

No. 2008-1596

United States Court of Appeals
FOR THE FEDERAL CIRCUIT

CROCS, INC.,

Appellant,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee,

and

GEN-X SPORTS, INC.,

Intervenor,

and

DOUBLE DIAMOND DISTRIBUTION, LTD.

Intervenor,

and

COLLECTIVE LICENSING INTERNATIONAL, LLC, HOLEY
SOLES HOLDINGS, LTD., and EFFERVESCENT, INC.,

Intervenors.

On appeal from the United States International Trade Commission in
Investigation No. 337-TA-567

REPLY BRIEF OF APPELLANT CROCS, INC.

PUBLIC VERSION

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THE FEDERAL CIRCUIT

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Confidential Material Omitted

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Table of Abbreviations

'789 Patent	United States Patent D517,789
'858 Patent	United States Patent 6,993,858
ALJ	Administrative Law Judge
CLI	Intervenors Collective Licensing International LLC, Effervescent, Inc. and Holey Soles Holdings, Ltd.
CLI.Br. __	Brief for Intervenor Collective Licensing International LLC, Effervescent, Inc. and Holey Soles Holdings, Ltd.
Commission	United States International Trade Commission
Crocs	Appellant Crocs, Inc.
DD.Br. __	Brief of Intervenor Double Diamond Distribution, Ltd.
DD	Intervenor Double Diamond Distribution, Ltd.
Gen-X.Br. __	Brief of Intervenor Gen-X Sports, Inc.
Gen-X	Intervenor Gen-X Sports, Inc.
ID	Initial Determination
ITC.Br. __	Appellee International Trade Commission Brief
ITC	Appellee International Trade Commission
Op.Br. __	Brief of Appellant Crocs, Inc.

All Emphasis Added Unless Otherwise Indicated.

INTRODUCTION

The Commission and Intervenors' methodology to find noninfringement of the '789 patent does not comply with this Court's mandate in *Egyptian Goddess*: to determine whether there is substantial similarity between the patented and accused designs *as a whole* from the perspective of an ordinary observer familiar with the prior art. As an initial matter, the Commission and Intervenors have no expert testimony (or any other evidence) about how an ordinary observer would compare the accused shoes with the '789 design. Instead, the Commission and Intervenors identify what they think are "critical features," which they claim (without evidentiary support) an ordinary observer would use to distinguish the accused shoes from the '789 patent. But these "critical features" are so minor it is inconceivable that an ordinary observer would focus on them in an assessment of the overall similarity of the designs, as explained in detail by Crocs's expert.

By contrast, Crocs has offered a mountain of uncontroverted evidence that all of the accused shoes incorporate dominant design features created by a synergistic interaction between the shoe base, strap and large round rivet. These dominant features are *not* in the prior art, but *are* copied by every accused shoe, which leads to a finding of substantial similarity. This is confirmed by Intervenors' expert (who has 40 plus years of experience with footwear prior art), who testified that each of the accused shoes was closer to the '789 design than any prior art clog with a strap.

The Commission's finding that the '858 patent is obvious is based on legal error and major factual inaccuracies. The Commission's and Intervenor's entire case depends on a failure to recognize that the '858 invention is a revolutionary combination of elements that creates a shoe with a foam back strap that stays in place without constantly pressing on the back of the foot. This "passive restraint system" is essentially the exact opposite of what is disclosed in the Aguerre '249 patent, the primary strap reference cited by the Commission and Intervenor. This destroys their assertion of a *prima facie* case of obviousness. They have also completely failed to rebut Crocs's secondary considerations, which prove beyond question that the '858 patent is not obvious.

Crocs respectfully asks this Court to reverse the Commission, and find that: (1) the accused shoes infringe the '789 patent; and (2) the '858 patent is valid.

ARGUMENT

I. THE '789 PATENT IS INFRINGED BY THE ACCUSED SHOES AND PRACTICED BY CROCS'S SHOES.

Crocs was prejudiced by the Commission's detailed, erroneous construction of the '789 patent, which it used as a checklist of "*critical features*" necessary for infringement. ITC.Br.31. This led to a deeply flawed application of the "ordinary observer" test, and incorrect findings of noninfringement based solely on the absence of one or two of these tiny "*critical features*."

Worse yet, the Commission incorrectly described these "*critical features*" – the width and extent of the strap, and the uniformity and spacing of holes in the sidewall – and they are so minor they would have no impact on an assessment of overall similarity.¹

¹ The Commission and Intervenors implicitly concede that the claim construction is erroneous. They do not deny that Figure 1 illustrates a slight bulge in the strap; they merely claim that "most" of the figures show a uniform width. CLI.Br.38. But written descriptions of a design patent must consider *all* figures, and it is undisputed that requiring a strap of uniform width is not consistent with *all* of the figures. *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1377 (Fed. Cir. 2002). In response to Figure 4's depiction of a gap in the spacing of holes on the sidewall, CLI argues only that any gap is insignificant compared to the gap in the accused shoes. CLI.Br.39. The accused shoes are irrelevant to claim construction, and do not refute expert testimony that one of ordinary skill would recognize the patent includes a gap in the spacing. *See Young Dental Mfg. Co. v. Q3 Special Prods. Inc.*, 112 F.3d 1137 (Fed. Cir. 1997).

An ordinary observer familiar with the prior art should focus on features that distinguish the patented design from the prior art “depending on the *overall effect* of those differences on the design.” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d at 665, 677 (Fed. Cir. 2008). However, the Commission and Intervenors argue that an ordinary observer would focus on features so trivial that they are barely noticeable. They ignore this Court’s warning not to assign “exaggerated importance to small differences between the claimed and accused designs.” *Id.* For example, they argue that the rearward extent of the strap is a “*critical feature*,” despite expert testimony that any difference is only “a few millimeters.” A16535,Q&A1068.

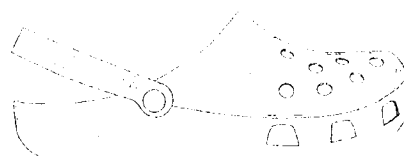


FIG. 2

In stark contrast, Crocs introduced substantial evidence that an ordinary observer would notice *dominant* design features in the patented design that: (a) are *not* the prior art; and (b) *are* in *all* the accused shoes. Crocs’s design features are “dominant” because they represent a synergistic interaction between many different design elements in the base of the shoe, the strap and the rivet that would be immediately apparent to an ordinary observer.

Crocs's dominant design features include: (1) a confluence of parts and design lines that draws the buyer's eye to the connector as a focal point (referred to at the hearing as the "Eye of Sauron"); and (2) a continuous visual ring formed by the well-defined sidewall, which continues through the strap (which also has a width visually similar to the width of the sidewall) and goes all the way around the shoe ("Ring of Fire").

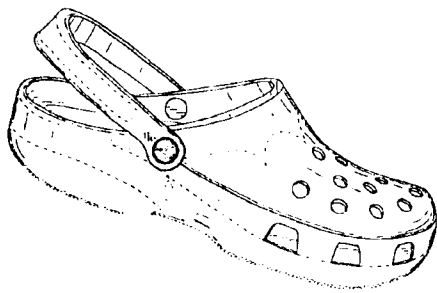


FIG.1
"Eye of Sauron"
A17476

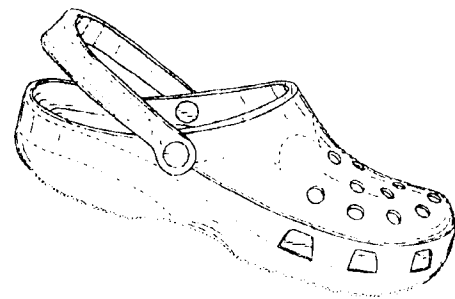


FIG.1
"Ring of Fire"
A17474

Undisputed expert testimony established that an ordinary observer would find each of the accused shoes substantially similar to the '789 patent based, in part, on the presence of these dominant design features – which are indisputably *not* in the prior art. *Even Intervenor's expert testified that each of the accused shoes was closer to the '789 design than any prior art clog with a strap.*

The Commission's claim construction and noninfringement finding should be reversed. The Court should find that the accused shoes infringe the '789 patent, and Crocs's shoes satisfy the technical prong for domestic industry.

A. The Commission's Noninfringement Finding Should Be Reversed.

1. The Commission and Intervenor improperly focus on trivial features that would not affect an ordinary observer's assessment of substantial similarity.

The Commission and Intervenor improperly use the '789 patent as a blueprint for hindsight reconstruction. They conveniently add the Aguerre strap to the Aqua Clog at precisely the same point of attachment as the patent, and then argue the only features not in the prior art are their so-called "*critical features*:" (1) a strap of uniform width that extends to the heel of the shoe; and (2) uniform spacing of trapezoid-shaped holes in the sidewall toward the front portion of the shoe. ITC.Br.31; CLI.Br.48-49; Gen-X.Br.22-23; DD.Br.33-35.

They then focus solely on their microscopic "*critical features*," and ignore what effect these tiny elements might have on the overall design. The only evidence regarding their effect is that there is none. Crocs's expert, Mr. Whatley testified:

[A]n ordinary observer would not discern any difference between the overall design of a shoe with a strap that slightly bulges as compared to a shoe with a strap that is exactly uniform between the two rivets, especially in the context of comparing the claimed design as a whole with the accused products.

A17122,Q&A18.

Further, the uniform spacing of the holes in the sidewall was such an "extremely minor difference" that it was "inconceivable" that an ordinary observer would notice it. *See, e.g.*, A16524. Finally, an ordinary observer would not focus

on an “isolated design feature like the precise position to which the strap extends,” which for some of the accused shoes differs from the ’789 design by only “a few millimeters.” *See, e.g.,* A16535,Q&A68.

Relying on the false premise that the combination of the Aqua Clog and Aguerre essentially disclosed the patented design, Intervenors conclude that there is no infringement because their tiny “**critical features**” are not present in the accused shoes. This is incorrect as a matter of law. This Court eliminated the “point of novelty” test to avoid undue focus on minor differences:

[U]nlike the point of novelty test, the ordinary observer test does not present the **risk of assigning exaggerated importance to small differences** between the claimed and accused designs relating to an insignificant feature simply because that feature can be characterized as a point of novelty.

Applying the ordinary observer test with reference to prior art designs also avoids some of the problems created by the separate point of novelty test. . . . ***The attention of the court may therefore be focused on whether the accused design has appropriated a single specified feature of the claimed design, rather than on the proper inquiry, i.e., whether the accused design has appropriated the claimed design as a whole.***

Egyptian Goddess, 543 F.3d at 677.

That is precisely what the Commission and Intervenors do here: focus on whether the accused design has appropriated specific features rather than the claimed design as a whole. The Commission called these differences “key, significant differences” and “critical features that would make them substantially

similar to Crocs' patented design." ITC.Br.29,31. Without them, the Commission concluded there could be no substantial similarity. ITC.Br.32.

This approach improperly assigns "exaggerated importance to small differences" and ignores whether the *overall effects* of the claimed and accused designs are substantially the same. This is both legally and factually wrong, and requires reversal.

2. The hindsight reconstruction of the '789 design through the combination of prior art is legally incorrect.

Smith v. Whitman Saddle Co., 13 S. Ct. 768 (1893), does not support the improper hindsight reconstruction of the '789 design. In *Whitman Saddle*, the Court found that the specific combination of two halves of a saddle was not patentable because it was customary to combine two halves from hundreds of available prior art styles to form a saddle according to the purchaser's preference. *Id.* at 771.

The Commission and Intervenors have identified only the Aqua Clog combined with Aguerre or Hawker.² But unlike *Whitman Saddle*, it was not customary to combine the Aqua Clog with prior art straps, because the Aqua Clog was not "half" a shoe; it was a complete product without any strap.

² Under the ordinary observer test, the burden of production as to any comparison prior art is on the accused infringer. *Egyptian Goddess*, 543 F.3d at 678-79.

Inventor Scott Seamans added a specific strap assembly to the Aqua Clog, creating a unique ornamental impression that was indisputably not in the prior art.³ While differences in *Whitman Saddle* were “not material,” it is undisputed that the addition of the strap assembly was highly material to the design of the '789 patent. *Whitman Saddle* simply does not justify the hindsight combination of the prior art.

3. The Commission’s findings demonstrate that the combination of prior art does not disclose the '789 design.

The Commission’s own findings undermine any attempt to retrospectively combine the Aqua Clog and Aguerre in an improper manner that ignores nearly all of the features of the patent. The Commission held the '789 patent to be valid, finding that an addition of the Aguerre strap to the Aqua Clog was “not identical, or even substantially similar” to the '789 design. A00149-150. Moreover, *none* of the prior art combinations proposed by Intervenors “produces the footwear design in the '789 patent.” A00150. Prior to *Egyptian Goddess*, the Commission also found that the '789 design contained “points of novelty” not in the prior art. This included the “Eye of Sauron,” which was found to be in all the accused shoes. A00123.

³ The uniqueness of the '789 design is highlighted by the fact that a different base, a different strap, or even one at a different attachment point would radically alter the design, and destroy even the dominant design features identified by Crocs. See A03329-31, A16506, A17506, A17180-81, A21640-41.

B. The Accused Shoes Copied Dominant Design Features From the Patent that Distinguish it from the Prior Art and Compel a Finding of Substantial Similarity.

Crocs's proper approach to the ordinary observer test is completely different from Intervenor's obsession with tiny "critical features." Crocs focused on dominant design features that differentiate the patent from the prior art *and* impact the overall design. Crocs also introduced substantial, uncontroverted evidence that an ordinary observer *would* find that the inclusion of these features in the accused shoes creates substantial similarity. These dominant features describe the synergistic interaction of multiple design elements in the base and the strap assembly: the "Eye of Sauron" and the "Ring of Fire."

Under *Egyptian Goddess*: "If the accused design has copied a particular feature of the claimed design that departs conspicuously from the prior art, the accused design is naturally more likely to be regarded as deceptively similar to the claimed design, and thus infringing." 543 F.3d at 677. More than substantial evidence demonstrates that Intervenor copied the "Eye of Sauron" and the "Ring of Fire." These were indisputably *not* in the prior art, but their presence in the accused shoes makes them deceptively similar to the '789 design.

1. Evidence regarding the perspective of an ordinary observer shows that the overall design of each accused shoe is substantially similar to the '789 design.

Cros's expert provided the only evidence regarding the perspective of an ordinary observer familiar with the prior art. The Commission and Intervenors dispute this, but cite no evidence in rebuttal. Instead, they contend that the accused shoes and the ALJ's own opinion are sufficient evidence, and that "simple technology does not require any expert testimony." CLI.Br.41. But the cited caselaw does not support this. This Court's holding in *Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1287, does not "suggest[] that the accused product alone provides substantial evidence" (CLI.Br.41); indeed, the finding of infringement was "benefit[ed] by expert testimony." Similarly, *Goodyear Tire & Rubber Co. v. Hercules Tire of Rubber Co.*, 162 F.3d 1113 (Fed. Cir. 1998) does not authorize the ALJ to substitute his opinion for that of the "ordinary observer." See DD.Br.15.

The fact that the technology is not complex does not change the lack of evidence. There is no evidence that the ALJ is an "ordinary observer" who can substitute his opinion for that of the hypothetical ordinary observer familiar with the prior art. Indeed, CLI concedes that the ALJ "simply concluded" that these differences preclude infringement. CLI.Br.59. And Gen-X admits that the

Commission relied on an “*inference* that the ordinary observer would notice” the asserted differences, rather than any evidence. Gen-X.Br.27.

The only evidence regarding the ordinary observer comes from Crocs’s expert, Ian Whatley. He did exactly what this Court mandated in *Egyptian Goddess*: he performed the ordinary observer test from the perspective of one familiar with the prior art. He first focused on the dominant design features that affect overall similarity, and then analyzed the accused shoes under the “point of novelty test,” which was applicable at that time. Specifically, Mr. Whatley testified that an ordinary observer would notice the “Eye of Sauron” and the “Ring of Fire,” which cause the ’789 design and each of the accused designs to have the same overall ornamental effect. For example, Mr. Whatley testified that these dominant design features, which are indisputably absent from the prior art, are present in the Explorer Redesign:

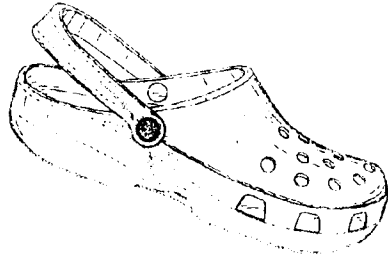


FIG.1

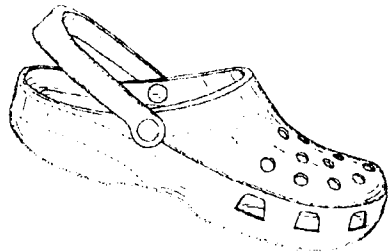
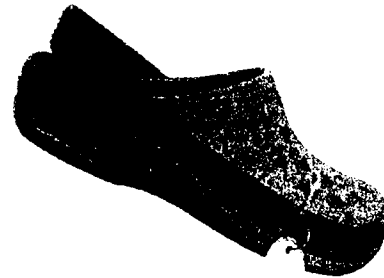
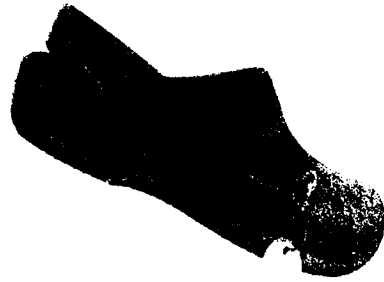


FIG.1



See A17447; A17445.

Mr. Whatley testified that these features are found in all of the accused shoes.⁴ See Op.Br.22-25. Because the purpose of the point of novelty test is “to focus on those aspects of a design which render the design different from the prior art designs,” Mr. Whatley also analyzed substantial similarity from the perspective of an ordinary observer familiar with the prior art. See *Egyptian Goddess*, 543 F.3d at 677 (citations omitted).

Further, Mr. Whatley addressed the Commission’s trivial “*critical features*” from the ’789 claim construction, and concluded that an ordinary observer would find that these minor distinctions had no effect on the overall impression of the

shoe. See A16524-25,Q&A1039-42 (Explorer); A16534-35,Q&A1065-68 (Explorer Redesign); A16543-44,Q&A1091-94 (Cricket); A16552-53,Q&A1117-19 (Compel I); A16561-63,Q&A1142-46 (Compel II); A16571-73,Q&A1169-73 (Compel III); A16581-82,Q&A1196-98 (Komodos); A16590-91,Q&A1221-23 (Komodo Redesign); A16600-01,Q&A1247-52 (Original Beach Dawgs); A16610-12,Q&A1275-81 (Redesigned Beach Dawgs); A16621-22,Q&A1305-10 (Groovy/Big Dawgs); and A16630-31,Q&A1332-35 (Waldies). Thus, the only evidence demonstrated that an ordinary observer would not notice such minor differences.

2. Intervenors' Expert Testimony Further Illustrates Substantial Similarity In The Context Of The Prior Art.

The only other evidence that sheds any light on the ordinary observer analysis comes from CLI's expert, Phillip Nutt, who further confirmed that the accused shoes are substantially similar to the patented design. Mr. Nutt is an expert in the prior art of footwear, having collected shoe samples, catalogs, and magazine advertisements for forty years. A21115-25. Although Mr. Nutt admitted that he was *not* providing testimony on how an ordinary observer would analyze the

(...continued from previous page)

⁴ Contrary to Double Diamond's assertions, Mr. Whatley performed this analysis for each of the accused shoes and concluded that they all infringe the '789 patent. See Op.Br.20-22.

accused shoes, he repeatedly testified that the accused shoes were closer to the '789 design than any prior art. His comparison testimony as an *expert* in the prior art is arguably even more probative than that of an ordinary consumer.

For example, Mr. Nutt testified that the Holey Soles Explorer is closer to the '789 than any prior art:

Q. [...] Can we have slide CDX-1052 up, please. Isn't it true, sir, that there is no prior art clog with a back strap that is closer to the '789 design than the Holey Soles Explorer?

A. Okay. Now – I – I accept the statement.

* * *

Q. Right. The samples in the magazines that you found are not as close to the '789 patent as the Holey Soles Explorer, right?

A. Correct.

A03357,1280:18-1281:20; A17513. Mr. Nutt also admitted:

Q. Are you aware of any prior art clog with a back strap that is closer to the '789 design than the Compel II?

A. With a back strap?

Q. Yes.

A. I will say no.

A03355,1274:8-23; A17511.

Mr. Nutt similarly testified that the other accused shoes were closer to the '789 patent than anything in the prior art. A03353,1265:13-1266:7, A17509 (Compel I); A03357,1281:15-20; A17514 (Komodo); A03340-41,1214:22-1215:4 (WaldiesAT). Mr. Nutt's testimony further illustrates that an ordinary observer familiar with the prior art would find the accused shoes to be substantially similar in their *overall designs* to the '789 patent.

More than substantial evidence supports a finding that an ordinary observer would find each accused shoe to be substantially similar in overall design to the '789 patent. Accordingly, Crocs respectfully asks this Court to reverse the Commission and find that all of the accused shoes infringe the '789 patent.

C. Crocs Satisfied the Technical Prong of the '789 Patent.

Although the Intervenors did not previously dispute that Crocs's Cayman and Kids Cayman shoes embody the '789 patent, they now use the same arguments for domestic industry that they made for infringement. *See* ID,112. CLI argues, that Crocs's analysis failed to consider the prior art, including the Aqua Clog and Aguerre. They further argue that an ordinary observer would find that Crocs's shoes are not substantially similar to the '789 patent because they lack the same "*critical features*" supposedly required for infringement. Such contentions are meritless.

As with infringement, there is no evidence – much less substantial evidence – to support the Commission's finding that an ordinary observer would find that these trivial features destroy the overall substantial similarity between Crocs's shoes and the '789 patent. Again, Mr. Whatley provided the only evidence regarding the perspective of an ordinary observer familiar with the prior art.

Mr. Whatley testified that Crocs's Beach, Cayman, and Kids Cayman shoes incorporate the "Eye of Sauron" and the "Ring of Fire." A17014,Q&A2499-2502,

A17018-19,Q&A2513-14; A17459-60 (Beach); A17021,Q&A2521-24, A17025-26,Q&A2535-36; A17469-70 (Cayman); A17028,Q&A2543-46, A17032-33, Q&A2557-58; A17464-65 (Kids Cayman). Mr. Whatley also testified that an ordinary observer would not find that the so-called “critical features” affect a shoe’s overall design. *See supra*, § II.B.1.

Accordingly, the Commission’s finding that Crocs does not satisfy the technical prong of the ’789 patent should be reversed.

II. THE COMMISSION’S FINDING THAT THE ’858 PATENT IS OBVIOUS SHOULD BE REVERSED.

A. The Commission and Intervenors Have Made No *Prima Facie* Showing that the ’858 Invention Was Obvious.

1. The ’858 patent describes a revolutionary “passive restraint system” with a foam strap that “lends support” to the back of the foot without constantly pressing on it.

As both claimed and described, the ’858 invention is a combination system with a solid, single-piece foam strap directly riveted to a foam base to create foam-to-foam friction that keeps the strap in various intermediate positions so that it will not fall due to gravity. This “passive restraint” system “lends support” to the back of the foot without constantly pressing on it. *See* ’858 at 9:46-53; 10:19-25; 6:17-29. With unprecedented comfort and fit, it is undisputed that no such thing existed before Scott Seamans invented it. Moreover, the Commission’s finding that the ’858 invention is obvious is unsupported by fact or law, and should be reversed.

The Commission and CLI misapprehend the '858 invention, which underlies their assertion that it is obvious. Alternatively, they assert that '858 invention is simply a foam strap, direct contact, or just adding a generic strap to the Aqua Clog. Having thus oversimplified or misconstrued the invention, they then try to knock down the straw man. These characterizations are wrong, and cannot be the premise for clear and convincing evidence to support obviousness.

Even the Commission recognized the "passive restraint system" of the '858 invention:

[T]he '858 patent discloses a firm foam strap that acts as a **passive restraint** to the Achilles portion of the foot and can be set in various fixed position[s] because of the **friction** created by the *direct contact* between the upper portion of the base and the strap.

A00090 (italics in original; bold/underline added) (citing '858 patent generally).

The Commission incorporated this concept into its construction of "lends support":

[T]he strap may simply be present in an intermediary position ready to "***lend support***" to the Achilles portion of the foot ***should there be any contact*** with the Achilles portion of the foot.

A00062-63 (italics/bold added).

Overwhelming evidence demonstrated that the '858's passive restraint system was indeed revolutionary. Through multiple millennia since the first shoe with a strap, back straps had "relied on the principle of ***tension*** against the foot to maintain the strap in position," which "had the effect of urging the foot forward within the shoe." A17153,Q&A119. CLI's expert, Mr. Nutt, testified that to

improve fit for a back strap, “it’s better if you have a buckle or some form of *tension* adjuster if you want it to be supportive.” A03320 (1131:17-1132-8).

The ‘858’s passive restraint system was radically different. As explained by Crocs’s expert, Mr. Whatley:

The patented Crocs products neither push the foot forward into the shoe nor leave the shoe free to fall off the foot, only providing transient support or “lending” support as it is called in the ‘858 patent. This allows a loose anatomical shape of the upper to meet the fit needs of a bigger proportion of the population than would a traditional shoe closure mechanism. This gave the shoes *superior fit* in that they were *comfortable on more potential consumers* than prior art products . . .

A17153,Q&A119. Mr. Nutt agreed the shoes are “comfortable beyond belief.”

A14730-31. Mr. Whatley further linked this comfort to the ‘858 invention:

*[T]he strap assembly both augments and enhances the performance of such features as cushioning, roll-on, toe spring, fit relative to the contours of a human foot, top line padding, the raised pattern on the support base, tread patterns and torsional rigidity; thus producing a **significant improvement in comfort.*** As in these illustrative cases, the specific combination of elements claimed in the ‘858 patent provides superior benefits not present in the footwear that was available before the advent of the claimed invention.

A17153-54,Q&A120.

Evidence about the ‘858’s revolutionary passive restraint system is utterly undisputed. The ITC’s obviousness finding should be viewed in this context.

2. **Aguerre is antithetical to the “passive restraint system” of the ‘858 invention.**

- a. **Aguerre teaches an elastic strap that fits snugly behind the heel; it does *not* teach the use of friction to suspend the strap in an intermediate position.**

To support obviousness, the Commission and CLI rely heavily on the Aguerre ‘249 patent. Their reliance is misplaced. Aguerre has no foam strap; it cannot teach foam-to-foam friction to keep the strap in an intermediate position. In fact, Aguerre teaches the opposite: friction is a *problem* to be solved by washers.

Most important, the very concept underlying the Aguerre strap is just like thousands of years of prior art shoes, and is antithetical to the passive restraint system of the ‘858 invention. Aguerre teaches that a strap should fit snugly behind the heel. A19017,4:27-36. This conventional wisdom was revolutionized by the ‘858 strap, which “lends support” to the back of the foot only when needed. Unlike Aguerre and thousands of earlier straps, the ‘858 strap does *not* constantly press against the back of the foot. ‘858 at 6:17-29.

Ignoring the record, CLI argues that “the discussion of friction in Aguerre plainly shows that materials other than foam function as a ‘passive restraint’ by maintaining their position without contacting the wearer’s foot.” CLI.Br.71. This assertion is manifestly wrong. Aguerre clearly states that “the rear heel strap fits snugly behind the heel to secure the convertible slide to the human foot.” A19017,4:35-36. It is not a *passive* restraint that merely “lends support.”

Beyond merely ignoring the record, the Commission mischaracterizes it:

Aguerre discloses that direct contact between a pivotable strap and the vamp could *suspend the strap* between the heel and the top of the footwear *using frictional forces*.

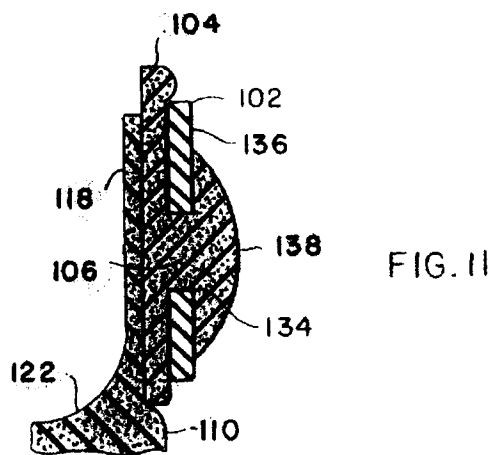
ITC.Br.34,36. Thus, the Commission asserts that the combination of the Aqua Clog and Aguerre teach “a frictional force to *maintain the strap in place* without having to press against the foot.” *Id.* However, none of the Commission’s citations support a teaching to use friction to “suspend the strap,” as in the ‘858’s passive restraint system.

For example, the Commission cites the ‘858 file history (A17778-79), which merely states that Aguerre includes “a strap attached at opposite ends thereof to the base section for securing the footwear on the foot of the wearer.” The Commission also cites Aguerre Figures 11 and 13 (A19014), which teach nothing about friction to suspend the strap in an intermediate position. Nor does the Commission’s citation to Aguerre at 9:21-23, which merely states that friction is a problem that interferes with smooth rotation. A19020.

Even the ALJ’s ID, also cited by the Commission, only asserts that Aguerre Figures 11 and 13 show direct contact between the vamp and the strap – *not* that the strap could be “suspended” using friction. The Commission’s reliance on the record for this point is simply wrong.

- b. The “direct contact” structure in Aguerre facilitated “free rotation,” which is the opposite of direct contact to create friction to use as a benefit.

CLI argues that Aguerre teaches the same frictional “direct contact” as in the ’858 patent. CLI.Br.65-66. The opposite is true. Figure 11 shows direct contact between yellow strap 102 and pink vamp 104 (*not* orange base 122 or side 118); however, there is *no rivet* attaching the strap 102 to the vamp 104.

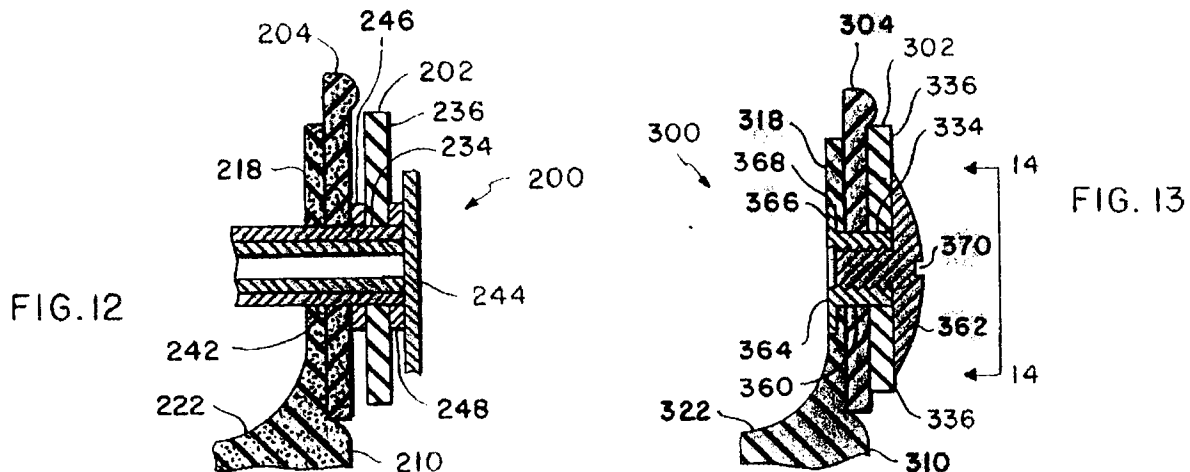


Rather, the vamp has an integral stud 106 and stop 138 (all pink), and yellow strap 102 rotates “*freely*” around the stud:

[T]he penetration 134 in the terminal ends 136 of the rear heel strap 102 must be large enough and the length of the outwardly extending studs 106 must be long enough so that the rear heel strap 102 can be *freely rotated* about the ends of the studs 106.

A19019,7:48-53. Thus, Figure 11 emphasizes *free rotation*, not friction to keep the strap in an intermediate position.

The Aguerre embodiments shown in Figures 12 and 13 are even *less* relevant to the '858 invention. Figure 12 includes green washers 246 to eliminate friction, and Figure 13 includes a blue screw 362 to lock the strap in place:



In short, no embodiment in Aguerre has anything to do with the '858 patent's passive restraint system. This is especially true given that the elastic heel strap "fits snugly behind the heel to secure the convertible slide 100 to the human foot" – exactly what the '858 patent sought to avoid.

Although the Commission now pretends there is no distinction between the Aguerre strap and the '858 invention (ITC.Br.36), it found a difference in its ID:

Now, it is true that the strap disclosed in the Aguerre '249 patent was made of material other than foam and was *adjustable and elastic so that it held the foot snugly in the shoe*. By contrast, the '858 patent discloses *a firm foam strap that acts as a passive restraint* to the Achilles portion of the foot and can be set in various fixed position[s] because of the *friction created by the direct contact* between the upper portion of the base and the strap.

A00090. Thus, even the ID recognized that the Aguerre strap was “elastic” and “held the foot snugly in the shoe.” By contrast, the ‘858 invention used friction to enable the strap to be “set in various fixed positions” as a “passive restraint.” Aguerre’s teachings, when combined with the Aqua Clog, do not come close to establishing a *prima facie* case of obviousness by clear and convincing evidence.

3. No evidence supports the argument that it was obvious to substitute foam as the material for a prior art strap added to the Aqua Clog.

Given that Aguerre’s strap assembly is completely different from the ‘858 invention, the only remaining question is whether there is clear and convincing evidence that it would have been obvious to substitute foam as the material for some non-foam prior art strap (like Aguerre) and combine it with the Aqua Clog. The answer is a resounding “no.”

As an initial matter, even if one of ordinary skill used foam to make an Aguerre-like strap, none of Aguerre’s three methods for attaching a strap to the Aqua Clog would have resulted in the ‘858 invention. Figure 11 does not even use rivets; it simply uses integral studs that are part of the vamp. Quite clearly, the Aqua Clog had no such integral studs for attaching a strap; it was a complete product in and of itself. Moreover, Aguerre taught *free rotation* of the strap around the studs in Figure 11 – not friction. A19019,7:49-53.

Although Figure 12 uses a rivet to attach the strap, it includes nylon washers to eliminate friction between the strap and the base. This would not result in the '858 patent's passive restraint system, because there would be no frictional contact between the base and strap. Finally, Figure 13 of Aguerre taught the use of a screw to bind the heel strap to the vamp. Thus, even if one of ordinary skill used an Aguerre-type strap made of foam, nothing indicates that it should be attached with foam-to-foam friction to "lend support" to the foot, as claimed in the '858 patent.

The various attachment methods taught by Aguerre (none of which would result in the '858 invention) also undercut CLI's argument that it was "obvious to try" foam as a strap material. CLI.Br.67. Aguerre taught three attachment methods, but none would result in a strap that would "lend support" without constantly pressing against the foot.

Moreover, all of the evidence indicated that a one-piece foam strap was unsuitable for conventional shoe straps. CLI's expert testified (A21318,Q&A 25):



Thus, Mr. Nutt directly contrasted elastic/stretchable straps with the foam material in the patent: “*Foam EVA* does not have a good memory *though* . . .”⁵ Indeed, Mr. Nutt testified that it is “preferable” to have a strap that is both elastic *and* length-adjustable. A03315-16,1114:23-1115:3. He repeated:

[I]t’s better if you have a buckle or some form of tension adjuster if you want [a strap] to be supportive. If you just want it to be lightly supportive, it can be elasticated.

A03320,1131:17-1132-8. This is consistent with the straps in Aguerre and Quillot, which “relied on the principle of tension against the foot to maintain the strap in position,” and “urg[ed] the foot forward within the shoe.” A17153,Q&A119. The ‘858 strap is neither elastic nor adjustable (as with a buckle), because it does not use the “principle of tension” to keep the strap pressed against the foot.

CLI’s argument that it was “obvious to try” foam is a classic example of hindsight reconstruction. It was absolutely *not* obvious to use a one-piece foam strap with no buckle or other means for length adjustability to improve fit. The idea of a shoe strap that was not in constant contact with the foot was revolutionary.

⁵ Mr. Nutt’s testimony contradicts CLI’s argument that there is no evidence that the foam material in the ‘858 patent is inelastic. CLI.Br.70. Mr. Whatley confirmed foam’s inelasticity, because foam is “excessively prone to tearing.” A17152,Q&A118. Finally, if the foam strap of the ‘858 patent were elastic, it would constantly press against the back of the foot (as in Aguerre), rather than “lend[ing] support” even when *not* constantly pressing against the back of the foot. Cf. A19017,4:27-36 (“fits snugly behind the heel”).

Even CLI's "substitution" cases support this point. According to CLI (CLI.Br.68): "Substitution of materials will not, in and of itself, create novelty if the *same purpose or function* could be achieved through the old materials." (Quoting *Lyle/Carlstrom Assocs. v. Manhattan Store Interiors, Inc.*, 635 F. Supp. 1371, 1383-85 (E.D.N.Y. 1986). That is exactly the point. One cannot merely substitute foam for other strap materials, because their purpose and function are radically different. For example, EVA foam (as in the '858 patent) *would not work* for the Aguerre strap. The Aguerre strap was "elastic" and "flexible" to ensure a snug fit behind the heel. A19017,4:27-36. [REDACTED]

[REDACTED] A21318,Q&A25.

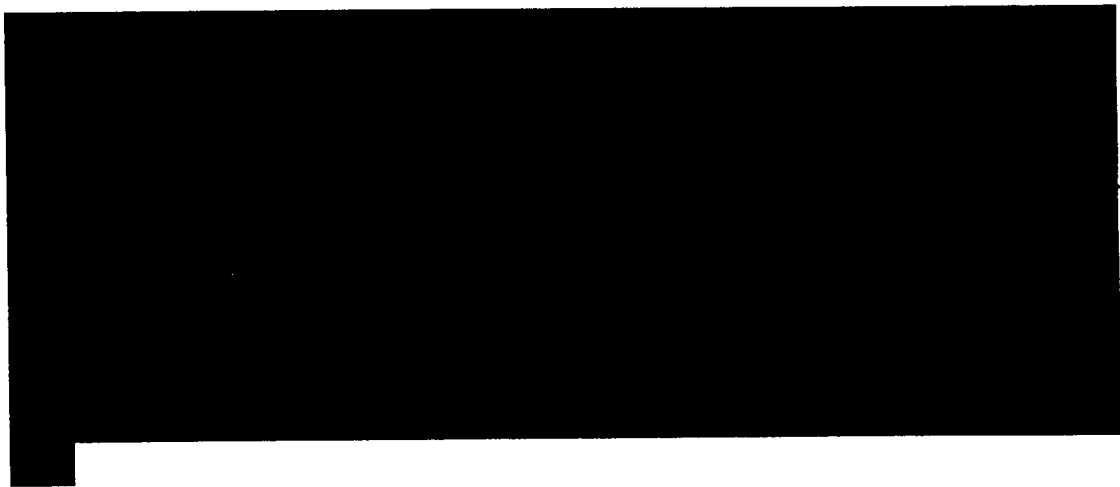
It was simply not obvious to attach a foam strap to the Aqua Clog, particularly in the manner used by Mr. Seamans. "It is well established, moreover, that a mere change in material . . . cannot give rise to a patentable invention if the properties of the materials are already known and *the result obtained was the one to be expected.*" *Brunswick Corp. v. Champion Spark Plug Co.*, 689 F.2d 740, 750 (7th Cir. 1982). Because prior art straps were elastic, length-adjustable or both, there was no reason to try foam for a strap. The "result to be expected" from a one-piece foam strap was that it *would not work*.

Conversely, Mr. Seamans' use of a one-piece foam strap, riveted to the base of the shoe with direct foam-to-foam contact, obtained a result that was *not* "the

one to be expected.” It created a revolutionary system in which the strap “lends support” without constantly pressing against the heel, resulting in unprecedented fit and comfort. A17153-54.

CLI also argues that “the evidence showed that the strap would have functioned just as well, and achieved the same purposes stated in the patent, if it had been made of another material.” CLI.Br.68-69. For this false proposition, CLI apparently assumes that the only purpose of the ‘858 strap was to “secure the shoe to the foot,” as in Aguerre. However, the “snug fit” of Aguerre’s elastic strap was manifestly *not* the purpose of the ‘858 patent’s passive restraint system.

Finally, CLI argues that “the record does not support an argument that a foam strap on a foam shoe performed differently than expected by skilled practitioners.” CLI.Br.71. CLI is wrong. Setting aside performance issues based on how the strap is attached, overwhelming and uncontroverted evidence shows that the specific shoe claimed in the ‘858 patent performed fantastically well:



A17155,Q&A126.

The Commission and Intervenors have utterly failed to identify clear and convincing evidence of a *prima facie* case that the '858 claims are obvious. The Commission's finding of obviousness should be reversed.

B. Not Only Does this Court Requires *Prima Facie* Nexus Where the Commercially Successful Products Practice the Invention, Substantial Evidence Also Proves a Nexus Between the '858 Invention and the Success of the Patented Shoes.

Crocs has submitted evidence that its patented shoes (the Beach, Cayman and Kids Cayman) experienced stunning commercial success. Because the Commission determined that these shoes practice the '858 patent (A00084), there is a *prima facie* nexus between the '858 invention and the success of the patented shoes. *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988); *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995) ("A *prima facie* case of nexus is generally made out when the patentee shows both that there is commercial success, and that the thing (product or method) that is commercially successful is the invention disclosed and claimed in the patent.").

The Commission and CLI have refused even to address this controlling caselaw regarding a *prima facie* nexus and the requirement that "the burden of coming forward with evidence in rebuttal shifts to the challenger." *Demaco*, 851 F.2d at 1393. The Commission merely asserts that Crocs has the burden to prove a

nexus, but cites no evidence to rebut the *prima facie* nexus to which Crocs is entitled.

Failing even to cite *Demaco*, CLI argues “that Crocs’ commercial success was unrelated to the claimed feature.” CLI.Br.72. CLI then cites almost no evidence in its failure to rebut Crocs’s *prima facie* nexus.

CLI points to the testimony of Ron Snyder, Crocs’s CEO, in which he acknowledged that there were “other significant reasons for Crocs’s success,” but ignores the rest of his testimony:

Q. So would you say it’s a fair statement that it’s – the commercial success of Crocs is the result of more than simply the fact that there is a strap and a rivet attached to the Aqua Clog?

A. I would say that, just because of the fact that this product took off so quickly, that there was such a uniqueness to it, like I said, nothing – I don’t think any of us have seen, in a number of years, anybody in this room included, something take off so quickly. So it had to be the uniqueness of the design of this product. I mean, it was being sold as the Aqua Clog before, when Scott Seamans designed the product for a broader market. There became so many more uses. It became relevant to all age groups, not just, let’s say, gardeners. And it just – it just proliferated both in the U.S. and around the world.

A03156,485:17-486:9. Thus, Mr. Snyder absolutely confirmed that the commercial success of Crocs’s shoes related, in large part, to the functional design of the shoes, which made them available for many more uses.

In voluminous and uncontroverted testimony, Mr. Whatley confirmed that both the comfort and wide range of uses for Crocs’s shoes were a direct result of

the '858 invention. He testified that Crocs' shoes gave "transient support" without pushing the foot forward in the shoe, thereby allowing the shoe to fit a larger proportion of people and providing superior fit and comfort. A17153,Q&A119. Mr. Whatley further testified that "the specific combination of elements claimed in the '858 patent provides superior benefits not present in the footwear that was available before the advent of the claimed invention." A17153-54,Q&A120.

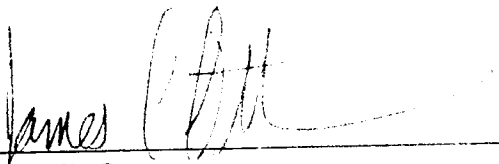
Thus, there is substantial, undisputed testimony that the "passive restraint system" of the '858 patent played a dominant role in the commercial success of the patented shoes. Moreover, there is no authority to support CLI's proposition that the '858 invention must be the *sole* reason for Crocs's commercial success.

Given the lack of a *prima facie* case of obviousness and Crocs's overwhelming evidence of secondary considerations (including commercial success, copying, etc.), Crocs respectfully asks this Court to reverse the Commission's finding that the '858 patent is obvious.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Crocs respectfully requests that the Court reverse the Commission's finding of noninfringement for the '789 patent, find that each of the Intervenor's accused shoes infringe, and find that Crocs's domestic industry shoes practice the '789 patent. In addition, Crocs respectfully asks the Court to reverse the Commission's finding that the '858 patent is obvious, and find that it is valid.

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