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**FILE**

CPSA Sec. 3(a)(1)  
Power Lawn Mowers



*Kee*  
**RESTRICTED**

62/ U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D. C. 20207

#299

MAY 27 1982

OFFICE OF THE  
GENERAL COUNSEL

Comments Processed

*withholdings throughout*

James F. Rill, Esquire  
Collier, Shannon, Rill & Scott  
Attorneys-at-Law  
1055 Thomas Jefferson Street, N.W.  
Washington, D. C. 20007

Dear Mr. Rill:

This letter responds to your letter of February 25, 1982, in which you request a determination of whether certain high-wheel walk-behind lawn mower models made by Kee Manufacturing Company, Inc., are consumer products and thus subject to the Safety Standard for Walk-Behind Power Lawn Mowers, 16 C.F.R. Part 1205. The data you have submitted indicate that these mowers are not consumer products because consumers do not appear to "customarily" use them.

As you know, the term "consumer product" is defined in 15 U.S.C. § 2052(a)(1), and the term does not include "any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer." The legislative history of this section indicates that products that are not used more than occasionally by consumers are not consumer products. H.R. Rep. No. 92-1153, 92d. Cong., 2d. Sess. 27 (1972).

In general, we have established no specific criteria to determine whether consumers use a product more than occasionally. Instead, we review all available information relevant to a particular determination.

In the case of these Kee mowers, you have submitted the following data which indicate that the current use and distribution patterns of these mowers are such that these mowers do not fall within the definition of the term "consumer product":

1. The weight and cost of these mowers exceed those of the usual consumer mowers.

ADVISORY OPINION

**RESTRICTED**

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~~RESTRICTED~~

2. The 20 inch diameter rear wheels make these mowers suitable for some mowing applications for which normal consumer mowers would be unsuited.

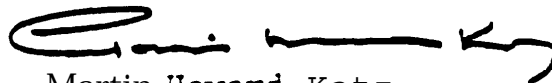
3. As shown by the letters from Kee's sales manager and advertising agency, and from two of Kee's major distributors, it appears that Kee's marketing and promotional activity is directed primarily toward commercial and agricultural users.

4. The three-point promotional plan for Kee's distributors and dealers that you outline should help ensure that any sales of these mowers to consumers would be minimized and not more than occasional.

Our technical staff has reviewed the information which you submitted, and no information that would contradict any of the factors mentioned above has been brought to our attention. Therefore, based on all of these factors, we reached our conclusion that, at the present time, the use and distribution patterns of these mowers are such that they are not consumer products.

We wish to stress, however, that this determination is based primarily on the information supplied by you, and, if data showing different use or distribution patterns become available, our determination could change. For example, if consumer use patterns were to change in the future so that these mowers would be used more than occasionally by consumers, they could then be considered subject to the standard.

Sincerely,



Martin Howard Katz  
General Counsel

~~RESTRICTED~~

Collier, Shannon, Rill & Scott  
Chartered

Attorneys-at-Law

1055 Thomas Jefferson Street, N. W.

Washington, D. C. 20007

Telephone: (202) 342-8400

Writer's Direct Dial Number



February 25, 1982

Margaret Freeston, Esq.  
Acting General Counsel  
Consumer Product Safety Commission  
Washington, D.C. 20007

Dear Ms. Freeston:

This letter is a request on behalf of Kee Manufacturing Company, Inc. ("Kee") for an interpretation, pursuant to 16 C.F.R. §10007, of the Consumer Product Safety Act as it applies to the **Commission's** Safety Standard for Walk-Behind \*Power Lawn Mowers, 16 C.F.R. Part 1205 ("Standard"). Specifically-, Kee requests a determination of whether the lawn mowers herein described constitutes a "consumer product" within the meaning of the Consumer Product Safety Act, 15 U.S.C. §2501, et seq. and of such Standard.<sup>1/</sup>

Kee manufactures a line of high-wheel walk-behind lawn mowers designed to meet the needs of commercial users in rural and agricultural areas of the Southeastern United States. This region is characterized by high weeds, deep sand and fast growing Argentine Bahia, Pensacola Bahia and St. Augustine grasses. Kee produces approximately-high-wheel mowers annually, resulting in total sales of [REDACTED], including sales of replacement parts.

Although the Kee high-wheel mowers do not satisfy any of the express exclusionary criteria set forth at 15 C.F.R. §1205.1(c), their cost, physical characteristics and proposed marketing plan demonstrate that they are not consumer products within the terms or objectives of the Consumer Product Safety Act or the Standard. To construe them to be consumer products covered by the Act would impose a substantial compliance burden on Kee without reducing any actual risk of injury to consumers.

1. Kee's High-Wheel Mowers Possess the Physical Characteristics of Commercial Equipment

At the suggestion of representatives of the General Counsel's Office during a meeting with Kee's president, Mr. Duane Bustle, on September 28, 1981, Kee has prepared a chart comparing its high-wheel mowers with typical consumer-type mowers. This chart demonstrates the significant differences between these two types of products.

<sup>1/</sup> The mowers for which Kee requests an interpretation are identified as C-20, C-22, CG-22, C-25 and CG-25. Descriptions of these commercial mowers and their specifications are contained in Exhibit A, attached.

Comparison of High-Utility v. Consumer Walk-Behind Mowers

Kee

Typical Consumer Mower

Weight

105-183 lbs.

49-102 lbs.

Construction

Arc welded tubular steel frame suitable for rough and continuous commercial use. Deck made of rust-free, cast aluminum.

No frame used. Engine and handle are bolted to steel stamped deck.

Overall Appearance

Simple functional design to permit optimal accessibility during maintenance and greater durability.

Smooth lines, plated handles and attractive exterior finish designed for eye appeal to consumer.

Blade Spindle

The spindle assembly consists of a 1" diameter blade shaft, two ball bearings, a bearing housing, a blade and a sheave for the belt drive. A V-belt from the blade engine to the blade spindle transmits the power required to rotate the blade spindle.

Blade is mounted on the engine using the hole that is tapped in the end of the crankshaft. Crankshaft is 7/8" in diameter.

Wheels, Rear

20" diameter pneumatic knobby tread tires, designed for use over rough agricultural terrain, sandy soil and tall grass in coastal areas of SE United States.

8" diameter with either plastic or steel hub, usually with no ball bearings.

Wheels, Front

6" or 8" diameter rubber mounted on a steel hub with two ball bearings. On most models, the front wheel can swivel 360 degrees for greater maneuverability during extended use.

Same as rear wheels.

Handle

A plow shear design handle to provide greater lateral control on rough terrain and grades. Handle is cross braced and bolted to steel frame for continuous commercial use.

Two-piece tubular steel handle bolted together and connected to the mower deck by a pin or bolt.

Height of Cut Adjustment

The blade is moved using a wrench to remove two 3/8" bolts.

Wheels raised or lowered using adjusting brackets which wheels are mounted. No tools required.

Engine

5 H.P., 7 H.P. and 8 H.P. horizontal shaft engines.

3 to 5 H.P. engine.

Suggested List Price

20" blade, 5 H.P. push - [REDACTED]

18"-20" blade, 3 or 3.5 H.P. push - Avg. \$210.

22" blade, 5 H.P. push - [REDACTED]

21" blade, 3/5 or 4 H.P. push Avg. \$274.

22" blade, 5 H.P. self propel - [REDACTED]

21" - 22" blade, 3.5 H.P., 4 H.P. 6 5 H.P. Self-propel - Avg. \$395.

25" blade, 8 H.P. self propel - [REDACTED]

25" blade, self propel -- (not aware of any consumer models in this cut width.)

\*Note: Information on consumer type mowers was obtained from brochures featuring Southland, Mono, Falls/Sycamore, K & S, Harry, Snapper and Toro. Pricing information was obtained locally, by Kee, from two lawnmower dealers and one chain discount store.

As this comparison demonstrates, the characteristics of Kee high-wheel mowers provide a clear contrast to those of typical consumer products. Accordingly, they should not be covered by the safety standard. This conclusion would also be consistent with the treatment accorded the Toro commercial mowers which possess similar physical characteristics. See CPSC Advisory Opinion No. 284, (December 1, 1981).

2. Kee's High-Wheel Mowers Are Marketed Primarily to Commercial and Agricultural Users

In its advisory opinions to Bachtold and Toro the Commission indicated that a manufacturer's promotion and marketing patterns are significant factors in assessing whether a product is a commercial or consumer item. See Bachtold Bros., Inc., CPSC Advisory Opinion No. 278 (August 14, 1980); Toro, supra at 1. The United States Court of Appeals for the District of Columbia has also emphasized this factor, stating that "there must be a significant marketing of that product as a distinct article of commerce for sale to consumers before the product may be considered as 'customarily' produced or distributed in that manner." ASG Industries, Inc. v. CPSC, 593 F.2d 1323, 1328 (D.C. Cir.) cert. denied, 444 U.S. 864 (1979). Last month the United States District Court for the District of Columbia reaffirmed the importance of the "significant marketing" requirement, holding that residential aluminum wiring is not a consumer product, because "it is not customarily sold to consumers as an article of commerce." CPSC v. Anaconda Co., No. 77-1843 (D.D.C. Jan. 7, 1982).

Kee's high-wheel mowers are not marketed as an article of commerce for sale to the typical consumer. Kee's marketing and promotional activity is directed primarily toward commercial and agricultural users.<sup>2/</sup> Kee advertises its high-wheel mowers in Yard & Garden, Outdoor Power Equipment and Lawn Care Industry--all publications intended to reach commercial and agricultural users. While Kee does not have reliable information on the ultimate disposition of all of its mowers, known purchasers of Kee's products include municipalities throughout the [REDACTED]

[REDACTED] Letters from Kee's sales manager, Mr. Thomas Stanley and from two of Kee's major distributors, [REDACTED], attest to the predominantly commercial use of Kee's high-wheel products.<sup>3/</sup>

- 
- <sup>2/</sup> A recent letter from Charles Gravel, President of Kee's advertising agency confirms that commercial users are the target of Kee's advertising campaign. This letter is attached as Exhibit B.
- <sup>3/</sup> The letters from Mr. Stanley, - are attached as Exhibits C and D.

Margaret Freeston, Esq.  
February 25, 1982  
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In planning its advertising strategy and other promotional activities, Kee relies heavily on the advice of its major distributors. Typical of the feedback Kee receives from its distributors is the letter it recently received from its [REDACTED]

[REDACTED] which accounts for a third of Kee's total sales of high-wheel mowers. In a recent letter to Kee's President, [REDACTED] Vice President For Finance, [REDACTED] advised that Kee's primary marketing efforts should be "aimed in the direction of serious, heavy duty grounds care applications such as municipal governments, local industrial grounds care and similar commercial applications."<sup>4/</sup>

In addition to the commercially-oriented marketing strategy just described, Kee's promotional plan at the retail level is carefully calculated to discourage the sale of its commercial-type products for unintended consumer user. [REDACTED]

[REDACTED]

3. Compliance With the Safety Standard Will Impose an Unreasonable Burden on Kee.

The Commission has considered the degree of risk and the cost of compliance to be factors relevant to a determination of whether a product is a consumer or commercial item. In connection with the exclusion of reel-type mowers from the lawn mower standard, for example, the Commission observed that since reel mowers represented less than 1% of the walk-behind mower market, the low risk of injury from such mowers did not justify coverage within the standard. <sup>44</sup> Fed.Reg. 9997. Similarly, the high-wheel mowers of the type here at issue comprise only 1.1% of the total walk-behind power mower market.<sup>5/</sup> Moreover, because these mowers are customarily operated

<sup>4/</sup> The letter of [REDACTED] is attached as Exhibit E.

<sup>5/</sup> Figure reported in September-August 1981 Monthly Report of Shipments and Inventory released by Outdoor Power Equipment Institute.

by knowledgeable and experienced commercial users, the risk of injury is significantly reduced.<sup>6/</sup>

Where the risk of injury associated with a product is low, the Commission and the courts have recognized that the cost of compliance may determine the proper scope of a standard's coverage. See 44 Fed.Reg. 9998; ASG Industries, Inc. v. CPSC, 593 F.2d 1323 (D.C.Cir. 1979); Aqua Slide 'N' Dive v. CPSC, 569 F.2d 831 (5th Cir. 1978). Thus, the Commission's decision to exclude certain large mowers from the Walk-Behind Mower Standard's coverage was based, in part, on the fact that commercial or specialty mowers are typically manufactured by small-sized firms that would be subjected to an unreasonable economic burden if forced to redesign their products to comply with consumer safety features. 44 Fed.Reg. 9998. As the Commission observed with respect to such companies, "[t]he economic burden for these manufacturers could be greater than that for the manufacturers of the smaller mowers usually used by consumers since they must spread the cost of compliance over fewer production units." Id. The Commission's reasoning is equally applicable to the high-wheel mowers manufactured by Kee. [REDACTED]

[REDACTED]

[REDACTED]

To summarize, the unreasonable economic burden that compliance would impose on Kee as a small, specialty manufacturer, as well as the similarities in physical characteristics and promotional approach between Kee's high-wheel mowers and the Toro mowers recently categorized as commercial, support an interpretation from the Commission that Kee's high-wheel mowers are not consumer products within the meaning of the Consumer Product Safety Act, 15 U.S.P.C. 52501 et seq. and the Safety Standard for Walk-Behind Power Lawn Mowers, 16 C.F.R. Part 1205.

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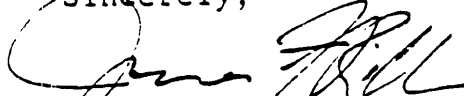
<sup>6/</sup> Although Kee does not have precise information on the rate of injury associated with high-wheel mowers, in the past ten years the company has sold over [REDACTED] high-wheel mowers and received reports of only 10 injuries, establishing a rate of .-injuries per mower produced. Of these 10 claims, only two cases went to trial and in both instances Kee prevailed.

Margaret Freeston, Esq.  
February 25, 1982  
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Kee considers the production and financial figures contained in this letter to be confidential and requests that it not be released by the Commission unless Kee is first given notice and an opportunity to document its request for confidential treatment.

Sincerely,

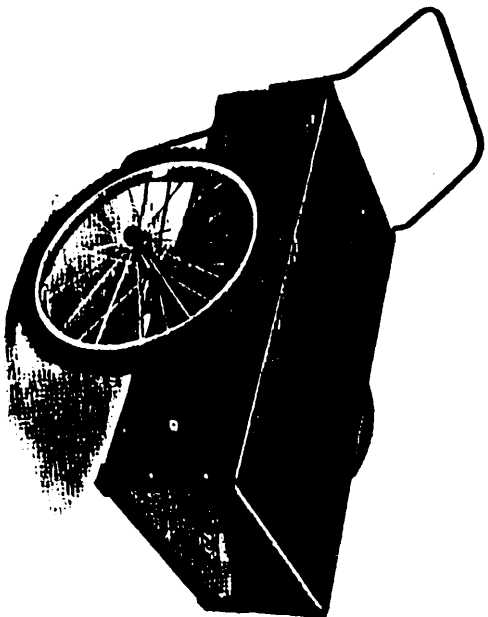
  
JAMES F. RILL

Attorney for Kee  
**Manufacturing Company**

JFR: jab  
Enclosure



# "THE MULE" BY KEE



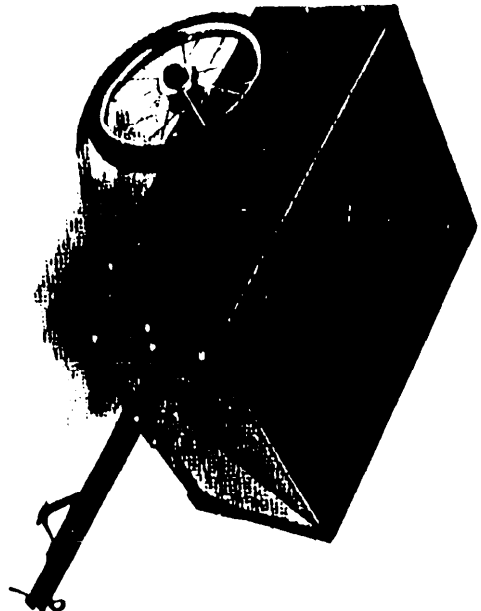
## THE MULE CART/TRAILER

**MODEL K516C (Cart) / K516T (Trailer)**  
 Load Capacity: 300 lbs., 5 cu. ft.  
 Inside Dimensions: 24" wide x 32" long x 12" deep  
 Overall Dimensions: 33½" wide x 45" long x 21" high  
 16" diameter semi-pneumatic wheels with ball bearings

**MODEL K820C (Cart) / K820T (Trailer)**  
 Load Capacity: 300 lbs., 8 cu. ft.  
 Inside Dimensions: 24" wide x 47½" long x 12" deep  
 Overall Dimensions: 37" wide x 60" long x 23" high  
 Big 20" diameter semi-pneumatic wheels with ball bearings

**MODEL K826C (Cart) / K826T (Trailer)**  
 Load Capacity: 400 lbs., 8 cu. ft.  
 Inside Dimensions: 24" wide x 47" long x 12" deep  
 Overall Dimensions: 37" wide x 60" long x 26½" high  
 Big 26" diameter pneumatic tires mounted on heavy duty welded steel wheels with ball bearings for easy push'n or pull'n the big loads.

## STANDARD FEATURES



- SLIDE IN OR OUT REAR PANEL FOR EASY DRAPING
- BALANCES ON END FOR STORAGE. REQUIRES LESS SPACE THAN MOST OTHER CARTS.
- CAST ALUMINUM CORNER POSTS GIVE RIGID SUPPORT FOR THOSE HEAVY LOADS.
- LARGE WHEELS MAKE IT EASY TO PUSH OR PULL.
- VERSATILE CONVERSION FEATURE ALLOWS YOU TO USE AS TRAILER OR CART.
- GALVANIZED STEEL SIDE PANELS WON'T ROT OR RUST.
- 80" DIAMETER AXLE EXTENDS ALL THE WAY BENEATH THE CART TO GIVE ADDED STRENGTH.
- 1/2" EXTERIOR PLYWOOD FLOOR TREATED TO GIVE LONG SERVICE.

**Kee Manufacturing Co., Inc.**

Post Office Box 2196 / Bradenton, Florida 33508

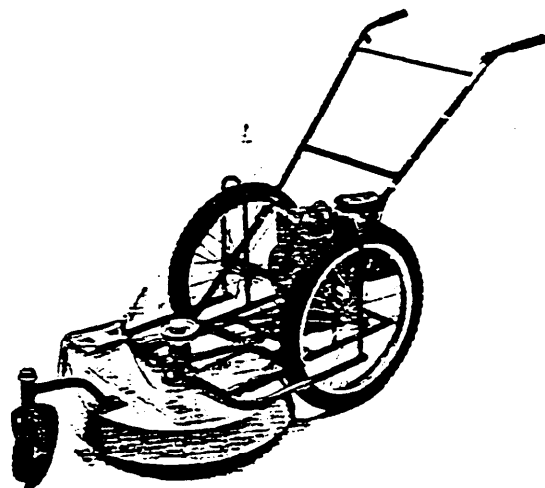
**KEE**

Distributed By:

# KEE GC MODELS

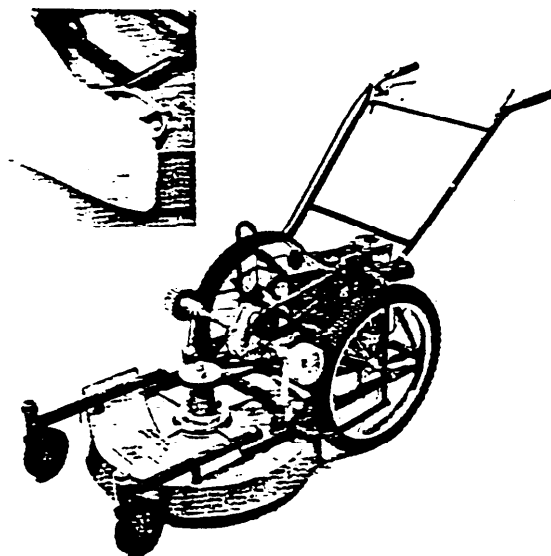
## MODEL GC-22

ENGINES AVAILABLE (SPECIFY)	WIDTH CUT	HEIGHT CUT	FRONT WHEEL
5 H.P. BRIGGS 5 H.P. BRIGGS I/C** 4% H.P. CLINTON *(Cast Iron)	21 1/4"	ADJUSTABLE 2" to 3 1/4"	8" SWIVEL
AVAILABLE WITH OR WITHOUT SELF PROPEL			
ACCESSORIES			PART #
GRASS BAG KIT			850
SEMI PNEUMATIC TIRES (A.N.C.)			750



## MODEL GC-25 Commercial

ENGINES AVAILABLE (SPECIFY)	WIDTH CUT	HEIGHT CUT	FRONT WHEELS
7 H.P. BRIGGS 8 H.P. KOHLER *(Cast Iron)	24 1/4"	ADJUSTABLE 2" to 3 1/4"	6" SWIVEL (DUAL)
AVAILABLE WITH OR WITHOUT SELF PROPEL			
ACCESSORIES			PART #
GRASS BAG KIT			850
BLADE CLUTCH			478



## STANDARD KEE MOWER FEATURES

- CAST ALUMINUM ALLOY DECK
- 1 INCH DIAMETER STEEL BLADE SHAFT
- GREASE FITTINGS AT ALL WEAR POINTS
- WELDED TUBULAR STEEL FRAMES
- HEAVY DUTY 36 SPOKE 20 INCH WHEELS
- HEAVY DUTY STEEL BLADE
- ADJUSTABLE CUTTING HEIGHT

### SELF PROPEL FEATURES

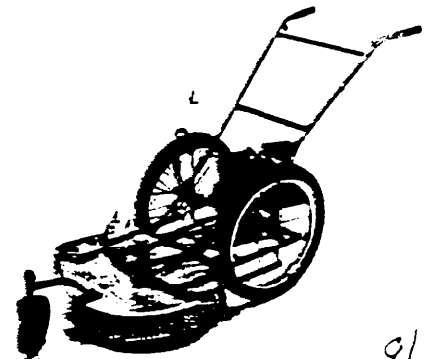
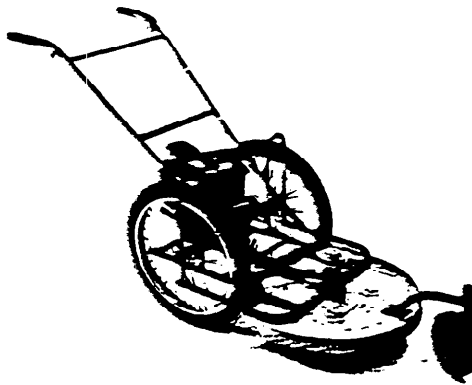
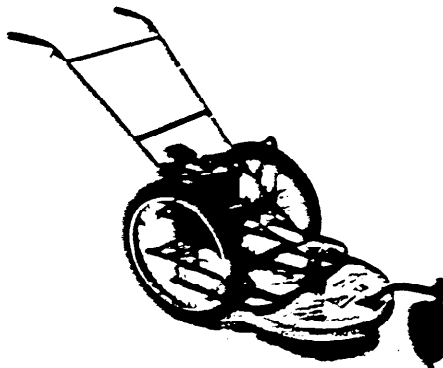
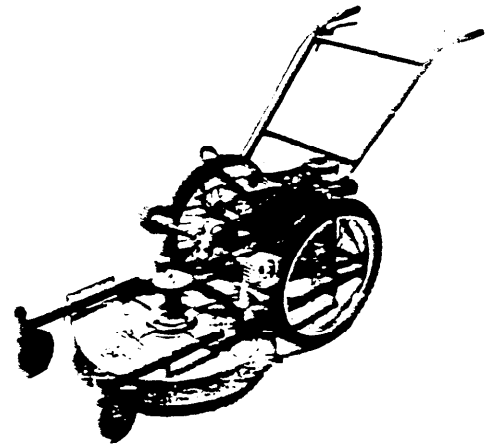
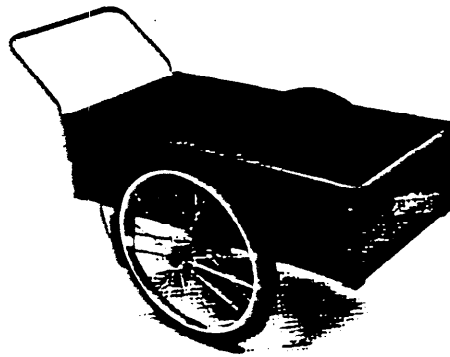
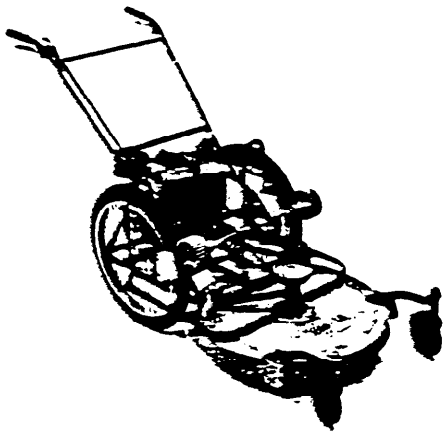
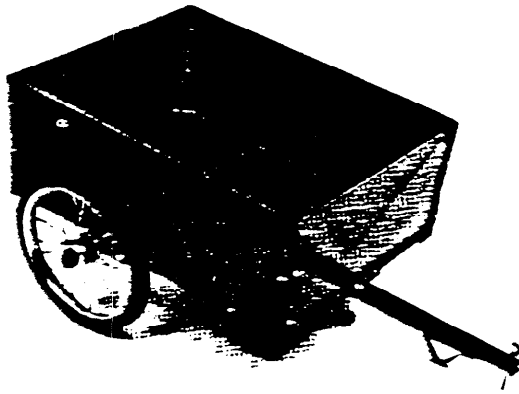
- ENCLOSED CAST ALUMINUM GEAR BOX
- CONVENIENT CONTROL UNIT

**MANUEVERABILITY:** The large rear wheels take the work out of pushing the mower and the swivel front wheel(s) makes turning so easy. The mower is balanced to properly distribute the weight to prevent the front end from "digging in."

**MAINTAINABILITY:** The design is simple and all parts are accessible for easy maintenance and inspection. Many parts are standard on all models.

**ECONOMY:** Because of Kee's durability, the life cost of the Kee Mower that is properly maintained can be as low as many brands that have less initial cost, and in addition, you will have the satisfaction of having a machine that is tough enough to get your mowing done.

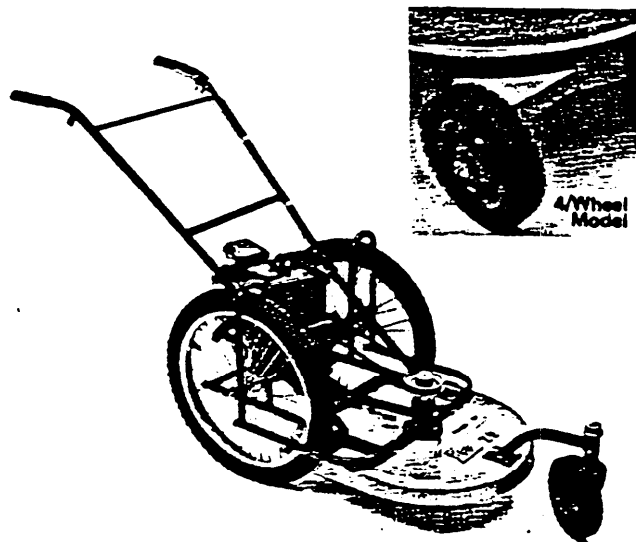
# Kee Manufacturing Co., Inc.



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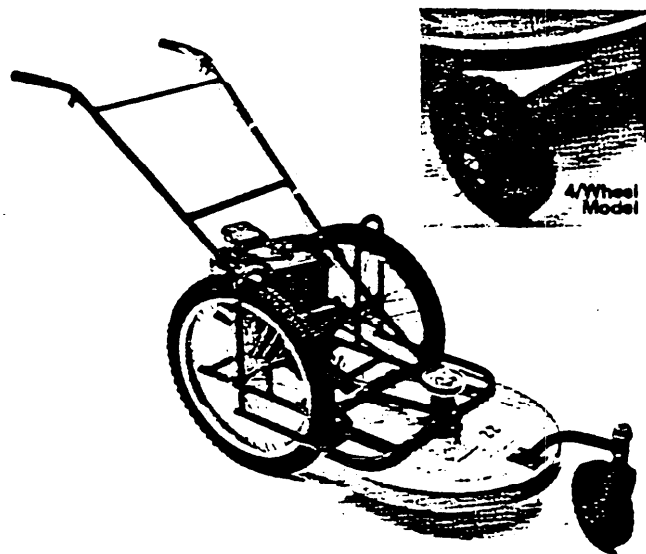
**Manufacturers Of Quality Lawn & Garden Equipment Since 1948**

# KEE C MODELS



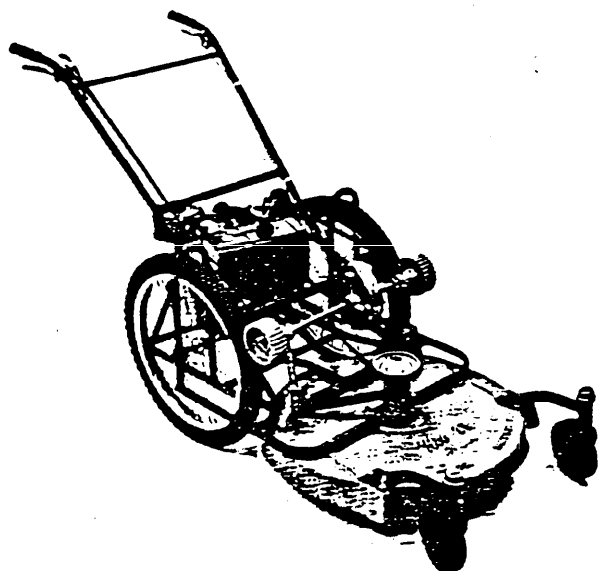
## MODEL C-20

ENGINES AVAILABLE (SPECIFY)	WIDTH CUT	HEIGHT CUT	FRONT WHEELS (SPECIFY)
5 H.P. BRIGGS	20"	ADJUSTABLE 1½" to 3"	8" SWIVEL or 6" FIXED (4/W Model)
AVAILABLE WITH OR WITHOUT SELF PROPEL			
ACCESSORIES			PART #
SEMI PNEUMATIC TIRES (At N.C.)			750
SIDE GUARDS			603



## MODEL C-22

ENGINES AVAILABLE (SPECIFY)	WIDTH CUT	HEIGHT CUT	FRONT WHEELS (SPECIFY)
5 H.P. BRIGGS 5 H.P. BRIGGS I/C** 4½ H.P. CLINTON. (cast Iron)	21½"	ADJUSTABLE 1½" to 3"	8" SWIVEL or 6" FIXED (4/W Model)
AVAILABLE WITH OR WITHOUT SELF PROPEL			
ACCESSORIES			PART #
SEMI PNEUMATIC TIRES (At N.C.)			750
SIDE GUARDS			609



## MODEL C-25

ENGINES AVAILABLE (SPECIFY)	WIDTH CUT	HEIGHT CUT	FRONT WHEELS
7 H.P. BRIGGS 8 H.P. KOHLER* (Cast Iron)	24½"	ADJUSTABLE 1½" to 3"	6" SWIVEL (DUAL)
AVAILABLE WITH OR WITHOUT SELF PROPEL			
ACCESSORIES			PART #
SEMI PNEUMATIC TIRES (At N.C.)			750
SIDE GUARDS			615
BLADE CLUTCH			478

\* I/C Series equipped for Industrial/Commercial Applications. Standard with cast iron cylinder sleeve, ball joints both sides, dual element air cleaner, Stellite exhaust valve and seat, positive type valve rotator.

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Withhold -  $a_2$ ,  $b_3 + b_4$

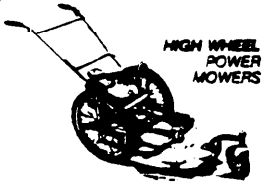
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# Kee Manufacturing Co., Inc.

## KEE

Quality Lawn & Garden Equipment Since 1948



January 28, 1982

To whom it may concern:

Based on my experience working within the dealer network which is comprised of-dealers throughout [REDACTED], it is my opinion that the commercial consumer buys the bulk of Kee high wheel mowers.

[REDACTED]

In [REDACTED] our Kee high wheel mowers will be found in the parks departments, lawn care companies, industrial complexes, farm and groves.

By far the majority of machines sold in [REDACTED] are composed in the categories stated above.

Because of the heavy construction and the high horsepower, the typical consumer would have little or no use for a machine such as ours.

Yours truly,

KEE MANUFACTURING COMPANY, INC.

Tom Stanley  
Sales Manager

TS/eb

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Withhold -  $a_2, b_3 + b_4$



Withhold-  $a_2, b_3 + b_4$