

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

In the Matter of

CERTAIN FOAM FOOTWEAR

Inv. No. 337-TA-567

ORDER: VACATUR AND REMAND OF INITIAL DETERMINATION

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 (“the ‘858 patent”); 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 complaint identified 11 respondents.

The Commission terminated the investigation as to the trade dress allegation on September 11, 2006. On October 10, 2006, a twelfth respondent was permitted to intervene as a respondent. Six respondents have been terminated from the investigation on the basis of a consent order or a settlement agreement.

On various dates in September and October 2006, six respondents (Double Diamond Distribution Ltd., (Double Diamond), Gen-X Sports Inc.(Gen-X), Collective Licensing International, LLC, (Collective), Effervescent, Inc.(Effervescent), Holey Shoes Holdings, LTD,

(Holey Shoes)) (collectively, “the respondents”) moved for summary determination of non infringement of the ‘789 patent. Crocs and the IA opposed all of the motions. On November 7, 2006, the presiding administrative law judge (ALJ) issued the subject ID (Order No. 32) granting respondents’ motions for summary determination of non-infringement of the ‘789 patent. Because the ALJ found that no respondent infringed the ‘789 patent, he terminated the investigation as to that design patent. Because respondent Old Dominion Footwear (ODF) was accused of infringing only the ‘789 patent, the ALJ terminated ODF from the investigation. On November 8, 2006, the ALJ issued Order No. 36 staying the procedural schedule.

On December 21, 2006, the Commission issued a notice determining to review-in-part the ID 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 ODF because no party challenged the ALJ’s finding of no infringement by ODF.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has determined that Order No. 32 does not resolve sufficiently the issue of infringement of the ‘789 patent. The Commission has determined that the subject ID does not resolve adequately the issues raised by the IA concerning the existence of genuine issues of material fact which, if present, would preclude the grant of summary judgment of non-infringement of the ‘789 patent. Particularly, the ID did not address expressly the testimony by Crocs’ expert that an ordinary observer would have been confused into purchasing each model of the accused footwear, supposing it to be the ‘789 patent design.

Further, the Commission has determined that the subject ID does not resolve adequately the issues raised by Crocs and the IA concerning infringement. Particularly, the ID does not

expressly define the ordinary observer or address the extent of “such attention as a purchaser usually gives”. *See Gorham Co. v. White*, 81 U.S. 511, 528, 20 L. Ed. 731 (1871). Further, the Commission has determined that the subject ID fails to adequately distance itself from an “element-by-element” analysis, which is improper under *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1372 (Fed. Cir. 2006), when applying the “ordinary observer” test. The Commission has also determined that the ID does not adequately discuss the similarities, as well as the differences, between the respondents’ shoes and the ‘789 design when applying the “ordinary observer” test.

Accordingly, the Commission hereby **ORDERS** that:

1. Order No. 32 is vacated except for its findings concerning infringement by ODF.
2. Order No. 32 is remanded for further proceedings in accordance with this Order.
2. Notice of this Order shall be served on the parties to this investigation.

By Order of the Commission.

/s/
Marilyn R. Abbott
Secretary to the Commission

Issued: February 15, 2007