

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

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**In the Matter of** )

**CERTAIN FOAM FOOTWEAR** )

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**Inv. No. 337-TA-567**

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW-IN-PART AN  
INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION OF NON-  
INFRINGEMENT OF U.S. DESIGN PATENT NO. D517,789**

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part an initial determination (“ID”) (Order No. 32) of the presiding administrative law judge (“ALJ”) granting summary determination of non-infringement of U.S. Design Patent No. D517,789 in the above-captioned investigation under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., telephone 202-708-2310, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436. Copies of all nonconfidential 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 SW., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<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 the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. (“Crocs”) of Niwot, Colorado. 71 *Fed. Reg.* 27514 (2006). The amended complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (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 foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858; U.S. Patent No. D517,789 (“the ‘789 patent”); and the Crocs trade dress (the image and overall appearance of Crocs-brand footwear). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainant requested that the Commission issue a permanent general exclusion order and permanent cease and desist orders. The complaint

identified 11 respondents. The Commission terminated the investigation as to the trade dress allegation on September 11, 2006. A twelfth respondent was permitted to intervene as a respondent in the investigation on October 10, 2006. Five respondents have been terminated from the investigation on the basis of a consent order or a settlement agreement. The ALJ has granted a joint motion filed by an additional respondent and complainant to settle the investigation based on a settlement agreement and consent order.

On September 29, 2006, Crocs moved for summary determination of infringement of the '789 patent. Six of the remaining respondents moved for summary determination of non-infringement of the '789 patent on various dates in October 2006. Those respondents included Double Diamond Distribution Ltd.; Gen-X Sports Inc.; Old Dominion Footwear; Collective Licensing International, LLC; Effervescent, Inc.; and Holey Soles Holdings, Ltd. (collectively, "respondents"). These motions were opposed by Crocs and the Commission Investigative attorney (IA).

On November 7, 2006, ALJ issued the subject ID (Order No. 32) granting respondents' motions for summary determination of non-infringement of the '789 patent and denying Crocs' motion. Crocs and the IA petitioned for review of the ID pursuant to 19 C.F.R. § 210.43(a) on November 15, 2006. Respondents opposed the petitions on November 22, 2006. The IA filed a motion for leave to file a reply on November 28, 2006.

Upon considering the parties' filings, the Commission has determined to review-in-part the ID. The Commission has also determined to deny the IA's motion for leave to file a reply.

The Commission has determined to review Order No. 32 to the extent that the ALJ granted the motions for summary determination of non-infringement of the '789 patent as to each respondent except for respondent Old Dominion Footwear as no party challenges the ALJ's conclusion on this issue.

On review, the parties are requested to submit briefing with respect to the following issues: 1) whether any genuine issues of material fact exist to preclude summary determination, 2) whether the ALJ could fairly be considered as the "ordinary observer" in the ordinary observer test for infringement of a design patent, and if not, who should the "ordinary observer" be (e.g., "impulse-buy purchaser"), 3) whether the ALJ properly construed the design claim in light of the prior art, 4) whether the accused products of the remaining respondents would satisfy the "points of novelty test" for design patent infringement assuming these products satisfy the ordinary observer test, and whether, in light of the current record, it is appropriate for the Commission to decide this test on review given that the ALJ did not make a finding on it, 5) whether the depiction of the strap in Figure 1 of the '789 precluded the ALJ's claim construction that the strap must have uniform width between the two round connectors, and 6) whether the ALJ properly determined the strap to be substantially ornamental, rather than functional. In addressing these issues, the parties are requested to cite relevant authority.

**WRITTEN SUBMISSIONS:** The written submissions should be concise and thoroughly referenced to the record in this investigation. The written submissions must be filed no later than the close of business on January 8, 2007. Reply submissions must be filed no later than the close of business on January 16, 2007. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) 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. § 201.6. Documents for which confidential treatment is granted by the Commission 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 section 210.42(h) (19 C.F.R. § 210.42(h)) and 210.43(d) (19 C.F.R. § 210.43(d)) of the Commission's Rules of Practice and Procedure.

By order of the Commission.

/s/  
Marilyn R. Abbott  
Secretary to the Commission

Issued: December 21, 2006