UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:	
CERTAIN EXERCISING DEVICES	Investigation No. 337-TA-24

COMMISSION MEMORANDUM OPINION IN SUPPORT OF THE COMMISSION ACTION

USITC Publication 813
Washington, D.C.
April 1977

UNITED STATES INTERNATIONAL TRADE COMMISSION

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April 20, 1977

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CERTAIN EXERCISING DEVICES	)	

COMMISSION MEMORANDUM OPINION

Procedural history

On February 3, 1976, Rainbow Lifegard Products, Inc., of El Monte, California, filed a complaint with the Commission under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), alleging that certain respondents violated section 337 by the unlicensed importation and sale in the United States of certain exercising devices covered by claims 1, 2, 6-10, 12, 15, and possibly 3 and 11 of U.S. Patent No. 3,743,280, the effect or tendency of which is to destroy or substantially injure a domestic industry which is efficiently and economically operated in the United States. An amendment to the complaint was filed with the Commission on March 25, 1976. Named as respondents in the complaint were several importers of the subject exercising devices.

On April 14, 1976, the public notice of investigation was issued (41 F.R. 16617, April 20, 1976). Copies of the notice of investigation and the complaint, as amended, were served on the respondents. No formal answers to the complaint were filed. One respondent replied

informally. The presiding officer ruled that the failure of respondents to file responses in conformity with the requirements of section 210.21 of the Commission's Rules of Practice and Procedure constituted a waiver of their right to contest the allegations in the complaint, as amended, and the notice of investigation.

A notice of Prehearing Conference was issued on June 22, 1976, and was served on the parties. Only the complainant, the Commission investigative staff, and one respondent replied thereto. As only the complainant and the Commission investigative staff indicated an intention to attend, the conference was conducted by telephone conference call on July 15, 1976. During that telephone call, complainant announced its intention to file a motion for summary judgment in lieu of a hearing. Such motion was received, together with a motion for a ruling regarding the timeliness of its filing, on November 20, 1976.

The Commission investigative staff filed a response to the motion for summary determination on December 2, 1976, which included certain additions and modifications, subsequently agreed to on December 9, 1976, by the complainant. Also on December 9, 1976, the Commission investigative staff filed an additional set of proposed findings as a result of data which it had received subsequent to its previous response, which data updated and modified certain findings of fact relating to total imports of infringing products during 1976. Complainant filed no objections to this second set of additional findings.

On January 21, 1977, the presiding officer issued a recommended determination in the investigation, under section 210.53 of the Commission's Rules of Practice and Procedure, that the Commission find a violation of section 337 with respect to claims 1, 2, 6-10, and 12 of U.S. Patent No. 3,743,280. No exceptions to the recommended determination were filed.

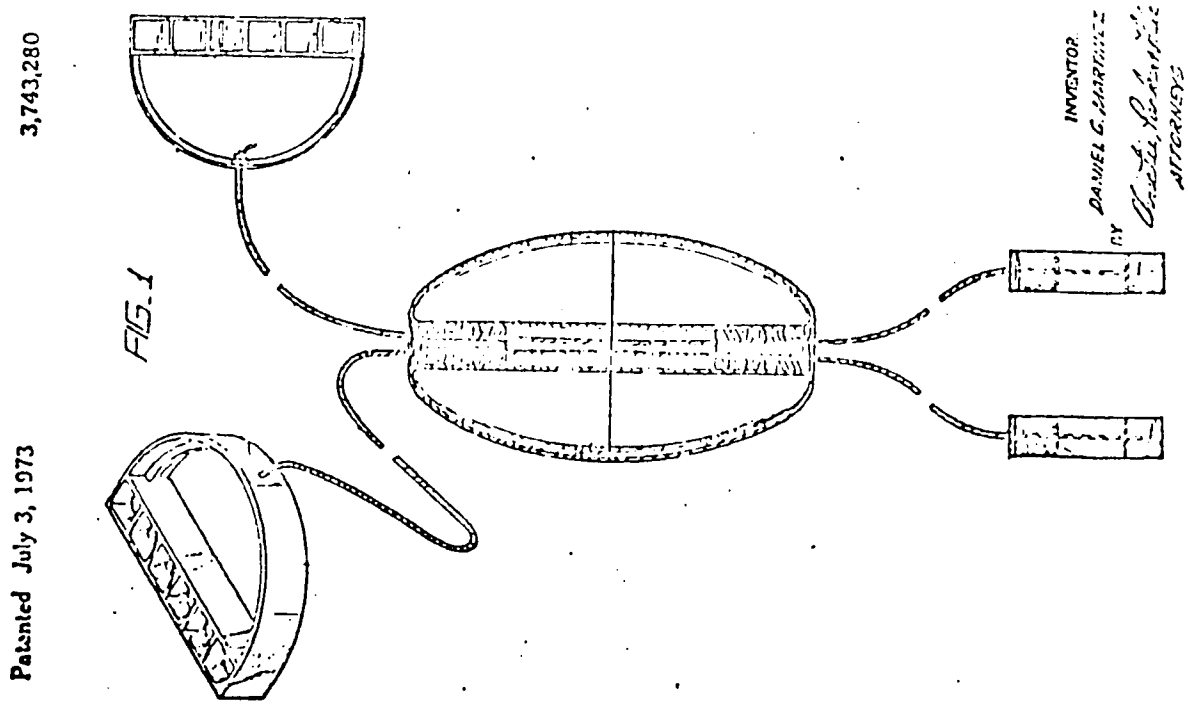
On March 2, 1977, the Commission issued a notice and order announcing a hearing for March 29, 1977, before the Commission for oral argument and for the receipt of information concerning relief, bonding, and the public interest factors set forth in subsections (d) and (f) of section 337. The notice also provided for complainants filing of a proposed order granting relief, and advice was requested from any interested person or government agency.

The hearing was conducted on March 29, 1977, with only the Commission investigative staff in attendance. No substantive advice or information was received from other government agencies in response to the Commission notice of March 2, 1977.

Description of the subject articles

The product which is the subject of this investigation is composed of a pair of cords of equal length which have handles at each end thereof and which are passed through a hole in a shuttle member, an oblong-shaped, buoy-like member, hereinafter referred to as a shuttle assembly. Typically, two people face each other, with the separate handles at the adjacent ends of the cords in each hand. Initially, the shuttle is placed close to one person whose hands are together; as that person moves his hands apart, this outward movement of the hands propels the shuttle along the cords toward the other person whose hands are together until the shuttle reaches him, at which time he

moves his hands apart to return the shuttle back along the cords. The shuttle is moved back and forth along the cords in this manner, either for exercise or as a game under such rules as the users may choose to adopt. (Fig. 1 of U.S. Patent No. 3,743,280 is reproduced below, with reference numbers omitted.)



Consideration of the issues presented

Having reviewed the recommended determination of the presiding officer and having considered all relevant submissions, the Commission, in substance, approves and adopts the findings of fact recommended by the presiding officer 1/ and, accordingly, adopts the recommended conclusions of law of the presiding officer.

1/ Findings 97-99 relate to expenses incurred by Complainant both in court actions and in pursuing its complaint before this Commission to prevent imports of infringing exercising devices. The Commission does not consider such expenses in assessing the tendency of imports to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

Pursuant to section 337, the Commission must consider:

(1) whether there is a violation of section 337, and, if so,

(2) what remedy should be afforded for such violation, and

(a) whether the remedy chosen should be withheld in light of public interest considerations set forth in subsections (d) and (f) of section 337, 1/ and

(b) should an order imposing relief issue, what amount of bond should be established for the entry of the subject articles until the order becomes final.

Determination and order of the Commission

In adopting the conclusions of law recommended by the presiding officer, we have found violations of section 337 proven on the record of this case in the unlicensed importation into the United States of certain exercising devices by reason of their having been made in accordance with claims 1, 2, 6-10, and 12 of U.S. Patent No. 3,743,280 and in their unlicensed sale by the owner, importer, consignee, or agent of either, the tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States.

We have also directed the exclusion of the subject imports from entry into the United States for the term of the patent, and have determined the amount of the bond required by subsection (g)(3) of section 337 to be 350 percent of the value, f.o.b. foreign port, of the articles.

1/ If the Commission determines that there is a violation of section 337, it may order the appropriate statutory relief to remedy the violation unless, after considering the effect of such remedy upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, it finds that relief should not be ordered.

In determining to exclude these articles from entry into the United States, we have considered the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, and find no reason why these articles should not be excluded for any of the effects of our determination in these areas. An Order directing exclusion in accordance with this Opinion is attached, and the same has issued on the date of this Opinion.

Remedy

Section 337 provides, in effect, that in the event that the Commission determines there has been a violation of said provision, that the Commission shall apply the remedy of either exclusion of the offending article from entry into the United States or, in lieu of this action, order the persons violating the law to cease and desist their unlawful methods and acts. In the Commission notice of March 2, 1977, we solicited comment on the choice of remedy in the event that a violation was found in this case. Both the complainant and the Commission investigative staff argued that an order of exclusion is the proper remedy. No other comments were received.

The record developed by the presiding officer indicates that persons other than respondents have imported the subject article. This creates the possibility that any *in personam* cease and desist orders issued by the Commission might be avoided through shifts in sourcing to any of a number of other potential importers. Therefore, the Commission has determined that an exclusion order is the appropriate remedy in the circumstances of this case.

Public interest factors

No evidence which would show an adverse effect on the relevant public interests by the exclusion of infringing exercising devices from entry into the United States was submitted to the Commission by the parties to the investigation, by the Government agency and departments contacted by the Commission, or by any other person. It appears that the domestic industry has the capability of meeting the domestic demand for this product. The effect of the exclusion order on competitive condiditons in the United States and upon United States consumers is not such that the order should be denied. Finally, the production of like or directly competitive articles in the United States will not be affected except as prescribed by the patent laws of this country.

Bonding.--We have determined that the bond provided for in section 337(g)(3) is to be prescribed by the Secretary of the Treasury in the amount of 350 percent of the value of the articles concerned, f.o.b. foreign port. 1/ Since the infringing exercising devices undersell the domestic product by substantial amounts, this bond amount should offset affect any competitive advantages resulting from the unfair acts in the importation or sale of the infringing articles. The amount was

1/ Commissioner Ablondi has determined that the amount of the bond should be 200 percent of the value of the articles concerned, f.o.b. foreign port.

based upon an analysis of wholesale prices of the domestic low-cost product and the value of the imported product when entered under items 737.95 and 735.12 of the Tariff Schedules of the United States. It is also the lower of two amounts recommended by complainant and, in our view, prescribing different bond amounts for similar products would create confusion in the administration of our order.

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1. Exercising equipment I. Title
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UNITED STATES
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WASHINGTON, D.C. 20436

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