

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

In the Matter of

**CERTAIN ADJUSTABLE KEYBOARD
SUPPORT SYSTEMS AND
COMPONENTS THEREOF**

Investigation No. 337-TA-670

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART A FINAL
DETERMINATION ON VIOLATION OF SECTION 337; SCHEDULE FOR FILING
WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY,
THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review a portion of the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on February 23, 2010, regarding whether there is a violation of section 337 in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-4737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 13, 2009 based on a complaint filed by Humanscale Corporation (“Humanscale”) of New York, New York. 74 *Fed. Reg.* 10963 (Mar. 13, 2009). The complaint, as amended, named the following two companies as respondents: CompX International, Inc., of Dallas, Texas and Waterloo Furniture Components Limited, of Ontario, Canada (collectively, “CompX”). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain adjustable keyboard support systems and components thereof that infringe certain claims of U.S. Patent No. 5,292,097 (“the ‘097 patent”).

On February 23, 2010, the ALJ issued a final ID, including his recommended determination on remedy and bonding. In his final ID, the ALJ found that respondents did not violate section 337 with respect to their “Wedge-Brake” products because they did not infringe asserted independent claim 7 or asserted dependent claim 34. The ALJ found, however, that respondents did violate section 337 with respect to their “Brake-Shoe” products because they infringed dependent claim 34. The ALJ also found that there was no violation with respect to independent claim 7 because respondents established by clear and convincing evidence that claim 7 is invalid for obviousness under 35 U.S.C. § 103. The ALJ further found that respondents have not established any intervening rights. Finally, the ALJ found that complainant proved the existence of a domestic industry in the United States with respect to the ‘097 patent. Accordingly, the ALJ recommended that the Commission issue a limited exclusion order barring entry into the United States of infringing adjustable keyboard support systems and components thereof. The ALJ further recommended the issuance of a cease and desist order against respondent Waterloo Furniture Components Ltd. Finally, he recommended that the Commission set the bond during the Presidential review period at 100 percent of the entered value of the infringing products.

On March 9, 2010, Humanscale, CompX, and the Commission investigative attorney (“IA”) each filed a petition for review of the ALJ’s final ID. On March 17, 2010, CompX filed a reply to Humanscale’s petition for review. On the same day, Humanscale filed its consolidated reply to CompX’s and the IA’s petitions for review. Also on the same day, the IA filed a consolidated reply to Humanscale’s and CompX’s petitions for review.

Having examined the record of this investigation, including the ALJ’s final ID and the submissions of the parties, the Commission has determined to review (1) the claim construction of the term “frictionally interengagable” recited in dependent claim 34, (2) infringement of claim 34 by the Brake-Shoe products, (2) the priority date of claim 34, (3) invalidity for anticipation and obviousness of claims 7 and 34, and (4) the defense of intervening rights. The economic prong of the domestic industry requirement is already under review. No other issues are being reviewed. This constitutes a final determination that the Wedge-Brake products do not infringe claims 7 and 34 and therefore there is no violation with respect to these products.

The parties should brief their positions on the issues on review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Assuming that the locking means of claim 34 is not limited to the first and second locking members of claim 7, and assuming that “frictionally interengagable” locking means do not include serrated locking structures that operate through blocking, what is the proper construction of the term “frictionally interengagable”? Should the Commission limit the construction of “frictionally interengagable” to the V-shaped structures described in the ninth embodiment of the ‘097 patent? Please cite to evidence from the record as support.

2. Applying the construction of “frictionally interengagable” provided in response to Question 1, do the Brake-Shoe products meet this limitation? Please cite to evidence from the record as support.
3. What, if any, assembly of the keyboard support system does Humanscale perform in the United States? Are keyboard support systems shipped to customers by Humanscale in an assembled, partially assembled, or disassembled state?
4. If the “articles protected by the patent” under 19 U.S.C. § 1337(a)(2) are the entire keyboard support systems, what portion of Humanscale’s (a) investment in plant and equipment and (b) employment of labor and capital in the United States can be attributed to the manufacture and processing of these articles? Out of this portion, what part is attributed to the process of assembling the keyboard support system as opposed to manufacturing the keyboard and mouse support platforms?
5. According to respondents, since 2003, Humanscale has sold a certain number of units of “its allegedly patented mechanisms either as a separate article of commerce or as a component of bundled keyboard support systems.” *See* Reply of Respondents CompX in Response to the Commission’s Notice to Review an Initial Determination of the Economic Prong of the Domestic Industry Requirement, at 6; *see also* RX-005C. Is respondents’ statement of the figure accurate based on the record?
6. Of the total number of units of the patented mechanisms sold by Humanscale, how many units were sold individually and how many units were sold as components of a bundled keyboard support system?
7. Sales of the patented mechanism by itself constitute what percent of Humanscale’s total revenue, and sales of the patented mechanism as components of a bundled keyboard support system constitute what percentage of the total revenue?
8. Does section 337(a)(3)(c) allow the Commission to consider investments in research and development or engineering related to technology not covered by the ‘097 patent when addressing the domestic industry requirement? Are Humanscale’s investments in research and development or engineering related to the keyboard and mouse support platforms investments in the exploitation of the ‘097 patent? Are Humanscale’s investments in research and development or engineering related to assembling the keyboard and mouse support platforms with the patented support means investments in the exploitation of the ‘097 patent? What are Humanscale’s investments for each?
9. Under section 337(a)(3)(C), can Humanscale’s activities relating to its domestically manufactured keyboard and mouse platforms be considered “investment” in the “exploitation” of the ‘097 patent that is not “engineering, research and development, or licensing”?”
10. If foot 4 of Kompauer corresponds to the “second element” of claim 7, does Kompauer disclose the limitation “pivotally mounted” under the

ALJ's construction? Also, does Kompauer disclose each and every limitation of claim 7 under the ALJ's construction of the disputed claim terms? Please cite to evidence from the record as support.

11. If one or more limitations is not disclosed by Kompauer under the ALJ's constructions, does Adam, Holtz, or Hood make up for this deficiency under the ALJ's construction? Please cite to evidence from the record as support.
12. If the answer is yes to Question 11, does the record explain why a person of ordinary skill in the relevant field would have had a reason to combine the elements in the way claim 7 does?
13. What evidentiary standard should the Commission apply to the affirmative defense of intervening rights, clear and convincing evidence or a preponderance of the evidence?
14. Does the evidence of record show that the scope of reexamined claim 34 has substantively changed from the original claims of the '097 patent? Please provide any relevant claim constructions for the original claim terms of the '097 patent as well as any relevant discussions during the reexamination proceeding regarding amendments to these claims.
15. Does the evidence of record show that the "specific thing," *i.e.*, the specific accused products, were "made, purchased, offered [for sale], or used within the United States, or imported into the United States" prior to the grant of the reexamination certificate to the '097 patent? 35 U.S.C. § 252.
16. Does the evidence of record show that respondents made "substantial preparation[s]" before the grant of the reexamination certificate to "manufacture, use, offer for sale, or [sell] in the United States" the accused products in their current form? 35 U.S.C. § 252. In addition, does the evidence of record show that respondents made investments or commenced business related to the accused products prior to the grant of the reexamination certificate? *Id.*
17. If the answer to Question 15 or 16 is yes, does the evidence of record show that the accused products did not infringe or would not have infringed any of the original claims of the '097 patent?

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in a respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

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

If the Commission orders some form of remedy, the United States Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the patent expires and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on May 10, 2010. Reply submissions must be filed no later than the close of business on May 17, 2010. The written submissions must be no longer than 60 pages and the reply submissions must be no longer than 30 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46 and 210.50).

By order of the Commission.

/s/
Marilyn R. Abbott
Secretary to the Commission

Issued: April 26, 2010