices.--Average net selling prices were computed on a quarterly basis. Table specifications were the same as above (i.e., a 52- or 48-inch convertible game table complete with accessories). The average net selling prices were for the largest volume sales category reported by the firms. The complainant reported lower prices for sales above a certain quantity; respondent reported no price differential for convertible game tables sold in either large or small lots.

The net selling price for complainant's 52-inch table fluctuated during 1971, the first year of introduction. These price fluctuations probably represent experimentation with various price strategies as complainant sought to develop a market for a new and at that time unique product. During 1972, the selling price of complainant's 52-inch table stabilized and remained the same during the first quarter of 1973. The level of complainant's average selling price during 1972 reflects the premium program, in which complainant in effect retailed its tables to companies for use as incentive awards.

The average net selling price for complainant's 48-inch convertible game table remained the same throughout 1972 and during the first quarter of 1973. The average price, which reflects the actual transactions by complainant, was less than the published price for the same table. At this selling price, the allegedly infringing imported table undersold the complainant's table by about 8 percent per table from the time respondent first reported sales in the second half of 1972.

The Tariff Commission also sought price data on complainant's 48-inch top assemblies which were sold to Chromcraft and Schubert. Complainant reported that during the second and third quarters of 1972 top assemblies sold separately were sold in small quantities at a constant price. Beginning in late 1972 and continuing into the first quarter of 1973, the quantity of top assemblies sold separately substantially increased, and complainant's sales were made in larger lots. Complainant's average selling price subsequently decreased in the first quarter of 1973; in conjunction with sales in even larger lots, the price was reduced even further.

Retail prices.--Retail prices displayed wide variation during 1972, depending largely upon whether or not the convertible game tables were ultimately offered with matching chairs. The highest retail prices were upwards of $700 for complete table and chair ensembles. The lowest retail price for convertible game tables alone (48-inch) was $187, quoted by complainant in its advertisement in The Counselor (September 1972 issue), a magazine directed to the specialty advertising and premium trade.

Complainant indicated that respondent's table shown in the Sears catalog and priced at $195 undersold Montgomery Ward's table (complainant's table) by 12 percent during the prime fall and winter marketing season in 1972, and, as a result, Ward's withdrew its illustration of the complainant's convertible game table from its 1973 fall and winter catalog. Ward's, however, featured complainant's table on a full page of its 1972 Christmas catalog at $189--one of the lowest retail prices surveyed by the Commission. 1/

1/ See footnote 1 on p. A-21.

Summary of the Legal Issues Presented at the Conclusion of the Preliminary Inquiry

I. As to the patents involved--

A. Whether the imported convertible game tables, or components thereof, are embraced or are capable of being embraced (upon final assembly) within the claim(s) of U.S. Patent No. D223,539, and/or U.S. Patent No. 3,711,099.

B. Whether, under the circumstances of this case, the complainant may be accorded relief under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) against the importation and sale of convertible game tables, or components thereof, which are embraced or are capable of being embraced (upon final assembly) within the claim(s) of U.S. Patent No. D223,539, and/or U.S. Patent No. 3,711,099.

II. As to other unfair acts-- 1/

A. Whether complainant's allegations relating to trademark misuse, false pricing, failure to mark with country of origin, false representation of sponsorship, and palming off, are supported by facts.

B. Whether, under the circumstances of this case, any one or all of such practice(s), if supported by facts, constitute unfair method(s) of competition or unfair act(s) for which relief may be provided to complainant under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).

III. Whether, under the circumstances of this case, good and sufficient reason exists for the Commission to order a full investigation.

IV. As to a temporary exclusion order--

A. Whether the facts as shown indicate a prima facie violation of the provisions of section 337.

B. Whether, in the absence of a temporary order of exclusion, immediate and substantial injury would be sustained by the complainant.

1/ To Commissioner Ablondi there is an additional issue as to whether there is a violation of section 5(a) of the Federal Trade Commission Act which bears a direct and causal relationship to unfair methods of competition or unfair acts in the "sale" of an imported article under section 337.

The Institution of a Full Investigation

On August 30, 1973, the Commission considered the information which had been assembled during the preliminary inquiry. On the basis of the data before it, the Commission determined that good and sufficient reason existed for it to order the initiation of a full investigation in the matter of certain convertible game tables and components thereof. Notice of the institution of a full investigation and of a public hearing in connection therewith to commence on October 15 was published in the Federal Register.

The Commission decided not to recommend at that time the issuance of a temporary exclusion order to the President. 1/ Pursuant to the provisions of section 333 of the Tariff Act of 1930 (19 U.S.C. 1333), the Commission authorized the issuance of a subpoena to respondent to compel testimony and to compel the production of books, documents, and records relative to the subject matter of the investigation.

The subpoena was issued on September 10, 1973, and was duly served on respondent by registered mail. The response to the subpoena was received by the Commission in respondent's offices at Chicago, Ill., on October 1 and 2, 1973.

The first hearing on this matter was held before the Commission pursuant to notice in the Tariff Commission Building, Washington, D.C., on October 15-17, 1973. The second hearing was held on February 5, 1974.

1/ Commissioner Moore voted at that time to recommend the issuance of a temporary exclusion order by the President.

The Commission determined that U.S. Patent Nos. D223,539 and 3,711,099 were proper subjects of a full investigation, on the ground that respondent had imported and sold, without license from the U.S. patent owner, certain convertible game tables manufactured abroad which were similar in general configuration and construction to those manufactured by the complainant and which were, as such, probably made in accordance with the invention(s) disclosed in these patents, neither of which had expired or been adjudicated invalid.

The Commission defined the scope of the full investigation as follows:

> That, for the purposes of section 337 of the Tariff Act of 1930, an investigation be instituted with respect to the alleged violations in the importation and sale in the United States of convertible game tables made in accordance with the claims of U.S. Design Patent No. 223,539 and U.S. Patent No. 3,711,099 and components thereof; with respect to the allegation that complete sets of the imported product are the subjects of unfair pricing; and with respect to the allegation that complete sets of the imported product are the subject of false representations as to sponsorship.

The Commission determined that the allegations pertaining to the trademark "TRIO", failure to mark with country of origin, and "palming off" were not to be included within the scope of the investigation.

INFORMATION DEVELOPED SUBSEQUENT TO THE INSTITUTION OF THE FULL INVESTIGATION

Response to the Commission's Subpoena

The response to the Commission's subpoena, which was made on October 1 and 2, 1973, in Chicago, Ill., established that respondent's imports of convertible game tables accounted for a far greater portion of domestic consumption in 1973 (through July 31, 1973) than they did in 1972; that significant inroads had been made by these imports into the domestic market; and that the penetration was being maintained by repeated importations of large volumes of this product. The number of convertible game tables imported by respondent during the first 7 months of 1973 alone was more than three times the number it had imported during calendar year 1972. There were indications that the rate of importations of this product would increase even further in the months ahead.

The response to the Commission's subpoena also indicated that there were significant discrepancies between the advertised and actual regular price of respondent in its marketing of the subject convertible game tables through its retail outlets, the "Minnesota Fats" stores in the Chicago area. The response to the Commission's subpoena failed to disclose the name of a single purchaser of a FLIPPER table from these stores for a price of $299, and did not reveal any supporting documentation to the four retail sales slips provided to the Commission's staff earlier by the respondent (see section on respondent's contentions).

The Information Developed at the Commission Hearing Held October 15-17, 1973

The evidence submitted by complainant as to the patents

Complainant introduced one of its convertible game tables and one of the allegedly infringing imported convertible game tables into evidence as physical exhibits (see app. D) and then proceeded to apply the claims of its U.S. Patent No. 3,711,099, first to its own product, and then to the imported product. 1/ In this manner, complainant's attorney, who had qualified himself as an expert witness, testified that all claims of U.S. Patent No. 3,711,099 except claims 9 2/ and 11 3/ found substantial response in the imported product. Having earlier established that the domestically produced product introduced into evidence at the hearing was representative of the product marketed and sold by complainant, complainant's attorney then attempted to establish, through adverse questioning of respondent's witness, that the sample of allegedly infringing imported product introduced into evidence at the hearing was representative of the product marketed and sold by respondent. 4/

Complainant did not proffer evidence as to infringement of U.S. Patent No. D223,539 (its design patent) at the hearing.

1/ Transcript of the hearing, pp. 176-210.

2/ Ibid., p. 204. Claim 9 refers to a plurality of arcuate cutout sections in the planar shelf which was not found on the copy of respondent's table introduced into evidence at the hearing.

3/ Ibid., p. 205. Claim 11 refers to each of the table tops being circular in configuration. The table tops on the copy of respondent's table introduced into evidence at the hearing were octagonal.

4/ Ibid., pp. 216-220.

The evidence submitted by complainant as to false pricing

Complainant introduced into evidence an affidavit executed by a certain Mr. Anthony Morelli, of 1005 Belleforte St., Oak Park, Ill., and then elicited testimony from Mr. Morelli pertaining thereto. The affidavit in question indicated that on December 26, 1972, Mr. Morelli, a high school principal, visited eight "Minnesota Fats" stores in the Chicago area at the request of the office of complainant's counsel. The affidavit also indicated that Mr. Morelli made notes after his visit to each store, which notes were expressly made a part of the affidavit and incorporated therein.

At the hearing Mr. Morelli identified the affidavit in question as being the affidavit that he had executed. After refreshing his recollection by referring to the affidavit, he identified the names of all eight stores as well as the salesmen he had talked to in seven of these stores. 1/ Mr. Morelli's testimony as to the regularly established price of the FLIPPER table, based on his inspection of each store, was summed up by the following statements:

> It simply depended on which store you were in. The established price went from $229 to $249 to $299 and it simply varied from store to store. This was told to me either by a salesman or I saw it in an ad, that is a flyer, that they may have had on the window or on a table. 2/

1/ There appears to be some discrepancy in the testimony as to the number of retail stores operated by respondent through its subsidiary, Rozel Industries, Inc., in Chicago. See the statement by Mr. Marcus (respondent's counsel) contained on p. 48 of the transcript of the hearing: "Rozel Industries is a subsidiary of Armac Enterprises. There are six local stores in the Chicago area." (Emphasis supplied.) The answer Mr. Slotky (president of Armac Enterprises and Rozel Industries) gave to Chairman Bedell's question, "There are six Rozel retail stores in the Chicago area?" was "In the Chicago area only." Ibid., p. 341.

2/ Ibid., p. 39.

> I could not form a definite opinion or conclusion as to what the regular price would be because it would depend on the store that I visited. As I indicated, it would vary from store to store. 1/

Mr. Morelli's testimony as to what the sales price was in these stores on December 26, 1972, was exemplified by his statement: "The sale price in all of the eight stores was the same. That was $199." 2/

Mr. Morelli's testimony as to when the sale would be over was summed up by the following statement:

> It depended on who you talked to. In general, none of the sales personnel really knew when the sales would be over and in essence some said a week, some said two weeks, some said when we hear from the main office. When I asked, well, when will that be, they simply indicated they really did not know. 3/

Complainant then introduced into evidence an advertisement appearing on page 4, section 3, of the Chicago Sunday Tribune of September 30, 1973. This advertisement referred to the "Fabulous Flipper Table" and stated "Regular $299, save $99.12. Ten days only." Mr. Morelli testified that on Friday, October 12, 1973, 2 days subsequent to the date advertised in the paper for the end of this sale, he visited the Oak Park store and once again viewed a FLIPPER table. He testified that there was a tag that had a sale price on it of $199.88 and also a tag to the effect that the regular price was $299. 4/

1/ Ibid., p. 40.
2/ Ibid., p. 39.
3/ Ibid., p. 40.
4/ Ibid., p. 38.

Complainant's counsel alleged at the hearing that the particular prices with regard to which testimony was given showed an effect or tendency to destroy or substantially injure an efficiently and economically operated industry in the United States in that respondent selected prices which were representative of the regularly established prices of complainant's product and then offered the imported product at a lower price, leading the public to believe they now had a real bargain. This, it is alleged, fostered the sales of the imported item to the detriment of the domestic product. 1/

The evidence submitted by complainant as to false representation of sponsorship

Complainant's attorney had raised the issues as to the use of the terms "FLIPPER" and "UNIROYAL" in his supplemental complaint. However, at the hearing complainant's attorney did not pursue the issue he had raised as to the use of the term "FLIPPER", nor did he offer any evidence at the hearing which controverted respondent's explanations as to the circumstances surrounding the use of the name "UNIROYAL." 2/

The evidence submitted by complainant as to whether the domestic industry was efficiently and economically operated

There was testimony at the hearing by the general manager of complainant's ATI Recreation Division to the effect that there was a conscious effort on the part of management to increase the number

1/ Ibid., p. 74.
2/ Ibid., pp. 355-356.

of convertible game tables produced against the man-hours worked, that attention was constantly given to balance, work flow, and the geography of work stations to achieve optimum output of this product, that performance of complainant's employees was kept at the desired level by continuous observation and supervision, that the output of new employees was kept at a certain minimum, that an independent roving quality inspector routinely checked one out of every hundred finished tables for mechanical defects, and that employee turnover had not increased significantly within the last 12 months. 1/

The general manager of complainant's ATI Division also testified at the hearing that--

> I feel we are at the optimum compromise which I am confident to recommend to the Board at this moment in terms of capital investment against certainty of market, against, therefor, reasonable probabilities of sale and giving the amortization base to recover the equipment 2/

The evidence submitted by complainant as to immediate and substantial harm

There was testimony by complainant's vice president of finance, ATI Recreation Division, to the effect that complainant and a company listed on the New York Stock Exchange were engaged in negotiations looking toward the licensing of the patent covering the subject convertible game table, but competition from imports had significantly forced down the price perimeters and royalty fees complainant could reasonably expect to get in any such agreement; 3/ imports of convertible

1/ Ibid., pp. 79-87.
2/ Ibid., pp. 89, 90.
3/ Ibid., p. 238.

game tables continued unabated; 1/ 2,000 convertible game tables were being manufactured in Taiwan for shipment to Sunshine Cover & Tarp Co., another importer; 2/ imports were primarily responsible for a decline of $10 per unit in the selling price of the domestic product, which, if projected into 1973, would result in a total revenue loss of $170,000 for 1973 alone; 3/ by virtue of intense competition from imports, Montgomery Ward, a major customer of complainant, demanded a decrease in price, or, as an alternative, a cutback in the number of convertible game tables ordered from complainant; complainant had reduced prices, but this was not enough to stave off a cutback of some orders; 4/ intense price competition from imports was causing at least one other large customer of complainant, Chromcraft, to seriously question the prices it was paying to complainant for components (tops) of convertible game tables, in view of a newspaper advertisement for a FLIPPER table of which Chromcraft had been made aware. 5/

The same witness maintained that complainant should also count as its lost profit the opportunities for sales it would have had from respondent's convertible game tables or at least the royalties attendant thereto. 6/

The evidence presented at the hearing indicated that there was a history of ever-increasing sales by complainant (albeit with a decrease in profit), that there was an increase in employment of 6 to 10 people,

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1/ Ibid., p. 230.
2/ Ibid., p. 229.
3/ Ibid., p. 231.
4/ Ibid.
5/ Ibid., pp. 232-238.
6/ Ibid., p. 240.

and that complainant had been operating at maximum capacity; nevertheless, the complainant's plans for increasing its physical plant facilities, for increasing capital expansion, for further increasing employment at the plant, and for pursuing a more vigorous research and development effort were being shelved because of intense import competition. 1/

The evidence submitted by respondent as to the patents

At the hearing respondent introduced a copy of its application to the U.S. Patent Office for a design patent covering the imported convertible game table, which bore a notation by the examiner that "since this application appears to be in condition for allowance except for formal matters prosecution is closed . . . ." 2/

Respondent then introduced into evidence a copy of the April 26, 1973, memorandum it had submitted to the Commission's staff earlier (see section on respondent's contentions) relating to the question of infringement of U.S. Patent No. 3,711,099. 3/

After qualifying himself as an expert witness, respondent's attorney proceeded to contend (1) that two forms of the invention were referred to in the abstract of the patent, rather than one; 4/ (2) that the language "said second and third tops comprising a single top . . ." (emphasis supplied) did not preclude the addition of still another top (a third top, which would result in a table with three separate tops),

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1/ Ibid., pp. 254-256 and pp. 263-269.
2/ Ibid., p. 410.
3/ Ibid., p. 413.
4/ Ibid., p. 415.

for the reason that "comprising" is never followed by a singular; 1/ (3) that elsewhere in the claims of this patent there are references to a "second top" and a "third top," which would be unnecessary if all that was intended was to incorporate two surfaces into one top (the second top); 2/ that, by virtue of the foregoing, the claims of this patent were contradictory 3/ and ambiguous; 4/ that such clarity or consistency as was found in the claims of this patent existed only if the claims were read on a table with three separate tops; 5/ and that respondent had not imported or sold any convertible game tables having three separate tops. 6/

Respondent's attorney contended that U.S. Patent No. 3,711,099 covered an aggregation rather than a combination, since there was no demonstrable cooperative action between the various elements of the table, 7/ and that the indefiniteness of the claims of this patent effectively precluded his challenging of the validity of this patent. 8/ Respondent's attorney also pointed out that certain claims of this patent covered matters that were quite obvious and old in the art. 9/

The evidence submitted by respondent as to false pricing

Respondent's retail pricing practices insofar as they related to sales of the FLIPPER table were explained by the following statements

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1/ Ibid., p. 423.
2/ Ibid.
3/ Ibid., p. 422.
4/ Ibid., p. 418.
5/ In support of its position respondent referred to a newspaper advertisement that had been introduced into evidence earlier wherein complainant's table was shown as having three separate tops. Ibid., p. 416.
6/ Ibid., pp. 366 and 423.
7/ Ibid., p. 430.
8/ Ibid., p. 433.
9/ Ibid., pp. 425-430 and 433.

made by Mr. Slotky in response to questions placed by his attorney:

> Mr. MARCUS: Would you comment as to your knowledge of our use of the term "regularly advertised manufacturer's list price," and the use of those types of things in the advertising that we do through the Rozel stores?
>
> MR. SLOTKY: When we take a new item especially that has not been proven as to what the ultimate consumer acceptance is going to be, you have to fish around to find out what price is going to move the item.
>
> Specifically, we took our FLIPPER table, we put the table on our floor at $299. We had mild or limited success at $299. Shortly thereafter, and I believe I have a copy of one of the ads, we noticed that the predominant price for this table, in the Chicago area, not ours but the GAMBIT, was $249.
>
> So, we subsequently lowered the price in our ads to $249. At this particular point, we are at $199.
>
> MR. MARCUS: Would you then state that we would have offered to the retail trade, through the Rozel subsidiary, tables at the specific prices if we had advertised them at those prices?
>
> MR. SLOTKY: Yes. 1/

Respondent then submitted in confidence data showing the total number of FLIPPER tables sold in the "Minnesota Fats" stores each month from September 1972 through September 1973 in relation to the total dollar volume for all sales of FLIPPER tables in the "Minnesota Fats" stores at the end of this period. Respondent also submitted in confidence data showing the relation of the total number of FLIPPER tables sold in the "Minnesota Fats" stores to the total of respondent's sales of FLIPPER tables to wholesalers. Respondent's counsel alleged at the hearing that even if he was unable to prove that respondent's advertised regular prices existed, the amount and number of sales by Rozel of tables alleged to be falsely priced pursuant to such practices

1/ Ibid., pp. 335-336.

were so miniscule and minor, both as to the total imports of respondent as well as to total sales of Rozel, that they would not indicate any type of injury to a U.S. business within the meaning of section 337. 1/

Respondent also submitted an advertisement from the Chicago Tribune dated September 11, 1971, in which a GAMBIT table was advertised for sale at $249, and elicited testimony from Mr. Slotky to the effect that the original price of the FLIPPER table was $299. 2/

The evidence submitted by respondent as to false representation of sponsorship

Respondent's attorney maintained that FLIPPER is a generic term 3/ and, through the introduction of a copy of the registered trademark, established that the name "FLIPPER" had been registered as a trademark for respondent's use. Respondent's attorney also elicited statements from both Mr. Slotky and Mr. Bernstein (executive vice president, Armac Enterprises, Inc.) to the effect that neither of them, in their respective sales and business experiences at Armac Enterprises, Inc., had heard anyone make any statements which would in any way tie FLIPPER table sales to the television program "Flipper." 4/

Mr. Bernstein also testified at the hearing that the use of the name "UNIROYAL" in an advertisement was a one-time promotion for Uniroyal, and that Uniroyal personnel had asked respondent if they could use respondent's address in the advertisement so that their customers would know from where the product would be coming. Mr. Bernstein further

1/ Ibid., p. 326.
2/ Ibid., pp. 336-337.
3/ Ibid., p. 327.
4/ Ibid., p. 332.

testified that orders were sent to respondent from the Uniroyal people, and that respondent "drop shipped" the tables to each of Uniroyal's customers and billed Uniroyal for each shipment. 1/ Finally, Mr. Bernstein testified that he had not used the name "UNIROYAL" in order to promote the sales of other FLIPPER tables. 2/

The evidence submitted by respondent as to whether the domestic industry was efficiently and economically operated

Respondent's attorney maintained that the industry in question encompassed more than complainant's facilities for construction of the GAMBIT table, 3/ and that, assuming the viability of complainant's plant facilities and an increase in the market demand for convertible game tables, complainant was capable of participating in any increase in the market for convertible game tables. 4/

Respondent's attorney alleged that the demand for complainant's convertible game tables has heretofore been equal to their production, 5/ that the trucking of material between different facilities added to the cost of the product and as such decreased its profitability, 6/ and that complainant had the right to vacate the premises on which its GAMBIT tables were being produced upon 30 days advance written notice to the lessor. 7/

1/ Ibid., p. 355.
2/ Ibid., p. 356.
3/ Ibid., pp. 103-105 and pp. 157-159.
4/ Ibid., p.109.
5/ Ibid., p. 155.
6/ Ibid., p. 282.
7/ Ibid., p. 166.

The evidence submitted by respondent as to immediate and substantial harm

Respondent's attorney alleged that the decline in the profitability of complainant's overall operation from 1971 to 1972 was not exclusively attributable to competition involving GAMBIT-type tables, 1/ nor, for that matter, was it "heavily related" to such competition during 1971 and 1972; 2/ that, at least as of the date of the hearing, respondent was not complainant's only competitor in the convertible game table market; 3/ that complainant's witnesses had no knowledge that respondent had actually approached Montgomery Ward with reference to sales of the subject product; 4/ that the price for the GAMBIT table in the Montgomery Ward catalog in 1972 was lower than the price of respondent's FLIPPER table in the 1972 Sears catalog; 5/ that, to some extent, complainant's "effective" licensees were in competition with it in its sales of convertible game tables; 6/ and that complainant's own estimate of the size of the market for convertible game tables in 1973, i.e., 50,000 units, 7/ when coupled with its projected output of convertible game tables in 1973, i.e., 12,000 complete sets (exclusive of tops sold separately), 8/ would seem to indicate that complainant could not in any event fill the domestic demand for the product.

1/ Ibid., p. 274.
2/ Ibid., p. 275.
3/ Ibid., pp. 278-280.
4/ Ibid., p. 301.
5/ Ibid., p. 309.
6/ Ibid., p. 301.
7/ Ibid., p. 291.
8/ Ibid., p. 101.

The Information Developed at the Commission Hearing Held on February 5, 1974

The contentions raised by complainant's attorney [1/]

During the hearing held October 15-17, 1973, complainant's attorney had been asked to prepare a brief on four separate legal questions: (1) The extent to which the Federal Trade Commission Guidelines relating to deceptive trade practices could be applied to the Tariff Commission proceedings; (2) what guidelines are used in U.S. courts for determining infringement of a design patent; (3) whether the purchasing of a product prior to the time a patent issues in order to copy it constitutes an act of unfair competition; and (4) whether enforcement of section 337 should be conditioned upon complainant's instituting patent infringement proceedings in court.

As to the first item, complainant's attorney in his brief points to the similarity between the provisions of section 45(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) (as well as provisions of the Uniform Deceptive Practices Act of the State of Illinois) and section 337 of the Tariff Act of 1930. He contends that the Federal Trade Commission Guidelines, which were adopted under the rulemaking authority of the Federal Trade Commission, provide that a regularly established price must be bona fide and not fictitious for purposes of a sale. Complainant's attorney concludes that section 45(a) of the Federal Trade Commission Act, the Uniform Deceptive Practices Act of Illinois, and the Federal Trade Commission Guidelines are applicable to section 337 proceedings, since section 337 is also applicable to the "sale" of an imported article in internal commerce.

1/ Complainant's brief was introduced into the record as exhibit 39 (ibid., p. 493).

As to item (2), complainant's attorney in his brief cites R. M. Palmer Co. v. Luden's Inc., 236 F. 2d 496 (1956), as authority for the propositions that (a) invention is as necessary in a design patent as in a utility patent; (b) the invention need not result from a flash of genius; (c) the invention must be a new, original, and ornamental design not obvious to a person of ordinary skill in the art; (d) visual sense is the primary ground for determining the value of a design patent; and (e) a design must be looked at as a whole--a combination of elements that are old is patentable if it produces a new and useful result as the consequence of the combination--a design which avails itself of suggestions old in the art is patentable if, as a whole, it produces a new and pleasing impression in the aesthetic sense. Complainant's attorney contends that a reading of this decision, together with a comparison of the two game tables before the Commission, is all that is required to determine whether there is an act of infringement or appropriation of U.S. Patent No. D223,539 by respondent.

In support of his contention as to item (3) that the purchasing of a product before the patent issues in order to copy it constitutes an act of unfair competition, complainant's attorney in his brief cites Zysett et. al. v. Popeil Brothers, Inc., 167 F. Supp. 362, aff'd 276 F. 2d 354. The court's findings of fact in that case were that the defendant had purchased a vegetable shredder in Chicago which had been made in Switzerland under authority of the plaintiff before the patent in suit had issued and while an application therefor was pending in the U.S. Patent Office, and that defendant took it apart and carefully examined the form of its manufacture and method of operation, using it as the model from which to make drawings,

molds, dies, and tools for subsequent manufacture of the structure charged to infringe the patent. The court concluded that it was an "unfair practice" for the defendant to have used plaintiff's commercial structures as models for defendant's devices although it did not constitute an infringement of the patent in suit until the patent had actually issued. Complainant's attorney alleges that the only factual difference between the cited case and the case before the Commission is that complainant's GAMBIT tables were purchased in the United States and then sent overseas for purposes of a copy, and submits that this is a distinction without a difference.

The last item covered in the brief submitted by complainant's attorney is the question raised as to whether a complainant's proceeding in court for a remedy by way of a suit for patent infringement should in any way affect the enforcement of section 337 of the Tariff Act of 1930. Complainant's attorney cites In re Von Clemm C.C.P.A. 229 F. 2d 441 as authority for the proposition that the Tariff Commission need not refrain from acting on a patent case brought before it under section 337 by virtue of the fact that there is litigation pending in a district court over the question of the validity of the same patent. Complainant's attorney also maintains that the legislative history of section 337 affirmatively rebuts any requirement that the parties first seek their relief through court proceedings.

The contentions raised by respondent's attorney [1]

During the hearing held October 15-17, 1973, respondent's attorney had been asked to furnish authority supporting the proposition that U.S. Patent No. 3,711,099 speaks of a table with three separate tops, as opposed to a table with two separate tops. Respondent's attorney submitted a brief in which he alleged that (1) the convertible game table sold by respondent Armac does not respond to the claims of the patent, and that (2) the claims of the patent are invalid for failure to comply with 35 U.S.C. 112 (pars. 1 and 2). [2]

1/ Respondent's brief was introduced into the record as exhibit 42 (ibid., p. 496, line 1).

2/ Pars. 1 and 2 of 35 U.S.C. 112 read as follows:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention. . . .

Respondent's attorney maintains in this brief that all of the independent claims of U.S. Patent No. 3,711,099 refer to a convertible game table having three tops, that the three tops are recited unambiguously in all independent claims, that the word "top" is not synonymous with "surface," that there is no antecedent for the reference to an "opposed surface" in these claims and that the "whereby" clause in each of these claims has no determinable relation to the structure theretofore recited. 1/

Attached to this brief is a copy of page 1467 and page 1536 of Webster's New World Dictionary (copyright 1962) containing definitions of "surface" and "top." 2/

In the opinion of respondent's attorney, an alternative form of the invention, one covering a three-top table, is set out in the specifications of the patent. Respondent's attorney alleges that this alternative form of the invention is the one upon which all of the claims were based and allowed. The view that the three-top table described in this part of the specifications is covered by the patent is, in the opinion of respondent's counsel, buttressed by the picture of the table shown in exhibit 14, which reveals three separate tops.

1/ Respondent's attorney noted that in the law of patents a "whereby" clause merely serves as an explanation of structure and is regarded as surplusage.

2/ Webster's New World Dictionary of the American Language (copyright 1962), published by the World Publishing Co., defines "surface" as follows: "1. a) the outer face, or exterior, of an object. b) any of the faces of a solid. . . . 3. in geometry, an extent or magnitude having length and breadth, but no thickness."

It defines "top" as follows: "3. the highest part, point, or surface of anything: as, the top of the hill. . . . 5. something that constitutes the uppermost part or covering of something else; specifically, a) a lid, cover, cap, etc.: as, a box top, bottle top."

Respondent's attorney concludes that respondent's table does not infringe U.S. Patent No. 3,711,099 since respondent's table is a two-top table. Respondent's attorney maintains that inasmuch as complainant chose to recite the alternate three-top invention in his claims, complainant cannot now be heard to assert that the claims read on the preferred embodiment which is claimed.

Respondent's attorney also maintains that the claims are invalid as aggregative and by virtue of their failure to satisfy 35 U.S.C. 112.

The petition of Sunshine Cover & Tarp, Inc.

The Commission introduced into the record a petition received from Sunshine Cover & Tarp, Inc., another importer of convertible game tables. 1/ In this petition it is requested that the tables being imported by Sunshine be exempted from any Commission recommendation for an exclusion order on the grounds that the ball-collection means are not "removable" from the table. 2/ The petition was received for whatever relevance it may have to the Commission's deliberations pertaining to the investigation. 3/

1/ The petition was introduced into the record as exhibit 38 (transcript of the hearing, p. 486, lines 22-23).

2/ Claims 1-3 each read in part as follows: "said ball collection means being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table."

3/ The Commission visited the facilities of Sunshine Cover & Tarp, Inc., in Los Angeles, Calif., on Nov. 28, 1973, and discussed the importation by Sunshine of its convertible game tables. The representatives of Sunshine pointed out that the ball collectors on their tables consisted of a net stapled to the underside of the rebound pool table top, which net was in open communication with each of the opposed apertures in the rebound pool table tops. The Sunshine table, marketed under the trade name "FLIP-TOP," is illustrated in app. E.

The question relating to the importation of table top(s)

After having heard the testimony to the effect that complainant was unaware of the importation of table tops by themselves, 1/ the Commission asked complainant's attorney whether, in the event these tops were imported apart from the other components of this table, he would consider the same to be a violation of section 337. 2/

Complainant's attorney contended that even though the claim(s) of U.S. Patent No. 3,711,099 do not cover the table tops per se, the importation and sale of these table tops would constitute a contributory infringement under 35 U.S.C. sec. 271(c). 3/ He also contended, however, that there would be no infringement if it was demonstrated that a purchaser would purchase, for a noninfringing use, the reversible dining-card table top separate from the rebound pool table top and the remaining components of this table. 4/

Respondent's attorney did not address himself to the question concerning the application of the doctrine of contributory infringement to the importations of the two table tops by themselves. Insofar as relates to the single top, respondent's attorney did, however, take the position that there could be no contributory infringement if the imported article found its way in commerce by itself. 5/ He testified that if, for

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1/ Transcript of the hearing, pp. 496-498.
2/ Ibid.
3/ Ibid. 35 U.S.C. sec. 271(c) reads as follows:

Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

4/ Ibid.
5/ Ibid.

example, a conventional poker table top that could be set on a stool or other support means was to enter into commerce, no contributory infringement of U.S. Patent No. 3,711,099 would result. 1/

The Commission asked both parties to brief the question as to whether the Commission had jurisdiction over contributory infringement, and, if so, to indicate what method of enforcement could be employed to implement this doctrine. 2/

The question as to the validity of U.S. Patent No. 3,711,099

Complainant's attorney contended that if the Commission followed In re Von Clemm (which he alleged is binding upon the Commission), it would have no jurisdiction to look into the validity of U.S. patents, and that even if it had such jurisdiction, no credible evidence of invalidity of U.S. Patent No. 3,711,099 had been offered by the respondent. 3/

Complainant's attorney submitted that under 35 U.S.C. 282 a patent is presumed valid and that the burden of establishing the invalidity of a patent rested on the party asserting its invalidity. 4/ In the opinion of complainant's attorney, respondent had not offered enough evidence of invalidity of U.S. Patent No. 3,711,099 to shift the burden of sustaining its validity to complainant. 5/ Complainant's attorney concluded that, as a consequence, complainant was under no obligation to establish the validity of U.S. Patent No. 3,711,099. 6

1/ Transcript of hearing, pp. 496-498.
2/ Ibid., pp. 499-500. Complainant's final brief is included in app. F. Respondent's final brief is included in app. G.
3/ Ibid., pp. 504-506.
4/ Ibid.
5/ Ibid.
6/ Ibid.

Miscellaneous

Complainant's attorney introduced into the record an affidavit to the effect that there had been no change in complainant's productive capacity since October 15, 1973. 1/ He also introduced into the record an invoice showing that the first convertible game table was sold to Recreation Equipment Co. of Chicago, Ill., on February 12, 1971. 2/

The Commission introduced certain economic data relating to domestic production, importation, and sale of convertible game tables. Included were published price lists for both the domestic and the imported products, a confidential signed statement of the traffic manager of Armac Enterprises, Inc., as to imports and sales of convertible game tables by Armac Enterprises, Inc., and confidential data as to the number of persons employed by ATI, (total and those producing convertible game tables), the profit-and-loss experience on all operations of ATI and on convertible game tables, average net selling prices of ATI's 52-inch and 48-inch tables and Armac's 48-inch tables, the average unit cost of production of the domestic table, and the sales of convertible game tables by Sears, Roebuck & Co. 3/

The parties were requested by the Commission to update certain economic data.

The Commission inquired of complainant's attorney as to whether complainant was suffering irreparable injury. Complainant's attorney contended that complainant was suffering irreparable injury, particularly

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1/ Ibid., p. 463.
2/ Ibid., p. 465.
3/ Ibid., pp. 461-485.

in view of the fact that the market for convertible game tables is expected to be short-lived. 1/

Respondent's attorney contended that the evidence established that, because of complainant's limited productive capacity, complainant's ability to participate in this market could not be any greater if imports of convertible game tables ceased, and that complainant's troubles stemmed primarily from domestic competition. 2/

Complainant's attorney responded by contending that if respondent's imports of convertible game tables were excluded, complainant could well fill the present domestic demand for convertible game tables. If necessary, complainant would itself import convertible game tables until such time as its facilities in the United States could be expanded to handle the entirety of the U.S. demand for convertible game tables. 3/

1/ Ibid, pp. 506-507.
2/ Ibid, pp. 509-510.
3/ Ibid, 510.

Additional Economic Data Covering 1973

Imports of convertible game tables

In 1973 a second firm (Sunshine Cover & Tarp, Inc.) commenced importing convertible game tables. Reported imports by Armac and Sunshine were about five times as large in calendar year 1973 as imports by Armac alone in 1972.

Sales and inventories of imported convertible game tables

For 1973, Armac reported that it sold only two-fifths of the convertible game tables that it imported during the year. 1/ Sunshine reported that it sold three-fourths of the convertible game tables that it imported during 1973. Thus, a substantial number of imported convertible game tables were held in inventory at the end of 1973.

Complainant's production, sales, and inventories of convertible game tables in 1973 2/

Production.--In 1973, All-Tech's production of convertible game tables and separate top assemblies in the aggregate was a little more than four-fifths greater than in 1972. The great bulk of the increase in production was accounted for by a very substantial increase in the output of top assemblies. In November and December 1973 (i.e., the first 2 months of fiscal year 1974), complainant supplemented

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1/ Armac also reported that a substantial proportion of its imported tables were defective and could not be sold.

2/ Unless otherwise noted, the years referred to in sections relating to the complainant's operations are fiscal years ended Oct. 31.

its production by purchasing convertible game tables from a domestic manufacturer. Such purchases were equal to about one-fifth of complainant's output in fiscal year 1973 and somewhat less than complainant's production in November-December 1973. In 1973, convertible game tables and separate top assemblies accounted for about two-fifths of All-Tech's total output of billiard and pool tables; in 1972 they accounted for about a third. All-Tech's total output of billiard and pool tables in 1973 was about one-fifth greater than in 1972.

Sales and inventories.--In 1973, All-Tech's volume of sales of convertible game tables and separate top assemblies in the aggregate was more than twice as large as in 1972; more than half of the increase was accounted for by increased sales of separate top assemblies. The value of sales in 1973 was also more than twice as large as in 1972. In November-December 1973, complainant's sales of convertible game tables and top assemblies of its own manufacture and of those purchased were equal to about a third of its sales in all of fiscal year 1973. The value of All-Tech's sales of all billiard and pool tables was about one-third larger in 1973 than in 1972, reflecting the increased proportion of sales accounted for by convertible game tables that are less expensive than the other types of billiard and pool tables manufactured by the firm.

Yearend inventories of convertible game tables and separate top assemblies in the aggregate were substantially lower in 1973 than they were in 1972.

Complainant's employment and man-hours worked on convertible game tables in 1973

All-Tech's employment of production workers on convertible game tables was a fifth greater in 1973 than in 1972; total employment, however, was about a tenth less.

Man-hours worked by production workers on convertible game tables were almost 75 percent greater in 1973 than in 1972. From 1972 to 1973, output per man-hour increased by about 15 percent.

Complainant's financial experience in fiscal year ended October 31, 1973

Net sales for the ATI Division were nearly a third larger in 1973 than in 1972. A net operating loss was sustained again in 1973. However, the ratio of such net operating loss to net sales was substantially lower in 1973 than it was in 1972.

Net sales of convertible game tables and top assemblies in 1973 were about double the sales in 1972. A net operating loss was sustained in 1973, as it was in 1972. The ratio of such loss to net sales in 1973 was somewhat less than it was in 1972. The net operating loss sustained on sales of convertible game tables and top assemblies represented a significant portion of the net operating loss experienced by the ATI Division in 1973--a portion larger in 1973 than in 1972.

The ATI Division's inability to realize an operating profit on the sales of convertible game tables in 1973 is attributable to the continuing increase in material costs and its inability to raise prices commensurate with increased costs in the face of import competition.

The following table presents changes in unit costs of producing three different models of game tables.

ALL-Tech Industries, Inc.: Indexes of unit costs of production of convertible game tables, fiscal years 1971-73

(Fiscal year 1972=100)

Description of product	Year ended Oct. 31--		
	1971	1972	1973
48-inch top assembly only--	-	100.0	112.8
48-inch Gambit----------	-	100.0	115.5
52-inch Gambit----------	95.5	100.0	114.2

U.S. consumption of convertible game tables in 1973

Calculated on the basis of complainant's domestic sales and sales as reported by two importers, 1/ U.S. consumption doubled from 1972 to 1973. The ratio of sales of imported convertible game tables to U.S. consumption in 1973 was larger than in 1972.

Prices

The trends in average net selling prices of the convertible game tables sold by the complainant and the respondent between January 1, 1971, and December 1973 are shown in the table on page A-82.

1/ The two importers in 1973 were Armac Enterprises, Inc., and Sunshine Cover & Tarp, Inc.; the latter did not import during 1972.

Convertible game tables: 1/ Indexes of average net selling prices of All-Tech's 52-inch and 48-inch tables and Armac's 48-inch tables, by quarters, January 1971-December 1973.

(July-September 1972=100.0)

Period	Complainant, All-Tech Industries		Respondent, Armac Enterprises, 48-inch table
	52-inch table	48-inch table	
1971:			
January-March	87.1	-	-
April-June	102.4	-	-
July-September	90.7	-	-
October-December	82.9	-	-
1972:			
January-March	95.8	97.1	-
April-June	97.6	91.7	-
July-September	100.0	100.0	100.0
October-December	101.0	95.1	100.0
1973:			
January-March	99.2	96.4	100.0
April-June	103.9	101.4	2/ 104.3
July-September	104.6	99.0	2/ 104.3
October-December	100.3	96.9	2/ 104.3

1/ Accessories included.

2/ Data based on contract price to a major customer. Not strictly comparable with data for previous periods.

Source: Compiled by the U.S. Tariff Commission from questionnaire data supplied by All-Tech Industries, Inc., and Armac Enterprises, Inc.

The Change in Ownership of the Domestic Industry in Question

On May 31, 1974, Ebonite Corp., a wholly owned subsidiary of Fuqua Industries, Inc., filed a petition with the Commission in which it advised, among other things that, effective May 16, 1974, in return for the payment by it to ATI of $1,443,000 in cash and the assumption by it of substantially all of ATI's liabilities, (1) it acquired substantially all of the assets of ATI; (2) it became the owner of U.S. Patent No. 3,711,099 by assignment of ATI; (3) it became owner of U.S. Patent No. D223,539 by assignment from ATI; (4) it became owner of Registered Trademark Nos. 949,739 ("GAMBIT"), 842,783 ("ATI") and 814,378 ("ATI" design) by assignment from ATI; (5) it became the owner of trademark application Serial No. 416,491 by assignment from ATI; and (6) it became the owner by assignment from ATI of all causes of action, judgments, claims, and demands of whatsoever nature owned by ATI. Ebonite Corp. requested in this petition that it be substituted as the complainant before the Commission in this investigation, and requested that the Commission formally accept its petition to succeed.

In its petition Ebonite Corp., a manufacturer of bowling balls, maintained that ATI was acquired because ATI and Ebonite "have common means of distribution in a somewhat related field." 1/ Ebonite alleged

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1/ Ebonite Corp.'s petition to succeed, p. 3.

that "ATI was acquired by Ebonite because it is a leader in the billiard table field and has a reputation for quality. It is the present intention of Ebonite to maintain the Miami Lakes, Florida plant . . . ." 1/

The Commission visited the Miami Lakes, Fla., facilities of Ebonite Corp. on June 25-26, 1974, and on August 30-31, 1974. By the time of the Commission's visit on August 30-31, 1974, Ebonite had consolidated its convertible game table operations in the main plant 2/ and no longer maintained a separate bonded warehouse (as ATI had) for the storage of its products. It was observed that, in addition to the manufacture of the GAMBIT table, Ebonite was also manufacturing two new models of convertible game tables: the GAMBIT in a BUTCHER BLOCK model and the NOVA III model. The BUTCHER BLOCK model is shown in figure 7, and the NOVA III model is shown in figure 8.

Incident to the Commission's inspection of the facilities of Ebonite Corp. devoted to the manufacture of convertible game tables, it was observed that Ebonite Corp. was actively continuing ATI's domestic manufacture of convertible game tables (with the exceptions noted above). It was noted that (1) Ebonite used essentially the same production techniques ATI had employed in its production of convertible game tables; (2) a substantial number of the production personnel employed by ATI in its manufacture of convertible game tables remain employed

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1/ Ibid.

2/ Ebonite discontinued use of the satellite plant in Hialeah, Fla., which had been used by ATI in its manufacture of convertible game tables.

48" GAMBIT

Butcher Block

The Original 3-IN-1 Family Fun Table

MODEL 7423

The 3-in-1 after-dinner dinner table is new—it's now—it will make you the envy of your neighbors. This functional unit has been created to provide complete evening entertainment for apartment dweller and home owner alike. Handsomely finished in Butcher Block, this professionally designed table blends with every decor and complements the most discerning taste.

When dinner is over, the lightweight top is easily inverted to accommodate eight card-playing friends—or for a change of pace —remove the top and your carom pool table provides versatile entertainment usually found in palatial homes. Let your dinner table work and work and work—right through the evening. Join the after-dinner dinner table crowd—it won't quit when your dinner is over. Shipping weight 220 lbs.

CHAIRS AVAILABLE/PACKED 4 PER CARTON

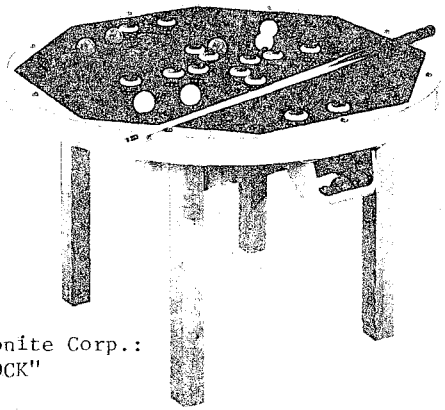
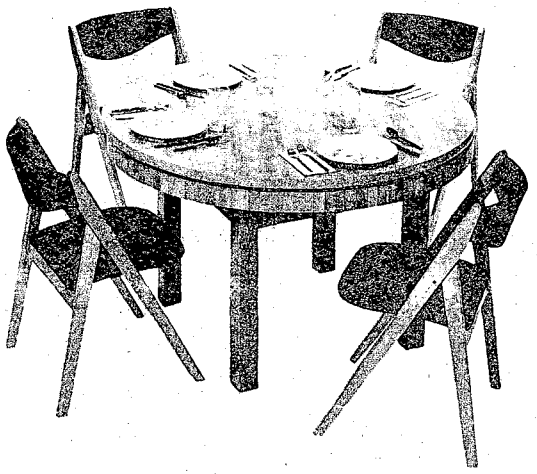
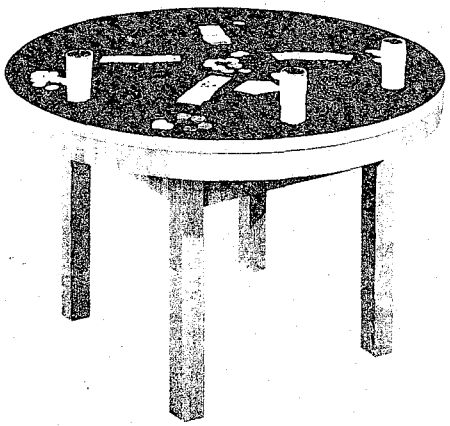


Figure 7.--Ebonite Corp.: "BUTCHER BLOCK"





EBONITE
A FUQUA PRODUCT

EBONITE CORP.
Billiard and Game Division
(formerly ATI RECREATION)
14000 N.W. 57th Ct.
Miami Lakes, Fl. 33014
Phone (305) 821-0150

MODEL 7423

- High pressure laminated mica top, quality construction, Butcher Block finish, decorator designed to meet the furniture standards.
- 48" overall diameter — stands 30" high.
- Lightweight convertible and removable top.
- Card table top contains recessed ash tray and glass holders as well as individual poker chip and card player sections.
- First quality wool and nylon blend billiard cloth for long lasting life.
- Carom pool table features removable ball receiver boxes that can be stored in the hide-away area on mounting brackets.
- Gum rubber cushions.
- Complete with leveling device to provide true roll.
- Accessories include 10 professional carom balls; two cue sticks, chalk, a set of rules, and a cleaning brush.
- Moderately priced at lower than the cost of an average dining table.
- Four individual square solid Butcher Block legs.

Option: Home Entertainment Gambit Game Package. Model #1101. Matching Butcher Block folding chairs. Model #1997.

NOVA III

Table Model 7124 ¾" Italian Slate
Table Model 7024 ¾" Slate-Kote™
Convertible Dining/Game Top Model 7124T

The Nova III is a newly designed Carom table that features a ¾" slate playfield, leg levelers and a unique removable storage compartment that provides "out of the way" storage for carom balls. Lively gum rubber cushions provide the fast action for this popular game. Lathe turned hardwood bumpers add that luxurious touch available only found in the finest tables. The same quality features that are found throughout the entire line of products. Complete with balls, chalk, professional cues and playing instructions.

CHAIRS AVAILABLE/PACKED 4 PER CARTON

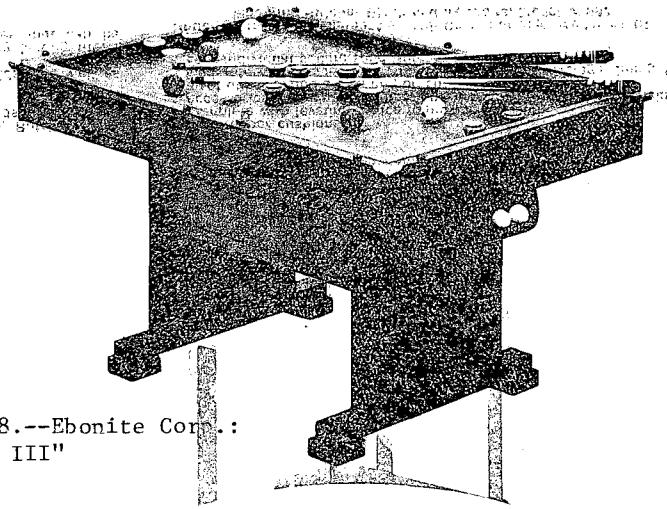
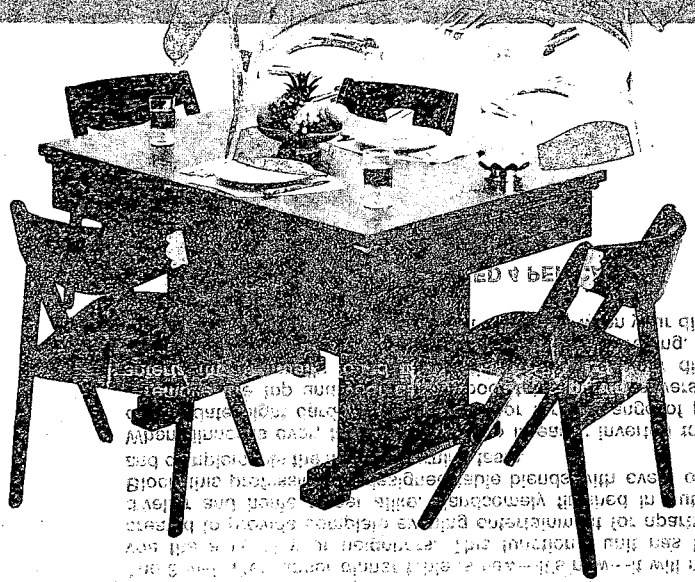
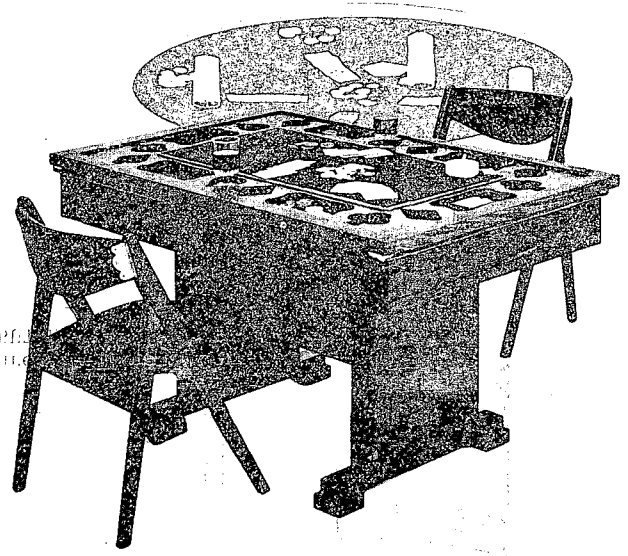


Figure 8.--Ebonite Corp.: "NOVA III"





A-84b

EBONITE
A FUQUA PRODUCT

EBONITE CORP.
Billiard and Game Division
(formerly ATI RECREATION)
14000 N.W. 57th Ct.
Miami Lakes, Fl. 33014
Phone (305) 821-0150

NOVA III

Specifications:
Model 7124 — 29.5" x 45.5" with ¾" slate playing field. Shipping weight approximately 260 pounds. Walnut color only.
Model 7024 — 29.5" x 45.5" with ¾" Slate-Kote playing field. Shipping weight approximately 230 pounds. Walnut color only.

Accessories:
1 set professional quality carom balls, chalk and two 49" professional cue sticks. Complete with playing instructions.

FEATURES:
- Top quality billiard rust bedcloth, wool and nylon blend for long lasting life.
- Lively quality gum rubber cushions.
- Removable ball storage compartment.
- Lathe turned hardwood bumpers.
- Burnished walnut wood grain burn-resistant mica.
- Solid wood tapered legs with built in leg levelers.
- Option. **Matching convertible dining poker card top.
- Packed complete in one carton for easy handling and installation with minimum manpower.

Option: *Matching conversation top available.
Easily converts this quality slate Carom table into a useful utility table. Shipping weight 20 pounds.
***Matching walnut folding chairs, Model #1999.**

by Ebonite; and (3) Ebonite Corp. retained as its plant manager the same individual who had supervised ATI's convertible game table operations.

The inspection of the facilities of Ebonite Corp. devoted to the manufacture of convertible game tables indicated that they were (as they were under ATI) efficiently and economically operated.

The Information Developed at the Commission Hearing
Held on September 12, 1974

By public notice issued on August 26, 1974, (39 F.R. 31711) the Commission ordered that a public hearing be held on September 12, 1974, for the purpose of affording complainant and all interested parties the opportunity to present evidence as to--

(1) the acquisition by Ebonite Corp., a subsidiary of Fuqua Industries, of the facilities of ATI engaged in the production of convertible game tables;
(2) whether Ebonite Corp., the successor company, is continuing in the production of convertible game tables covered by the claim(s) in U.S. Patent No. 3,711,099;
(3) whether Ebonite Corp., the successor company, is efficiently and economically operated; and
(4) the effect or tendency of imported convertible game tables and components thereof to substantially injure or destroy the domestic industry in question.

The hearing was held as scheduled on September 12, 1974. Ebonite Corp. was the only party that appeared before the Commission at this hearing. The evidence offered by or on behalf of Ebonite Corp. at this hearing is set forth below.

The evidence presented as to the acquisition of ATI by Ebonite

There was testimony presented at the hearing by the representatives of Fuqua Industries, Inc. (Ebonite's parent), to the effect that Fuqua Industries is primarily involved in the production and marketing of leisure activity products; that it has tried, and is trying, to shape its interest in the leisure products field by acquiring successful and established companies in this field; that the ATI acquisition was somewhat of an exception since ATI was in some financial difficulty when acquired by Fuqua Industries,

Inc.; and that, since its acquisition of ATI, Fuqua Industries had invested about $2.5 million in working capital in the facilities acquired from ATI. 1/ There was also testimony by Mr. Klamon as follows.

> . . . We have attempted to develop new products, as you see here in the hearing room, but we have also also attempted to maintain the products we were producing.
>
> We certainly kept the same work force and, indeed, I believe expanded it somewhat, because our sales are increasing. And generally speaking, really, we have attempted to take over ATI Recreation as it then existed and with the infusion of additional personnel and funds, we have attempted to make it a bigger and stronger and hopeful more profitable company. 2/

There was also testimony presented by the representatives of Fuqua Industries, Inc., to the effect that Fuqua Industries, Inc., first became aware of the availability of ATI for purchase about January 1974; that the most attractive feature of ATI was its unique and commanding position in the market place; that a draft of contract for the acquisition of ATI was prepared shortly after March 2, 1974; that the acquisition negotiations were stalled until April 17, 1974, by which time ATI had agreed to reduce its asking price; that a contract for the acquisition of substantially all of ATI's assets was executed on April 30, 1974; that the acquisition of substantially all of ATI's assets was consummated on May 16, 1974, for approximately $1,443,000 in cash, together with the assumption by Fuqua Industries, Inc., of substantially all of ATI's liabilities; and that the only ATI liability that was not assumed by Ebonite Corp. was an employment contract ATI had with a certain Mr. Goldsmith (the son of the President of ATI). 3/

1/ Transcript of hearing held on Sept. 12, 1974, pp. 18-30.
2/ Ibid., p. 32.
3/ Ibid., pp. 42-61.

The representatives of Fuqua Industries, Inc., also submitted at this hearing that among the assets acquired from ATI were all claims and causes of action then pending (including the Tariff Commission action); 1/ that Fuqua Industries, Inc., was aware of the Commission proceedings instituted on behalf of ATI early in the acquisition negotiations; 2/ that the officials of Fuqua Industries, Inc., fully understood and expected at the time of the acquisition that everything that ATI had before the Tariff Commission was to inure to the benefit of Ebonite Corp.; 3/ and that Fuqua Industries, Inc., would probably not have consummated the ATI acquisition in the absence of the exclusion order, or in the absence of a recommendation of such an order. 4/

The evidence presented to establish that Ebonite Corp. is continuing in the production of convertible game tables covered by the claims(s) in U.S. Patent No. 3,711,099

There was testimony at the hearing by the vice president, marketing, Ebonite Corp., to the effect that Ebonite Corp., a wholly owned subsidiary of Fuqua Industries, Inc., for the most part operated independently of its parent; that the details of production, sales, and planning were left entirely within the discretion of the appropriate officers at Ebonite Corp.; that the officers at Ebonite Corp. had determined to continue production of the 48-inch and 52-inch walnut-colored convertible game tables originally introduced by ATI under the GAMBIT name; that Ebonite had introduced an additional model in the GAMBIT line, using a BUTCHER BLOCK

1/ Ibid., pp. 61-62.
2/ Ibid., p. 55.
3/ Ibid., pp. 61-62.
4/ Ibid., pp. 39-40.

motif; that Ebonite was also manufacturing and marketing a new rectangular-shaped convertible game table under the "NOVA III" name; and that the officers of Ebonite Corp. intended to introduce wider arrays of models and colors in which convertible game tables would be offered to the public in the future. 1/

The same officer of Ebonite Corp. maintained that the new GAMBIT in the BUTCHER BLOCK motif and the NOVA III model manufactured by Ebonite Corp., like the 48-inch and 52-inch walnut GAMBIT, each have a rebound pool-playing surface on one top (the lower top) and a reversible dining and card-playing surface on the second top. 2/ He also maintained that all three models currently being produced by Ebonite Corp. feature a removable ball box. 3/

Ebonite Corp.'s vice president, marketing, also submitted that the two new convertible game table models were together expected to account for approximately 23 percent of total sales of convertible game tables in 1974. 4/ (It would thus appear that the 48-inch and 52-inch walnut GAMBIT (which are the same as those manufactured by ATI) are expected to account for approximately 77 percent of Ebonite Corp.'s total sales of convertible game tables for 1974).

1/ Ibid., pp. 75-85.
2/ Ibid., p. 85.
3/ Ibid.
4/ Ibid., pp. 86-87.

Ebonite Corp.'s attorney, who had represented ATI at the earlier Commission hearings (at which time he had qualified himself as an expert witness on the patent questions) alleged that the BUTCHER BLOCK model and the NOVA III model were covered by the claim(s) in U.S. Patent No. 3,711,099. After attempting to read the claim(s) in this patent on these two models through the use of claim charts, he contended that claims 3, 4, 5, 8, 10, 14, and 15 in this patent covered the BUTCHER BLOCK model and that claims 3, 4, 5, 8, 10, and 15 covered the NOVA III model. 1/

The evidence submitted to establish that Ebonite Corp. is efficiently and economically operated

There was testimony at the hearing by Ebonite Corp.'s vice president, finance, to the effect that Ebonite Corp., like ATI, ran an efficient and economical operation in the manufacture of convertible game tables. 2/ He testified that Ebonite Corp. retained ATI's supervisor of manufacturing 3/ and that the direct labor costs in the manufacture of convertible game tables were the same for Ebonite as they had been for ATI. 4/ Ebonite Corp.'s vice president, marketing, who expressed certain reservations about the efficiency and economy of ATI, conceded that Ebonite Corp. kept essentially the same production personnel ATI had, and that it used the same tools and production techniques that ATI had used incident to the manufacture of its convertible game tables. 5/

1/ Ibid., pp. 177-185.
2/ Ibid., p. 168.
3/ Ibid., p. 163.
4/ Ibid., p. 166.
5/ Ibid., pp. 153-158.

Ebonite Corp.'s vice president, finance, maintained that Ebonite Corp. reduced its manufacturing overhead, thereby achieving certain economies, by (1) closing down its satellite plant in Hialeah, Fla., and moving its convertible game table operations into the main plant; (2) eliminating use of a third warehouse; and (3) reducing the number of personnel employed at Ebonite from 263 to about 225. 1/ He also maintained that Ebonite Corp. had reduced the manufacturing overhead from 207 percent of direct labor to 180 percent of direct labor. 2/

Ebonite Corp.'s vice president, finance, also submitted that additional economies would be effected by (1) reducing dependence upon Montgomery Ward as Ebonite's single largest customer, 3/ (2) installing certain automated equipment, 4/ and (3) enlarging the capacity of the plant. 5/ He also maintained that the convertible game table plant was operating at 85 to 90 percent of capacity. 6/

In addition to making or planning the foregoing improvements, Ebonite has revamped its marketing structure for convertible game tables. According to Ebonite Corp.'s vice president, marketing, Ebonite has divided its sales department into three divisions aimed at (1) the special market (for other manufacturers that buy parts of convertible game tables,

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1/ Ibid., p. 167.
2/ Ibid., p. 172.
3/ Ibid., p. 162.
4/ Ibid., pp. 174-175.
5/ Ibid.
6/ Ibid., p. 168.

such as Chromcraft and Schubert), (2) the retail market (involving accounts serviced by 11 to 12 sales agents working for Ebonite on a commission basis), and (3) the national market (involving mass merchandisers served directly by Ebonite Corp.). 1/ The same witness submitted that this structuring of Ebonite Corp.'s sales department was effectuated in order to organize the sales force and to reduce the company's dependence on a single customer (i.e., Montgomery Ward) for a significant part of its sales. 2/

1/ Ibid., pp.76-78.
2/ Ibid.

The evidence presented as to the effect or tendency of the imported convertible game tables and components thereof to injure or destroy the domestic industry

There was testimony at the hearing by Ebonite Corp.'s vice president, marketing, that there continues to be a residual effect in the market from convertible game tables imported in 1973, and that import competition was detectable even in 1974. 1/

In support of this view, Ebonite Corp.'s vice president, marketing, submitted that the survey he had made on the foreign manufacturers of convertible game tables revealed that a manufacturer that had supplied 3,000 tables to Sunshine Cover & Tarp, Inc., through March 1974, had an order pending with Sunshine for delivery of 20,000 units in 1974-75; that the same manufacturer delivered 600 tables to Regal Industries in Canada and was currently filling a large order for that firm; that unidentified manufacturer delivered 600 tables to S. S. Kresge in 1973 and, since March 1974, has shipped 2,000 tables to Sunshine Cover & Tarp, Inc.; that another manufacturer sold 2,000 of its tables to Academy Broadway in New York during 1973 and part of 1974, shipped 2,400 tables to Sunshine Cover & Tarp, Inc., in 1973, and was currently producing 600 tables for Eastern Novelty of New York and filling a large order for S. S. Kresge; and that still another manufacturer produced 20,000 tables for Armac Enterprises, Inc., and 3,000 tables for Sutra Imports in 1973. 2/

1/ Ibid., p. 102.
2/ Ibid., pp. 96-99.

Ebonite's vice president, marketing, introduced into the record a copy of Alden's catalog appearing in a recent issue of the St. Louis Post Dispatch which featured what seemed to be an Armac table which was offered for sales at $196 (freight prepaid anywhere in the United States. 1/ He also testified that a buyer at the May Co. in St Louis had told him that he was placing orders for convertible game tables with Armac Enterprises, Inc. 2/ Ebonite's vice president, marketing, maintained that these facts indicate either that Armac has a lot of convertible game tables in inventory or that Armac is still importing convertible game tables. 3/

The same witness submitted that the residual effect of import competition could also be seen in the fact that Ebonite Corp.'s sales of convertible game tables had decreased over the same period a year before. 4/ Specifically, he testified that, because of import competition, Chromcraft had decreased its purchases of convertible game table tops from Ebonite Corp. 5/ He explained that Ebonite Corp.'s published prices for convertible game tables (which ranged from $165 to $195, depending on the model, size, and composition of the rebound pool-playing surface) made its table uncompetitive with the imported product, which was being sold for about $120. 6/ He alleged that the effect of the outstanding temporary exclusion

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1/ Ibid., pp. 99-100.
2/ Ibid.
3/ Ibid.
4/ Ibid., pp. 124-125.
5/ Ibid., p. 101.
6/ Ibid., p. 104-107.

order, however, was beginning to be felt: in order to enter certain convertible game tables which were held up at the port of Los Angeles by the U.S. Customs Service, Imperial Billiard Industries, the importer, contacted Ebonite Corp. and agreed to a spot license whereby a royalty of $15 per table was paid by it to Ebonite Corp.; 1/ in addition, negotiations were now proceeding with Sears, Roebuck & Co. to have Sears purchase convertible game tables from Ebonite Corp. in 1975-76. 2/

Ebonite's vice president, marketing, maintained that the 40,000 to 50,000 units that were imported in 1973 amounted to 7-1/2 million dollars, worth of business that did not go to the domestic industry. 3/ He also maintained that, if the exclusion order was made permanent, the volume of convertible game tables manufactured by Ebonite Corp. would increase from less than 30 percent of total operations (at present) to about 50 percent of total operations, 4/ and that Ebonite Corp. would proceed with expenditures on new tooling, new product designs, new advertising, and new marketing techniques. 5/ He submitted that if, on the other hand, the exclusion order was lifted, major retailers such as Sears, Montgomery Ward, and Penney's would go abroad and buy the cheaper imports and sell them in the

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1/ Ibid. The witness maintained that with the addition of this charge to the price of the imported product, the import then became competitive with Ebonite Corp.'s product.
2/ Ibid., p. 93.
3/ Ibid., p. 119.
4/ Ibid., p. 144.
5/ Ibid., p. 114-115.

United States "at ridiculously low prices", thereby ruining the market for domestic manufacturers of convertible game tables. 1/ Ebonite Corp.'s vice president, marketing, submitted that if he had to fight renewed import competition, he would go out of the convertible game table business, since there would no longer be any profit in that business. 2/

In conclusion, Ebonite Corp.'s attorney submitted that the liabilities Ebonite Corp. assumed from ATI established that Ebonite Corp. did succeed to the business of ATI for purposes of the Tariff Commission action, and that the preexisting injury which hurt ATI still overhangs the market and is injuring Ebonite Corp. 3/ He also alleged, in response to questions by the Commission, that the question is not whether there is injury to ATI or injury to Ebonite Corp., but rather whether there is injury to the domestic industry in question, which in this case was an industry represented by a patent, the ownership of which was transferred from ATI to Ebonite Corp. 4/ In this respect, Ebonite Corp.'s attorney alleged that, regardless of the strength, effectiveness, and profitability of the particular owner of the patent involved, the domestic industry remained one and the same. 5/

In response to questions by the Commission relating to the institution by Ebonite Corp. of court action against importers and

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1/ Ibid., p. 93-94.
2/ Ibid., p. 114.
3/ Ibid., p. 134.
4/ Ibid., p. 137.
5/ Ibid., p. 138-139.

other domestic infringers, Ebonite Corp.'s attorney alleged that even though Ebonite Corp., with the backing of Fuqua Industries, Inc., was more financially able to pursue such actions than ATI was, the advantages of instituting such actions (i.e., the recovery of damages represented by the royalties it would have been entitled to from the sales of these tables) were far outweighed by the prohibitive cost of instituting and maintaining an action against each infringer. 1/

1/ Ibid., p. 149.

Additional Economic Data for 1974

Imports of convertible game tables

In addition to Armac and Sunshine Cover & Tarp, two new firms, Academy Broadway Corp. and Imperial Billiard Industries began importing convertible game tables between January and April 1974. Sunshine Cover & Tarp did not report any imports during this period. Though data on the total volume of imports for this 4-month period are incomplete, it is estimated to have been equal to about one-fifth of the total volume imported during all of 1973.

Since the issuance of the temporary exclusion order in May, Imperial Billiard Industries has imported some additional tables. The tables imported by Imperial were stopped by the U.S. Customs Service, and Imperial was required to pay the complainant a licensing fee before they could enter the country.

Armac has continued to sell FLIPPER tables since the issuance of the temporary exclusion order in May. A Washington, D.C., area retailer reported that it purchased small amounts of these tables from Armac between May and September and that it had additional tables on order in the middle of October. Thus far, Armac has given the retailer no indications of an inability to supply these tables.

Complainant's production and sales of convertible game tables during the first 9 months of fiscal year 1974 1/

Production.--In the first 9-months of fiscal year 1974, the production of convertible game tables was about two-fifths greater than in all of fiscal year 1973. However, production of separate top assemblies in the 9-month period was reduced to less than one-fifth of the amount in the year earlier. During this 9-month span the complainant continued to supplement its production by purchasing tables from another domestic manufacturer. These purchases amounted to more than one-fifth of the complainant's own production.

During the first 9 months of fiscal year 1974, convertible game tables and separate top assemblies accounted for more than half of the complainant's total output of billiard and pool tables; in 1973, the proportion was slightly smaller. The complainant's total output of billiard and pool tables during the first 3-quarters of 1974 was about four-fifths of the total output during all of fiscal year 1973.

Sales and inventories.--In the first 9-months of fiscal year 1974 the complainant's volume of sales of convertible game tables was equal to slightly more than three-fifths of the quantity achieved for fiscal year 1973. The value of sales during this period was slightly less than three-fifths of the value achieved during the preceding 12-month period. Since the period August 1 through October 31 includes part of the peak selling season, sales for all of fiscal 1974 could easily equal or surpass those for 1973.

1/ ATI Division was the complainant during November 1973-April 1974; Ebonite, during May-July 1974.

Inventories of convertible game tables on July 31, 1974, were substantially larger than on October 31, 1973.

The value of the complainant's sales of all billiard and pool tables during the first 9-months of 1974 was about two-thirds of the value for all of 1973.

Employment

Between October 13, 1973, and July 31, 1974, the complainant's total work force was reduced by more than 20 percent, chiefly as a result of efforts to cut expenses.

Because of changes in the complainant's accounting procedures, data on man-hours worked and output per man-hour in the production of convertible game tables are not available.

Prices

The average net selling price of the complainant's 52-inch and 48-inch GAMBIT tables increased during May-September 1974, rising by 7.0 percent and 3.9 percent, respectively, over the averages for the October-December 1973 period.

Although information on Armac's average net selling price was not available, it was found that that company did sell a small quantity of tables to a retailer during the May-September period at an average price that was more than 10 percent higher than its average net selling price for the first quarter of 1973. However, Armac's average price is probably lower on larger orders for these tables.

Apparent U.S. consumption of convertible game tables during the first 4-months of 1974

Armac, which has been an important supplier of convertible game tables, did not furnish the Commission with data on sales and imports of this product during the first 4-months of 1974. Consequently, apparent U.S. consumption could only be roughly estimated at about one-fourth of the volume for all of 1973.

APPENDIX A

U.S. PATENTS D223,539 AND 3,711,099

AND ADDITIONAL MATERIALS

United States Patent Office

Des. 223,539
Patented May 2, 1972

223,539

CONVERTIBLE TABLE FOR UTILITY, GAMES, AND BUMPER POOL

Ernest Milu, Hollywood, Fla., assignor to All Tech Industries, Inc., Miami, Fla.

Filed May 17, 1971, Ser. No. 144,382

Term of patent 14 years

Int. Cl. D21—02

U.S. Cl. D34—3

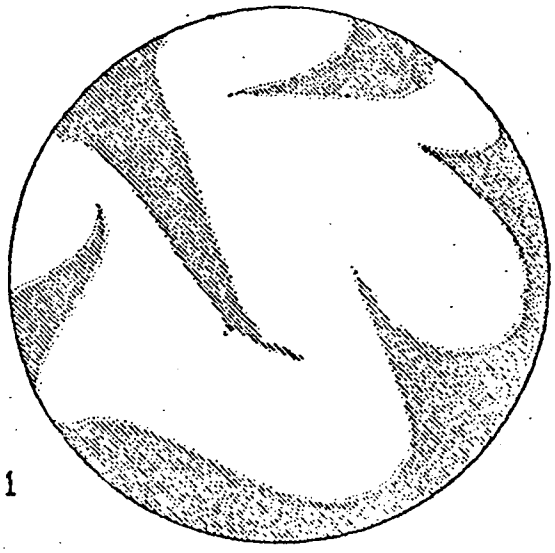


FIG. 1

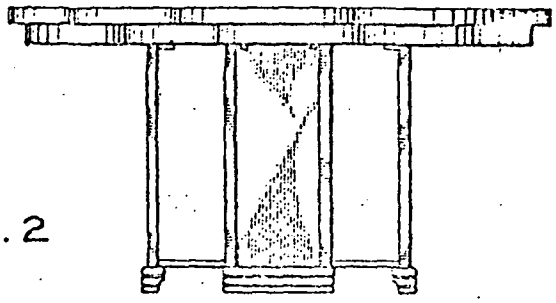


FIG. 2

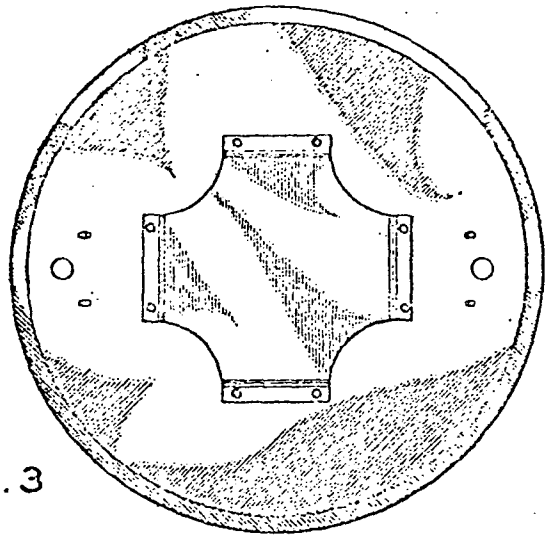


FIG. 3

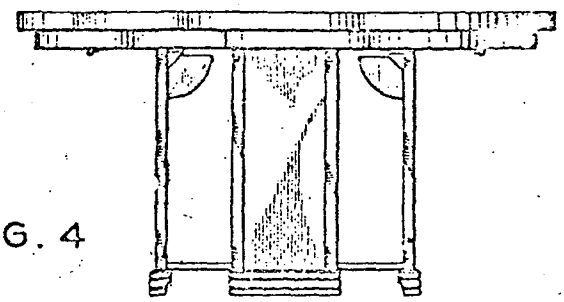
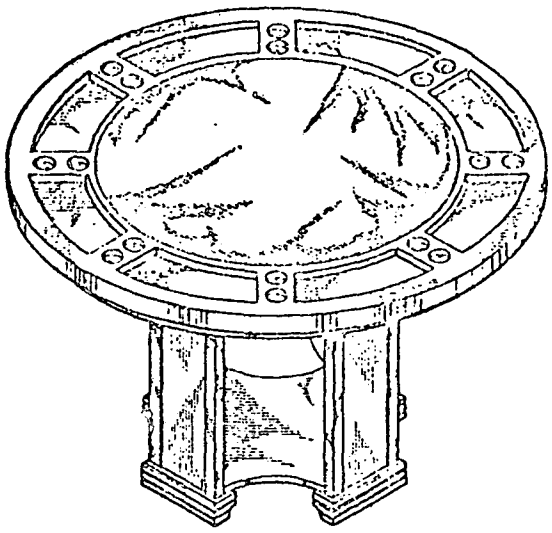


FIG. 4

FIG. 5



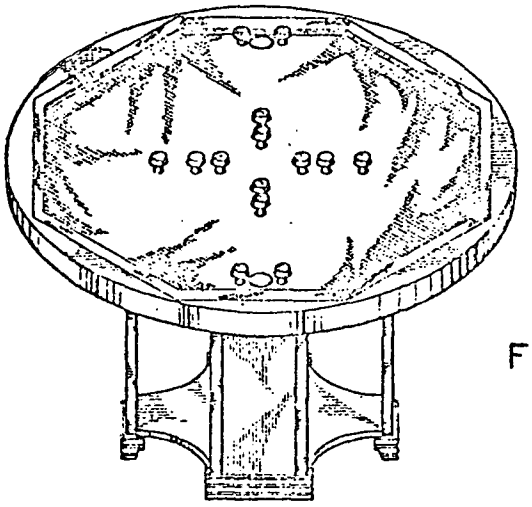


FIG. 6

FIG. 1 is a top plan view of a convertible table for utility, games, and bumper pool, showing my new design.

FIG. 2 is a side elevation thereof.

FIG. 3 is a bottom plan view thereof.

FIG. 4 is a side elevation of the table at right angles to that shown in FIG. 2.

FIG. 5 is a perspective oblique view of the table with the top shown in FIG. 2 inverted.

FIG. 6 is a perspective view of the table shown in FIG. 2.

The table shown is convertible to form three top surfaces and shows ball receiving receptacles in storage position in FIG. 4, which may be removably secured under the holes shown in FIG. 3.

I claim:

The ornamental design for a convertible table for utility, games, and bumper pool, as shown and described.

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MELVIN B. FEIFER, Primary Examiner

United States Patent [19]

Milu

[11] **3,711,099**

[45] ***Jan. 16, 1973**

[54] **CONVERTIBLE TABLE FOR UTILITY GAMES AND BUMPER POOL**

[75] Inventor: **Ernest Milu**, Hollywood, Fla.

[73] Assignee: **A.T.J. Recreation Inc.**, Miami, Lakes, Fla.

[*] Notice: The portion of the term of this patent subsequent to May 2 1986, has been disclaimed.

[22] Filed: **Nov. 3, 1971**

[21] Appl. No.: **195,098**

Related U.S. Application Data

[63] Continuation-in-part of Ser. No. 65,196, Aug. 19, 1970.

[52] **U.S. Cl.** ..... **273/123 R**, 108/150, 278/3 C, 278/12, 273/5 R

[51] **Int. Cl.** **A63d 15/04**

[58] **Field of Search**.....273/3 C, 4 R, 4 A, 4 B, 4 C, 273/5 R, 5 A, 5 B, 5 C, 11 R, 11 C, 12, 22, 123 R, 136 Z; 108/59, 150, 156, 159; 297/157; D6/29, 177, 179; D34/3, 5 J

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Primary Examiner—Richard C. Pinkham
Assistant Examiner—Richard T. Stouffer
Attorney—Dominik, Knechtel, Godula & Demeur

[57] **ABSTRACT**

There is disclosed a combination flat top and game table assembly, the combination including a leg support for supporting the table arrangement, the first top secured to the leg support and forming a first type of game table surface a second top constructed for removable seatment upon the first top, the second top forming a second type of game table surface and a third top formed into a flat table surface which may be positioned on the first top for converting the assembly into a normal flat top table. In the preferred embodiment, the second and third tops are formed from a single top having one surface formed into a flat table top, and the reverse surface forming a second game means, the second top being reversibly positionable upon the first top thereby to expose either the flat table top or when reversed, to expose the second type of game table surface. Included in the game table assembly are removably positionable ball collection compartments which are positioned directly under pockets in the first game table surface when the assembly is to be used as a pool table.

15 Claims, 9 Drawing Figures

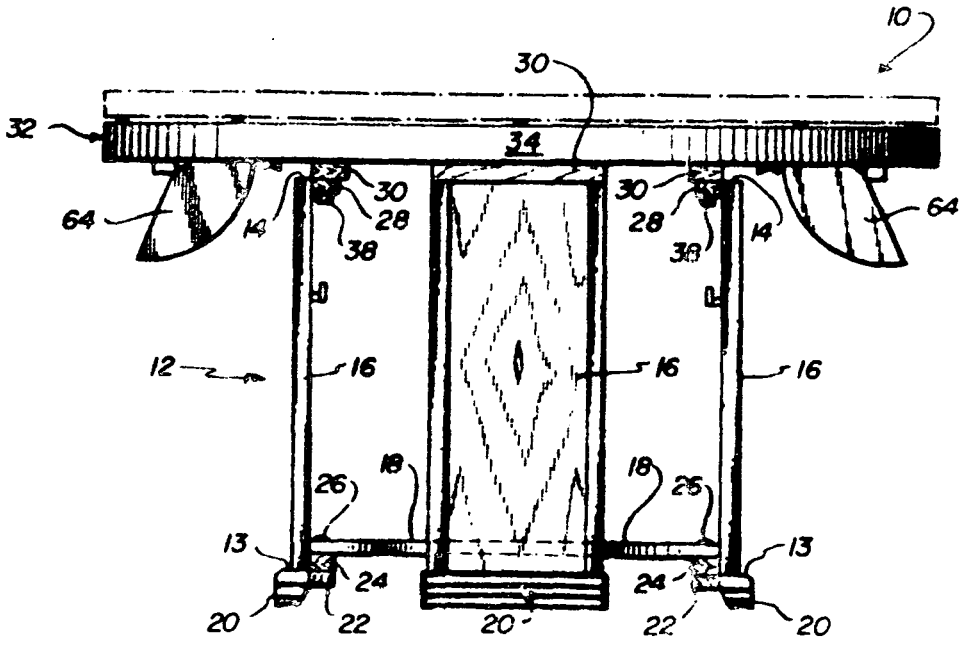

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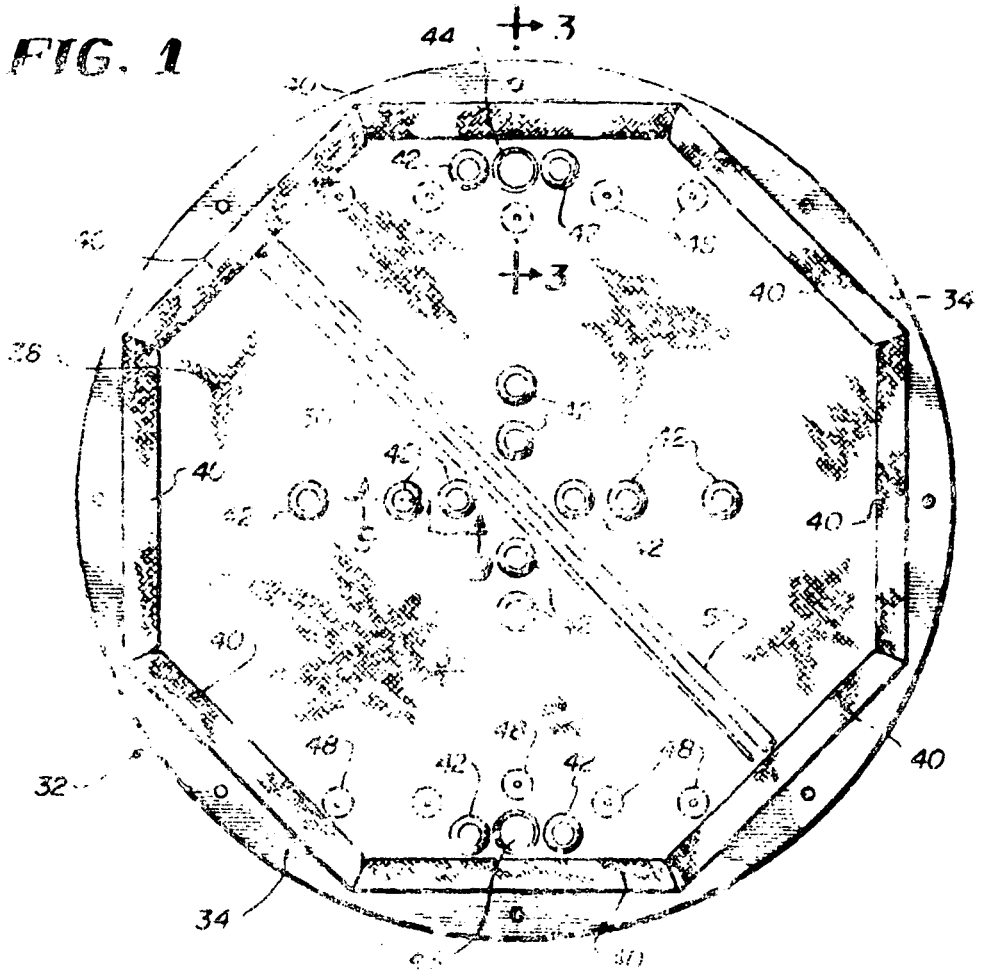
FIG. 1



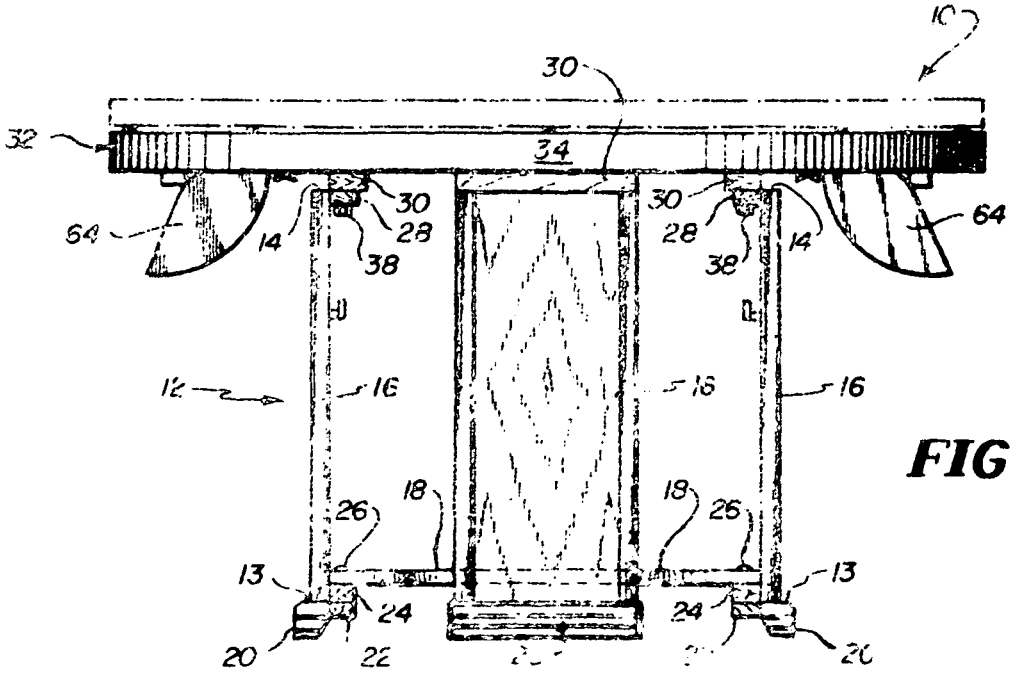


FIG. 2

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FIG. 3

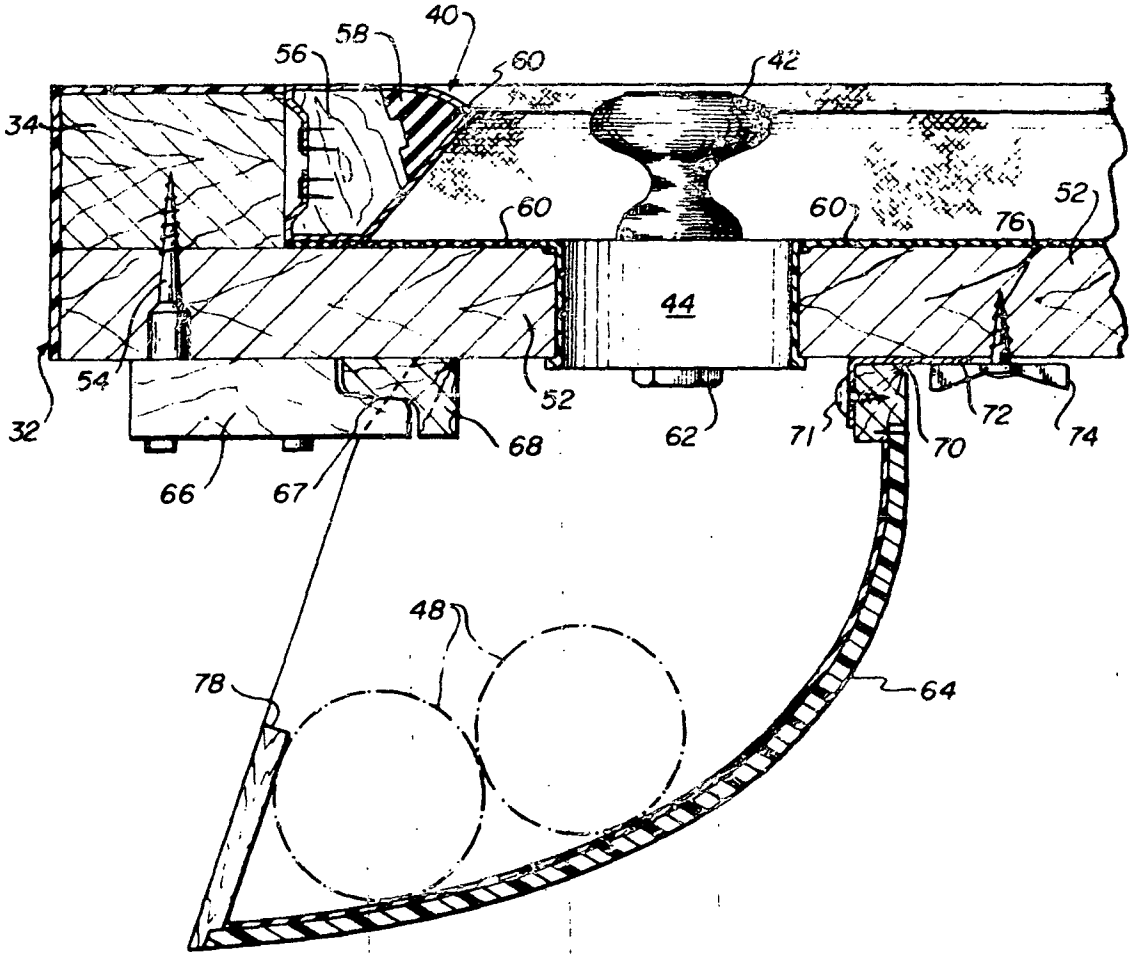


FIG. 6

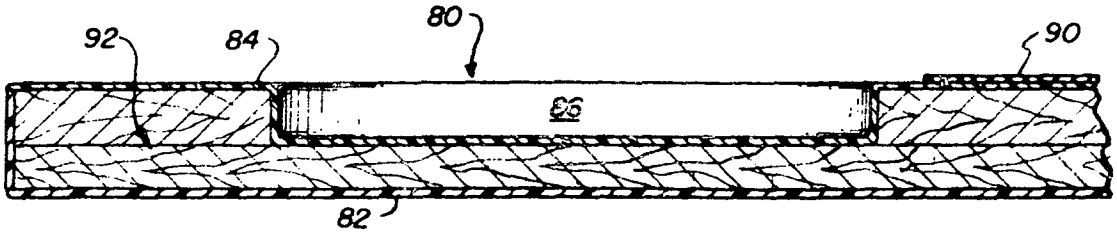


FIG. 7

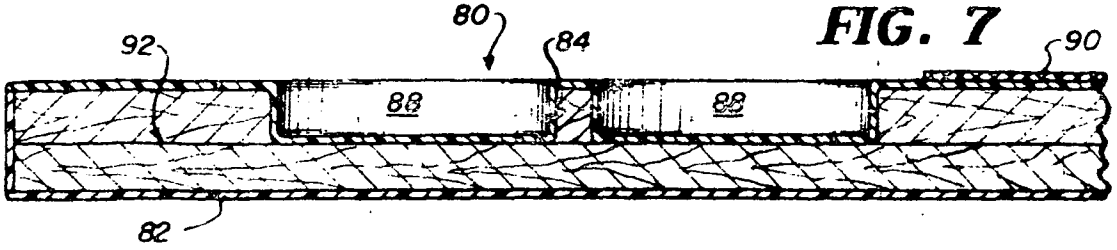
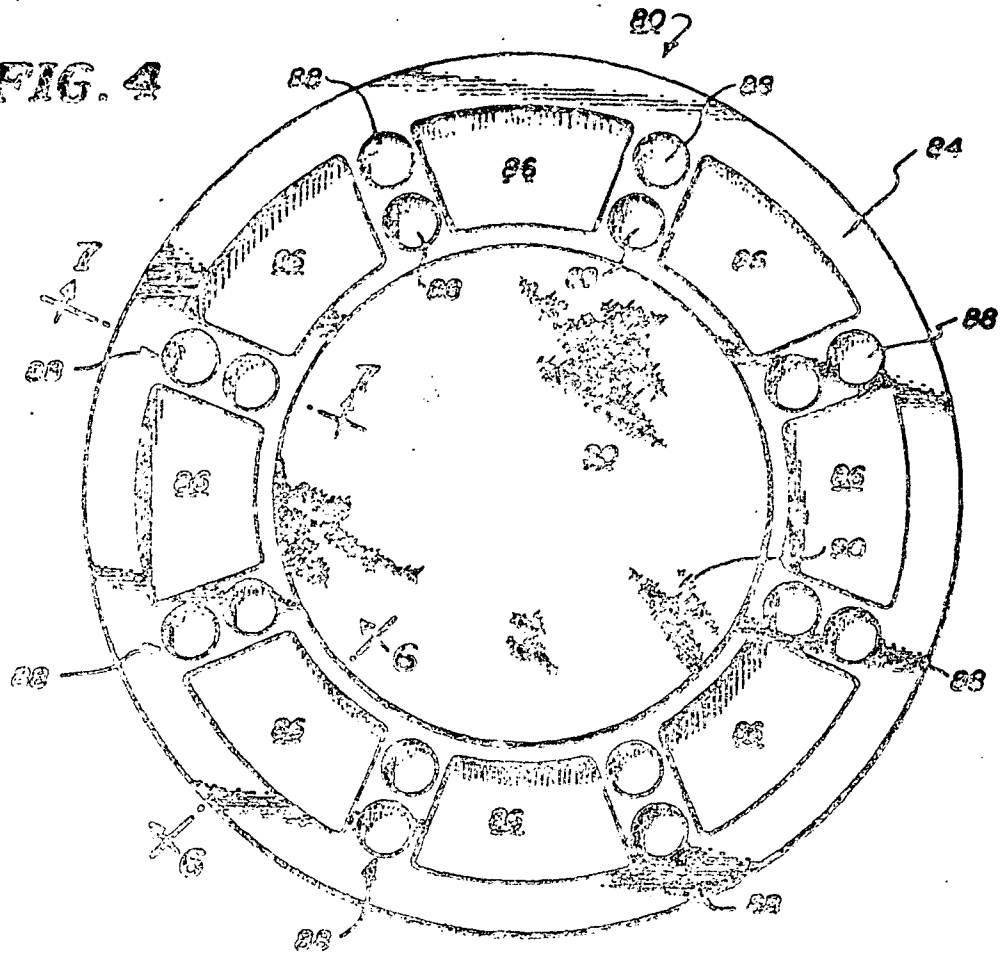


FIG. 4



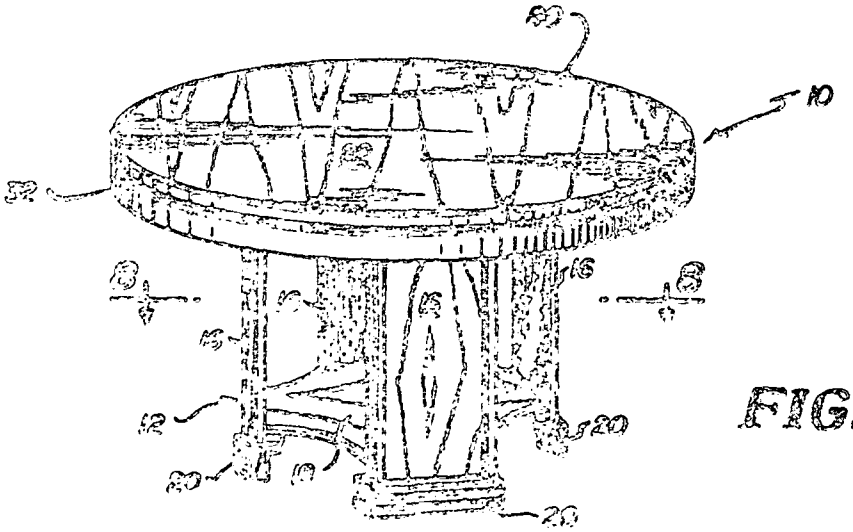


FIG. 5

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FIG. 8

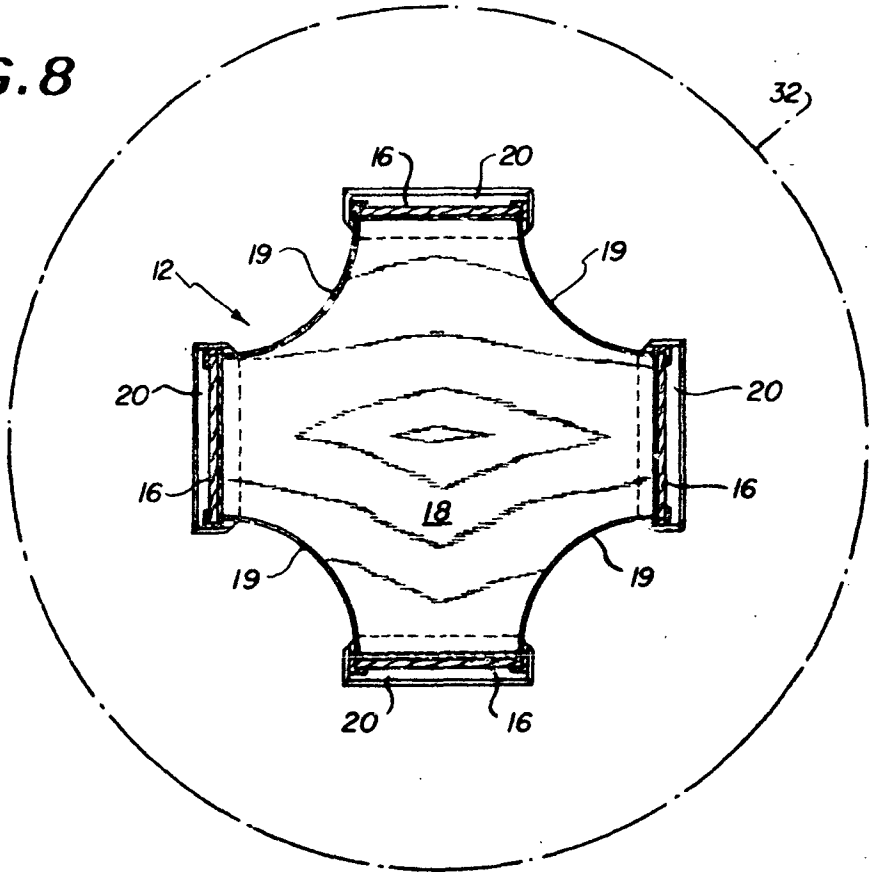
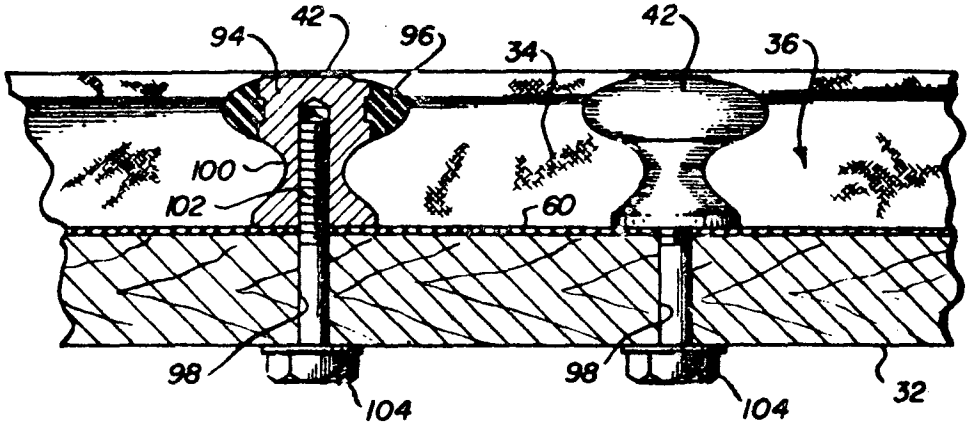


FIG. 9



CONVERTIBLE TABLE FOR UTILITY GAMES AND BUMPER POOL

CROSS REFERENCE TO RELATED CASE

This application is a continuation-in-part of application Ser. No. 65,196, entitled CONVERTIBLE TABLE, filed on Aug. 19, 1970, in the name of Ernest Milu and assigned by mesne assignment to A.T.I. Recreation Inc. of Miami Lakes, Fla.

BRIEF DESCRIPTION OF THE INVENTION

The present invention is directed to a novel table assembly which includes, in combination, a single table having a plurality of tops thereby to permit the utilization of the table as a normal flat top type table as well as a game table, having at least two different game playing surfaces. More specifically, the table assembly of the present invention includes a single pedestal arrangement supporting thereon a first top which is formed into a first game means, and, in the preferred embodiment, a second top having reverse surfaces, one surface being formed into a flat top table and the reverse surface formed into a second game playing surface, the second top being removably positionable upon the first top, whereby the user may select either of two game playing surfaces, or the normal flat top type table surface without the need of having to employ three different tables. Once again, in the preferred embodiment, the first top is formed into a pool ball game playing surface, and the second top has a first flat planar surface for use as a normal table and a reverse surface which is formed into a card game playing surface, the second top being proportioned so as to seat directly over the first top, thereby to provide a compact and convenient combination table arrangement.

BACKGROUND OF THE INVENTION

Heretofore in the prior art, where a person has desired the convenience and enjoyment of a game table, it has been necessary to purchase or acquire a separate table assembly embodying the particular game which the person desired. For example, card game playing tables have been known, and generally take the form of the playing surface having a fabric covered central portion and with a plurality of player convenience cavities disposed around the periphery of the table, the cavities usually taking the form of a large cavity for game related articles, and either one or two circular apertures to accommodate a beverage container. However, such tables serve only the particular function or purpose described, and hence, usually such tables are provided with foldable or collapsible legs in order to permit the user to store the same when it is not in use.

Another example of such game tables has been the current advent of home pool or bumper pool tables. Presently, such sport has become very popular with the public and many of such types of game tables are being currently sold throughout the United States. However, is quite apparent that such tables are again separate entities unto themselves, and therefore, it is necessary for the particular purchaser to have the physical facilities to accommodate such tables. In the usual case, a pool or bumper pool table is disposed or positioned in one's family room or basement, and while several of such

types of tables are collapsible, in the usual case, such tables are rather bulky and heavy and therefore, once installed, tend to remain in a permanent installation. This particular aspect of such game tables therefore must, of necessity, diminish the numbers of such tables which are sold, since today's environment, many people do reside in apartments and condominium type units and such abodes do not usually have sufficient room to accommodate card playing tables, or pool or bumper pool tables.

With respect to the patented art, there are many patents which show game tables, such as for example, U.S. Pats. No. 3,522,778, which is directed to a pool type game table; No. 3,489,409, which is also directed to a six sided pool table; and No. 3,544,108, which is again directed to another variety of a pool game table. Other patents which relate to game tables includes Pats. No. 3,360,265, which is directed to a simulated golf course of billard like tables; and No. 1,625,265, which is directed to a golf course game table which may be employed for indoor use. It is apparent that various other patented game tables are known in the art without need of further recitation herein. However, all of such game tables share one common drawback and that is the fact that such tables serve strictly one function or purpose, and that is, providing a game playing surface for the particular game involved.

As has been set forth hereinabove, one of the principal drawbacks of such tables is that the user must have the space available to install such tables, since in most cases, such tables are not collapsible, or if they are, present a very bulky package for storage. Furthermore, where the user desires to have more than one type of game table, such problems are accentuated since it is virtually impossible to find any home having the necessary space to have a plurality of game tables set up. This problem is even more accentuated in the case of persons who reside in either apartments or condominium type units since usually space is simply not available to permit the permanent installation of a game table having no other utilitarian function.

At best, some of such game tables have been provided with a separate solid cover, peripherally registering with the periphery of the game table, such that the user may place the hard cover over the game table when not in use thereby to utilize the table as a normal flat top table. However, in most cases, it is the consumer or the user who must manufacture such tops as a do-it-yourself project, which is not only time consuming, but in most cases, such tops are not well-fitted and cannot usually be finished to match the particular wood or veneer finish of the game table.

It is therefore the principal object of the present invention to provide a combination flat-top table and game table which may be arranged in such manner as to embody a plurality of game playing surfaces as well as a flat top, thereby to function as a normal flat top type table, as well as a game table.

Another object of the present invention is to provide a table assembly which in combination includes leg means for supporting a top, a first top affixed to the leg means which is formed into a first game means, a second top which is formed into a second game means, and a third top which provides a smooth flat planar surface to function as a normal table, each of the tops

being removably positionable upon the first top thereby to permit great versatility as well as the convenient storage for all of the game means as well as the normal flat top type table.

In connection with the foregoing object, it is another object of the present invention to find a table assembly which in combination, includes a first top disposed upon leg means, the first top being formed into a pool ball game playing surface, and a second top which has two surfaces, one surface thereof formed into a planar flat table top, and having the reverse surface thereof, formed into a second game playing surface, the second top being removably positionable upon the first top, the user having the ability to select either the smooth flat top surface for exposure, or the reverse game playing surface thereof for exposure.

Still another object of the present invention in connection with the foregoing object, is to provide a table assembly in combination wherein the second game means formed in the second top comprises a card game playing surface, having a plurality of player convenience cavities, disposed thereabout, which, nevertheless, continues to permit the second top to be removably positionable upon the first top while still affording the user the opportunity to select either of the two surfaces of the second top for placement upon the first top.

Yet a further object of the present invention is to provide a table assembly combination of the type set forth above, wherein each of the tops is circular in configuration with each of the tops having substantially the same diameter thereby to permit the respective peripheries thereof to be in substantially identical registry or with the uppermost top having a slight overhang, one with respect to the other, thereby to permit the user to conserve space.

Still a further object of the present invention is to provide a table assembly which in combination permits the user to obtain the advantages of having a plurality of game tables, while at the same time providing the user with a table which has a flat top surface thereby to function as a normal dining table, and hence, permitting the user to permanently install such table in a particular location avoiding the necessity of having a plurality of such tables in order to provide at least two different game tables as well as a normal type dining table.

Further features of the invention pertain to the particular arrangement of the elements and parts whereby the above outlined and additional operating features thereof are attained.

The invention, both as to its organization and method of operation, together with further objects and advantages thereof, will best been understood by reference to the following specification, taken in connection with the accompanying drawings in which:

FIG. 1 is a top plan view of the pool ball playing game surface of the table of the present invention;

FIG. 2 is a side elevational view of the table assembly of the present invention showing also the pool ball catcher racks removably positioned under the first top of the present table;

FIG. 3 is a side cross-sectional view showing a portion of the pool ball game playing surface taken in the direction of the arrows along the line 3—3 of FIG. 1;

FIG. 4 is a top plan view showing one surface of the second top which is formed into a card game playing surface in accordance with the present invention;

FIG. 5 is a plan view of the table assembly of the present invention showing the first top disposed on the pedestal assembly and the second top removably positioned thereon and having the normal flat table top in the exposed position;

FIG. 6 is a cross-sectional view of a portion of the second top of the table combination of the present invention showing the card game playing surface formed in the one surface thereof and the flat top surface formed along the other surface thereof, taken in the direction of the arrows along the line 6—6 of FIG. 4;

FIG. 7 is a side cross-sectional view through a portion of the second top showing a pair of player convenience cavities formed in the card playing surface of one side of the top and again, the smooth flat surface on the other side of the second top, taken in the direction of the arrows along the line 7—7 in FIG. 4;

FIG. 8 is a cross-sectional view showing the arrangement of the legs and the leg support shelf taken in the direction of the arrows along the line 8—8 in FIG. 5; and,

FIG. 9 is a cross-sectional view showing the mounting of the obstacle bumpers on the pool ball game playing surface taken in the direction of the arrows along the line 9—9 in FIG. 1.

Referring now to the drawings, and more specifically FIGS. 1 and 2 thereof, there is shown a table assembly, generally referred to by the numeral 10 which consists of a pedestal leg arrangement 12 having a bottom end 13 for seatment upon an underlying support surface such as a floor or the like, and a top end 14, for supporting thereon the table top. The pedestal leg arrangement 12 is shown to consist of a series of four legs 16, each of the legs 16 assuming a rectangular configuration, the length of the rectangular configuration comprising the height of the leg 16 and the width of the rectangular configuration forming a side to side elongated leg support. The four legs 16 are interconnected and supported adjacent the bottom end 13 thereof by means of a leg support shelf 18. Each of the legs 16 is provided with a support block 20 for supporting the legs 16 on the ground or floor, each of the support blocks 20 including an inwardly extending shoulder 22, having a spacer element 24 mounted thereon. The leg support shelf 18 is shown to be mounted to each of the four spacer elements 24 by means of a bolt 26, thereby to fixedly secure the support shelf 18 to each of the four legs 16.

The top ends 14 of each of the legs 16 includes an inwardly extending flange shoulder 38 upon which is supported a second spacer element 30.

As shown in FIGS. 1 and 2, the table assembly 10 includes a first top 32, which is generally circular in configuration and is provided with peripheral side wall 34, thereby to form a well 36 internally of the peripheral side wall 34. The well 36 forms the playing surface for a pool ball game, of the type generally known as a bumper pool game. The first top 32 is mounted on, and supported by, the series of four second spacer elements 30, which are, in turn, mounted upon and supported by the inwardly flange shoulder 28, the first top 32 being mounted thereon by means of a bolt and nut arrange-

ment 38 extending downwardly from the first top 32 and through the second spacer elements 30 and inwardly extending flange shoulders 28.

With reference to FIG. 1 of the drawings, the pool ball game playing surface is illustrated. It is observed that a plurality of resilient cushions 40 are mounted on the peripheral side wall 34 internally thereof, the resilient cushions 40 forming an octagonal interior playing boundary. The well 36 forming the playing surface of the pool ball game is provided with a plurality of obstacle bumper posts 42, a pair of such obstacle posts 42, guarding the first ball pocket 44, disposed adjacent one edge of the playing surface, and a second pair of obstacle bumper posts 42 guarding a second ball pocket 46, adjacent an opposed side of the game playing surface. In addition, a cross-shaped configuration of obstacle bumper posts 32 are provided in a generally centralized region of the table, in the manner well understood in connection with bumper pool games. The bumper pool game is played with a plurality of pool balls 48 (shown in phantom in FIG. 1) and with pool cues 50, all in the manner which is well understood in the art.

In FIG. 3 of the drawings, the construction of the first top 32 is more clearly shown. It will there be observed that the first top consists of a support base 52, which in the preferred embodiment is formed of wood, and having the peripheral side wall 34 mounted thereon by means of a wood screw 54. The resilient cushions 40 are shown to be formed of a backing elements 56 generally formed of wood, to which is secured a resilient element 58 which thereby forms the resilient cushion 40. The complete resilient cushion 40 as well as the surface of the support base 52 is covered with a fabric such as felt 60 in the manner well understood with respect to such games.

Each obstacle bumper post 42 is secured to the support base 52 of the first top 32 by means of a threaded bolt which extends downwardly from the obstacle bumper post 42, through the support base 52, and held in position by a nut 62, along the undersurface of the support base 52.

As illustrated in FIG. 3, the first top 32 is provided with a pair of pool ball catcher racks 64, one rack 64 being provided for each of the two ball pockets 44 and 46 respectively. It will be noted that the pool ball catcher rack 64 is removably mounted to the undersurface of the support base 52, whereby the racks 64 may be removed when the table is to serve other functions and purposes as will be more fully described hereinafter. The means of removably attaching the pool ball catcher rack 64 to the undersurface of the table includes a support block 66 which is mounted to the undersurface of the support base 52, the support block 66 having an inwardly extending shoulder 67. The support block 66 and shoulder 67 cooperate with a support ledge 68 which is formed as part of the pool ball catcher rack 64, the inwardly extending shoulder 67 and support ledge 68 each being so shaped and constructed so as to be disposed in mating relation when the pool ball catcher rack 64 is mounted thereon. The rear end of the catcher rack 64 is provided with a right angle clip 70, which is secured to the near end of the catcher rack 64 by means of a wood screw 71, the right angle clip 70 having a flanged portion 72 which extends outwardly with respect to the catcher rack 64. The under side of the support base 52 is provided with a wing nut 74, held in position by means of a wood screw 76, whereby the rear end of the catcher rack 64 is removably secured to the undersurface of the support base 52 by merely revolving the wing nut 74 until one of the wings makes contact with the outer surface of the flanged portion 72 of the right angle clip 70.

Finally, it will be noted that the pool ball catcher rack 64 is provided with an opening 78 which permits the user to insert his hand therethrough to have access to the pool balls 48 as the same are caught in the pool ball catcher rack 64 during the playing of the bumper pool game.

With reference to FIGS. 4 through 7 of the drawings, the construction and configuration of the second top 80 of the table assembly 10 of the present invention is illustrated. In FIG. 5 the manner in which the second top 80 may be removably positioned upon the first top 32 is illustrated with the one surface of the second top 80 which forms the flat table top 82 in the exposed position. The second top 80 is also circular in configuration and in the preferred embodiment, the diameter of the second top 80 is slightly larger than the diameter of the first top 32 whereby the outer periphery of the second top 80 slightly overhangs the periphery of the first top 32.

In FIG. 4 of the drawings, the reverse surface of the second top 80 is illustrated. It will be observed that the second top 80 has a reverse surface 84 which is formed into a card game playing surface. The card game playing surface includes a series of eight player convenience cavities 86, which are used in association with retaining game incident paraphernalia, such as cards, chips or the like, and is further provided with a series of eight pairs of circular cavities 88 which may be utilized either in connection with retaining game associated paraphernalia, or may be utilized to hold beverage containers. The central portion 90 of the reverse surface 84 is, in the preferred embodiment, covered with a fabric such as felt or the like in a manner which is customary with game tables of the type referred to herein.

With respect to FIGS. 6 and 7 of the drawings, the specific construction of the second top 80 is illustrated. The internal portion 92 of the second top 80 is preferably formed of a wood material and includes a covering formed of a plasticized material, such as a phenolic sheet of the type generally sold under the trade name Formica, thereby to form a very smooth and stain resistant table top surface. The reverse surface 84 of the top 80, which includes the player convenience cavities 86 and circular cavities 88 may ideally be formed of a molded plastic such that the cavities 86 and 88 respectively are preformed in a molding operation either by an injection molding process or a blow molding process, and thereafter secured to the reverse surface 84 by any appropriate means such as an adhesive or the like.

FIG. 8 of the drawings illustrates the pedestal leg arrangement 12 and shows the manner in which the series of four legs 16 supports the first table top 32. As has been indicated hereinabove, each of the legs 16 is rectangular in configuration, the width of the rectangular configuration thereby forming a side to side elon-

gated support structure for supporting the first top 32. In this manner, a very pedestal leg arrangement 12 is formulated. In addition, FIG. 8 illustrates the manner in which the leg support shelf 18 interconnects and supports the four legs 16. Hence, since the top end 14 of the legs 16 is fixedly secured to the under side of the first top 32, and the lower end of each of the legs 16 is fixedly secured to the leg support shelf 18, it will be appreciated that the pedestal leg arrangement 12 forms a very secure and stable support for the table. In addition, FIG. 8 illustrates the configuration of the leg support shelf 18 in the preferred embodiment. It will be observed that the support shelf 18 includes a series of four arcuate cut-outs 19, each of which is disposed between adjacent legs 16. The arcuate cut-outs 19 thereby provide a convenient space for the user to position his or her legs while seated at the table, regardless of the manner or function which the table serves, whether being used as a dining table, or whether the user is utilizing one of the game playing surfaces.

FIG. 9 of the drawings illustrates the simple construction of the obstacle bumper posts 42 and the manner in which each of the same is secured to the first top 32. It will be observed that each obstacle bumper post 42 has an internal portion 94 formed of a wood material to which is circumferentially secured a circular resilient element 96 which may be formed from a rubber or foam cushion material. The first top 32 is provided with a plurality of bores 98 which are positionally located thereby to locate an obstacle bumper post 42 at the positions as illustrated in FIG. 1 of the drawings, and each of the obstacle bumper posts 42 is centrally bored and threaded as shown at 100, whereby the bumper post 42 may be secured to the top 32 by means of a threaded bolt 102 extending upwardly through the corresponding bore 98 in the top 32 and into the threaded bore 100 of the bumper post 42. The threaded bolt 102 includes a hexagonal head 104, which permits the installer to conveniently thread and secure the bolt 102 into position, thereby to fixedly secure the bumper post 42 to the first top 32.

The second top 80 is shown to be removably positionable upon the first top 32, and in the preferred embodiment, merely seats against the first top 32 and is held in position only by gravity. If desired, the table assembly 10 may be provided with a series of felt spacers adhesively secured to the upper surface of the first top 32 thereby to prevent the tops from scratching one another as the second top 80 is positionally disposed upon or removed from the second top 80.

The method of utilizing the table assembly of the present invention now becomes clear. Where the user desires to utilize the table as a bumper pool table, he need only remove the second top 80 from positional engagement with the first top 32, thereby to expose the pool ball game playing surface. The second top 80 may be stored in any convenient place, and in this connection, in the preferred embodiment, the second top 80 has a thickness of less than 1½ inches whereby the second top 80 may be stood on end and stored in any convenient place, such as behind bookcases, a breakfront, or other similar large piece of furniture. Obviously, where the user desires to have the card game playing surface exposed, he need only position the reverse surface 84 of the second top 80 on top of the first top 32, and the table is then ready for use as a card game playing surface. Alternatively, where the user desires to utilize the table as a dining table, or the like, he need only reverse the second top 80 by positioning the card game playing surface downwardly over the pool ball game playing surface, which thereby exposes the flat table top 82.

It is furthermore clear that due to the simplified construction of the table assembly of the present invention, a manufacturer may employ any popular furniture style in order to enhance the aesthetic characteristics of the table assembly. It is therefore apparent that a user may employ the table assembly of the present invention as a formal dining room table while still obtaining the advantages of having a pair of game tables available to him for subsequent use. In this manner, the user is provided with the convenience of being able to install the table in one location in his place of abode, and utilize the table for whatever purpose is desired, without either having to purchase a plurality of tables, or without having to move the table in order to gain access to the game playing surfaces.

It will be understood by reference to the above description, that it would not be completely necessary to have a reversible top, such as second top 80, in order to achieve the advantages of the present invention. Where desired, one could manufacture a table obtaining most all of the advantages of the present invention by supplying a table having a series of three tops thereby fulfill the objects and advantages herein. For example, in such construction, the first top would comprise a bumper pool game and would be fixedly secured to the pedestal arrangement. The second top could be the card game playing surface and would be so constructed as to be positionally engageable with the first top merely seating the same atop. A third flat, smooth table top could then be provided which would in turn seat upon the second top, in sandwich arrangement, thereby to complete the assembly. Obviously, such construction would have the inherent disadvantage of forcing the user to handle two removable tops rather than one as illustrated in the present invention, and hence, while such as assembly does provide many of the advantages of the present invention, nevertheless, the advantages of compactness and storageability is somewhat diminished. Hence, in the preferred embodiment of the present invention, it is considered to be desirable to have a second top which includes a first surface which is formed into a flat table top and a second surface which is formed into a card game playing surface, thereby to expose one surface or the other by merely reversing the top and eliminating the need for storing the top while another one is in use.

It will be apparent from the above description and drawings, that by virtue of the present invention, a table assembly has been provided which permits the user to have the convenience and enjoyment of a formal dining room table, as well as a pair of tops forming first game playing surfaces and second game playing surfaces. Furthermore, the table assembly of the present invention is compact and eliminates the need for the storage of a plurality of tops, as well as eliminating the need for requiring the user to purchase a number of tables in order to obtain the advantages of

table in one's place of abode. In addition, the table assembly of the present invention is constructed in an aesthetically presentable manner which may nevertheless be manufactured and sold at a cost substantially less than the cost of formal dining room sets, and indeed, eliminates the need of the purchaser have to purchase a plurality of tables in order to obtain the benefits of card game playing tables, pool tables, and dining room tables. It will therefore be appreciated that all of the above objects and advantages have been accomplished by means of the table assembly depicted herein and the various embodiments thereof to provide an extremely compact and easily convertible combination table.

While there has been described what at present is considered to be the preferred embodiments of the present invention, it will be understood that various modifications may be made therein and it is intended to cover in the appended claims all such modifications as fall within the true spirit and scope of the invention.

What is claimed is:

1. A combination flat top, game table and bumper pool game table assembly comprising in combination,

leg support means having an upper end and a lower end,

a first top having a lower surface fixedly secured on said upper end of said leg support means and an upper surface consisting essentially of a bumper pool game playing surface,

said bumper pool game playing surface being bounded by a plurality of opposed rectilinear surfaces and including a plurality of obstacle bumper posts positioned substantially centrally on said bumper pool game playing surface,

said bumper pool game playing surface being substantially imperforate and having a pair of oppose ball apertures, one each of said ball apertures being disposed adjacent one of said rectilinear surfaces,

a pair of ball collection means mounted on the lower surface of said first top and each of said pair of ball collection means being in a position in open communication with and directly below one of said ball apertures,

said ball collection means being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table,

said leg support means including a plurality of legs,

a substantially planar shelf member positioned adjacent the lower ends of said legs and secured to each of said legs adjacent the periphery of said planar shelf member,

a second top forming a second game means and being removably positionable upon said first top,

a third top forming a flat smooth surface and being removably positionable upon said first top,

said second and third tops comprising a single top having one surface formed as a flat smooth top and the opposed surface formed into said second game means,

whereby said table assembly may be utilized as a flat top table with said third top positioned and supported upon said first top, and said assembly may be utilized as a second game means when said second top is exposed, and may be utilized as a bumper pool game when said first top is exposed.

2. A combination flat top, game table and bumper pool game table assembly comprising in combination,

leg support means having an upper end and a lower end,

a first top having a lower surface fixedly secured on said upper end of said leg support means and an upper surface consisting essentially of a bumper pool game playing surface,

said bumper pool game playing surface being bounded by a plurality of opposed rectilinear surfaces and including a plurality of obstacle bumper posts positioned substantially centrally on said bumper pool game playing surface,

said bumper pool game playing surface being substantially imperforate and having a pair of opposed ball apertures, one each of said ball apertures being disposed adjacent one of said rectilinear surfaces,

a pair of ball collection means mounted on the lower surface of said first top and each of said pair of ball collection means being in a position in open communication with and directly below one of said ball apertures,

said ball collection means being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table,

said leg support means including a plurality of legs,

each of said ball collection means being disposed between a corresponding leg and the outer periphery of said first top,

each of said legs having a length dimension extending downwardly from said lower surface of said first top, and a width dimension which is substantial but less than one-half the length dimension,

a substantially planar shelf member positioned adjacent the lower ends of said legs and secured to each of said legs adjacent the periphery of said planar shelf member,

a second top forming a second game means and being removably positionable upon said first top,

a third top forming a flat smooth surface and being removably positionable upon said first top,

said second and third tops comprising a single top having one surface formed as a flat smooth top and the opposed surface formed into said second game means,

whereby said table assembly may be utilized as a flat top table with said third top positioned and supported upon said first top, and said assembly may be utilized as a second game means when said second top is exposed, and may be utilized as a bumper pool game when said first top is exposed.

3. A combination flat top, game table and bumper pool game table assembly, comprising in combination,

support means having an upper end and a lower end,

a first top having a lower surface fixedly secured on said upper end of said support means and an upper surface consisting essentially of a bumper pool game playing surface,

a bumper rail surrounding said bumper pool game playing surface defining a plurality of opposed equal rectilinear surfaces,

a plurality of obstacle bumper posts positioned substantially centrally and symmetrically on said bumper pool game playing surface,

said bumper pool game playing surface being substantially imperforate and having a pair of opposed ball apertures,

each of said ball apertures being disposed adjacent one of said rectilinear surfaces,

a pair of ball collection means mounted on the lower surface of said first top and each of said pair of ball collection means being in a position in open communication with and directly below one of said ball apertures,

said ball collection means being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table,

each of said ball collection means being disposed between the support means and the outer periphery of said first top,

a second top removably positionable upon said first top, and second top having a game playing surface,

a third top forming a flat smooth surface and being removably positionable upon said first top,

said second and third tops comprising a single top having one surface formed as a flat smooth top and the opposed surface containing said second game means,

whereby said table assembly may be utilized as a flat top table with said third top positioned and supported upon said first top, and said assembly may be utilized as a second game means when said second top is exposed, and may be utilized as a bumper pool game when said first top is exposed.

4. A combination flat top, game table and bumper pool game table assembly comprising in combination,

leg support means having an upper end and a lower end,

a first top having a lower surface fixedly secured on said upper end of said leg support means and an upper surface consisting essentially of a bumper pool game playing surface,

said bumper pool game playing surface being bounded by a plurality of opposed rectilinear surfaces and including a plurality of obstacle bumper posts positioned substantially centrally on said bumper pool game playing surface,

said bumper pool game playing surface being substantially imperforate and having a pair of opposed ball apertures, one each of said ball apertures being disposed adjacent one of said rectilinear surfaces,

each of said ball apertures being bounded on opposed sides thereof by an obstacle bumper post,

a pair of ball collection means mounted on the lower surface of said first top and each of said pair of ball collection means being in a position in open communication with and directly below one of said ball apertures,

said ball collection means consisting of a pair of ball racks, each of said ball racks being removable from said position in open communication with and directly below each of said ball apertures to a position removed therefrom such that the lower surface of said first top is unobstructed to occupants seated at said table and permitting utilization of said table for other functions,

said leg support means including a plurality of legs,

each of said ball collection means disposed between a corresponding leg and the outer periphery of said first top,

each of said legs having a length dimension extending downwardly from said lower surface of said first top, and a width dimension which is substantial but less than one-half the length dimension,

a second top forming a second game means and being removably positionable upon said first top,

a third top forming a flat smooth surface and being removably positionable upon said first top,

said second and third tops comprising a single top having one surface formed as a flat smooth top and the opposed surface formed into said second game means,

whereby said table assembly may be utilized as a flat top table with said third top positioned and supported upon said first top, and said assembly may be utilized as a second game means when said second top is exposed, and may be utilized as a bumper pool game when said first top is exposed.

5. The combination flat top, game table and bumper pool game table assembly, as set forth in claim 3 above, wherein, each of said apertures is flanked by a pair of bumpers.

6. The combination flat top, game table and bumper pool game table assembly, as set forth in claim 1 above, wherein said planar shelf member is positioned horizontally with respect to each of said legs.

7. The combination flat top, game table and bumper pool game table assembly, as set forth in claim 1 above, wherein said bumper pool game playing surface is recessed and is bounded by said plurality of opposed rectilinear surfaces, and each of said rectilinear surfaces is provided with resilient bumper means secured thereto.

8. The combination flat top, game table and bumper pool game table assembly, as set forth in claim 3 above, wherein said game playing surface of said second top is formed into a card game playing surface including a plurality of player convenience apertures.

9. The combination flat top, game table and bumper pool game table assembly, as set forth in claim 1 above, wherein said planar shelf member includes a plurality of arcuate cut-out sections positioned between adjacent legs, thereby to provide occupant convenience sitting positions about said table.

10. The combination flat top, game table and bumper pool game table assembly as set forth in claim 3 above, wherein said support means comprises a series of four legs for supporting said first top, each of said legs being fixedly secured to the lower surface of said first top and extending downwardly therefrom to an underlying support surface.

11. The combination flat top, game table and bumper pool game table assembly as set forth in claim 1 above, wherein each of said first and second tops are substantially circular in configuration.

12. The combination flat top, game table and bumper pool game table assembly as set forth in claim 1 above, wherein said pair of ball collection means is positioned between a corresponding leg and the outer periphery of said first top.

13. The combination flat top, game table and bumper pool game table assembly as set forth in claim 1 above, wherein each of said pair of ball collection means comprises a ball rack formed by a bottom wall, side walls, a back wall, and a partial front wall.

14. The combination flat top, game table and bumper pool game table assembly as set forth in claim 3 above, wherein said bumper pool rail surrounding said bumper pool game playing surface defines an overall octagonal configuration thereby to provide an octagonally shaped bumper pool ball game playing surface for said bumper pool ball game.

15. The combination flat top, game table and bumper pool game table assembly as set forth in claim 3 above, wherein said third top forming said flat smooth surface is covered with a plasticized material, thereby to form a smooth and protected table top.

* * * * *

APPENDIX B

SALES SLIPS SUPPLIED BY
ARMAC ENTERPRISES, INC.

Minnesota Fats
POOL TABLES

EQUIPMENT — MANUFACTURED BY ROZEL INDUSTRIES, INC. — ACCESSORIES

LINCOLNWOOD
6501 N Lincoln Ave.
Lincolnwood, Ill. 60645
Suburbs - 677-0050
Chicago - 463-6140

LOMBARD
21 W. 251 Roosevelt Rd.
Lombard, Ill. 60148
627-6722

WAUKEGAN
1923 W. Grand
Waukegan, Ill. 60085
244-0077

BEVERLY
2108 W. 95th
Chicago, Ill. 60643
233-5477

OAK PARK
6945 W. North Ave.
Oak Park, Ill. 60302
771-6060

PALATINE
630 E. Northwest Hwy.
Palatine, Ill. 60067
359-7510

Customer's Order No. MSL Phone No. Date 8/15 1972

Sold To

Address OASH

City

QUAN.	DESCRIPTION	PRICE	AMOUNT
1	FLIPPER		299 00
	CUSTOMER TAKEN FULL FACTORY EQUIPMENT		
	$313.95 Paid in full MSL		
			299 00
		TAX	14 95
		TOTAL	313 95

DELIVERY INSTRUCTIONS: TAKEN

DATE DELIVERED

DELIVERED BY: MBLuedman

DELIVERY ACCEPTED BY:

No. 38164

UARCO INCORPORATED

A-121

Minnesota Fats
POOL TABLES

EQUIPMENT — MANUFACTURED BY ROZEL INDUSTRIES, INC. — ACCESSORIES

LINCOLNWOOD	LOMBARD	WAUKEGAN
6501 N. Lincoln Ave Lincolnwood, Ill. 60645 Suburbs - 677-0050 Chicago - 463-6140	21 W. 251 Roosevelt Rd. Lombard, Ill. 60148 627-5722	1923 W. Grand Waukegan, Ill 60035 244-0077
BEVERLY 2109 W. 95th Chicago, Ill. 60643 233-5477	**OAK PARK** 6945 W. North Ave. Oak Park, Ill 60302 771-6060	**PALATINE** 630 E. Northwest Hwy. Palatine Ill 60067 359-7510

Customer's Order No. Phone No. Date Aug 18 1972

Sold To

Address Cash.

City

QUAN.	DESCRIPTION	PRICE	AMOUNT	
1	Flipper table		299	00
	Equipped			
	Pd 313.95			
	MP			
DELIVERY INSTRUCTIONS: Customer Pickup.		TAX	14	95
		TOTAL	313	95

DATE DELIVERED	DELIVERED BY:	DELIVERY ACCEPTED BY:
	M J Eastman	

No. 36893

UARCO INCORPORATED

A-122

Minnesota Fats

POOL TABLES

EQUIPMENT MANUFACTURED BY ROZEL INDUSTRIES, INC. ACCESSORIES

LINCOLNWOOD
6501 N. Lincoln Ave.
Lincolnwood, Ill. 60645
Suburbs - 677-3050
Chicago -

LOMBARD
21 W. 251 Roosevelt Rd.
Lombard, Ill. 60148
627-5722

WAUKEGAN
1923 W. Grand
Waukegan, Ill. 60085
244-0077

BEVERLY
2106 W. 95th
Chicago, Ill. 60643
[illegible]

OAK PARK
6945 W. North Ave.
Oak Park, Ill. 60302
771-6050

PALATINE
830 E. Northwest Hwy.
Palatine, Ill. 60067
359-7510

Customer's Order No. [illegible] Phone No. Date 8/19 19 82

Sold To

Address Cash + Carry

City

QUAN.	DESCRIPTION	PRICE	AMOUNT
1	3-Way Flipper Full Felt Equip.		299 00

Paid

DELIVERY INSTRUCTIONS:

TAX 14 95

TOTAL 313 95

DATE DELIVERED | DELIVERED BY: | DELIVERY ACCEPTED BY:

No. 42522

UARCO INCORPORATED

Minnesota Fats

POOL TABLES

EQUIPMENT **MANUFACTURED BY ROZEL INDUSTRIES, INC.** **ACCESSORIES**

LINCOLNWOOD
6501 N. Lincoln Ave.
Lincolnwood, Ill. 60645
Suburbs - 677-0050
Chicago - 267-6140

LOMBARD
21 W. 251 Roosevelt Rd.
Lombard, Ill. 60148
627-6722

WAUKEGAN
1923 W. Grand
Waukegan, Ill. 60085
244-0077

BEVERLY
2108 W. 95th
Chicago, Ill. 60643
233-5477

OAK PARK
6945 W. North Ave.
Oak Park, Ill. 60302
771-6060

PALATINE
630 E. Northwest Hwy.
Palatine, Ill. 60067
359-7510

Customer's Order No. | Phone No. | Date 8-26 19 72

Sold To

Address Cash

City

QUAN.	DESCRIPTION	PRICE	AMOUNT
1	3-Wall FLIPPER Full Fact. Equip.		299 00

Paid Taken

DELIVERY INSTRUCTIONS:

TAX 14 95

TOTAL 313 95

DATE DELIVERED	DELIVERED BY:	DELIVERY ACCEPTED BY:

No. 42647

UARCO INCORPORATED

APPENDIX C

BACKGROUND INFORMATION ON ARMAC ENTERPRISES, INC.

Background Information on Armac Enterprises, Inc. 1/

Armac Enterprises, Inc. is engaged in the fabrication and distribution of pool tables, bumper pool tables, poker tables, and table tennis tables and tops, and the distribution of pool table accessories and vinyl boats. These products are sold principally to discount, premium, department, sporting goods and furniture stores. A wholly-owned subsidiary, Rozel Industries, Inc., sells pool tables and accesories at retail through six outlets located in the Chicago metropolitan area. Most adult-size pool tables and substantially all of the accessories sold by Armac Enterprises, Inc. and Rozel Industries, Inc. carry the "Minnesota Fats" endorsement which is used as a trade name by the Company. 2/ Another wholly-owned subsidiary, Sutra Import Corporation, distributes imported pool table equipment and supplies through the United States. . . .

The Company's executive offices and principal manufacturing facilities are located at 3900 South Union Avenue, Chicago, Illinois 60609. . . .

. . . . . .

Armac Enterprises, Inc. was incorporated in April 1969 as a Delaware Corporation. In May 1969 it succeeded to the business conducted prior thereto by Armac Service Products, Inc., Telequip Radio Company, and Stratford Products, Inc., all of which predecessor companies were engaged in various aspects of the business presently carried on by Armac Enterprises, Inc. On the same date it acquired as a wholly-owned subsidiary Rozel Industries, Inc., a corporation engaged in the retail sale of pool tables and the distribution of pool table equipment and supplies.

In August 1970, the Company acquired Leisure Sports, Ltd., a manufacturers' representative engaged in the distribution of recreation equipment and sporting goods.

As of June 30, 1970, the Company acquired Sutra Import Corporation, a principal supplier of the Company. Sutra now operates as a wholly-owned subsidiary of the Company.

. . . . . .

1/ The following information was extracted from a prospectus published by the company on Aug. 30, 1972, and obtained from the files of the Securities and Exchange Commission.

2/ ". . . the Company believes that its use of the trade name 'Minnesota Fats' is of value in identifying its product. This trade name has been registered with the United States Patent Office."

The following table shows the percentage of wholesale and retail sales 1/ and income before income taxes and extraordinary item to total sales and total income before income taxes and extraordinary item:

Fiscal Year Ended December 31	Wholesale Distribution		Retail Distribution	
	Sales	Income	Sales	Income
1969	82%	54%	18%	46%
1970	84	61	16	39
1971	90	89	10	11

. . . . . .

Prior to 1971, the Company's order backlog for pool tables and accessories did not develop substantially until the second half of the year. In January 1971, the Company received its first major purchase order from Sears Roebuck and Co. ("Sears"). The Company's sales to Sears during 1971 were $3,268,000 and for the six months ended June 30, 1972 were about $760,000. As of June 30, 1972 the Company had purchase orders from Sears in the amount of approximately $4,198,000 and a total company backlog (including Sears) of approximately $6,135,000.

. . . . . .

The Company has entered into separate arrangements with Sears Bank and Sears for the financing of the Sears production prior to sale and delivery to Sears. Under these arrangements, goods fabricated for the Sears purchase orders are placed in a bonded warehouse . . . and the Company receives a warehouse receipt therefor. The Company then pledges the warehouse receipts with Sears Bank as security for loans equal to 90% of the Sears purchase order price for the warehoused goods, up to a maximum of $3,750,000 in loans outstanding at any one time. These loans bear interest at one percentage point over Sears Bank prime rate and are repayable from the sale proceeds when Sears takes delivery and the sale is completed.

1/ Armac's net sales rose from $4.3 million in 1969 to $12.5 million in 1971.

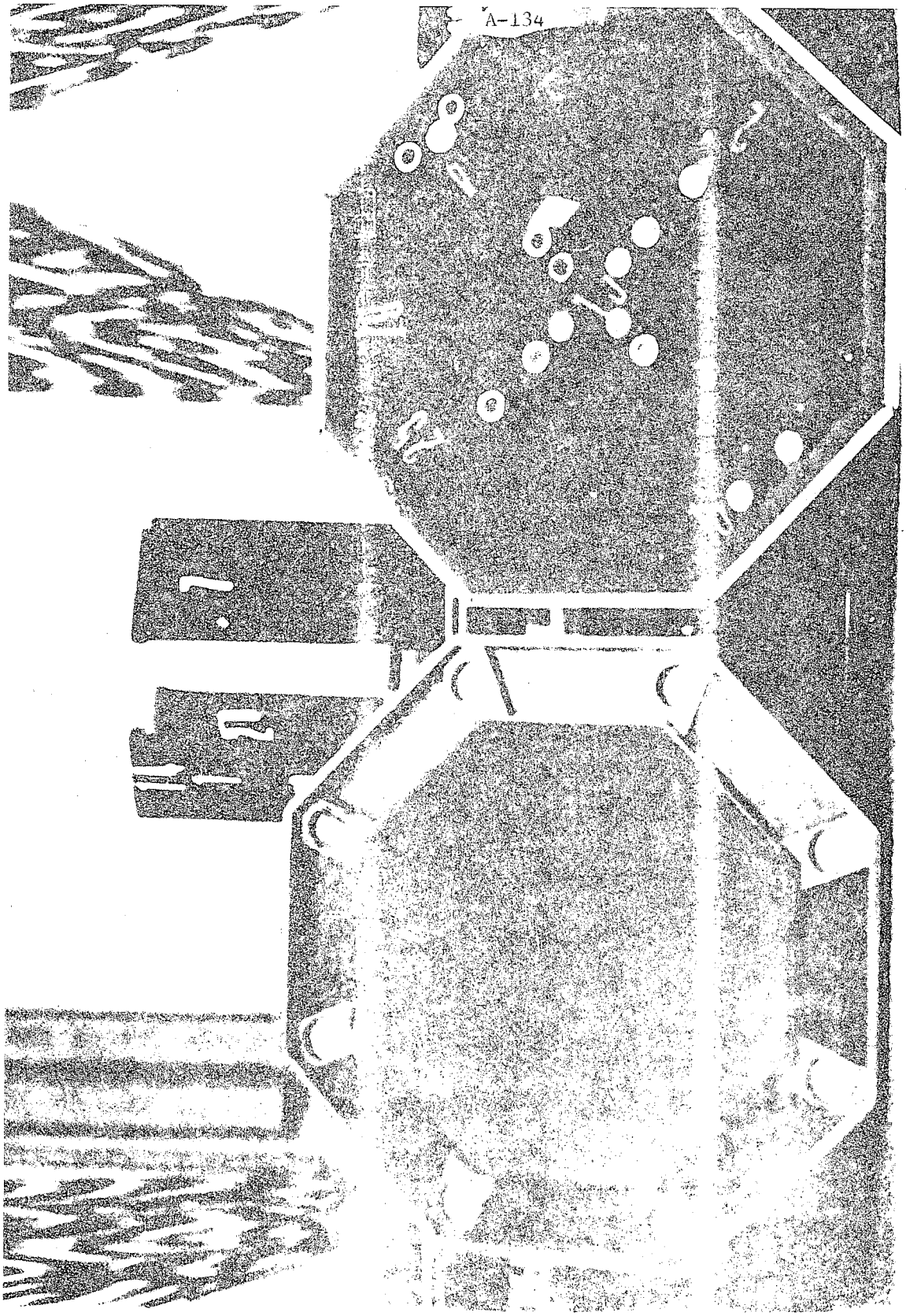
Substantially all of the junior-size and adult-size low-priced pool tables fabricated by the Company are sold nationally to chain, department, premium, discount, sporting goods and furniture stores. During 1971, approximately 75% of its sales were to multi-store retailers. During 1971, Sears and the largest other single customer accounted for approximately 26% and 12% of the gross sales of the Company, respectively, and the 15 largest customers including Sears accounted for approximately 62% of gross sales. The Company estimates that the Sears business . . . will continue to account for a substantial portion (in relation to other customers) of 1972 sales. Wholesale sales are effected through both sales employees and manufacturers' representatives.

. . . . . .

The Company has a written agreement with Minnesota Fats Enterprises, which owns the name "Minnesota Fats," for the use of that name. Pursuant to this contract, which terminates December 31, 1978, the Company will pay Minnesota Fats Enterprises annual royalties equal to 1/2 of 1% of net sales by Armac Enterprises, Inc. of certain of its lines of pool tables and accessories bearing that trade name. During the three year period from the commencement of the agreement through December 31, 1971, these payments totaled $78,789. Royalty payments in 1972 through June 30 totaled $20,500. The Company's subsidiary, Rozel Industries, Inc,. also has a written contract with Minnesota Fats Enterprises permitting it to use the "Minnesota Fats" name on all of its products for a period of 50 years from February 1, 1969. No royalties are to be paid by Rozel pursuant to this contract. Minnesota Fats Enterprises is a corporation wholly owned by Philip Zelkowitz. Mr. Zelkowitz and his wife are major shareholders of the Company . . .

APPENDIX D

COMPLAINANT'S PHYSICAL EXHIBITS



APPENDIX E

ILLUSTRATION OF CONVERTIBLE GAME TABLE
IMPORTED BY SUNSHINE COVER
& TARP, INC.

Sunshine Cover & Tarp, Inc
"FLIP-TOP"

APPENDIX F

FINAL BRIEF OF COMPLAINANT

A-138

Before the

UNITED STATES TARIFF COMMISSION

In the matter of Convertible Game Tables and Components Thereof (Unfair Methods of Competition and Unfair Acts) Investigations 337-34

COMPLAINANT's BRIEF ADDRESSED TO "CONTRIBUTORY INFRINGEMENT" per request at subsequent hearing of February 5, 1974

PREFACE

On February 5, 1974 the final hearing, pursuant to publication and notice in the Federal Register, was held in connection with this case. The bulk of the items requested by the Commission in connection with the hearing commencing on October 1 1973 and terminating October 17, 1973 were covered with the positions of both parties. Still remaining open would appear to be a lurking concern of at least certain of the Commissioners as to the question of "Contributory Infringement".

FACTUAL POSITION

The facts would appear to be simple. The question is, what if the reversible top portion which is separate from the rebound playing surface, and support, is imported "innocently" by an importer, consignee, or agent in the United States. Would

this top necessarily be excluded, or alternatively does it constitute "contributory infringement"?

CONTRIBUTORY INFRINGEMENT - DEFINED

While "contributory infringement" or "inducing infringemen was a matter of case decision prior to 1952, 35 USC 271 which became effective on July 19, 1952 has clearly defined the same. The sections pertinent are Sections B and C, reading as follows:

> § 271 (b) "Whoever actively induces infringement of a patent shall be liable as an infringer."
>
> § 271 (c) "Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer. (Emphasis supplied unless otherwise noted)

Accordingly in this instance, we submit that not only shoul the question "contributory infringement" be considered, but also the question of one who may "actively induce" infringement should be considered. We will address each under appropriate subheadings below:

INDUCING INFRINGEMENT

The inducing of the infringement of any patent results when one sells a particular combination or, if one will, a "kit", the use of which must necessarily result in infringement.

In this instance, we call the Commission's attention to Exhibit 5, the "Minnesota Fats" instruction sheet which accompanied the ARMAC table in its shipping container, as the same was opened prior to the hearing commencing on October 15, 1973. Appropriate portions of Exhibit 5 are attached as the Appendix to this brief. It becomes overwhelmingly apparent that the intention of these instructions, albeit contained in one of two or three boxes which might have contained the base support, the rebound game table, or the reversible top; that the intention was that all three be used in the combination as defined in Petitioner's patent. Accordingly, it is submitted that the "agent" or the "consignee" of the importer, all being controlled by Respondent ARMAC, actively intended to participate to be one to "induce infringement" by the ultimate user.

Case support for this proposition appears in Noll v. O.M. Scott & Sons Co. 467 F2d 295; 175 USPQ 392 (CA 6, 1972) where the Court pointed out:

> "The District Court found that Scott had actively induced infringement of the Schwerdle patent through the sale and promotion of Clout.[3]"
>
> "[6] [3]Claim 2 is directed to the method of crabgrass control. The mere sale of Clout cannot constitute direct infringement since such conduct is not the making, using or selling of the patented invention which is the predicate for direct infringement set forth in 35 USC §271(a). However, if the ultimate users of Clout practice the claimed method by applying Clout to their lawns in accordance with Scott's directions, Scott has 'actively induce[d] infringement *** [and is] liable as an infringer.' 35 USC §271(b)."

It is axiomatic that "contributory infringement", and logically "the inducing of infringement", cannot take place in the absence of actual infringement, Stukenborg v. Teledyne, Inc. 441 F2d 1069; 169 USPQ 584 (CA 9, 1971). In this instance, one can only conclude from reading the"Minnesota Fats" instruction sheet, Exhibit 5, that the intention is that the entire combination be used exactly in accordance with the claims of United States patent #3,711,099. (The same logic obtains as to Petitioner's design patent #D-223,539.) Consequently, if the intention, as evidenced by the instruction sheet, Exhibit 5, is that the "kit" will ultimately be assembled in an infringing act, within the continental United States, we submit that the "importation" under these circumstances, and with this instruction sheet, permits the importer to actively induce infringement. Thus, Section B of 35 USC 271 finds applicability.

CONTRIBUTORY INFRINGEMENT

As pointed out above, 35 USC 271 (c) relates to the shipping of any elements which may be used in a patented combination, to one who will use it in that patented combination and "knowingly" intending such use. It is redundant to repeat the comments with regard to Exhibit 5, the "Minnesota Fats" instruction sheet. There is no question but that the importer, its consignee, as well as the agent (the "Minnesota Fats" stores) and others receiving the unit intended the ultimate combination to be employed. Therefor

as to the exhibits disclosed during the hearing, we submit that contributory infringement has been established. We call the Commission's attention to the recent United States Supreme Court decision in Deepsouth Packing Co., Inc. v. Laitram Corp.

US ; 173 USPQ 769 (1972), where shrimp cleaning equipment shipped overseas in a disassembled form was held to be not an infringement. This case, however, is the very converse of the one present where the parts were assembled overseas, but intended for an ultimate combination in the United States where the United States patent obtains. The Commission's attention is also drawn to "report to the President on preliminary inquiry into complaint under Sections 337 of the Tariff Act of 1930, entitled 'Panty Hose' dated March, 1971, page 3" where it was held:

> "The Commission has uniformly held that patent infringement by itself is an unfair method of competition under Section 337-2"
>
> . . .
>
> 2-"Synthetic phenolic resin USTC investigation #316-4(1927); coilable metal rules and holders, USTC investigation #337-8(1935)."

In this latter case the Commission said:

> "The unlicensed importation into the United States of articles produced according to the terms of a United States patent constitutes an unfair method of competition in violation of Section 337."

Therefore, not only has the Commission held in 1971 that patent infringement constitutes a violation of Section 337, but the decision of the Court of Customs and Patent Appeals in re: Von Klem 229 F2d 421 has also held the same.

Furthermore, we believe it incredible that shipping the base, rebound game table, and reversible tops is done without the intention that the same be used together in the combination of the patent.

Finally, the question arises as to what, if anything, is the plight of the innocent importer who imports only the top member including a game table surface, and a flat table surface. To this we answer the following:

1. He need only demonstrate that the same is to be used apart from the combination of the patent, perhaps by showing that the diameter is inconsistent with that being employed with the base, or by actual certification or affidavit to the effect that the same will be used with fixed legs, or reversible legs and not in connection with the rebound game surface.

2. Any catalog sheet showing the ultimate product, submitted with an affidavit, could permit such an innocent importer to bring the product into the United States.

While the above would appear to present a "paper dragon" for a battle in the future, it is noteworthy that the Respondent at no time indicated that the tops were intended for this use. Sunshine Cover and Tarp presented a belated and almost frantic petition to the Commission, and nowhere did it mention that it had an intention of importing the reversible top, apart from

the combination with the rebound game surface and support. Accordingly, we submit that the likelihood of there being such "innocent" importer is remote. The dictates of the Supreme Court in Aro Mfg. Co. v. Convertible Top Replacement Co. 337 US 476; 141 USPQ 681 (1964) fit this case:

> "In enacting §271(c), Congress clearly succeeded in its objective of codifying this case law. The language of the section fits perfectly Aro's activity of selling 'a component of a patented *** combination ***, constituting a material part of the invention, *** especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.' Indeed, this is the almost unique case in which the component was hardly suitable for any noninfringing use.[7]"
>
> "[7]Aro's factory manager admitted that the fabric replacements in question not only were specially designed for the Ford convertibles but would not, to his knowledge, fit the top-structures of any other cars."

Furthermore, any exclusion order remains open and subject to the jurisdiction of the Tariff Commission, to modify the same in the event inequities appear. Therefore, any such "innocent" importer who has not made himself heard to date, but is rather notable by his silence, could be protected by future petition.

Finally, if out of an abundance of caution, the Commission seeks to protect "innocent" importers who do not as yet exist, we suggest that the "findings and recommendations of the Commission", paraphrasing the "Panty Hose" case, direct a recommended order reading as follows:

> "Upon conclusion of its inquiry the Tariff Commission, on February , 1974, ordered and agreed to recommend to the President that he issue a temporary exclusion order to forbid entry into the United States, except under bond, of convertible game tables embraced within the claims of United States patent #3,711,099 except where the importation is made under license of the registered owner of said patent, or unless a component of the subject convertible game table patent is imported into the United States for a substantial noninfringing use, as a staple item in commerce, until the final order is completed."

We submit that the above suggested exception in the proposed order need not be inserted at the present time, since nobody has raised the issue of "contributory infringement" except the Commission itself. Should the Commission wish to proceed out of an abundance of caution, however, the above type order is submitted for the remote possibility of reversible tops entering the United States "innocently".

CONCLUSION

We submit that the Commission is now in as good a position as it ever will be to recommend a temporary exclusion order. The same was done in connection with the "Panty Hose" case in 1971. We have proposed the language for such an order above, upon the authority of that case, and submit that in view of the

seasonal nature of the subject product, that such a temporary exclusion order be recommended.

Respectfully submitted,

Jack E. Dominik
Counsel for Complainant
DOMINIK, KNECHTEL, GODULA & DEMEUR
Of counsel

DOMINIK, KNECHTEL, GODULA & DEMEUR
Two North Riverside Plaza
Suite 1400
Chicago, Illinois 60606
(312) 726-5342

To get the most pleasure possible from your new "Flipper" table, please read the following installation and playing instructions.

The unique, versatile 3 in 1 game table. This table is so functional that it will probably be used more than any other piece of furniture. Use it as a dinnette or dinner table. Then just flip the lightweight top over and convert it to an 8 player card table with recessed glass or ash tray holders, felt playing surface and separate poker chip sections. Remove the lightweight top entirely and behold, a six sided professional quality pool-a-game table.

TABULATION OF ASSEMBLY HARDWARE

INSIDE THE CARTON YOU WILL FIND A PACKAGE CONTAINING THE HARDWARE ESSENTIAL TO ASSEMBLE YOUR POOL TABLE.

PART NO.	DESCRIPTION	QTY.
33323	5/16 Washer – Use with Hex Bolt (No. 24) and Carriage Bolt (No. 25) for pedestal and base platform assembly.	16
33324	5/16–18 x 1¾" Hex. Hd. Bolt – Use to attach pedestals (No. 17) and (No. 18) to Pool-O-Game Table (No. 2)	8
33325	¼–20 x 2" Carriage Bolt – Black – Use to attach Base Platform (No. 15) to Pedestals (No. 17) and (No. 18)	8
33326	¼–20 Hex Nut – Use with (No. 25) above	8

The list of tools outlined below are essential to assembly your table.

One (1) 7/16 Open End or Box Wrench
One (1) 1/2 Open End or Box Wrench

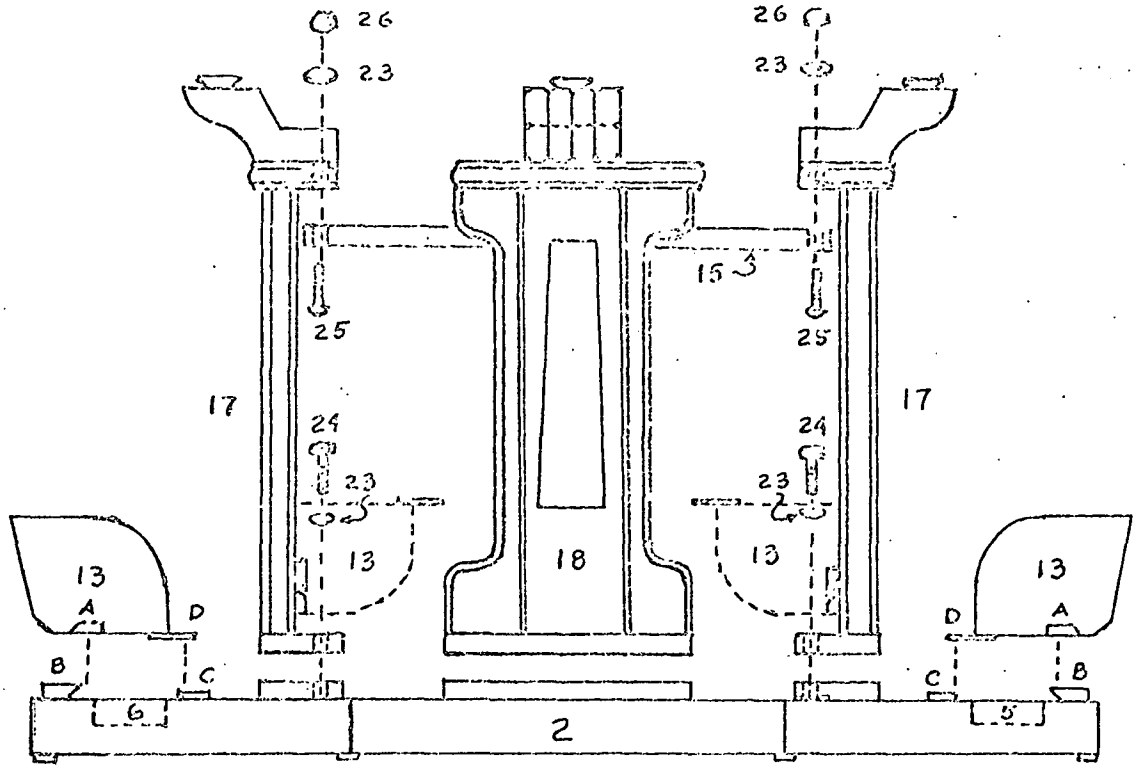


Fig. 1

This fine 3 in 1 game table is packaged and shipped in one reinforced protective corrugated carton. It is recommended that the table package be transported to the table site while still intact. Carefully remove all table parts, accessories, and hardware package.

Pedestal and Base Platform Assembly:

1. As shown in Fig. 1, invert and carefully lay Pool-O-Game (No. 2) table on flat surface.
2. Before starting pedestal assembly note that there are two pedestals (No. 17) with the "Hide-A-Way Ball Box" (No. 13) Hanger Strip located inside and just below the top of the pedestal. Be sure to mount these two pedestals on the table ends with the ball holes (No. 5) and (No. 6) as shown in Fig. 1. Whenever table is used other than Pool-O-Game the Ball Return Box (No. 13) can be stored out of the way as shown by dotted lines.
3. Using Hardware (No. 23) 5/16 Washer with (No. 24) 5/16–18 x 1¾" Hex. Hd. Bolt mount Pedestals (No. 17) to table as shown in Fig. 1.
4. Install Base Platform (No. 15) with mica finish down using Hardware (No. 25) ¼–20 x 2" Carriage Bolt with (No. 23) 5/16 Washer and (No. 26) ¼–20 Hex. Nut. See Fig. 1.
5. Install Pedestals (No. 18) using hardware as described in Step 3 and 4.
6. To attach the Hide-A-Way Ball Return Box (No. 13) Fig. 1. Engage (A) under angled lip of (B). Turn Swival Block (C) over Metal Clip (D).

Your table is now completed assembled. Carefully turn the table upright and follow leveling procedure.

HOW TO LEVEL YOUR TABLE

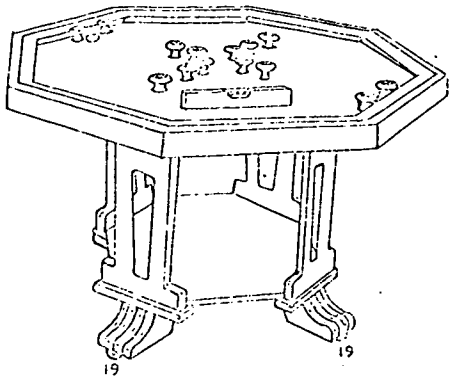


Fig. 2

Place a carpenters level on bed of table. Move level around table and determine low spot. To raise that area turn Leveling Foot (19) counterclockwise. Recheck entire playing area with level and adjust leveling feet counterclockwise to raise and clockwise to lower until table is level. Fig.2.

Enjoy your table!

POOL-O-GAME AS PLAYED ON THE ARMAC FLIPPER

The Object of Pool-O-Game

1. Pool-O-Game is played by two players or by four as partners.
2. Each side has five red balls or five white balls, one of each being a marked ball.
3. To set up, place two red balls on each side of white cup. Place white balls in same position around the red cup.
4. Players shoot their marked ball at same time hitting opposite side cushion first (see dotted lines Fig. 3) banking their ball into or near their colored cup. The player who plays his ball nearest or into his cup shoots again. Marked cue ball must be pocketed first. In the event that both marked balls are pocketed on first shots each player takes one of remaining balls and spots it in front of cup and both shoot again as they did with spot ball.

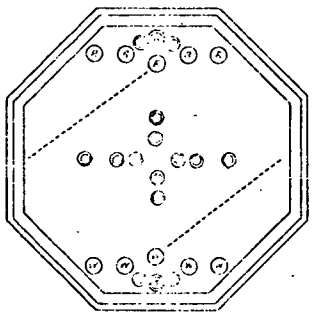


Fig. 3

5. The first player to get marked ball into his color cup may play any one of his four remaining balls. Players may use their ball to block or know away opponent's balls.
6. If a player sinks another ball before his marked ball is pocketed his opponent may remove two of his own balls.
7. Each time a player sinks his ball into his own color cup, he shoots again immediately. (Exception: First shot – see Rule 4.)
8. In case the ball leaves the table, it should be placed in the center of the bumpers.
9. If the player sinks one of his opponent's balls, there is no penalty, but if he sinks one of his own balls into his opponent's cup, his opponent may then take off two of his own balls by dropping them into cup.
10. The first player or team to sink all five of their balls is the winner.
11. If either player sinks his last ball into opponent's cup, he automatically loses the game.

"LIVING" WITH YOUR NEW TABLE

This model table has been thoroughly designed and constructed with years of pleasure and use for you in mind. Your enjoyment of this investment will be increased by properly caring for it and making sure it is not abused. The following points are most important.

Sitting on the Rails:
In a word, DON'T! This is the most common abuse of all pool tables. Sitting on the rails will break the rubber cushions loose from the wood liner to which they are cemented, necessitating costly repairs. Sitting on the rail will also loosen and weaken the rail assembly over a period of time on any pool table, resulting in slower action off the cushions. Sitting on the table will, in time, also knock the table out of level. Insist that all players learn proper use of the cue stick. It is to their advantage and yours.

Covering the Table:
Cover the table anytime it is not in use. This will help keep the table dust-free and protect it from dampness and accidental damage.

Lighting:
Proper lighting of the playing area is essential to the game of pool. Keep the light fixture clean and replace weak or burned out bulbs or tubes.

BED SPOTS

Continuous ball spotting can cause premature wear at the spotting points if these points are neglected. Periodically examine the spots and re-glue loose spots and replace missing or worn spots immediately.

To replace a spot, first thoroughly brush the spot area. After positioning the spot, roll it down with a billiard ball for best results.

CUE CHALK

Chalk is vital to the game of pool. Properly used, it prevents miscues and aids in putting English on the ball. For best results, use quality chalk in good condition. Chalk that has a deep hole worn in it makes cue points dirty, and it wears ridges around the cue tips. Periodically, check each piece of chalk and discard badly worn or broken pieces. Reduce the depth of the hole in worn pieces by rubbing them over a piece of coarse sandpaper.

For maximum efficiency, the chalk should be held lightly against the cue tip and rotated with a few half-turns of the wrist. Then slant the chalk slightly to coat the edges of the cue tip. Grinding the chalk and tip together destroys the edges of the tip and causes miscues.

DAMAGED CLOTH

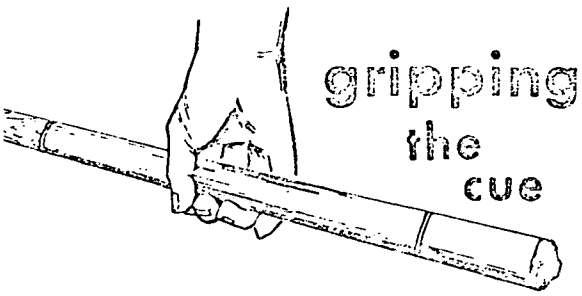
Damaged cloth should be repaired at once to prevent the damage from spreading. The most common causes of cloth damage are careless players, overhanging cue tips, coin tossing and beverage spillage. Coin tossing on the bed cloth must be prevented as the edge of a coin is sharp enough to cause a small cut in the cloth.

Special do-it-yourself materials for cleaning or making minor repairs to the cloth are available at your Minnesota Fats Dealer.

BILLIARD BALLS

Periodically, billiard balls should be thoroughly wiped with a soft, dry cloth to maintain their luster. When they appear dirty or dull looking, clean and polish them with Minnesota Fats Billiard Ball Cleaner.

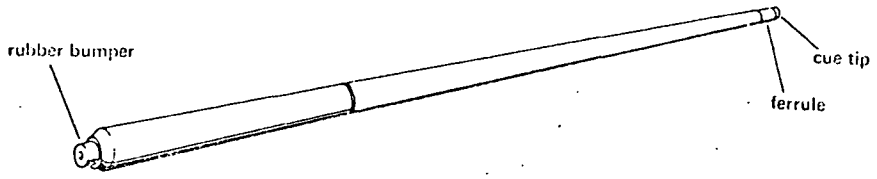
Never use a buffing wheel or similar device to polish billiard balls, as this will result in out-of-round balls that will not roll true.



Find the balance point on the cue, then grip it about 3 to 5 inches behind this balance point. Grip it lightly with the thumb and first three fingers. This gives a spring action to your stroke and permits better control GRIPPING THE CUE TIGHTLY OR PRESSING IT AGAINST THE PALM OF YOUR HAND WILL CRAMP YOUR STROKE AND DEADEN THE ACTION OF THE BALL.

CUE REPAIR INSTRUCTIONS

The cue stick actually takes a terrific beating from shock after shock in the course of a game. Replacement of tips, ferrules, etc., is normal maintenance. Parts and instructions for these repairs are in inexpensive kit form and available at your Minnesota Fats Dealer.



CLEANING

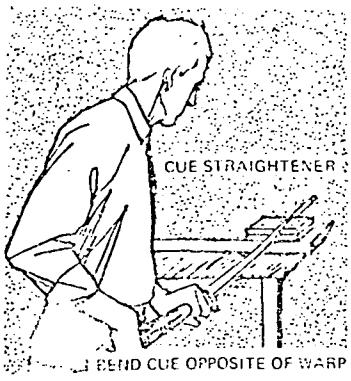
Rough or dirty cue shafts may be easily restored to playing condition by rubbing with fine sandpaper (220 grit) or fine steel wool. An occasional polishing with a good grade of furniture wax will help to keep the cue shafts in top playing condition.

STRAIGHTENING

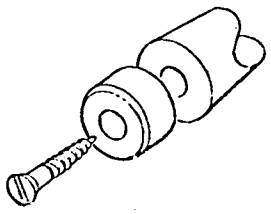
One common cause of warped cues is leaning them against the wall instead of replacing them in their storage rack. Intense heat, cold or dampness can also warp cues, therefore, racks should be located on inside walls, but never near hot or cold air outlets, radiators, heaters, etc.

Warped cues can be easily straightened by using a cue straightener. The straightener is made of two parallel pieces of maple with rounded corners to prevent marking the cues. It should be attached to the top surface of a work bench.

Place the warped cue in the straightener and using a strong, heavy pressure, bend the shaft at the point of the warp. Visually check the cue after each bend until the cue is again straight.



RUBBER BUMPER SCREW-ON TYPE

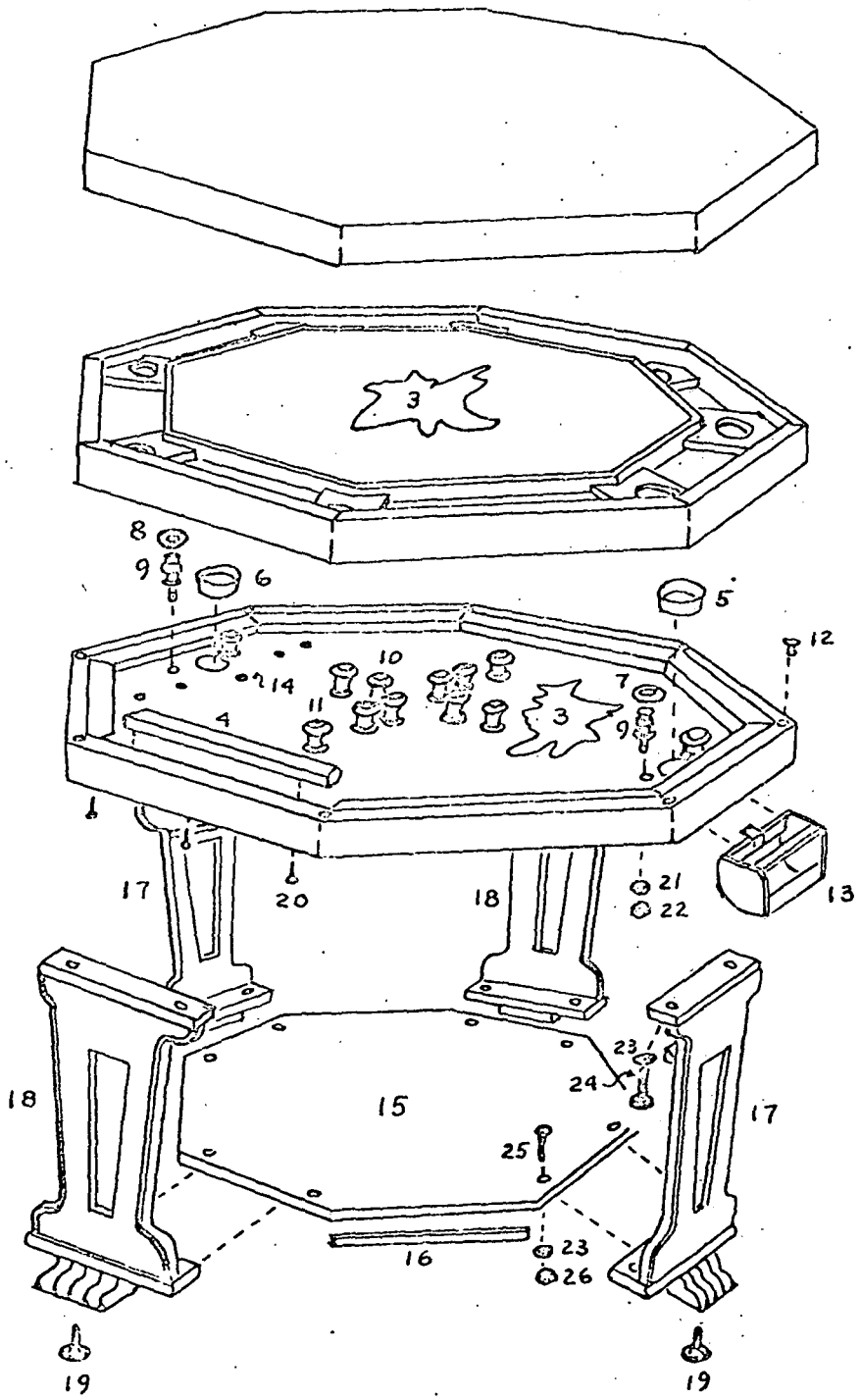


RUBBER BUMPERS

Rubber bumpers are screwed into the butt of the cue to prevent the cue from splitting or being damaged in the event the butt contacts the floor or other hard surface.

Loose bumpers should be tightened immediately and split or worn bumpers must be replaced.

"FLIPPER"
Model No. 333
Table Assembly



KEY NO.	PART NO.	DESCRIPTION	QTY.
1	33301	Diamette Top and Card Table	1
2	33302	Pool-O-Game Table Assembly	1
3	33303	Green Wool Cloth *	
4	33304	Cushion Assembly	8
5	33305	Red Hole Liner	1
6	33306	White Hole Liner	1
7	33307	Red Rubber Bumper Ring	6
8	33308	White Rubber Bumper Ring	8
9	33309	Bumper Post — Less Rubber Ring	14
10	33310	Red Bumper Post Assembly	6
11	33311	White Bumper Post Assembly	3
12	33312	Protective Rubber Ring	3
13	33313	Hide-A-Way Ball Return Box	2
14	33314	Ball Placement Spots	10
15	33315	Base Platform	1
16	33316	Base Platform Trim	4
17	33317	Pedestal Assembly - with Ball Box Hanger Strip	2

KEY NO.	PART NO.	DESCRIPTION	QTY.
18	33318	Pedestal Assembly - less Ball Box Hanger Strip	2
19	33319	Leveling Foot	4
20	33320	No. 8 x 1¼ Phillip Hd. Wood Screw	2
21	33321	5/16 Washer	14
22	33322	5/16—18 Hex Nut	14
23	33323	5/16 Washer	16
24	33324	5/16—18 x 1¼" Hex Hd. Bolt	8
25	33325	¼—20 x 2" Carriage Bolt	8
26	33326	¼—20 Hex Nut	8
**	33327	Set 2-1/8 Balls (Molded)	
**	33328	Cue	
**	33329	Chalk	
**	33330	Replacement Playfield Cloth-Green Wool *	
**	33331	Replacement Card Table Cloth-Green Wool *	
**	33332	Replacement Cushion Cloth-Green Wool *	
**	33333	Owners Manual	

** NOT ILLUSTRATED

REPLACEMENT PARTS

WHEN ORDERING PARTS, ALWAYS GIVE THE FOLLOWING INFORMATION:

Table MODEL NUMBER

Table MODEL NAME

Table SIZE

PART NUMBER

PART DESCRIPTION

PARTS ORDERS RECEIVED WILL BE BILLED AT PREVAILING PRICES IN ADVANCE OF SHIPMENT. PROMPT SHIPMENT WILL BE MADE UPON RECEIPT OF PAYMENT.

ALL PARTS LISTED HEREIN MAY BE ORDERED DIRECT FROM:

ARMAC ENTERPRISES
3900 South Union Avenue
Chicago, Illinois 60609

10M 8/72

APPENDIX G

FINAL BRIEF OF THE RESPONDENT
ARMAC ENTERPRISES, INC.

BEFORE THE

UNITED STATE TARIFF COMMISSION

INVESTIGATION NO. 337-34

IN THE MATTER OF:

CONVERTIBLE GAME TABLES
AND COMPONENTS THEREOF

BRIEF OF THE RESPONDENT, ARMAC ENTERPRISES, INC.

Facts Preceding Action in Tariff Commission.

ATI RECREATION, INC. ("ATI") first began its attempt to limit competition in the field of convertible games tables by its lawsuit against ARMAC ENTERPRISES, INC. ("Armac") filed in the Northern District of Illinois on May 9, 1972, the outcome of which is treated in Part II of this brief filed by Armac's patent counsel, Leonard Knox. After the conclusion of that lawsuit, which was finalized in August, 1972, Armac was subjected to certain tactics of ATI which it believed to be unwarranted and it filed its lawsuit on September 28, 1972 (which lawsuit is still pending) charging ATI with anti-trust violations, trade libel, slander and disparagement, as well as unfair competition, deceptive trade practices, misuse of ATI's patent rights, and misuse and abuse of the jurisdiction of the District Court. Shortly after the filing of the Armac lawsuit, on or about October 20, 1972, ATI filed its complaint with this Tariff Commission.

In filing its action with the Tariff Commission rather than counter-claiming and alleging infringement in the existing United States District Court action, 72C 2420, ATI proceeded to the Tariff Commission hoping to be able to use the Tariff Commission's limited review of its patent as a basis for successful limitation of competiti in the convertible game table field.

Section 19 U.S.C. 1337 Requires a Recommendation to the President Only if it Finds a Violation in Accordance with all of the Requirements of Section 337(a)

The statute under which the complainant has brought its charge requires a finding against the respondent, provided that the evidence introduced and obtained by the Commission supports the conclusion that the respondent acted or its acts resulted in a violation of the following items:

(1) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee or agent of either.

(2) The effect or tendency of which is to destroy or substantially injure an industry efficiently and economically operated in the United States, or monopolize trade and commerce in the United States.

Unfair Acts.

The complaint, both original and supplemental, charge the respondent with unfair competition in the importation or sale on the following items:

(a) Patent infringement of its design patent and process patents.

(b) Trademark infringement.

(c) Copying of prototype of product.

(d) Analysis of market penetration.

(e) Causing to be published in a trade catalog a game table which it imports and purports to sell.

(f) False pricing.

(g) Failure to comply with marking product with indication of country or origin.

(h) False representation of sponsorship.

Each of these acts was set forth as an act of the respondent, Armac, in the original and supplemental complaint filed by the complainant, ATI.

Patent Matters.

In regard to the patent charges, it was demonstrated by brief of Leonard Knox, the brief of Robert Austin, and the actions in the United States District Court in front of Judge Bauer that Armac did not infringe in any way the design patent of ATI, and reliance is made upon Part II of this brief submitted by Leonard Knox and the prior brief of Robert Austin with regard to non-infringement on the part of Armac, as well as invalidity of ATI's process patents issued and obtained on January 16, 1973.

Trademark.

The use of the trademark "Trio" and "Gambit" was admitted by Armac when ATI filed its lawsuit in May of 1972, and such use was immediately terminated as indicated by Mr. Slotky's testimony on Page 330:

Mr. Marcus: "When you first merchandised this (the Flipper table) what was the name under which you merchandised it?"

Mr. Slotky: "I believe when it first came out we called it a Trio table."

Mr. Marcus: "Was that name changed?"

Mr. Slotky: "Yes it was."

Mr. Marcus: "When and why?"

Mr. Slotky: "All-Tech Industries had incorporated the use of the name Trio and we were notified that we were not allowed to use that name. We immediately notified our New York sales office and Mr. Bernstein and all of our sales representatives and that literature was changed as soon as possible."

Mr. Marcus: "So that as soon as you were aware that Trio was not to be used you immediately altered the name Trio?"

Mr. Slotky: "Yes."

Prototype Product.

At the hearing no evidence was introduced to prove that Armac copied any of ATI's tables and on Page 390 of the testimony in response to Mr. Dominick's question:

Mr. Dominick: "But you are telling me that your company or any of its affiliates or subsidiaries, officers or agents, none of these people ever purchased a Gambit table prior to offering for sale the first Flipper? Is that your testimony?"

Mr. Slotky: "Mr. Dominick, I cannot testify for anybody that is not here. I can only say that I did not purchase it."

Mr. Dominick: "Who did?"

Mr. Slotky: "I cannot answer that if I do not know."

Nowhere else is there any reference to an acquisition by Armac of an ATI table, rather it was Armac's testimony that it produced its own prototype, its patent counsel has submitted substantial evidence of prior art and in fact ATI's original attempt to obtain a patent was denied, as set forth in Mr. Drozdowski's testimony.

Market Penetration.

There was an allegation under Section V(d) that Armac reviewed the prototypes of ATI and analyzed their market penetration. There was no testimony whatsoever set forth at the hearing and Armac denies any and all of those acts.

Trade Catalog.

The allegation in Part V of the original complaint sets forth an unfair act by the use of Co-Op Electric Company (an independent third party) publishing in their catalog (not under the control or direction of respondent) a copy of the Armac table along with the name Trio. Testimony was introduced at Page 357 to show the inadvertence of that act, it happening in February through April of 1972, and Exhibit 22 was introduced to show the total number of sales of Flipper tables by Co-Op Electric Company and the resultant limited extent of any damage by this action.

False Pricing.

In the supplemental complaint Armac was charged with false pricing. That false pricing was evidenced by testimony of ATI that they had obtained various prices from Rozel Industries, Inc. (a wholly owned subsidiary of respondent) and that those prices were not in accordance with "regularly established" prices. Mr. Morelli admitted that he had been paid by ATI to specifically find evidence that would support the ATI allegations and in his testimony acknowledged the fact that after he had been at three of the establishments the sales personnel had turned "cold" towards him. It is quite obvious that his testimony is not objective testimony (witnessed by the emotional "cold" feeling of strangers), he both being a paid witness as well as obtaining facts necessary to support the allegations of the complainant. The allegation of false pricing was charged against respondent due to advertising in newspapers of the Flipper table by Gimbel's Department Store (New York) and Gertz of Long Island, both of which are totally outside the control or direction of Armac.

The supplemental complaint next charges Armac with a characterization of unfair prices based upon the Morelli testimony. It is quite evident from the testimony introduced by Armac that the total business scope of Rozel Industries, Inc. is, although a subsidiary of Armac, the operation of six local Chicagoland retail stores and that the overwhelming majority of all Armac sales of Flipper tables was made by Armac through and to wholesale sources. Thus, it is difficult to see how the action of a subsidiary of Armac which is so localized could

be construed to taint or otherwise affect the operations and sales of ATI. Complainant also alleges violations of the Federal Trade Act and Deceptive Practices Act, but no action was ever taken in those areas or complained of by ATI, and such references are rather shallow since ATI is again attempting to have the Tariff Commission solve all of its problems with regard to competition in convertible game table sales.

Country of Origin.

The next allegation of failure to comply with country of origin markings was abandoned by ATI's counsel in open hearing.

False Sponsorship.

False representation of sponsorship was alleged by ATI on two counts, the first being the use of the name Flipper, along with a small picture of a dolphin in a hexagon, as well as the use of the Uniroyal envelope and card in a Flipper table promotion.

Documents introduced indicated that Armac had itself registered the trade name Flipper, showing a picture of a dolphin, and had obtained trademark registration of the entire image. In addition to such documents, testimony was offered that the concept of dolphin and Flipper was not associated with the use of the television show, "Flipper" (a television show that today is relegated to reruns on UHF channels) by any of the officers of Armac at the time of the creation of the name Flipper. A letter from Uniroyal acknowledged the fact that, the charge of usurpation of Uniroyal's name was in fact a Uniroyal promotion undertaken at their request and not a mis-use by Armac. Such evidence as was introduced is

sufficient proof that such acts were not, although being characterized as such, unfair competition. Both of these instances indicate the total disregard that the complainant has for determining facts and circumstances before filing charges, a fact which has been demonstrated, and its negligence in sponsoring false allegations exemplified by its situation as a defendant in the District Court case currently pending for trade libel and slander.

Armac disputes in its entirety and believes it has demonstrated in its testimony and evidence, that it has not been guilty of any unfair method of competition, and that where there was a wrongful use of the trademark "Trio" it immediately acted to correct that error. As to the balance of such acts, it contends that it is not infringing, disputes the validity of the patent that is set forth, and in all other respects believes that it has engaged in fair competition with the complainant.

Injury to an Industry.

The next proposition laid down by the statute provides that if there are unfair acts that the effect or tendency must be to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry.

The testimony which was introduced with regard to industry by Armac demonstrated a domestic industry in the United States which was increasing and contained no less than seven companies, two of which

purchase goods from the complainant. The history of the complainant includes the fact that All-Tech Industries, Inc. ("All-Tech") acquired the patent alleged through the efforts of its employee, Ernest Milu, and at a subsequent time transferred that patent to a company entitled ATI Recreation, Inc. ("ATI"). Some time subsequent to that transfer, ATI was liquidated, the patent was again transferred and the manufacture of the table conducted by the parent of ATI, All-Tech Industries, Inc. Thus, when we examine the effect as to efficiency, injury and industry, we must consider the entire operation of All-Tech, as well as the industry that includes all the United States producers.

All-Tech testimony by Mr. John Babbs indicated that its tables were manufactured in a one-story 20,000 square foot plant that had previously been used for manufacture of kiddie rides, as well as six-pocket pool tables. That facility was leased under a three year lease with a thirty day option to cancel, and in the opinion of their expert, he would not recommend expansion of that facility, as such expansion would not be efficient. The testimony further indicated that any research and development was conducted primarily at the main plant of All-Tech and that the assembly and the manufacture was not a novel type of operation, but a somewhat standard procedure in the pool table business.

Mr. Babbs came to work in May of 1973, and testified that the Gambit facility (ATI's convertible game table) used approximately 45 to 46 people, that there was a very low rate of turnover and that

he was able to increase the output of product without increasing the labor force, changing production from 65 units per day to approximat 80 units per day.

Mr. Richard Drozdowski, another witness for the complainant testified that ATI would produce approximately 12,000 total tables during 1973 and he assessed the total market for tables at 50,000 units (this is as opposed to Mr. Stanton Bernstein of Armac, who assessed the market at approximately 100,000 units). In regard to efficiency, Mr. Drozdowski indicated the following on Page 155 of the transcript:

Mr. Marcus:	"Since Mr. Babbs came with your company the products produced have gone up, is that correct, indicating efficiency in operation?
Mr. Drozdowski:	"Yes."
Mr. Marcus:	"Is the demand for the product equal to the production?"
Mr. Drozdowski:	"On the convertible tables?"
Mr. Marcus:	"Yes."
Mr. Drozdowski:	"Yes."

On Page 121 of testimony Mr. Drozdowski indicated that the total number of employees in the Gambit plant in the beginning of March, 1972 was approximately 30 to 35, and he further stated that in Octob 1973 it was between 45 and 50. Thus, the employment levels in the Gambit operation have increased, and if, as Mr. Drozdowski said, production is equal to demand, and as Mr. Babbs indicated, that production has been increased because the man hours per unit have been decreased, the conclusion reached is that sales of the complain

have increased while production costs have decreased. This calculation of increased efficiency is certainly opposite to the normal expectation of substantial injury in an industry. The requirement of having to determine these numbers inferentially is further set forth under our due process argument.

Upon questioning Mr. John Davenport, a financial expert of the complainant, information was attempted to be solicited with regard to the financial condition of All-Tech. Mr. Davenport, starting on Page 274, confirmed the fact that All-Tech, during the period 1971 to 1973, increased both in profits and sales. In response to the following question, Mr. Davenport answered:

Mr. Marcus:	"Would you attribute the drop (the 1971 loss) to the Gambit table competition?"
Mr. Davenport:	"Not exclusively, No, sir."
Mr. Marcus:	"Substantially...?"
Mr. Davenport:	"Well, we had a participation in Gambit at that time, I would expect that the dynamic input related to loss factors are not heavily related to Gambit during that period."

Thus, the testimony indicates that prior to 1972, the year in which competition began from Armac, the company was at a loss, and during 1972-1973 the company has had a profit, certainly not an indication of a company that is having economic difficulty, or where competition threatens to substantially injure or destroy its operations.

In further testimony Mr. Davenport indicated that the work force had increased by at least one-quarter since the beginning of 1973, production was up and demand strong. (Davenport 281-282)

Mr. Davenport, in an attempt to show damage to All-Tech, indicated that there was a reduction in selling prices by ATI by approximately $10.00 per unit and that Montgomery Ward (then a major customer) demanded a reduction in selling price to Ward's and that All-Tech had been forced to grant a reduction in the selling price because of "intense import price competition". He further indicated that imports had caused a problem with All-Tech's licensing program with a general loss of profits attributed to the importation by Armac Despite the statements made by Davenport, there was no information that was substantiated at the hearing, the licensees that were represented as having license agreements were really nothing more than purchasers of table tops from the complainant and did not have a written license agreement, all of which was admitted by Mr. Davenport

On the question of Mongomery Ward's loss of selling price, or ev the loss of the Montgomery Ward's account, Davenport ascribed to Armac the causation of this event, although he indicates that he received his information from a Ward's buyer, he further admitted that Mr. Carl Novy, a past Vice-President of the complainant had gone into business in competition with the Gambit table and had sold table to Montgomery Ward. Mr. Davenport indicated:

Mr. Marcus: "Do you know whether or not Mr. Novy has gone into competition with you?"

Mr. Davenport: "I do not know that definitively, but I expect that is what his intention is. That is the information that reaches me."

Mr. Marcus: "Do you know whether or not he has sold to Wards?"

Mr. Davenport: "I have heard the rumor but I do not know that to be a fact."

In fact, it is the understanding of the respondent that Ward's has terminated its buying of the Gambit table from the complainant and has substituted its purchasing with Mr. Novy's firm and not Armac.

In further testimony Mr. Davenport revealed that although the buyer from Montgomery Wards demanded a lower price from ATI, Davenport neither saw nor received evidence of any price list that the buyer had of the Armac price to Sears, and in further testimony indicated that the Sears catalog price for the tables is higher than the Ward's price. This entire area of damage, of course, has been eliminated as the Montgomery Ward account has been lost by ATI and is now serviced by Carl Novy, the prior Vice-President and prior fiduciary of the complainant.

Mr. Davenport also commented on the size of the convertible game table market and indicated:

Mr. Marcus: "Do you have any opinion as to the size of the market possibilities in 1974?"

Mr. Davenport: "We think they are very significant."

Mr. Marcus: "Double?"

Mr. Davenport: "I think the projections that are included for the size of the market are rather confidential information, Mr. Marcus, for 1974."

Mr. Marcus: "But it is a substantial increase?"

Mr. Davenport: "I think so, yes." (Testimony Page 292)

This testimony indicates a substantial variance from the concept that there is a destruction of an industry. It indicates, rather, that competition being free has created an industry and that it is increasing in terms of its demand by the public. This is certainly not an example of an individual who looks at an industry and says "this is the size of the industry and if I do not preclude the others from coming in I will lose my share".

With regard to the idea that the industry that must be maintained and protected is one which is operated in the United States, testimony was introduced both by Armac as well as by complainant that the complainant attempted to purchase parts and raw materials in the Far East, but was not successful in doing so, and that it had had a full time employee located in the Far East, who primarily was responsible for obtaining materials and supplies for the operations of All-Tech. In fact, at the hearing on February 5, 1974 counsel for complainant stated that if respondent was excluded from the

market by Commission recommendation, then certainly for a period of time "our people (All-Tech) might be on the next plane to Taiwan to contact their (Armac's) present supplier with regard to supplying us". Testimony was not taken at the hearing, but information gathered by the Commission will undoubtedly show that All-Tech purchases a substantial source of its material from the Far East and that its tables and finished products contain a great deal of imported materials.

As a concluding item, it is curious to note that in the compilation by the Commission in its Exhibit 29, in which it shows a pool table price of the complainant ranging from a low of $145.00 to a high of $214.00, that the Commission failed to review the complaint in which complainant contends that his prices were as low as $130.00 and as high as $150.00. It is apparent that the Commission in preparing this table did not put much credence in the statements made by the complainant and it is submitted that many of the statements and allegations made have the same credence as those found by the Commission.

Conclusion of Facts.

It is quite apparent from the review of the testimony and the evidence that Armac is aware of, that the facts submitted do not substantiate any unfair methods or acts of competition in the importation or sale of any article into the United States where the effect or tendency to destroy or substantially injure an industry which is efficiently and economically operated in the United States,

or which would tend to prevent the establishment of the industry. It is rather evident that the effect of the Tariff Commission's action, if it were to recommend exclusion, would tend to attempt to create a monopoly for a United States patent holder of a patent, the validity of which has not been tested. The section that created the Tariff Commission had as its counterpart the Sherman and Clayton Acts (15 USC, Paragraph 1, 15 USC, Paragraph 12) which were designed to prevent monopolies, and it is rather interesting that in the event the Commission rules to exclude a product that is competitive that it will be creating a tendency towards a monopoly in a particular area.

Exclusion of Goods Under Section 337 of the Tariff Act of 1930 Should Not be Used Where Another Remedy is Adequate.

The conception of Section 337 of the Tariff Act has as its basis the ability to control unlawful foreign imports where there was no adequate remedy available to a domestic manufacturer. The domestic manufacturer could not obtain jurisdiction over the foreign source and therefore through Section 337 there existed a very powerful remedy, that is the ability to exclude from importation in a type of in rem jurisdiction the infringing or unlawful product. Over the years this concept has had a number of applications and as indicated by the assigned case number to this proceeding, 337-34, the instant case is only the thirty-fourth case under Section 337 that has been held and reviewed by the Tariff Commission.

The ability to recommend the issuance of a temporary or a permanent exclusion order excluding certain goods from the country is a very strong and powerful remedy within the scope of the Tariff Commission, and should only be recommended to the President where there is no other adequate remedy which a domestic manufacturer can obtain and utilize. Section 337 tends to strengthen the position of a domestic manufacturer and where the patent is so encompassing it can create a monopoly. This is a problem which the Tariff Commission must be concerned with and a consideration in their decision to make any recommendation to the President.

In this case we have a complainant who is a domestic manufacturer filing its complaint against a respondent who is a domestic manufacturer, both whom manufacture many lines of pool table products and are in competition with each other in all of their various lines of products. In addition to that fact, one of the respondent's subsidiaries supplies various accessories, and from time to time, raw material to the complainant, and it is quite obvious that both parties being United States based companies also import from the Far East, both material goods for raw material manufacturing, as well as finished products, all of which are used in the competitive world in which the parties reside.

In May of 1972 the complaint initiated a lawsuit in the United States District Court for the Northern District of Illinois charging the respondent with patent infringement of its design patent and trademark violations. There was a subsequent settlement

and in August, 1972 the court dismissed the action. After certain actions on the part of the complainant, respondent Armac Enterprises, Inc., filed a lawsuit in the United States District Court for the Northern District of Illinois entitled Armac Enterprises, Inc. v. ATI Recreation, Inc., et al., No. 72C 2420, which litigation is currently pending. In that lawsuit, as indicated in the first part of this brief, numerous items were alleged, including anti-trust violations, as well as various other causes of action. During the last week in October, the complainant sought to file its lawsuit in front of the Tariff Commission to press home its charge that the respondent had violated Section 337 of the Tariff Act and thus avail itself of the Tariff Commission's rules and regulations to circumvent its mandatory requirements under the Rules of Civil Procedure for the United States District Court.

Rule 13 of the Rules of Civil Procedure for the United States District Court provides in part:

> "Rule 13. Counterclaim and Cross-Claim.
>
> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim and the pleader is not stating any counterclaim under this Rule 13."

It is quite apparent that by the complainant failing to file its counterclaim for the matters alleged in its complaint with the Tariff Commission in the District Court action and seeking instead to file an action at the Tariff Commission, that the complainant was seeking to take advantage of the fact that under prior law, especially In re Von Clemm, 229 F2d 441 (CCPA) 1955, the Commission would not inquire into the question of validity with respect to issued patents. Thus, the complainant, through a procedural mechanism has, in its opinion, removed the question of validity from the considerations of the Federal lawsuit that was in process at the time it filed its complaint with this Commission. It is quite clear that the sanctions imposed by Rule 337 should not substitute for a remedy that could be adequate, and that an adequate remedy could be an injunction or restraining order in the event that the patent sought to be claimed as being breached or infringed would be before the United States District Court and subject to its jurisdiction.

The Industry as Defined in Section 337 of the Tariff Act Does Not Only Include the Line of Product Subject to the Patent and its License Holders, But Does Include the Entire Industry Servicing the Domestic Population or in the Alternative Includes the Entire Business of the Patent Holder.

In any fledgling industry, the patent holder will undoubtedly be one of the individuals seeking to bring a secure position to its products. There may be various numbers of individuals and concerns that are at the same time moving to compete with that product and

any consideration of the industry must include all such companies.

In considering Section 337, the fact that a product is similar to another product has been sufficient to bring it within the concept of infringement, such as in N-Z Ear Hearing Aids, Tariff Commission Publication No. 182, and in prior cases a line of business was sufficient to allow the Commission to look at the entire company, such as All-Tech as the industry, Furazolidone (Tariff Commission Publication No. 299, dissenting opinion of Commissioner Thunberg.)

Injury or Tendency to Injure Must be Substantial in Order to Find a Violation of the Statute.

The commission, assuming that it has found an unfair act, must find as a cause and effect relationship to that unfair act, a substantial injury or tendency to arrive at a substantial injury to the domestic manufacturer or industry arising out of that unfair act.

Injury to a domestic industry has been evidenced by loss of sales and good will, Furazolidone, supra, decreasing profits, along with the requirement to reduce prices to meet the lower prices of imports, Articles Comprised of Plastic Sheets Having an Open Structure (Tariff Commission Publication No. 444 (December, 1971)), loss or decrease in the employees at the facility which manufactures the patented product, as well as production being reduced, Meprobate, (Tariff Commission Publication No. 389 (April, 1971)).

In reviewing the effect upon the complainant it was demonstrated by testimony that although their production increased their demand was equal to production, therefore their sales increased. It was also indicated that the cost of a unit part decreased because their man hours per unit decreased through efficiencies. Further testimony elicited the fact that employment had gone up and in Exhibit 29, except in one instance, it appears that the prices for their tables stayed constant or increased. Therefore, since the units of sale increased and the prices remained constant and their costs decreased; it is apparent that both their profitability, as well as their sales, went up. In addition to that fact, as the complainant is a public corporation, and its reports are available to the Commission through the Securities and Exchange Commission, it is quite obvious that All-Tech had an increase in its earnings from 1971 to 1973, and it is rather difficult to see where the injury to their industry occurred.

If anything had an effect upon the profits or the competitive condition of the complainant, it appears that all the competition that it received and is receiving from all other domestic manufacturers of convertible game tables is substantially intense. The major manufacturers of pool tables are all moving into convertible game tables. Some, such as Fisher Manufacturing Company, have a table substantially identical to that of the complainant and respondent has itself been under intense price competition as the domestic industry took hold and sales of the convertible game tables increased.

In any event, it appears that there will be a tendency to limit the importation of these products into the United States due to the fluctuation of the U. S. dollar and other world currencies, as the cost benefit that would have been attributed to United States manufacturers who use foreign goods has been substantially reduced, as well as eliminated due to the substantial decrease in the purchasing power of the dollar in relation to the cost of the goods in the foreign countries.

When applying some of the unfair acts specifically to the tendency to injure it is obvious that they have no effect. Charges of unfair pricing at Rozel Industries where the sales are limited to six retail Chicago stores and where there was a miniscule amount of total sales in relationship to total imports, it is evident there can be no effect or tendency to substantially injure the complainant. Patent infringement is denied and validity challenged, but in light of the economics that have been supplied to the Commission, it is difficult to see where any injury might arise. Sales to Sears and any effect upon Montgomery Ward cannot be laid at the door of the respondent as it is quite obvious that the complainant's own Vice-President went into competition with All-Tech and was able to solicit the Montgomery Ward account from the complainant. It is quite apparent that there is no injury that can be demonstrated in accord with the standards of injury set down by this Commission.

The Tariff Commission has the Responsibility to Review the Validity of a Patent Which is Issued.

The Tariff Commission has long taken a position that the validity of a patent, when issued by the patent office, cannot be reviewed by the Tariff Commission, In re Von Clemm, supra, and Frischer & Co. v. Bakelite Corp., 29 F2d 247. The position of the Tariff Commission in consistently refusing to review validity is incongruous with the due process clause under Article V of the U. S. Constitution, as well as accepted law, both common law as well as statutory.

The patent office, when it issues a patent, declares that there is a presumption of validity to that patent. 35 USC 282. However, presumption has long been defined as a mandatory, but a rebuttable inference and there is no doubt that a presumption which is only prima facie must afford the party against whom the presumption is raised to inquire and rebut the presumption. Schmedinger v. Welsh, 383 F2d 455, cert. denied 390, U.S. 946. The only way to overcome the presumption is by the Commission undertaking to question validity as well as non-infringement. It is obvious that a respondent in these matters finds itself in a position that existed to a patent licensee prior to the rendering of Lear v. Adkins, 395 US 653, where the patent licensee was estopped to deny the validity of the patent. It is quite obvious to the Commission that such is not the law any longer and it is further more obvious to the respondent, as an explanation of the complainant's actions, why he chose to go to the Tariff Commission

rather than to file his counterclaim in the Federal District Court action that is presently in progress. The mandatory presumption not being able to be rebutted by the claim of invalidity, and the Commission not accepting or reviewing the same, places the burden on the respondent of having what it considers to be (and to which opinions have been filed with the Commission) an invalid patent accepted as valid due to the rules of the Commission. Certainly, in any patent infringement action or in any declaratory judgment action the question of validity would be before the reviewing court and it has long been a method of normal procedure that the court pass upon an attack on validity. Prior art, as well as opinions of counsel, with regard to validity have been filed with the Commission and we would urge that the Commission consider validity and depart from its prior established position of non-review of that question.

The Procedure Followed by the Tariff Commission, Coupled With its Failure to Review Validity Constitutes a Violation of Due Process Under the United States Constitution.

A respondent in a Tariff Commission complaint finds itself in the unusual situation of being charged by a complainant and being unable to interrogate the complainant or discover the information which has been supplied to the Commission in order to determine the truth or falsity of that information. It is axiomatic that the right of confrontation and cross-examination applies not only in criminal cases, but also in all types of cases where there is a

threat to life, liberty or property. Greene v. McElroy, 360 US 474 (emphasis supplied).

In the conduct of the Tariff Commission proceedings a respondent is unable to discover the information supplied to the Commission by the complainant and therefore unable to test the voracity or the truth of those statements and to present impeachment evidence. The evidence presented as "business confidential" under the rules of the Commission is such that it may very well be inflamatory, as well as false. The respondent is entitled to rebut evidence presented against it in front of an administrative tribunal and has the inalienable right to present evidence, as well as to be able to determine the claims of the opposing party and meet them, Morgan v. U.S., 304 U.S. 1, and E. B. Muller & Co. v. Federal Trade Commission, 142 F2d, 511, and the complainant in an action such as the Tariff Commission has no right, and in fact due process forbids, such complainant to communicate privately with the administrative agency. Camero v. U.S., 375 F2d, 777.

In Greene v. McElroy, supra, the Court is speaking of the subject of discovery and the right which a respondent has stated:

> "Certain principles have remained relatively immutable in our juris prudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might

> be faulty or who in fact might be perjerous, or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections and the requirements of protection and cross-examination. They have ancient roots. We find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him. This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory agency actions were under scrutiny."

Therefore, the evidence supplied to the Commission and unavailable is the same as testimony which cannot be rebutted by the accused in this proceeding, and accordingly violates the precepts of the doctrine of due process.

Since the Supreme Court decided Glidden Co. v. Zdnaok, 370 U.S., 530, there has been some question to whether the United States Court of Customs and Patent Appeals ("CCPA") would be available as the appella review of the actions of the Tariff Commission. The Supreme Court specifically stated that the issue of judicial review of Section 337 actions must be considered as an open question since it had determined that the CCPA was an Article III court (Article III of the Constitution) and would only be able to review cases that came to it which were "cases or controversies", and as the Tariff Commission function was strictly a recommendation the CCPA might not be able to take jurisdiction of such a case. If there is no appeal available, what protection does a respondent have where the Tariff Commission accepts the mandatory presumption of validity of a patent and will not consider invalidity, make a determination that there was an unfair act through

infringement (of a possibly invalid patent) and orders that the product be excluded from the United States. Where there is no appellate review, there is no opportunity to test validity and no chance to impeach evidence it is quite apparent that this seriously disables the party charged with the violation of a statutory offense and constitutes a violation of its rights to due process, a violation from which the respondent has no recourse and suffers a definite chance of loss of property due to that process.

Conclusion.

It is the position of the respondent that there were no unfair acts which were occasioned and which had a substantial tendency to injure the complainant. The convertible game table business became a large business in 1972 and 1973 and supports the sales of a substantial number of domestic manufacturers in this line of endeavor. The total sales of convertible game tables throughout the United States is strong and production is increasing, the employment established in this area is increasing. It is obvious that the industry is healthy. In addition, the respondent has urged that the Commission accept the entire domestic industry producing convertible game tables as its definition of "industry", or in the alternative, that it consider the entire operations of All-Tech. Synthetic Star Sapphires and Synthetic Rubies, Tariff Commission 337-13. Respondent further urges that the Commission consider validity of the complainant's patents and it refers to the opinions of its patent counsel, along with the

exhibits of prior art filed with the Commission during the pendency of this matter.

In conclusion, respondent asks that the Commission consider the fact that there is no due process permitted to the respondent, no discovery or ability to impeach the information or evidence given, and when that is combined with the validity of a patent being accepted as a presumption, the possible effect on respondent is severe, especially when the complainant has the simple choice of filing its counterclaim in the current Federal District Court action. The respondent requests that after consideration the Commission determine that the complaint be dismissed.

Respectfully submitted,
ARMAC ENTERPRISES, INC.

By: _____
Ira Marcus, General Counsel

BEFORE THE UNITED STATES TARIFF COMMISSION

IN RE ATI RECREATION, INC.

CASE 337-L-55

PART II OF BRIEF OF RESPONDENT ARMAC ENTERPRISES, INC. TO COMPLAINANT'S BRIEF FILED FEBRUARY 5, 1974 AND WITH RESPECT TO PATENT MATTERS BEFORE THE TARIFF COMMISSION

THE CHARGE OF PATENT INFRINGEMENT

The matter of alleged infringement of Complainant's mechanical patent No. 3,711,099 is submitted as fully covered in the opinion of patent counsel for Respondent, Leonard S. Knox (Exh. 26) which is incorporated in this brief by reference. To the extent that the Commission will address itself to invalidity of the patent, reference is made to the opinion (Exh. 27) of predecessor counsel for Respondent, which is also incorporated herein by reference.

As to Complainant's Design Patent No. D-223,539,

Respondent was made Defendant in a complaint for infringement filed in the U. S. District Court for the Northern District of Illinois, Eastern Division, Case No. 72 C 1129. It is appropriate to give some attention to that litigation since, to the extent that the present proceedings are investigative, the findings are res judicata.

In the "Final Order" entered by Judge Bauer on May 19, 1972 and approved by counsel for Complainant, Respondent was enjoined from making, using or selling convertible game tables infringing the Design Patent by making, using or selling a table base substantially identical to Exhibit D attached to the Complaint in that action. It is important to note that the Court made no Findings of Fact or Conclusions of Law on the question of infringement, but was more interested in resolving the controversy in a way that would dispose of the alleged infringement. Further, the order included the following:

> 5. That the parties shall in good faith consult with regard to defendant's proposed non-infringing re-design.

On August 28, 1972 the Court considered the status of the litigation and stated that the order of

May 19, 1972 was to be the final judgement.

In fact, pursuant to the above paragraph 5, several conferences, vis-a-vis and by telephone, were held between counsel for the respective parties, as a result of which Defendant took the position that its re-design constituted complete avoidance of Plaintiff's design saying:

> "Mr. Knox: We will accept the final order if it is simply a matter of consulting. We have consulted."
>
> "The Court: All right. That disposes of the lawsuit."

Both orders continue in force. From May 19, 1972 to the present, a period of almost two years, Respondent has been advertising and selling its own design of convertible game table. Notwithstanding, Complainant has made no charge that Respondent is in contempt of Court by any alleged failure to comply with the order. If Complainant was of the opinion that the order had not been complied with, then how can it explain its lack of action. Complainant's silence is tantamount to recognition that the Final Judgement had been fully complied with.

Now Complainant attempts to "re-litigate" the

issue of infringement of the same design patent in seeking a finding by this Commission that the patent is infringed and thus, in effect, substitute its conclusions for Judge Bauer's Final Judgement. If this is the Complainant's position it would have been more logical (1) to re-open the case before Judge Bauer (2) file its motion for an Order to Show Cause why Armac should not be held in contempt or (3) to take either of these steps concurrently with the present investigation. It is submitted that Complainant is estopped from pressing its charge of infringement before this Commission. On the contrary, it is Respondent's position that, insofar as concerns the issue of infringement raised here and considering the fact that the present proceeding is purely investigative, the matter is res judicata. During the hearing, Commissioner Moore inquired of Mr. Dominik whether the matter of alleged infringement of the mechanical patent had ever been litigated before a United States District Court and his response was in the negative. By so doing, the Commissioner could be understood as implying it would respect a finding of a United States District Court in its own deliberations.

Inasmuch as the Complainant has seen fit to re-activate the question of infringement of the Design Patent, the Commission's attention is respectfully directed to the parallel comparison between Complainant's patent and Respondent's design inserted here in full. This tabulation was handed up to Judge Bauer on June 23, 1972 as part of the record, together with a copy of the patent and a photograph of Defendant's proposed design. In this way the Court could readily comprehend the lengths to which Armac had gone to avoid the design patent and thus finally put to rest even a suggestion that Respondent was infringing.

PLAINTIFF'S PATENT	DEFENDANT'S PROPOSED DESIGN
1. The top is circular.	1. The top is 8-sided.
2. The edges of the legs are straight and parallel.	2. The edges of the legs converge toward the bottom.
3. The legs are unpierced.	3. The central portion of the legs is pierced to define a pair of narrow branches.
4. The edges of the legs are uninterrupted from top to bottom.	4. At the bottom, the legs have protruding portions which interrupt the straight line.

PLAINTIFF'S PATENT	DEFENDANT'S PROPOSED DESIGN
5. The strips flanking the straight edges of the legs extend beyond the flat rectangular shape of the legs.	5. The molding flanking the edges of the legs has an essentially semi-circular cross section.
6. The feet are somewhat elongated in a horizontal direction and almost exactly the same width as the legs.	6. The feet are considerably narrower than the width of the legs.
7. The feet have horizontal grooves which continue around the ends.	7. The feet are of a modified claw-like configuration.
8. At the bottom, the legs are braced by a flat piece, which may be regarded as a square having the corners cut out in quarter circles.	8. The bottom, which ties the legs together, extends beyond the legs, and has eight straight sides.
9. The flat bottom piece, which braces the legs, abuts the inside of the legs.	9. The bottom, tying the legs together, extends outwardly beyond the legs.

The Commission's attention is directed to the leading case of Gorham Company vs. White, 81 U.S. 511, 20 L. ED. 731. There the Supreme Court held that the following tests are to be applied in considering whether or not an accused design infringed the patent in suit. At page 524, the Court stated the question:

> "The sole question is one of fact. Has there been an infringement? Are the designs used by the Defendant substantially the same as that owned by the Complainants?"

At page 526, the Court cites Holdworth v. McCrea, 2 Appeal Cases, House of Lords, 388.

> ".....the appeal is to the eye and the eye alone is the judge of the identity of the two things.....the eye which takes the one figure and the other figure, and ascertains whether they are or are not the same."
>
> * * * * * *
>
> "We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance .....(Emphasis supplied)."
>
> * * * * * *
>
> "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."

This rationale was followed in the subsequent Supreme Court decision, Smith v. Whitman Saddle Company, 148 U.S. 674.

It is submitted that Respondent's design as illustrated in its own patent application is more than differentiated from Complainant's table. A finding of infringement of a design patent does not allow of generalities. This Commission is to compare and apply

its own subjective reaction in accordance with the rationale of Gorham v. White, adopted from Holdworth v. McCrea.

ALLEGED PURCHASE OF A PRODUCT BEFORE A PATENT HAS ISSUED IN ORDER TO COPY IT DOES NOT CONSTITUTE UNFAIR COMPETITION

Complainant's memorandum (Exh. 39) relies rather heavily on Zysset et al vs. Popeil Brothers, Inc., 167 E. Supp. 362, 119 USPQ 116.

As presented by the Complainant, the selected excerpts from this decision make it appear that the Court based its decision in large part on the purchase by Defendant of one of plaintiff's machines before the patent issued thereon. Complainant's excerpts from the opinion choose to omit key facts upon which the Court's balancing of equities was based: (Quoting from the opinion)

> 28. Defendant carried on some negotiations with the representatives of Karl Zysset, plaintiff, for the purchase of the latter's vegetable shredders or choppers or for a license under Zysset's patent rights and therefore knew of the pendency of the application for the patent in suit before it had actually sold vegetable shredders and choppers for which it used a Zysset chopper as a guide or model but such negotiations did not culminate

> in any agreement between the parties and the terms offered to Zysset by defendant were so low as to make it appear that the defendant never expected or intended that such negotiations would culminate in an actual agreement. With full knowledge of the pendency of Zysset's patent applications, the defendant informed the plaintiff Zysset that it intended to proceed with its manufacture and sale of the vegetable shredder and chopper charged to infringe whether or not it had a license from plaintiff and it proceeded to do so. (Emphasis supplied).

Accordingly, there was something more than a bare inspection by the defendant of the patentee's designs in the form of a privileged and confidential disclosure of a pending patent application in connection with negotiations which might or might not have resulted in a license. Where a prospective licensee enters into negotiations for a license under a pending application it is always the practice for the applicant to grant the prospect the opportunity to consider the same, and even to take a copy in order that the worth of the claims may be evaluated in the light of the terms of the license before the license is executed. Obviously such communications are on a confidential basis. As it turned out, the negotiations collapsed and good conscience dictated that the

Defendant not use the Plaintiff's disclosure to the detriment of Plaintiff. The quoted paragraph demonstrates beyond a doubt that Zysset was approached and induced to exhibit his designs based on the specious attitude of the defendant that it was sincerely considering taking a license. Consequently, the Court was moved by the very obvious equities in favor of Zysset, as follows:

> 30. The equities in this case are with the plaintiffs, Karl Zysset and New-Nel Kitchen Products Company. It was an unfair practice for the defendant to have used the commercial structures made by plaintiff.....as models..... although it did not constitute an infringement of the patent in suit until that patent had actually issued. Continuance of such practices after the issuance of the patent.....was an unfair and inequitable act by the defendant in aggravation of the infringement charged. (Emphasis supplied)

In the instant case, confidential disclosure as in Zysset was absent and, therefore, no similar

equities in favor of Complainant.

THE QUESTION OF AGGREGATIVE CLAIMS AS EXEMPLIFIED IN THE MILU MECHANICAL PATENT

The law which addresses itself to what is generally termed "patentable combination" is found in 35 USC 102,103 as follows:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Although the preceding section is a relatively new enactment, it actually codifies decisional patent law. At this point we are reminded of some of the standards that the inventor must have exercised some degree of ingenuity, inspiration or imagination or displayed something more than the ability of the routineer.

In view of the prior art available to Milu (Exh. 29) it is submitted that none of the criteria set forth in the statute have been satisfied. A careful reading of the record, not only in the present proceeding but in the litigation before the District

Court, and a careful inspection of the drawings of Milu's mechanical patent, makes it abundantly clear that if Milu invented anything it was a design for a convertible game table and that details of hardware and other components were well-known or well within the expertise of a mechanic or furniture maker. A careful scanning of the claims of Milu's mechanical patent fails to convince that the inventive faculty was at work. He had simply done what any furniture maker would have done normally. There is no presumption of validity of Milu Patent No. 3,711,099 where, as here, prior patents and public uses of convertible game tables more pertinent than those considered by the Patent Office are before the Commission. Green v. General Foods Corp. 402 F. 2d 708,711 and Brand Plastics Co. v. Dow Chemical Co., 168 USPQ 133, 147.

What is claimed in each of the claims of Patent No. 3,711,099 are arrangements of old elements performing their expected functions, producing no new, unexpected or unobvious result and not defining patentable inventions as required by law. Anderson's Black-Rock, Inc. vs. Pavement Salvage Co., Inc. 396 U.S. 57, 90 S.Ct. 305 and Great Atlantic and Pacific

Tea Co. vs. Supermarket Equipment Co., 340 U.S. 147, 71 S.Ct. 127, 130.

At this point it is significant that the Examiner in the Patent Office found (Exh. 27) that Respondent's design, disclosed in Zelkowitz' application Serial No. 274,185, differentiated patentably over Milu's Design Patent No. D-223,539, which was made of record in that application.

THE QUESTION OF CONTRIBUTORY INFRINGEMENT RAISED BY COMMISSIONER MOORE

At page 496 of the transcript, Commissioner Moore raises the matter of importation of table tops alone. In the ensuing colloquy between the Commissioner and Mr. Dominik, it appears that contributory infringement was at the heart of the question and counsel were requested to brief the point.

Contributory infringement is treated at 35 USC 271 (c). This sub-section, with immaterial portions deleted, reads as follows:

> "(c) Whoever sells a component of a patented.....combination..... constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article..... of commerce suitable for substantial

noninfringing use, shall be liable as a contributory infringer." (Emphasis ours)

Respondent finds itself unable to do much more than quote the preceding sub-paragraph of the statute and attempt to explain its implications since the background to which Commissioner Moore's question related was not disclosed. Consequently, to develop a given hypothetical situation and to apply the statute thereto becomes impractical. The record shows that Respondent does not import tops alone but only as part of its convertible game table.

One thing has been well-settled; that there can be no contributory infringement if there is no direct infringement. Deepsouth Packing Co. vs. Laitram Corp. La. 1972, 92 S.Ct. 1700, 406 U.S. 518. It is certainly valid to assume that the top of either party's table has use apart from the pedestal to which the same is normally attached. As pointed out by the witness, Knox, such top, when separate from the pedestal, could be supported on any ordinary table found in the home or elsewhere. As so regarded, such top would be a "staple article or commodity of commerce" suitable for non-infringing use and incapable of supporting a charge of contributory infringement.

Moreover, a base to support such top could be constructed in an infinite number of ways, none of which would meet the claims of Complainant's mechanical patent.

Moreover, an intent to infringe contributorily is required before one may be held for contributory infringement. It must be shown that he had knowingly done some act without which infringement would not have occurred. Individual Drinking Cup Co. v. Errett, (C.C.A.N.Y. 1924) 297 F. 733.

The attention of the Commission is also directed to the opinion of predecessor counsel (Exh. 27) which includes a great many patents disclosing separable tops intended for use in connection with conventional tables or other kinds of supports to combine playing surfaces for various games with a single support.

THE CLAIMS OF MILU'S MECHANICAL PATENT ARE INVALID AND NOT INFRINGED

The foregoing discussion points up quite forcefully the salient points upon which Respondent's position concerning validity of the mechanical patent,

has been predicated in that the claims fail to recite patentable combinations, not only between the table top and the base or pedestal but between the various other components of the table. On the question of aggregative claims being invalid see Lincoln Engineering Company of Illinois v. Stewart-Warner Corporation, 37 USPQ 1,3 and Solo Cup Company v. Paper Machinery Corporation et al, 144 USPQ 729.

For a claim of a patent to be infringed, every element recited in the claim must be found present in the accused device. Nelson v. Batson 322 F. 2d 132. Respondent's convertible game table does not incorporate all of the elements of any of the claims of the Milu patent and, therefore, does not infringe any of the claims thereof.

At page 505 of the transcript, counsel for Complainant discusses the question of validity of the mechanical patent with Vice-Chairman Parker:

> "There has been no proof of a first sale for the year prior to our filing date, or any of the statutory, what we call section 102 defenses."

However, 35USC 102 incorporates only certain

defenses which Respondent has not raised. There are other defenses under Section 102 as well as the defense of obviousness under Section 103. The Section 102 defenses are several.

Section 102(a) refers to prior knowledge by others and the inventor and of such nature as to show that the inventor named on the patent was not the first inventor. Respondent has raised this defense in its brief filed by predecessor counsel.

Section 102(b) refers to a patent, a printed description or a public use or a sale in the United States more than one year prior to the date of the application.

Section 102(c), (d), (f) and (g) have not been touched on in this brief since none of them is deemed to be applicable to the facts here.

Section 102(a), (b) and (e) are incorporated in the opinion of predecessor counsel on the question of validity.

35 USC 103 is directed to obviousness and reads:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought

> to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made".

Elsewhere in this brief the Respondent has taken the position that the table in the Milu mechanical patent was obvious at the time the alleged invention was made. To a person having ordinary skill in the art, namely, a furniture maker, assigned the task of making a game table to rest on the floor would, in the very routine of planning and execution, provide a pedestal to rest on the floor including one or more legs extended upwardly from the lower part of the pedestal upon which a table top would be secured. These several parts would be joined conventionally by notoriously old expedients such as wood blocks, screws, nuts and bolts and dowels. Glue may or may not be used and the choice of dimensions and materials would be determined by the end use to which the table might be put, having in view the economics of the market place in general, such as manufacturing cost, profit,sales expense and so forth.

A careful reading of the patent fails to reveal

any reasons for the manner in which the several parts of the table are joined which may be termed invention within the purview of 35 USC 103. Merely listing the components in claims does not lend them novelty. A simple catalogue of parts without any demonstrable cooperation between them is not a patentable combination. In Sinclair Carroll Co. v. Interchemical Corp. 325 US 327, it was held that an essential requirement for validity of a patent is that the claims display invention or more ingenuity then the work of a mechanic skilled in the art. See also In re Welch (CCPA), 213 F. 2d 555 and and In re Carter (CCPA), 212 F. 2d 189.

It is submitted that all of the claims of the Milu mechanical patent are invalid for obviousness under 35 USC 103, and therefore incapable of being infringed.

Respectfully submitted,

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Counsel for Respondent

Chicago, Illinois
February 25, 1974