

## 1979 Pat. App. LEXIS 27;; 207 U.S.P.Q. (BNA) 541

Board of Patent Interferences

Decided Feb. 21, 1979; Decided Feb. 21, 1979

No. 337-TA-47

### Reporter

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## **In re Certain Flexible Foam Sandals**

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### Notice:

ROUTINE OPINION. Pursuant to the Patent Trial and Appeal Board Standard Operating Procedure 2, the opinion below has been designated a routine opinion.

## **Core Terms**

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presiding officer, notice, patent, recommend, sandal, infringe, pre hearing, domestic

**Panel:** [\*1] Before Parker, Chairman, Alberger, Vice Chairman, and Moore, Bedell, and Stern, Commissioners.

## **Opinion**

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### Commission Memorandum Opinion

Procedural history of the investigation On January 18, 1978, Tiddies, Inc., of Pasadena, Tex. 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 in the unlicensed importation and sale in the United States of certain flexible foam sandals covered by claims 1-4, 6-9, 11, and 16-22 of U.S. Letters Patent 3,978,596, the effect or tendency of which is to destroy or substantially injure a domestic industry, efficiently and economically operated, in the United States. The Commission deemed the complaint properly filed within the meaning of section 210.20 of its Rules of Practice and Procedure ([19 CFR 210.20](#)) and instituted this investigation on February 14, 1978.

A public notice of the Commission's investigation was issued on February 14, 1978, and was published in the February 17, 1978, issue of the Federal Register ([43 F.R. 7060](#)). Copies of the notice of investigation and the complaint [\*2] were served on respondents identified by the complainant.

The complainant named as respondents two domestic importers, Young Californian Shoes, Inc., of San Diego, Calif. and Graham-Brown Shoe Company, of Dallas, Tex., both alleged importers of infringing articles. In addition, the complainant named [**\*\*542**] as a respondent the American Footwear Manufacturing Company, Inc., of Taichung, Taiwan, allegedly a foreign exporter of infringing articles.

Only Graham-Brown Shoe Company answered the complaint and notice. Inasmuch as that company had not imported the subject articles, it was terminated as a party respondent by the Commission's order of June 20, 1978. Young Californian Shoes, Inc., replied informally, but neither answered the complaint and the notice of investigation nor responded to interrogatories served by complainant nor answered a subpoena issued by the presiding officer. American Footwear Company, Inc., has had no contact with the Commission's investigation.

On August 15, 1978, the presiding officer issued a notice of a prehearing conference and hearing. The prehearing conference was scheduled for August 31, 1978, and the hearing was scheduled to begin on September 6, 1978.

[\*3] A notice cancelling the prehearing conference and hearing was issued by the presiding officer on August 30, 1978. That notice stated --

No respondent has complied with the Prehearing Statement Order nor otherwise indicated an intention to appear and contest the allegations of the complaint. Moreover, Complainant, in lieu of an appearance, intends to file by September 16, 1978, a motion for default judgment as to the remaining respondents that will permit the Presiding Officer to make a ruling disposition of this investigation. Accordingly, the prehearing conference and hearing will not be reset.

On September 13, 1978, complainant filed a motion for default judgment. The motion was accompanied by a memorandum in support of the motion, accompanying exhibits, and proposed findings of fact and conclusions of law. The Commission's investigative attorney responded to the motion in a document filed on September 26, 1978. The Commission's investigative attorney supported complainant's motion for default. Neither Young Californian Shoes, Inc., nor American Footwear Manufacturing Company, Inc., responded to the motion.

The presiding officer granted the motion for a default and, as authorized [\*4] by rule 210.21(d), filed the recommended determination, which he then certified to the Commission. No exceptions to the recommended determination were filed.

On December 4, 1978, the Commission issued a public notice and order providing interested persons and government agencies an opportunity to request oral argument with respect to the recommended determination of the presiding officer concerning whether there is a violation of section 337 in this case. Interested persons and government agencies were also invited to request the opportunity to make oral presentations before the Commission concerning relief, bonding, and the statutory public-interest factors. No requests for either an oral argument or an oral presentation were received. The only written comments received were those required by the Commission of the complainant (December 15, 1978) and of the Commission's investigative attorney (December 21, 1978). No advice or information was received from other government agencies in response to the Commission's December 4, 1978, notice. No other written comments or other information was received.

#### Description of the subject articles

The patented articles are sandals manufactured [\*5] in accordance with claims 1-6, 6-9, 11, and 16-22 of U.S. Letters Patent 3,978,596. Such sandals are constructed by mounting flexible straps, such as surgical tubing, into a flexible, multilayered foam sole to secure the sole to the foot of the wearer. (Figures 3 and 4 of U.S. Patent 3,978,596 are reproduced below, with reference numbers omitted.) [\*\*543]

#### 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 and, accordingly, adopts the recommended conclusions of law of the presiding officer.

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 (3) whether the remedy chosen should be withheld in light of public interest considerations set forth in subsections (d) and (f) of section 337, n1 and

[\*6]

(4) 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

[1] 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 flexible foam sandals by reason of their having been made in accordance with claims 1-4, 6-9, 11, and 16-22 of U.S. Patent 3,978,596 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.

#### Remedy

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 250 percent of the value, f.o.b. foreign port, of the articles. In determining to exclude these articles from entry into the United States, we have considered the effect of such exclusion upon the public health [\*7] 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, and find no reason why these articles should not be excluded. An order directing exclusion in accordance with this opinion is attached, and the same has issued on the date of this opinion.

Section 337 provides, in effect, that in the event that the Commission determines there has been a violation of said provision, 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 December 4, 1978, 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 [\*8] 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-interest factors by the exclusion of infringing sandals from entry into the United States was submitted to the Commission by the parties to the investigation, by the Government agency and departments contracted by the Commission, or by any other person. There is no shortage of competitive sandals either made in the United States or imported and sold in the United States which do not infringe complainant's patent. The effect of the exclusion order on competitive conditions in the United States and upon U.S. consumers is not such that the order should not issue. [\*\*544] 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 [\*9] in the amount of 250 percent of the value of the articles concerned, f.o.b. foreign port. Since the infringing sandals undersell the domestic product by substantial amounts, this bond amount should offset the effect of any competitive advantages resulting from the unfair acts in the importation or sale of the infringing articles. The amount was based upon an analysis of wholesale prices of the domestic low-cost product and the value of the imported product when entered under item 700.58 of the Tariff Schedules of the United States. It is also the lower of the amounts recommended by complainant and the Commission's investigative attorney. In our view, the record establishes a quality difference between the domestic patented product and the infringing imports which justifies choosing the lower amount.